IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

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
(No ID exists)

...Plaintiff

And

SANUM INVESTMENTS LIMITED
(ID No Unknown)

...Defendant

AFFIDAVIT

I, **SIMON CHESTERMAN** (Australia Passport No. E3089167), of care of 469G Bukit Timah Road Singapore 259776, do solemnly and sincerely swear and say as follows:

1. I am Dean and Professor in the National University of Singapore Faculty of Law.

2. Now produced and shown to me, annexed hereto and marked as "**SC-1**" is a true copy of my Expert Opinion.

3. Notwithstanding the fact that my Expert Opinion was requested by the Plaintiff, I confirm that my views set forth in my Expert Opinion have not been influenced by the Plaintiff. I believe that the opinions expressed in my Expert Opinion are correct.

4. I accept full responsibility for my Expert Opinion. I have read and understood the duties of an expert witness as set out in Order 40A of the Rules of Court.

5. I understand that in giving the opinions expressed in my Expert Opinion, my duty is to assist the Court on the matters within my expertise and that this duty overrides any obligation to the party from whom I have received instructions or by whom I am paid. I have complied with that duty.

Sworn in Singapore)
by the abovenamed)
SIMON CHESTERMAN)
on this 7th day of April 2014)

BEFORE ME,

COMMISSIONER FOR OATHS
William Oh
Kim Chong
C2014/0288
1 Apr 2014 - 31 Mar 2015
SINGAPORE

A COMMISSIONER FOR OATHS

This affidavit is filed on behalf of the Plaintiff.

THIS IS THE EXHIBIT MARKED "**SC-1**"

REFERRED TO IN THE AFFIDAVIT

OF **SIMON CHESTERMAN**

SWORN THIS 7th DAY

OF APRIL 2014

BEFORE ME

A COMMISSIONER FOR OATHS

EXPERT REPORT OF PROFESSOR SIMON CHESTERMAN

I. INTRODUCTION

1. I, Simon Chesterman, am the Dean of the Faculty of Law of the National University of Singapore, where I am a full professor.

2. My relevant areas of expertise include treaty law and countries in transition, and I have published extensively in the field of international law, including thirteen books and dozens of journal articles and chapters. I am also a founding editor of the *Asian Journal of International Law* and Secretary-General of the Asian Society of International Law.

3. I have been asked to provide the Government of the Lao People's Democratic Republic ("**Laos**"), the Plaintiff herein, with an expert report concerning issues of international law arising from Originating Summons No 24 of 2014 ("**OS 24**").

4. For the reasons stated herein, I have specific expertise in the issues on which I have been asked to opine, and I believe that my opinion is correct.

5. I have read Order 40A of the Rules of Court (Cap 322, R 5). I understand that my duty under Order 40A in providing this report is to assist this Honourable Court on the matters within my expertise, and that this duty overrides any obligation to the person from whom I have received instructions or by whom I am paid. I understand that, in giving this report, my duty is to this Honourable Court and I confirm that I have complied with that duty.

II. PROFESSIONAL EXPERIENCE AND QUALIFICATIONS

6. By way of background, I hold a Bachelor of Arts (Hons) and Bachelor of Laws (First Class Hons) from the University of Melbourne. In 2000, I was awarded a DPhil from the University of Oxford under the supervision of Professor Sir Ian Brownlie CBE QC FBA.

7. My teaching experience includes full-time positions at New York University (2004-2006) and the National University of Singapore (2007-present). I have also taught on a visiting or adjunct basis at the universities of Oxford, Southampton, Columbia, Melbourne, and Sciences Po. Subjects that I have taught include *United Nations Law & Practice*, which incorporates a substantial section on succession to treaties such as the UN Charter, and *State-Building and Post-Conflict Reconstruction*, which considers *inter alia* the break-up of the former Yugoslavia.

8. My relevant publications include *Law & Practice of the United Nations* (with Thomas M. Franck and David M. Malone, Oxford University Press, 2008); *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford University Press, 2004); *Making States Work: State Failure and the Crisis of Governance* (editor, with Michael Ignatieff and Ramesh Thakur, United Nations University Press, 2005). I have published a total of six authored and seven edited books, as well as 54 chapters and 58 journal articles ranging across many aspects of international law.

9. A copy of my detailed curriculum is annexed hereto as "**Annexe 1**".

III. ISSUES

10. I understand that OS 24 concerns Laos's appeal under section 10 of the International Arbitration Act (Cap 143A) against an Award on Jurisdiction ("**Award**") rendered by the Tribunal on 13 December 2013 in PCA Case No 2013-13 (the "**PCA Arbitration**"). A copy of the Award is annexed hereto as "**Annexe 2**".

11. The PCA Arbitration was commenced by the Defendant, Sanum Investments Limited ("**Sanum**"), a company incorporated in the Macao Special Administrative Region ("**SAR**").

12. In the Award, the Tribunal ruled that it had jurisdiction over the merits of the PCA Arbitration under Article 8(3) of a bilateral investment treaty ("**BIT**") between the Government of the People's Republic of China ("**PRC**") and Laos (the "**PRC-Laos BIT**")[1]. A copy of the PRC-Laos BIT is annexed hereto as "**Annexe 3**".

13. In reaching this conclusion, the Tribunal thereby disagreed with Laos's contention that the PRC-Laos BIT does not apply to the Macao SAR. I understand that one of the central issues in OS 24 is therefore whether the PRC-Laos BIT applies to the Macao SAR, so as to confer jurisdiction on the Tribunal.

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1 Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments, done at Vientiane, 31 January 1993, in force 1 June 1993, available at <http://unctad.org/sections/dite/iia/docs/bits/china_laos.pdf>.

14. I further understand that:

    (a) by a letter dated 7 January 2014 and transmitted via the PRC Embassy in Vientiane, Laos wrote to the PRC stating, *inter alia*, that Laos was of the view that the PRC-Laos BIT did not extend to the Macao SAR ("**Laos Letter**"). A copy of the Laos Letter is annexed hereto as "**Annexe 4**"; and

    (b) by a letter dated 9 January 2014 and transmitted via the PRC Embassy in Vientiane, the PRC replied to Laos stating, *inter alia*, its view that the PRC-Laos BIT is not applicable to the Macao SAR ("**PRC Letter**"). A copy of the PRC Letter is annexed hereto as "**Annexe 5**".

15. Sanum has filed an expert report dated 18 March 2014 by Professor Wenhua Shan ("**Professor Shan's Report**"), which contains his opinion on the following two issues, namely:

    (a) whether the PRC Letter represents a formal decision or an authoritative interpretation of the PRC Government on the question of whether the PRC-Laos BIT applies to the Macao SAR under PRC domestic law; and

    (b) the relevance of the PRC Letter to the question of the interpretation of the PRC-Laos BIT under international law.

16. Professor Shan's Report concluded that[2]:

(a) the PRC Letter does not represent either a formal decision or an authoritative interpretation of the PRC Government on the territorial scope of the PRC-Laos BIT and thus has no legally binding force under PRC domestic law; and

(b) the PRC Letter is irrelevant to the interpretation of the PRC-Laos BIT under international law.

IV. DOCUMENTS REVIEWED

17. For the purposes of preparing my report, I have reviewed the relevant legal authorities cited herein, as well as the following documents:

(a) OS 24;

(b) the 1st Affidavit of Outakeo Keodouangsinh;

(c) the 1st Affidavit of John K Baldwin;

(d) the 2nd Affidavit of Outakeo Keodouangsinh;

(e) the 2nd Affidavit of John K Baldwin;

(f) the 1st Affidavit of Chong Wan Yee Monica;

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2 Professor Shan's Report, paragraph 20.

(g) Summons No 884 of 2014;

(h) the 1st Affidavit of Chin-Puar Yow Hoy;

(i) the 3rd Affidavit of Outakeo Keodouangsinh;

(j) the 3rd Affidavit of John K Baldwin; and

(k) the 1st Affidavit of Ee Ah Choo.

18. I have, of course, also carefully reviewed Professor Shan's Report. As I am not an expert on PRC law, I am not qualified to comment substantively upon the views expressed in Professor Shan's Report on domestic PRC law.

19. However, I have reviewed the expert report of Professor Guiguo Wang. Contrary to Professor Shan's Report, Professor Wang's Report concluded that:

(a) under PRC law, the PRC Letter represents an official and formal position of the PRC on the question of whether the PRC-Laos BIT applies to the Macao SAR; and

(b) the interpretation of the PRC-Laos BIT set out in the PRC Letter is also consonant with the fact that under PRC law including the Macao Basic Law, the BIT is not applicable to the Macao SAR.

20. I understand that it is for this Honourable Court to determine whether it prefers the views on PRC law expressed in Professor Shan's Report or in Professor Wang's Report.

21. Nonetheless, I note that the conclusions expressed in Professor Wang's Report are more consistent with my understanding of the position, as a matter of international law, of the status of the PRC-Laos BIT in relation to the Macao SAR.

22. I have also been provided with the 1st Affidavit of John James Maresca. Mr Maresca concludes that as a matter of international diplomatic practice and custom, the PRC letter represents the official position of the PRC on the question of whether the PRC-Laos BIT applies to the Macao SAR. Again, this is consistent with my understanding, as a matter of international law, of diplomatic relations and practice.

V. SUMMARY OF VIEWS

23. I respectfully disagree with the opinion in Professor Shan's Report that the PRC Letter is not relevant to the interpretation of the PRC-Laos BIT under international law.

24. Further, I am of the opinion that the position in the PRC Letter is consistent with and supported by state practice and the wealth of academic literature that clearly demonstrate that, as a matter of international law, the PRC-Laos BIT does not apply to the Macao SAR.

VI. OPINION

1. The applicable principles of international law

25. The issue at hand concerns the territorial scope of the PRC-Laos BIT. I am in agreement with Professor Shan that the relevant international law provisions governing this issue are Article 29 of the Vienna Convention on the Law of Treaties[3] ("**VCLT**") and Article 15 of the Vienna Convention on Succession of States in respect of Treaties[4] ("**VCST**"). Though neither the PRC nor Laos are parties to the VCST, its provisions are often cited as reflecting customary international law.

26. Article 29 of the VCLT (a copy of which is annexed hereto as "**Annexe 6**") provides:

> "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."

27. Article 15 of the VCST (a copy of which is annexed hereto as "**Annexe 7**") 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:

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3 Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, in force 27 January 1980, available at <https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf>.

4 Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, in force 6 November 1996, available at <http://treaties.un.org/doc/Treaties/1996/11/19961106%2005-51%20AM/Ch_XXIII_02p.pdf>.

(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."

28. Professor Shan's Report correctly identifies this area of law as being referred to as the "moving treaty frontiers" rule (or sometimes the "moving treaty boundaries" rule or "moving-boundary principle")[5].

29. As Article 29 of the VCLT makes clear, the presumption is that a treaty is binding in respect of the entire territory of a state — in other words, the PRC-Laos BIT is presumed to apply to the Macao SAR upon restoration of Chinese sovereignty with effect from 20 December 1999. There are, however, two exceptions to this. First, if a "different intention" (that is, an intention that the PRC-Laos BIT does not apply to the Macao SAR) "appears from the treaty". Secondly, if that different intention is "otherwise established".

30. The position is similar under Article 15 of the VCST: the PRC-Laos BIT is presumed to apply to the Macao SAR upon restoration of Chinese sovereignty with effect from 20 December 1999, unless "it appears from the treaty" or "is otherwise established" that the application of the PRC-Laos BIT to the Macao SAR would be incompatible with the object and

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[5] Professor Shan's Report, paragraph 42.

purpose of the PRC-Laos BIT or would radically change the conditions for its operation.

31. As I will demonstrate, the PRC Letter is relevant to these exceptions in Article 29 of the VCLT and Article 15 of the VCST, which I believe are satisfied in the present case.

2. An intention that the PRC-Laos BIT does not apply to the Macao SAR can be and has been "otherwise established"

32. Pursuant to the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao[6] ("**1987 Sino-Portuguese Joint Declaration**") and under the PRC's domestic law, the PRC Government may at a future date decide, following consultation with the authorities of the Macao SAR, whether the PRC-Laos BIT should apply to the Macao SAR. The fact that the PRC Government has the ability to make such a decision appears to be accepted in both Professor Shan's Report and Professor Wang's Report.

33. Professor Shan's Report appears to conclude that even if the PRC Letter represents the official position or decision of the PRC Government, under international law principles, the PRC Letter will not establish an intention that the PRC-Laos BIT does not apply to the Macao SAR because:

[6] Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao, done at Beijing, 13 April 1987, available at <http://bo.io.gov.mo/bo/i/88/23/dc/en/>. A copy of the 1987 Sino-Portuguese Joint Declaration is annexed hereto as "**Annexe 8**".

(a) internal laws cannot be invoked as a justification for non-performance of a treaty obligation; and

(b) in any case the PRC Letter cannot offer retroactive evidence of the PRC's intention, at the time of the handover of Macao, as to whether the PRC-Laos BIT applied to the Macao SAR[7].

34. However, from an international law perspective, I do not think that the PRC Letter would be viewed as having the above intent or meaning. Far from trying to alter the legal position unilaterally, or retrospectively asserting the PRC's position at the time of Macao's handover, the PRC Letter is a confirmation that the process for extending the PRC-Laos BIT to the Macao SAR has not taken place.

2.1 There is no violation of Article 27 of the VCLT

35. Contrary to the views expressed in Professor Shan's Report, I do not think that the PRC Letter would infringe the rule contained in Article 27 of the VCLT that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

36. It may be helpful to illustrate this point by reference to the two possible scenarios in this case:

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[7] Professor Shan's Report, paragraphs 48-52.

(a) the PRC-Laos BIT in fact **applies** to the Macao SAR, but a decision of the PRC Government can unilaterally revoke the application of the PRC-Laos BIT to the Macao SAR; and

(b) the PRC-Laos BIT **does not apply** to the Macao SAR, but a decision of the PRC Government can extend the territorial scope of the PRC-Laos BIT so as to apply it to the Macao SAR.

37. The first scenario in paragraph 36(a) would indeed be a violation of international law and would further render various provisions of domestic PRC law (as described in Professor Shan's Report and Professor Wang's Report) moot.

38. As a matter of international law, the first scenario would violate the rule contained in Article 27 of the VCLT against internal law being used as a justification for failure to perform a treaty obligation. If a treaty extends to the territory of the Macao SAR it creates obligations that cannot be revoked unilaterally by the PRC.

39. Furthermore, if the PRC could in fact unilaterally revoke treaty obligations which applied in the territory of the Macao SAR, that would effectively render nugatory the provisions concerning the application of treaties to the Macao SAR in the 1987 Sino-Portuguese Joint Declaration (see paragraph 50 below).

40. The second scenario in paragraph 36(b) is, by contrast, consistent with both international law and with domestic PRC law (as the latter has been presented in Professor Shan's Report and Professor Wang's Report).

41. Although Article 27 of the VCLT does not allow internal law to justify non-compliance with an international law obligation, the VCLT does not prohibit the expansion of international law obligations to additional territories. Indeed, the whole point of the moving treaty frontiers rule is that an international law obligation undertaken by a state may later be extended to new territory.

42. Professor Shan himself, writing in a book published in 2009, acknowledges the possibility that the PRC's BITs will be regarded as not applying to the Macao SAR and the Hong Kong SAR. He wrote that "it would be advisable for the Chinese government to complete the required domestic law procedures, to avoid any doubt as to the applicability of such BITs to the SARs"[8].

43. For the reasons set out in the following sections of my report, the position set out by the PRC Government in the PRC Letter is consistent with the established position on the legal status of the Macao SAR.

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8 Norah GALLAGHER and SHAN Wenhua, *Chinese Investment Treaties: Policies and Practice* (Oxford: Oxford University Press, 2009), para 2.90. A copy of the relevant extract is annexed hereto as "**Annexe 9**".

2.2 International law and the status of the Macao SAR

44. The restoration of Hong Kong and Macao to the PRC in 1997 and 1999 respectively are among the least disruptive examples of state succession in modern history. In both cases, great pains were taken to ensure minimal disruption to international commercial obligations[9].

45. This makes the Hong Kong SAR and the Macao SAR somewhat unusual in the history of succession. Anthony Aust, for example, argues that[10]:

> "The circumstances of the handover of Hong Kong to China... were unique and do not provide much in the way of insight into the more usual treaty succession problems. Elaborate arrangements were made by China and the United Kingdom to enable treaty continuity after the return of Hong Kong to China, and to leave the Hong Kong Special Administrative Region (HKSAR) a large degree of autonomy in the conclusion of treaties in its own right. ... Similar provisions were made for Macao..."

46. Given the similarities between the Hong Kong SAR and the Macao SAR in this context, I will show how the example of the Hong Kong SAR is a particularly illuminating aid to the interpretation of the PRC-Laos BIT.

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9 CHENG Tai-Heng, *State Succession and Commercial Obligations* (Ardsley, NY: Transnational, 2006), p. 209. A copy of the relevant extract is annexed hereto as "**Annexe 10**".

10 Anthony AUST, *Handbook of International Law*, 2nd ed. (Oxford: Oxford University Press, 2010), p. 371. A copy of the relevant extract is annexed hereto as "**Annexe 11**".

2.2.1 THE INTERNATIONAL LAW CONTEXT OF HONG KONG AND MACAO'S HANDOVER TO CHINA

47. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong[11] ("**1984 Sino-British Joint Declaration**") provided, *inter alia*, that[12]:

> "The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."

48. Similarly, the 1987 Sino-Portuguese Joint Declaration provided[13]:

> "The Macao Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. ... The current social and economic systems in Macao will remain unchanged, and so will the life-style. The laws currently in force in Macao will remain basically unchanged"

49. With regard to international obligations, a process was established to provide certainty in relation to the Hong Kong SAR[14]:

> "The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and

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[11] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, done at Beijing, 19 December 1984, in force 27 May 1985, available at <http://www.cmab.gov.hk/en/issues/joint3.htm>. A copy of the 1984 Sino-British Joint Declaration is annexed hereto as "**Annexe 12**".

[12] 1984 Sino-British Joint Declaration, Article 3(3).

[13] 1987 Sino-Portuguese Joint Declaration, Articles 2(2),(4).

[14] 1984 Sino-British Joint Declaration, Annex I, Clause XI (Foreign Affairs).

needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government."

50. A similar process was outlined for the Macao SAR[15]:

> "The application to the Macao Special Administrative Region of international agreements to which the People's Republic of China is a member or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Macao Special Administrative Region, and after seeking the views of the government of the Macao Special Administrative Region."

2.2.2 THE HONG KONG SAR AND THE APPLICATION OF TREATIES

51. The international legal position concerning the application to the Hong Kong SAR of treaties entered into by the PRC is, therefore, similar to that of the Macao SAR. Consequently, the Hong Kong SAR experience may provide valuable guidance when examining the situation in the Macao SAR.

52. In the lead up to Hong Kong's handover in 1997, there was a great deal of discussion concerning the impact that the 1997 transition would have on the treaties applicable to the Hong Kong SAR. The focus was on making sure that the legal changes would be minimal and clear[16].

53. A Sino-British Joint Liaison Group was established to review multilateral and bilateral treaties applicable to Hong Kong. It identified those multilateral treaties that would continue to apply to the Hong Kong SAR, as well as multilateral treaties applicable to the PRC that would be

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15 1987 Sino-Portuguese Joint Declaration, Annex I, Clause VIII.

16 CHENG Tai-Heng, *State Succession*, p. 219.

extended to the Hong Kong SAR. The treaties were listed in a Note to the Secretary-General of the United Nations[17] (see paragraphs 61-62 below).

54. The Sino-British Joint Liaison Group also identified some 180 bilateral agreements signed by the United Kingdom that had previously applied to Hong Kong but would not apply to the new Hong Kong SAR. Model agreements were drafted for the Hong Kong SAR Government to conclude with individual bilateral partners in order to continue the substance of these agreements[18].

55. The focus throughout this period was the applicability of multilateral treaties. With respect to bilateral treaties, it is clear that the assumption was that all the bilateral treaties applicable to Hong Kong would lapse and would need to be supplemented by new agreements entered into by the Hong Kong SAR. There was no discussion, nor does it appear to have entered the minds of those concerned, that bilateral treaties then applicable to the PRC would suddenly apply to the Hong Kong SAR after 1 July 1997.

56. Indeed, the clear assumption was precisely the opposite. That was evident in an article written in 1997 by the outgoing Attorney-General of Hong Kong, J F Mathews[19]. It was also evident in a speech by Hong

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17 Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer, 2011), pp. 500-501. A copy of the relevant extract is annexed hereto as "**Annexe 13**".

18 CHENG Tai-Heng, *State Succession*, p. 217.

19 J.F. MATHEWS, "The Legal System of the Hong Kong Special Administrative Region", *University of Pennsylvania Journal of International Economic Law*, vol. 18 (1997), pp. 8-9. A copy of the article is annexed hereto as "**Annexe 14**".

Kong's Secretary for Justice at the twentieth anniversary of the entry into force of the 1984 Sino-British Joint Declaration, who recalled the efforts that were undertaken to ensure continuity and stability in both multilateral **and bilateral** treaty obligations[20].

57. In fact, it would have been devastating to the confidence of investors in Hong Kong had its international obligations — multilateral or bilateral — suddenly been left uncertain.

58. The scholarly literature likewise shows that, in the language of Article 29 of the VCLT or Article 15 of the VCST, an intention that the treaties entered into by the PRC would not automatically extend to the Hong Kong SAR had been "otherwise established".

59. For example, in a leading current textbook on treaty law and practice, Anthony Aust observes that it was agreed that none of the bilateral agreements then applicable to Hong Kong would survive handover[21]. There is no suggestion that the bilateral treaties entered into by the PRC would suddenly apply to the Hong Kong SAR. In fact, Aust states that

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[20] WONG Yan Lung, "Speech by the Secretary of Justice, Mr Wong Yan Lung, SC, at a luncheon of the Chinese General Chamber of Commerce to commemorate the 20th Anniversary of the Sino-British Joint Declaration coming into effect" (18 November 2005), available at <http://www.info.gov.hk/gia/general/200511/18/P200511170153.htm>. A copy of the speech is annexed hereto as "**Annexe 15**".

[21] AUST, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed, 2013), p. 339. A copy of the relevant extracts is annexed hereto as "**Annexe 16**".

Hong Kong's lapsing bilateral treaties were replaced **even if the PRC had existing bilateral treaties with the same parties**[22]:

> "Thus, before handover a substantial number of states concluded treaties with Hong Kong on such matters as air services, ***investment promotion and protection***, surrender of fugitive offenders, mutual legal assistance in criminal matters and transfer of prisoners, ***even though sometimes the third state already had a treaty on the same subject with China***."

60. An example cited by Aust is Japan. The PRC and Japan had a BIT that had been signed in 1988[23] but in May 1997 Hong Kong concluded its own BIT with Japan that came into force two weeks prior to the handover[24].

61. Such an interpretation of the legal position vis-à-vis the Hong Kong SAR is also consistent with the Note submitted by the PRC to the Secretary-General of the United Nations[25]. This Note listed:

    (a) treaties to which the PRC was a party that would be applied to the Hong Kong SAR after handover; and

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22 Ibid., pp. 339-340 [emphasis added].

23 Agreement Between Japan and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, done at Beijing, August 1988, available at <http://unctad.org/sections/dite/iia/docs/bits/china_japan.pdf>. A copy of the BIT is annexed hereto as "**Annexe 17**".

24 Agreement Between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment, done at Tokyo, 15 May 1997, in force 18 June 1997, available at <http://unctad.org/sections/dite/iia/docs/bits/hongkong_japan.pdf>, cited in AUST, *Modern Treaty Law and Practice*, p. 340. A copy of the BIT is annexed hereto as "**Annexe 18**".

25 United Nations Treaty Collection: Historical Information (UNTS Historical Info) (United Nations, New York, 2014), available at <http://treaties.un.org/pages/HistoricalInfo.aspx>, China, note 2. A copy is annexed hereto as "**Annexe 19**".

(b) treaties to which Hong Kong was a party and would continue to apply after handover.

62. The Note went on to state[26]:

> "With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application. For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State."

63. As Professor Zeng Huaqun of Xiamen University, Executive Vice President of the Chinese Society of International Economic Law, wrote in 2010[27]:

> "In order to maintain and develop [Hong Kong's] international investment relations after 1997, [Hong Kong] had two choices in the transition period (from 27 May 1985 to 30 June 1997): one was that [Hong Kong] negotiate and conclude BITs in its name with foreign countries in accordance with above provisions of the [1984 Sino-British Joint Declaration] and the [Basic Law], and the other was that [Hong Kong's] international investment relations were covered by the framework of Chinese BITs. [Hong Kong] chose the first one then. Considering the different economic and legal systems as well as different status in the international investment context between [Hong Kong] and Mainland China, the choice may better meet the specific needs of [Hong Kong] and serve the purpose of promoting and protecting international investment for [Hong Kong]."

64. As Professor Zeng subsequently observed in the same article[28]:

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26 Ibid.

27 ZENG Huaqun, "Initiative and Implications of Hong Kong's Bilateral Investment Treaties", *Journal of World Investment & Trade*, vol. 11 (2010), p. 670. A copy of the article is annexed hereto as "**Annexe 20**".

> "In general China's BITs are not applied to [Hong Kong] according to the relevant provisions of the [1984 Sino-British Joint Declaration], the [Basic Law] and [Hong Kong's] BITs."

2.2.3 *THE MACAO SAR AND THE APPLICATION OF TREATIES*

65. Though Macao's web of international obligations was less complex than Hong Kong's, precisely the same approach was clearly envisaged for the new Macao SAR[29].

66. In particular, there was a similar process to determine which multilateral treaties would apply to the Macao SAR after 1999 and to adopt new bilateral arrangements to supplement the Portuguese treaties that would no longer apply after the handover of Macao to the PRC. There is no evidence of any suggestion that bilateral treaties entered into by the PRC would suddenly begin to apply to the Macao SAR[30].

67. In fact, a similar Note to that concerning the Hong Kong SAR was deposited at the United Nations[31]. Again, a list of treaties that would extend to the Macao SAR and those that would continue to was provided. The Note also provided[32]:

> "With respect to other treaties that are not listed in the Annexes to this Note, to which the People's Republic of China is or will become a Party, the Government of the People's Republic of China will go through separately the necessary formalities for their

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[28] Ibid

[29] AUST, *Modern Treaty Law and Practice*, p. 336.

[30] CHENG Tai-Heng, *State Succession*, pp. 225-233.

[31] United Nations Treaty Collection: Historical Information (UNTS Historical Info), China, note 3. A copy is annexed hereto as "**Annexe 21**".

[32] Ibid.

> application to the Macao Special Administrative Region if it so decided."

68. I note that the Tribunal in its Award narrowly confined this statement only to multilateral treaties that are deposited with the Secretary-General of the United Nations[33]. In my opinion, this is a debatable point, as various states have used this mechanism to alert other states not only to multilateral but also to bilateral succession issues[34]. In any case, the statement is consistent with the broader position that only specific multilateral treaties would apply to the Macao SAR after the handover.

69. Furthermore, the established position espoused in the PRC Letter is also reinforced by the state practice of the PRC itself, as well as by important international organisations.

70. For instance, in 2008, the Government of the PRC and the Government of Mexico concluded a BIT[35] ("**PRC-Mexico BIT**") which included the following footnote[36]:

> "Authorized by the Central Government of the People's Republic of China, the Governments of Hong Kong and Macao Special Administrative Regions can separately negotiate and sign the Agreement on the Promotion and Reciprocal Protection of

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33 Award, paragraph 210.

34 See in particular the declarations by Estonia, Latvia, and Micronesia: United Nations Treaty Collection: Historical Information (UNTS Historical Info). A copy of the relevant extracts is annexed hereto as "**Annexe 22**".

35 Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, done at Beijing, 11 July 2008, available at <http://tradeinservices.mofcom.gov.cn/en/b/2008-07-11/76905.shtml>. A copy is annexed hereto as "**Annexe 23**".

36 Ibid, Note 1.

Investments with the Government of United Mexican States by themselves."

71. Such a footnote, and such authorisation, would have been entirely unnecessary if in fact the PRC-Mexico BIT presumptively applied to the Hong Kong SAR and the Macao SAR from the moment it was agreed between the PRC and Mexico.

72. Instead, the clear understanding – consistent with the PRC Letter – is that BITs concluded by the PRC (such as the PRC-Laos BIT and the PRC-Mexico BIT) do not automatically apply to the Macao SAR.

73. I note in passing that the PRC-Mexico BIT was not cited by the Tribunal in the Award, and that the Tribunal instead referred[37] to two BITs concluded by the Macao SAR with Portugal[38] ("**Portugal-Macao BIT**") and the Netherlands[39] ("**Netherlands-Macao BIT**"), in circumstances where there were also BITs between the PRC and Portugal[40] ("**PRC-Portugal BIT**") as well as the Netherlands[41] ("**PRC-Netherlands BIT**").

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37 Award, paragraph 281.

38 Agreement between the Government of the Macao SAR and the Government of the Republic of Portugal regarding the Reciprocal Promotion and Protection of Investments, done in Lisbon, on 17 May 2000. A copy is annexed hereto as "**Annexe 24**".

39 Agreement between the Macao Special Administrative Region of the People's Republic of China and the Kingdom of the Netherlands on Encouragement and Reciprocal Protection of Investments, done in Macao, on 22 May 2008. A copy is annexed hereto as "**Annexe 25**".

40 Agreement between the People's Republic of China and the Portuguese Republic on the Encouragement and Reciprocal Protection of Investments, done at Lisbon on 9 December 2005. A copy is annexed hereto as "**Annexe 26**".

41 Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government

74. In my opinion, the conclusion of BITs between the Macao SAR and countries that separately concluded BITs with the PRC is evidence that "otherwise establishe[s]", within the meaning of Article 29 of the VLCT and Article 15 of the VCST, that the PRC-Portugal BIT and the PRC-Netherlands BIT were not to apply to the Macao SAR.

75. Surprisingly, however, the Tribunal ruled that this merely demonstrated that the Portugal-Macao BIT and the Netherlands-Macao BIT were intended to provide protection additional to that conferred by the PRC-Portugal BIT and the PRC-Netherlands BIT[42].

76. As the PRC-Mexico BIT suggests, however, the Tribunal's ruling is, with respect, incorrect. In my opinion, the correct interpretation is that the BITs entered into by the PRC do not automatically apply to the Macao SAR.

77. This understanding is also consistent with the position adopted by the Secretariat of the World Trade Organization, which in 2001 prepared a periodic report on the Macao SAR that outlined the legal framework for foreign investment in the following terms[43]:

> "In 1999, Macau, China signed a double taxation agreement with Portugal (published in Decree-Law No. 106/99/M of 13 December 1999). Macau, China also signed a bilateral agreement on investment protection with Portugal (published in the *Government*

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of the Kingdom of the Netherlands, done on 26 November 2001. A copy is annexed hereto as "**Annexe 27**".

42 Award, paragraphs 290-295.

43 Trade Policy Review: Macao, China (World Trade Organization, WT/TPR/S/82, Geneva, 19 February 2001), available at <http://www.wto.org>, 20, para 27 [emphasis added]. A copy of the relevant extract is annexed hereto as "**Annexe 28**".

Gazette No. 31, on 31 July 2000). ***Macau, China has no other bilateral investment treaties or bilateral tax treaties.***"

78. Such a statement would clearly have been incorrect if, as Professor Shan's Report argues, the PRC-Laos BIT (and indeed all of the PRC's BITs) automatically applied to the Macao SAR as from the date of handover on 20 December 1999.

2.2.4 CONCLUSION

79. What all of the above shows, therefore, is that:

(a) First, Professor Shan's Report has omitted to highlight that there are materials and literature relating to the question of the territorial scope of the PRC-Laos BIT. Under international law, these sources can be taken into consideration to determine whether a "different intention" has been "otherwise established" for the purposes of Article 29 of the VCLT and Article 15 of the VCST.

(b) Secondly, contrary to Professor Shan's Report, the PRC Letter is relevant because it is consistent with the sources I have mentioned above, and is also evidence that the process for extending the PRC-Laos BIT to the Macao SAR has not taken place. Under international law principles, the PRC Letter can be taken into consideration to determine whether a "different intention" has been "otherwise established" for the purposes of Article 29 of the VCLT and Article 15 of the VCST.

(c) Thirdly, having regard to the sources I have mentioned above (including the PRC Letter), I am of the opinion that the position under international law is that it is "otherwise established" for the purposes of the exception in Article 29 of the VCLT and Article 15 of the VCST that the PRC-Laos BIT does not apply to the Macao SAR.

3. An intention that the PRC-Laos BIT does not apply to the Macao SAR "appears from the treaty"

80. Professor Shan's Report also takes the view that the PRC Letter cannot satisfy what Professor Shan refers to as the "explicit exception" under Article 29 of the VCLT or Article 15 of the VCST, on the basis that the PRC Letter does not "purport to interpret the terms of the PRC-Laos BIT"[44].

81. Indeed, Professor Shan's Report goes further in asserting that, even if the PRC Letter expresses the present intention of the PRC, the PRC Letter cannot be given what Professor Shan terms "retroactive effect" so as to establish an interpretation of the PRC-Laos BIT[45].

82. With respect, I disagree. Article 31 of the VCLT, concerning the general rule of interpretation of treaties, clearly provides[46]:

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44 Professor Shan's Report, paragraph 45.

45 Professor Shan's Report, paragraphs 48-52.

46 VCLT, Article 31.

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> ***3. There shall be taken into account, together with the context:***
>
> (a) ***any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions***;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

83. The PRC Letter read together with the Laos Letter constitute a subsequent agreement between the PRC and Laos regarding the interpretation of the PRC-Laos BIT within the meaning of Article 31(3) of the VCLT.

84. In his book, Professor Shan accepts that the PRC can manifest its intention that a BIT should not apply to the Macao SAR. Immediately after the passage quoted in paragraph 42 above, Professor Shan writes that "if the Chinese government does not want these BITs to apply to SARs, it

should make it clear in the relevant treaty"[47]. As is evident from Article 31 of the VCLT, however, treaty-interpretation is not predicated on, nor restricted to the words used in the text of the treaty. Parties to a treaty can also manifest their intentions through a subsequent agreement between them on the treaty's interpretation or application.

85. Furthermore, as Aust notes, there is no need for a further treaty to agree on an interpretation of a treaty[48]:

> "There is no need for a further treaty, since the paragraph refers deliberately to an 'agreement', not to a treaty. Provided the purpose is clear, the agreement can take various forms..."

86. In arguing that the PRC Letter cannot be relied upon to interpret the PRC-Laos BIT, Professor Shan's Report cites the following passage from Rudolf Dolzer and Christoph Schreuer's *Principles of International Investment Law*[49]:

> "[A] mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is incompatible with principles of a fair procedure and is hence undesirable."

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47 Norah GALLAGHER and SHAN Wenhua, *Chinese Investment Treaties: Policies and Practice* (Oxford: Oxford University Press, 2009), para 2.90.

48 AUST, *Modern Treaty Law and Practice*, p. 213.

49 Professor Shan's Report, paragraph 50, citing Rudolf DOLZER & Christoph SCHREUER, *Principles of International Investment Law*, 2nd ed. (Oxford University Press, 2012), p. 35.

87. With respect, this is a selective quotation from a larger passage that bears reading in full. In its larger context, the learned authors in fact recognise and confirm the validity of such an interpretative technique[50]:

> "Occasionally the states parties to a treaty may express an opinion on its proper interpretation in the course of arbitration proceedings. The two states, parties to a BIT, may issue a joint, non-binding statement on a question of interpretation pending before a tribunal.
>
> The NAFTA has a mechanism whereby the Free Trade Commission (FTC), a body composed of representatives of the three states parties, can adopt binding interpretations of the treaty. The FTC has made use of this method in July 2001 in interpreting the concepts of 'fair and equitable treatment' and 'full protection and security' under Article 1105 of the NAFTA. NAFTA tribunals have accepted this interpretation as binding.
>
> BITs do not normally have institutional mechanisms to obtain authentic interpretations of their meaning. But the United States Model BIT of 2004 provides for a mechanism that is similar to the one in the NAFTA:
>
> ARTICLE 30(3)
>
> > 'A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.'
>
> This method may be efficient, but has a serious drawback. States may strive to issue official interpretations to influence proceedings to which they are parties. However, a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is incompatible with principles of a fair procedure and is hence undesirable."

88. The concern is that such an interpretation might be invoked in bad faith. That is not the case here as the parties are not seeking to manipulate

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50 Ibid, pp 34-35 (notes omitted).

proceedings but rather to confirm their understanding as to the applicability of the PRC-Laos BIT.

89. Such an approach is consistent with the decision of the Ontario Federal Court of Appeal in *Edwards v. Canada* [2003] FCA 378, annexed hereto as "**Annexe 29**". The plaintiff, a Canadian pilot employed by a subsidiary of Cathay Pacific Ltd (which is incorporated in Hong Kong) tried to take advantage of the double-taxation treaty signed by Canada and the PRC in 1986. This was rejected, *inter alia*, because there had been a clear exchange of diplomatic notes between Canada and the PRC in 2001 whereby both parties agreed that the double-taxation treaty did not apply to Hong Kong SAR. The plaintiff argued that such diplomatic notes should not be used to construe the double-taxation treaty. This was rejected by the Court without hesitation[51]:

> "In my view, the commonly expressed intention of the parties is entitled to great weight and should not be ignored unless a contrary intent can be shown in either the words of the Treaty or in some other expression by the parties. No such contrary intent has been shown."

90. Therefore, the PRC Letter when read together with the Laos Letter can be interpreted as a subsequent agreement between the states parties to the PRC-Laos BIT regarding its interpretation or the application of its provisions which can, and should, be taken into consideration under Article 31 of the VCLT to interpret the PRC-Laos BIT.

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51 *Edwards v. Canada* (Federal Court of Appeal (Ottawa, Ontario)), [2003] FCA 378, para 29.

91. On that basis, contrary to Professor Shan's Report, an intention that the PRC-Laos BIT does not apply to the Macao SAR does "appears from the treaty" within the meaning of Article 29 of the VCLT and Article 15 of the VCST, when the PRC-Laos BIT is interpreted in accordance with Article 31 of the VCLT and in light of the positions expressed in the Laos Letter read together with the PRC Letter.

VII. CONCLUSION

92. Upon the restoration of Chinese sovereignty to the Hong Kong SAR and the Macao SAR, elaborate mechanisms were put in place to ensure business continuity and the unique and ongoing status of Hong Kong and Macau as maintaining a degree of international legal personality.

93. Multilateral treaties that would apply were listed in Notes to the Secretary-General of the United Nations. Bilateral treaties of the departing colonial powers that would lapse were replaced. At no point was it suggested that bilateral treaties entered into by the PRC would suddenly apply to the Hong Kong SAR and the Macao SAR. Indeed, precisely the opposite is clear.

94. Contrary to the view expressed in Professor Shan's Report, I believe that the only reasonable interpretation, consistent with the academic literature on the subject and state practice with regard to both the Hong Kong SAR and Macao SAR, is that, in accordance with Article 29 of the VCLT and Article 15 of the VCST, the PRC-Laos BIT does not presently apply to the Macao SAR.

95. Unsurprisingly, this is also consistent with the understanding shared by both Laos and the PRC, the two states parties to the PRC-Laos BIT, as reflected in the Laos Letter and the PRC Letter. Under Article 31(3) of the VCLT, such an interpretation must be taken into account.

96. For all those reasons, I must respectfully disagree with the conclusion reached in Professor Shan's Report that the PRC Letter is irrelevant to the question of the interpretation of the PRC-Laos BIT as a matter of international law.

97. Indeed, it follows from what I have said that I consider the PRC Letter to be relevant and material to the question of whether the PRC-Laos BIT applies to the Macao SAR.

98. In my opinion, consistent with the established position under international law, the PRC Letter clearly confirms that the PRC-Laos BIT does not apply to the Macao SAR.

PROFESSOR SIMON CHESTERMAN

Dated 7 April 2014

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Annexe-4	Letter dated 7 January 2014 from the Plaintiff to the Embassy of PRC
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Annexe-6	Extract of Article 29 of the Vienna Convention on the Law of Treaties
Annexe-7	Extract of Article 15 of the Vienna Convention on the Law of Treaties
Annexe-8	Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao, done at Beijing, 13 April 1987
Annexe-9	Extract from *Chinese Investment Treaties: Policies and Practice* (Oxford: Oxford University Press, 2009) by Norah GALLAGHER and SHAN Wenhua
Annexe-10	Extract from *State Succession and Commercial Obligations* (Ardsley, NY: Transnational, 2006) by CHENG Tai-Heng
Annexe-11	Extract from *Handbook of International Law,* 2nd ed. (Oxford: Oxford University Press, 2010)
Annexe-12	Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, done at Beijing, 19 December 1984

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Annexe-13	Extract from *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer, 2011) by Oliver Dörr and Kirsten Schmalenbach
Annexe-14	"The Legal System of the Hong Kong Special Administrative Region", *University of Pennsylvania* Journal of International Economic Law, vol. 18 (1997) by J.F. MATHEWS
Annexe-15	Copy of "Speech by the Secretary of Justice, Mr Wong Yan Lung, *SC,* at a luncheon of the Chinese General Chamber of Commerce to commensurate the 20th Anniversary of the Sino-British Joint Declaration coming into effect" on 18 November 2005
Annexe-16	Extract of *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed, 2013) by AUST
Annexe-17	Agreement Between Japan and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, done at Beijing, August 1988
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Annexe 1

to the Expert Report
of Professor Simon Chesterman

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Current employment

National University of Singapore: Associate Prof. (2007–09); Professor of Law (2009—); Vice Dean (2010–11); Dean (2012—).

Asian Society of International Law: Deputy Secretary-General (2009–12); Secretary-General (2012—).

Asian Journal of International Law: Editor (2010—).

Past employment

New York University School of Law: Executive Director of the Institute for International Justice (2004–06); Global Professor and Director of the Singapore Programme (2006–11).

International Crisis Group: Director, UN Relations (2003–04).

International Peace Academy: Senior Associate (2000–04).

Visiting/adjunct academic positions: University of Melbourne (1993–96; 2004–11); Institut d'Etudes Politiques de Paris (Sciences Po) (2004–06); Columbia University (2002–03); University of Oxford (1999–2000); University of Southampton (1998–99).

Consultancies: UN Development Programme (English language teacher, Beijing, China; 1991); Minter Ellison (1994–97); Masons Solicitors (1999); International Criminal Tribunal for Rwanda (legal intern;1999); UN Office for the Co-ordination of Humanitarian Affairs, Belgrade (FRY) (2000); International Commission on Intervention and State Sovereignty (ICISS) (2000–01); UN Office of Internal Oversight Services (2006–07); Government of Norway (2007–08); MAN Diesel & Turbo France SAS (2011); WongPartnership LLP (2011).

Academic qualifications

University of Oxford: Doctor of Philosophy in Law (2000).

University of Melbourne: LL.B. (Hons) (1997); B.A. (Hons) (1995).

北京第二外国语学院 [Beijing No 2 Foreign Languages Institute]: 中级毕业证书 [Intermediate Diploma in Chinese] (1991).

Prizes and fellowships (selected)

Young Researcher Award, National University of Singapore (2010).

Residency, Rockefeller Foundation Bellagio Study and Conference Center (2014, 2003).

American Society of International Law Certificate of Merit (2002).

Dasturzada Dr Jal Pavry Memorial Prize (Oxford) (2000).

Rhodes Scholar (Australia, 1997).

Supreme Court Prize (Victoria, Australia) (1997).

Research grants

Principal investigator of projects at NUS: *Sovereign Wealth Funds: Governance and Regulation* (NUS ARF/FRC, S$108,993; 2009–2011); *Rule of Law in International Affairs* (with Charles Sampford and Ramesh Thakur, Australian Research Council, AUD$296,000; 2009–2011); *Asian Society of International Law Young Scholars Workshop* (NUS ARF/FRC, S$59,672; 2008–2009).

Principal investigator of projects at NYU: *Improving the Global Regulation of Law and Legal Institutions in States at Risk: Local Impacts of Indicators, Financing Regimes and International Institutions* (Carnegie Corporation of New York, US$418,700; 2008–2010); *From Mercenaries to Market to Governance: The Commercial Military Sector and States at Risk* (Carnegie Corporation of New York, US$300,000; 2006–2008); *Making States Work: Governance and Accountability in States at Risk* (Carnegie Corporation of New York, US$300,000; 2004–2006); *Regulating the Private Commercial Military Sector* (Government of Canada, US$50,000; 2005–2006).

Principal investigator of projects at IPA: *State-Building: The Role of the United Nations in Supporting the Institutions of the State Before, During, and After Conflict; Operationalizing "The*

Responsibility to Protect" in the United Nations System (Carnegie Corporation of New York, US$362,000; John D. and Catherine T. MacArthur Foundation, US$250,000; 2003–2005); *Sanctions and the Political Economy of Crisis* (Government of France, US$10,000; Government of Canada, US$10,000; 2001); *A Decade of United Nations Sanctions: Theory and Practice* (Government of the United Kingdom, US$22,000; Government of Switzerland, US$11,000; Government of Germany, US$11,000; 2002); *Human Rights and the UN Security Council* (Government of the United Kingdom, US$43,000, 2001); *The Dilemmas of Transitional Administration: Self-Determination, Nation-Building, and the role of the United Nations* (Carnegie Corporation of New York, US$270,000; 2000–2003).

Total amount of research grants: US$2.37m.

Other experience

Government and other committees: Singapore Academy of Law (Vice-President, 2012—); Data Protection Advisory Committee (2013—); Casino Regulatory Authority Disciplinary Committee (2014—).

Member of editorial boards: *Brill Asian Law Series* (2013—); *Global Governance* (2009—); *Hague Journal on the Rule of Law* (2008—); *International Studies Review* (2013—); *Journal of European and International Affairs* (2012—); *Journal of International Peacekeeping* (2007—); *Journal of Intervention and Statebuilding* (Co-Editor, 2006–2013; Editorial Board, 2013—); *Melbourne Journal of Politics* (2004–2005); *Melbourne University Law Review* (Editor, 1995); *Mexican Yearbook of International Law* (2004—); *National Law University, Delhi Student Law Journal* (2014—); *The RGNUL Finance and Mercantile Law Review* (Advisory Board, 2012—); *Security Dialogue* (Editorial Advisory Committee, 2004—); *Singapore Year Book of International Law* (Co-Editor-in-Chief, 2008–2009); *South Asian Studies in International and Comparative Law* (2014—).

External reviewer: promotion & tenure for Australian National University, Hertie School of Governance, University of North Carolina; **grant proposals** for Australia-China Council, Australian Research Council, MacArthur Foundation, Netherlands Organisation for Scientific Research (NWO), Social Sciences and Humanities Research Council of Canada; **book manuscripts** for Cambridge University Press, CQ Press, Lynne Rienner Publishers, Oxford University Press, Routledge, United Nations University Press, United States Institute of Peace; **journal articles** for *American Political Science Review*, *Asian Journal of Comparative Law*, *Australian International Law Journal*, *Australian Journal of Political Science*, *Comparative Political Studies*, *Ethics & International Affairs*, *European Journal of International Law*, *European Journal of International Relations*, *Global Governance*, *Global Responsibility to Protect*, *International Journal*, *International Journal of Human Rights*, *International Journal of Transitional Justice*, *International Peacekeeping, International Security*, *International Spectator*, *International Studies Association Compendium Project*, *International Theory*, *Journal of Conflict & Security Law, Journal of Conflict Studies*, *Journal of Global Ethics*, *Journal of Intervention and Statebuilding*, *Journal of Peacebuilding and Development*, *Journal of Military Ethics*, *Law and Society Review*, *Melbourne Journal of International Law*, *Melbourne University Law Review*, *Security Dialogue*, *Singapore Academy of Law Journal*, *Singapore Law Review*, *Sydney Law Review*.

Association of American Law Schools, Executive Committee of the Section on Graduate Programs for Foreign Lawyers (2009–2010); American Society of International Law, Annual Conference Organizing Committee (2004–2005).

Electoral observer: East Timor (2001, 2002); Kosovo (2001).

Community legal centre: Fitzroy Legal Service volunteer (1994–1997).

Community radio: 'Night Air' (Oxygen, 1997–99); 'Done by Law' (3CR, 1996); 'Without Prejudice' (88.3 Southern FM, 1994–1996).

Languages

Native English speaker; conversational Chinese (Mandarin); basic French.

PUBLICATIONS

Authored books

1. (with Ian Johnstone and David M. Malone) *Law and Practice of the United Nations: Documents and Commentary* (2nd edition; Oxford: Oxford University Press, forthcoming).

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1. (editor) *Data Protection Law in Singapore: Privacy and Sovereignty in an Interconnected World* (Singapore: Academy Publishing, 2014), 313pp.
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5. (editor) *Secretary or General? The UN Secretary-General in World Politics* (Cambridge: Cambridge University Press, 2007), 280pp.
6. (editor, with Michael Ignatieff and Ramesh Thakur) *Making States Work: State Failure and the Crisis of Governance* (Tokyo: United Nations University Press, 2005), 400pp.
7. (editor) *Civilians in War* (Boulder, CO: Lynne Rienner, 2001), 291pp.

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Annexe 2

to the Expert Report
of Professor Simon Chesterman

PCA Case No. 2013-13

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS DATED 31 JANUARY 1993 AND THE 2010 UNCITRAL ARBITRATION RULES

- between -

SANUM INVESTMENTS LIMITED

"Claimant"

- and -

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

("Respondent," and together with Claimant, the "Parties")

AWARD ON JURISDICTION

ARBITRAL TRIBUNAL:
Professor Bernard Hanotiau
Professor Brigitte Stern
Dr. Andrés Rigo Sureda (Presiding Arbitrator)

Registry:
The Permanent Court of Arbitration

Tribunal Secretary:
Ms. Sarah Grimmer

13 December 2013

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I. THE PARTIES AND THEIR REPRESENTATIVES

1. The Claimant is Sanum Investments Limited ("**Sanum**" or **"Claimant**"), an entity incorporated in the Macao Special Administrative Region of the People's Republic of China ("**PRC**") ("**Macao SAR**" or "**Macao**"). The Claimant is represented by Mr. David W. Rivkin and Ms. Catherine M. Amirfar (Debevoise & Plimpton LLP, New York); Mr. Christopher K. Tahbaz (Debevoise & Plimpton LLP, Hong Kong); and Mr. Todd Weiler (Barrister & Solicitor, London, Ontario, Canada).

2. The Respondent is the Government of the Lao People's Democratic Republic ("**Laos**" or "**Respondent**"). The Respondent is represented by the Laos Ministry of Foreign Affairs, Mr. David Branson (King Branson LLC, Washington, D.C.), Ms. Jane Willems, Ms. Teresa Cheng S.C. (De Voeux Chambers, Hong Kong), Professor George A. Bermann (Columbia University School of Law, New York) and L.S. Horizon (Vientiane).

II. PROCEDURAL HISTORY

3. The Claimant commenced these proceedings by a Notice of Arbitration ("**Notice**") dated 14 August 2013 pursuant to the Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments dated 31 January 1993 (**"PRC/Laos Treaty**", "**BIT**", "**Treaty**").[1]

4. On 8 May 2013, the Tribunal and the Parties attended a first procedural conference in London.

5. On 21 May 2013, after consultation with the Parties, the Tribunal issued Procedural Order No. 1, which designated: (a) Singapore as the place of arbitration; (b) the Permanent Court of Arbitration ("**PCA**") as Registry; and (c) the 2010 UNCITRAL Arbitration Rules as the applicable procedural rules. Procedural Order No. 1 also set forth the timetable of the proceedings.

6. On 7 June 2013, the Claimant filed an Amended Notice of Arbitration ("**Amended Notice**").

7. On 9 August 2013, the Respondent filed its Memorial on Jurisdiction with exhibits RE-01 to RE-18 and legal authorities RA-01 to RA-25.

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[1] PRC/Laos Treaty (Ex. D to Claimant's Amended Notice of Arbitration).

8. On 1 October 2013, the Claimant filed its Statement of Claim and Response on Jurisdiction with (a) witness statements of Mr. John Baldwin, Mr. Clay Crawford, Mr. Richard A. Pipes; (b) expert reports of Mr. Joseph P. Kalt, Ph.D. (with Appendices A to C) and the Innovation Group (with Appendices A to G); (c) exhibits C-1 to C-421; and (d) legal authorities CLA-1 to CLA-118.

9. On 8 October 2013, the Tribunal held a pre-hearing telephone conference call with the Parties.

10. On 11 October 2013, the Presiding Arbitrator issued Procedural Order No. 2 on behalf of the Tribunal.

11. On 17 October 2013, the Respondent submitted its Reply in Support of its Objection to Jurisdiction with exhibits RE-19 to RE-23 and legal authorities RA-27 to RA-34.

12. On 31 October 2013, the Claimant filed its Rejoinder on Jurisdiction accompanied by exhibit C-422 and legal authorities CLA-119 to CLA-125.

13. On 6 November 2013, a hearing on jurisdiction was held in Singapore ("**Hearing on Jurisdiction**").[2] The attendees for the Claimant were Mr. John Baldwin, Mr. Shawn Scott, Mr. David Rivkin, Ms. Catherine M. Amirfar, Ms. Samantha J. Rowe, Dr. Todd Weiler, and Ms. Swee Yen Koh. The attendees for the Respondent were Ms. Jane Willems, Mr. David Branson, Mr. Werner Tsu, Mr. Kongphanh Santivong, Prof. Dr. Bountiem Phissamay, Mr. Ket Kiettisak, Mr. Khampheth Viraphondet, Mr. Sith Siripraphanh, Mr. Outakeo Keodouangsingh and Mr. Phoukong Sisoulath.

14. At the conclusion of the Hearing on Jurisdiction, the Tribunal requested the Parties to file further submissions on (a) the respective roles, if any, of Article 29 of the 1969 Vienna Convention on the Law of Treaties ("**VCLT**") and Article 15 of the 1978 Convention on the Succession of States in Respect of Treaties ("**VCST**"), in relation to the application or non-application of the PRC/Laos Treaty to the Macao SAR; and (b) an analysis of the texts of the PRC/Portugal, PRC/Netherlands, Macao/Portugal, Macao/Netherlands bilateral investment treaties to determine whether there exists any relationship between the treaties entered into by Macao and those entered into by the PRC.[3]

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[2] In advance of the Hearing on Jurisdiction, the Parties provided the Tribunal with an agreed core hearing bundle of exhibits and legal authorities.

[3] Hearing Transcript, pp. 175-176; Agreement between the Kingdom of the Netherlands and the Macao SAR of the PRC on Encouragement and Reciprocal Protection of Investments, signed 22 May 2008

15. On 15 November 2013, the Respondent submitted its Post-Hearing Submission in Support of its Objection to Jurisdiction accompanied by Tables 1 to 4 and exhibits RE-24 to RE-46 and legal authorities RA-35 to RA-53 ("**Respondent's Post-Hearing Submission**"), and the Claimant submitted its Response to the Tribunal's Questions on Jurisdiction accompanied by legal authorities CLA-126 to CLA-150 ("**Claimant's Response**").

16. Following several e-mails from the Parties on 17 and 18 November 2013, on behalf of the Tribunal, the Presiding Arbitrator directed the Parties to refrain from providing additional submissions unless invited to do so by the Tribunal.

17. In Procedural Order No. 1, the Tribunal undertook to its decision on jurisdiction in a brief statement to the Parties indicating whether the jurisdictional objections were upheld or denied as soon as possible and not later than 15 December 2013. Such statement was to be followed by a fully reasoned decision of the Tribunal. This Award on Jurisdiction constitutes the fully reasoned decision of the Tribunal and thus obviates the need for a brief statement.

III. FACTUAL BACKGROUND

18. Prior to 1999, Macao was considered a "Chinese territory" over which Portugal exercised administrative power.[4] After the handover of Macao by Portugal in 1999, the PRC resumed sovereignty over Macao and established it as a special administrative region ("**SAR**") under Article 31 of the Constitution of the PRC and the Basic Law of the Macao SAR ("**Macao SAR Basic Law**").[5]

19. On 13 December 1999, the PRC filed a Notification regarding the Macao SAR with the Secretary-General of the United Nations ("**UN**") ("**1999 Notification**")[6] that is recorded in a

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("**Macao/Netherlands BIT**") (CLA-128); Agreement between the Portuguese Republic and the SAR of Macao of the PRC Regarding the Reciprocal Promotion and Protection of Investments, signed 17 May 2000 ("**Macao/Portugal BIT**") (CLA-129); Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the PRC and the Government of the Kingdom of the Netherlands, signed 26 November 2001 ("**PRC/Netherlands BIT**") (CLA-130); Agreement between the Portuguese Republic and the PRC on the Encouragement and Reciprocal Protection of Investments, signed 10 December 2005 ("**PRC/Portugal BIT**") (CLA-131).

4 Respondent's Memorial on Jurisdiction, ¶ 23 referring to Articles 5(4) and 292 of the 1976 Constitution of Portugal, 2 April 1976 (RE-10); and Article 1 of the Joint Declaration of the Government of the PRC and the Government of the Republic of Portugal on the Question of Macao, 13 April 1987 ("**Joint Declaration**") (RE-11).

5 Respondent's Memorial on Jurisdiction, ¶¶ 25, 73; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 227. .

6 1999 Notification (RE-08).

UN document entitled *Multilateral Treaties Deposited with the Secretary-General: Status as at 1 April 2009*.[7]

20. Sanum was established on 14 July 2005 under the laws of the Macao SAR.

21. In the spring of 2007, Mr. John Baldwin, Chairman of the Board of Sanum, travelled to Laos to explore possibilities for investing in Laos upon learning that a locally incorporated entity involved in the resort and gaming business—the ST Group ("**ST**")—was in need of financing to develop its gaming business.[8]

22. According to the Claimant, Mr. Baldwin subsequently met with individuals, attorneys, representatives of ST, and high-ranking government officials to discuss cooperation in the development of gaming enterprises in Laos.[9] Sanum eventually became involved in the operation and development of two casinos and five slot clubs in Laos.

23. The Claimant alleges that, prior to its investment, its representatives were assured by Laos government officials, including the Prime Minister, that Laos had favorable conditions for foreign investors,[10] strongly respected the rule of law,[11] and that Sanum would be accorded an ongoing majority control of its investment and long-term protection and security for those investments and their returns,[12] as well as a favorable and certain tax regime.[13] Sanum submits that the Prime Minister personally assured it that partnering with ST would be beneficial to it,[14] and that Laos would protect Sanum's investment.[15] Sanum further alleges that other officials of the Respondent also assured Sanum representatives that they would support Sanum for as long as it lived up to its commitments.[16]

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7 United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 1 April 2009* (2009), Historical Information, China, Note 3, at VIII ("**UN Status of Multilateral Treaties**") (CLA-115/RE-18).

8 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 44.

9 Amended Notice, ¶¶ 18-19; Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 45-48.

10 Amended Notice, ¶ 20.

11 Amended Notice, ¶ 24; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 52.

12 Amended Notice, ¶ 20.

13 Amended Notice, ¶ 21; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 52.

14 Amended Notice, ¶ 22.

15 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 53.

16 Amended Notice, ¶ 23.

Conclusion of the Master Agreement

24. Sanum and ST formalized their relationship in a Master Agreement dated 30 May 2007, which would govern all of the joint ventures in which the parties would participate.[17] Specifically, ST promised Sanum 60% of each of its existing (and all future) gaming ventures, and Sanum promised to make payments to ST (*e.g*. US$1.5 million upon signing the Master Agreement and US$2 million upon receiving the government approvals to be arranged by ST) and to finance the development of their planned ventures.[18] According to the Respondent, the Master Agreement was not intended to be a definitive agreement, but an "agreement to agree."[19]

25. The Master Agreement envisaged the creation of three joint ventures: (1) the Savan Vegas Hotel and Casino ("**Savan Vegas**"), for which ST already held a concession; (2) the Paksong Vegas Hotel and Casino ("**Paksong Vegas**"), for which ST already held a concession; and (3) three slot clubs: the Vientiane Friendship Bridge Slot Club, also known as the Thanaleng Slot Club ("**Thanaleng**"); the Lao Bao Slot Club ("**Lao Bao**"); and the Ferry Terminal Slot Club, also known as Daensavan Slot Club ("**Ferry Terminal**").[20]

26. Sanum's investment and ownership in all of the joint ventures were contingent upon Government acceptance and approval.[21]

27. The Master Agreement provided that the gaming rights would be exclusively those of the joint ventures.[22]

Project Development Agreements

28. On 10 August 2007, two project development agreements ("**PDAs**") were concluded.[23]

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17 Amended Notice, ¶ 26; Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 49-51; Respondent's Memorial on Jurisdiction, ¶ 4.

18 Amended Notice, ¶ 26; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 49.

19 Respondent's Memorial on Jurisdiction, ¶ 4.

20 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 50; Respondent's Memorial on Jurisdiction, ¶ 5.

21 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 51; Respondent's Memorial on Jurisdiction, ¶ 6.

22 Respondent's Memorial on Jurisdiction, ¶ 6.

23 Respondent's Memorial on Jurisdiction, ¶ 7.

29. The first was concluded between Laos on the one hand and Sanum, Xaya Construction Co. Ltd. (a Laotian company), and Mr. Xaysana Xaysoulivong, on the other hand, with respect to Savan Vegas ("**Savan Vegas PDA**").[24] Therein, it was agreed that a joint venture—Savan Vegas and Casino Co. Ltd.—would be established under the laws of Laos to implement the Savan Vegas PDA ("**Savan Vegas JVC**").[25] The share ownership was divided as follows: Laos would own 20%, Sanum 60%, Xaya Construction Co. Ltd. 10%, and Mr. Xaysoulivong 10%.[26]

30. The second PDA was concluded between Laos on the one hand and Sanum, Nouansavanh Construction Co. Ltd. (a Laotian company), and Mr. Sittixay Xaysana, on the other hand, with respect to Paksong Vegas ("**Paksong Vegas PDA**").[27] Therein, it was agreed that a joint venture—Paksong Vegas and Casino Co. Ltd.—would be established under the laws of Laos to implement the Paksong Vegas PDA ("**Paksong Vegas JVC**").[28] The share ownership was divided as follows: Laos would own 20%, Sanum 60%, Nouansavanh Construction Co. Ltd. 10%, and Mr. Xaysana 10%.[29]

31. Both PDAs provided for dispute settlement by arbitration before the Economic Dispute Organization in Singapore.[30]

32. The Claimant submits that, through the PDAs, the Government agreed to an "Investment Incentive Policy" pursuant to which the joint ventures would be exempt from certain taxes.[31] According to the Claimant, the Government subsequently entered into a Flat Tax Agreement ("**FTA**") with Savan Vegas that capped annual taxes through the end of 2013.[32]

33. On 31 October 2007, the Government, Sanum, and ST executed Shareholders' Agreements for Savan Vegas and Paksong Vegas.[33]

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[24] Respondent's Memorial on Jurisdiction, ¶ 7; Savan Vegas PDA (RE-03).

[25] Respondent's Memorial on Jurisdiction, ¶ 7.

[26] Respondent's Memorial on Jurisdiction, ¶ 7.

[27] Respondent's Memorial on Jurisdiction, ¶ 7; Paksong Vegas PDA (RE-04).

[28] Respondent's Memorial on Jurisdiction, ¶ 7.

[29] Respondent's Memorial on Jurisdiction, ¶ 7.

[30] Article 22 of the Savan Vegas PDA (RE-03) and Paksong Vegas PDA (RE-04).

[31] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 7

[32] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 7

[33] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 57; Shareholders' Agreement between the Lao Government, Sanum, Xaya Construction Co., Ltd., Xaysana Xaysoulivong, and Savan Vegas, dated 31 October 2007 ("**Savan Vegas Shareholders' Agreement**") (C-056); Shareholders' Agreement

The Slot Clubs

34. According to the Claimant, negotiations over the future ownership and management of ST's three existing slot clubs—Thanaleng, Lao Bao, and Ferry Terminal—also proceeded in 2007 and 2008.[34]

35. On 6 August 2007, Sanum and ST entered into a Participation Agreement concerning the Lao Bao and Ferry Terminal Slot Clubs according to which Sanum would supply and maintain certain gaming machines in exchange for a percentage share in the revenue generated (60%).[35] Sanum and ST also entered into additional agreements concerning the Lao Bao and Ferry Terminal Slot Clubs, which granted Sanum management control of the clubs and protection of its 60% stake.[36]

36. On 4 October 2008, Sanum and ST entered into a Participation Agreement concerning the Thanaleng Slot Club, pursuant to which Sanum would supply and maintain certain gaming machines in exchange for revenue share.[37]

37. Sanum claims that it also invested in new slot club ventures in the provinces in which the Government had granted its investments monopoly gaming rights. On 25 October 2009, Savan Vegas opened a new slot club in Paksan. It also began exploring the possibility of having Savan Vegas open a slot club and international welcome center in Thakhaek.[38]

38. The Claimant describes its investment in Laos as follows:

> Sanum has made substantial investments […], including capital investments in its various Lao enterprises and projects exceeding US$85 million. It is a majority shareholder in both Savan Vegas and Paksong Vegas, which have been granted fifty-year land and development concessions and enjoy valuable monopoly gaming rights in five provinces pursuant to several agreements with the Lao Government, including the [PDAs] for each casino project. Sanum has ownership stakes in the Thanaleng, Lao Bao, and Ferry

between the Lao Government, Sanum, Nouansavanh Construction Co., Ltd., and Lao River Mining Sole Co., Ltd., and Paksong Vegas, dated 31 October 2007 ("**Paksong Vegas Shareholders' Agreement**") (C-057).

[34] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59.

[35] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59; Lao Bao and Ferry Terminal Participation Agreement, dated 6 August 2007 (C-051).

[36] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59; Ancillary Agreement between ST and Sanum, dated 1 September 2009 (C-063); Assignment of Lease, Ferry Terminal slot club, dated 1 September 2009 (C-064); Assignment of Leases, Lao Bao Slot Club, dated 1 September 2009 (C-065).

[37] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59.

[38] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 60.

> Terminal slot clubs, and is entitled to a share of their revenues. Sanum also brought in highly experienced slot and casino managers to assist in running Savan Vegas, and it has leveraged its extensive knowledge of the gaming industry to introduce new multistation games at Thanaleng, which proved very popular and contributed to the club's success. Such industry expertise and business know-how has generated considerable returns for Sanum's businesses, which have operated pursuant to the required licenses issued by the Lao Government.[39]

The Claimant's Claims

39. It is the Claimant's case that its investments, once operational, were successful, but that the Government of Laos, including its courts and provincial authorities, conducted itself in such a way as to breach multiple obligations under the Treaty; namely, breach of (a) the fair and equitable treatment obligation under Article 3(1); (b) the expropriation provision in Article 4; (c) the guarantee of transfer of payments provision in Article 5; and (d) the obligation under Article 3(2) to provide an investor no less favorable treatment than that provided to investors of third States.[40]

The Respondent's Limited Response on the Facts

40. The Respondent makes limited submissions on the facts at this stage of the proceedings.[41] It submits that (a) the investors have not made any capital investments but rather claim (without providing documentary evidence) to have loaned approximately US$65 million to the casino;[42] (b) over the first four years of casino operations, Savan Vegas reported gambling revenues increased to US$74 million per year but, according to Savan Vegas, every year the casino made a loss, relieving it of its obligation to pay out to its shareholders;[43] (c) there are concerns over the legitimacy of claimed expenses on the casino's books and loans apparently paid by Mr. Baldwin with respect to which he has been receiving interest payments.[44] The Respondent intimates that it will file a counterclaim seeking to terminate all of the relevant agreements with the Claimant.[45]

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[39] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 273; Hearing Transcript, p. 66.

[40] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 313.

[41] Respondent's Reply on Jurisdiction, ¶¶ 54-57.

[42] Respondent's Reply on Jurisdiction, ¶ 55.

[43] Respondent's Reply on Jurisdiction, ¶ 56.

[44] Respondent's Reply on Jurisdiction, ¶ 56.

[45] Respondent's Reply on Jurisdiction, ¶ 57.

Related Proceedings

41. On the same day that the present arbitration was commenced, Lao Holdings N.V. ("**Lao Holdings**"), a company formed in Aruba, the Netherlands, and the 100% owner of Sanum, also commenced arbitration proceedings against Laos pursuant to the bilateral investment treaty concluded between the Netherlands and Laos in 2005 ("**Lao Holdings Arbitration**").[46]

42. In April 2013, Lao Holdings requested provisional measures from the tribunal in the related proceedings.[47] On 17 September 2013, the tribunal in the Lao Holdings Arbitration awarded provisional measures to the claimant ordering the parties to maintain the *status quo* with respect to investments subject to that arbitration.[48]

IV. RELEVANT LEGAL PROVISIONS

43. The Preamble to the Treaty provides, in relevant part:

> The Government of the People's Republic of China and the Government of the Lao People's Democratic Republic (hereinafter referred to as Contracting States),
> Desiring to encourage, protect and create favorable 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 […]

44. Article 1(1) of the Treaty provides, in relevant part:

> The term "investments" means every kind of asset invested by investors of one Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the latter, including mainly
> (a) movable and immovable property and other property rights;
> (b) shares in companies or other forms of interest in such companies;
> (c) a claim to money or to any performance having an economic value;
> (d) copyrights, industrial property, know-how and technological process;
> (e) concessions conferred by law, including concessions to search for or to exploit natural resources.

45. Article 1(2)(b) of the Treaty provides, in relevant part:

> The term "investors" means:
> In respect of both Contracting States: […]
> (b) economic entities established in accordance with the laws and regulations of each contracting State.

[46] Respondent's Memorial on Jurisdiction, ¶ 2(iii).

[47] Respondent's Memorial on Jurisdiction, ¶ 10.

[48] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 24.

46. Article 3(1) and 3(2) of the Treaty provide:

> (1) Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.
>
> (2) The treatment and protection as mentioned in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.

47. Article 4(1) and 4(2) of the Treaty provide:

> (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.

48. Article 8(1), 8(2), and 8(3) of the Treaty provide:

> (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.

49. Article 29 of the VCLT states:

> 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.

50. 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.

V. SUMMARIES OF THE PARTIES' ARGUMENTS

A. WHETHER THE CLAIMANT IS COVERED BY THE BIT

1. Whether the BIT extends to the Macao SAR

(a) The Respondent's Position

51. The Respondent argues that the BIT does not provide protection to the Claimant because the BIT does not extend to cover the Macao SAR.[49]

52. The Respondent notes that the PRC resumed the exercise of sovereignty over Macao in 1999, and established Macao as an SAR pursuant to Article 31 of the PRC Constitution and the Macao SAR Basic Law.[50] The Respondent alleges that the Macao SAR Basic Law establishes the capacity of Macao to enter into international trade arrangements on its own behalf[51] and to adopt its own policies and laws on the protection and development of industry and commerce,[52] which includes the power to execute bilateral investment treaties.[53] It further contends that the Macao SAR Basic Law provides that international agreements to which the PRC is a party would not apply automatically in the Macao SAR but must instead be decided by the Central Government of the PRC.[54]

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49 Respondent's Memorial on Jurisdiction, ¶¶ 32-37.

50 Respondent's Memorial on Jurisdiction, ¶¶ 25, 71.

51 Respondent's Memorial on Jurisdiction, ¶ 27; Articles 106 and 112 of the Basic Law of the Macao SAR (RE-09).

52 Respondent's Memorial on Jurisdiction, ¶ 28; Article 114 of the Basic Law of the Macao SAR (RE-09).

53 Respondent's Memorial on Jurisdiction, ¶¶ 29-30; Articles 22 and Article 136 of the Basic Law of the Macao SAR (RE-09).

54 Respondent's Memorial on Jurisdiction, ¶ 31; Article 138 of the Basic Law of the Macao SAR (RE-09).

53. According to the Respondent, it is common ground that Article 29 of the VCLT, which contains the customary international law rule of "moving treaty frontiers", is operative in this case because Laos and the PRC are both signatories to the VCLT.[55]

54. The Respondent further submits that Article 15 of the VCST is an expression of customary international law.[56] According to the Respondent, the rule is "commonly understood to have two aspects, one negative (treaties of the predecessor State cease to be in force in the portion of territory in question, except for certain types of treaties or specific circumstances) and one positive (treaties of the successor State become in force in the portion of territory in question, except for certain types of treaties or specific circumstances)."[57] The Respondent specifies that the "rule formulated in Article 15 of the [VCST] in its negative and positive aspects and the exceptions applicable to the rule in both aspects are well grounded in customary international law."[58]

55. The Respondent submits that both Articles 29 of the VCLT and Article 15 of the VCST co-exist, are "very closely connected" and compatible.[59]

56. It is the Respondent's case that the Treaty does not extend to the Macao SAR because it falls within the exceptions to Article 29 of the VCLT[60] and the exceptions to Article 15 of the VCST.[61]

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55 Respondent's Post-Hearing Submission, ¶ 2.

56 Respondent's Post-Hearing Submission, ¶¶ 2-12, referring to, *inter alia*, Cahier, "Quelques aspects de la Convention de 1978 sur la succession d'Etats en matière de traités", in Dutoit and Grisel (eds), *Mélanges Georges Perrin* (Lausanne: Payot, 1984), pp. 73-74 ("**Cahier**") (RA-39). In an e-mail dated 17 November 2013, the Claimant submitted that the Respondent's reference to Cahier:

> "misleadingly implies that Cahier was discussing the exceptions in Article 15 as being custom, when it is clear from an even cursory review that he was instead describing the customary moving treaty frontiers rule – *and not* the exceptions that were added to Article 15 by the International Law Commission. (The full, brief discussion by Cahier of Article 15 was the following: 'Article 15 provides that when part of a State's territory becomes part of the territory of another State, the predecessor's treaties cease to apply and the successor's treaties become applicable to it. This rule is the corollary of the principle announced in Article 29 of the VCLT, according to which a treaty is binding upon each party with regard to its entire territory. This provision corresponds to State practice, it was adopted without amendment at the Conference and it simply codifies a customary rule.')." (Claimant's emphasis)

See also Hearing Transcript, pp. 54, 57.

57 Respondent's Post-Hearing Submission, ¶ 4.

58 Respondent's Post-Hearing Submission, ¶ 12.

59 Respondent's Post-Hearing Submission, ¶¶ 15-16, 22.

60 Respondent's Memorial on Jurisdiction, ¶¶ 35-37; Hearing Transcript, p. 16.

57. The Respondent contends that the 1999 Notification filed by the PRC with the UN Secretary-General as depositary operates as a reservation to the territorial application of the BIT to the Macao SAR.[62] The Respondent emphasizes that the 1999 Notification *specifically* provided for the application of the treaties listed in its Annexes I and II to the Macao SAR,[63] and that the BIT was not listed in either of these two Annexes.[64]

58. The Respondent cites paragraph IV of the 1999 Notification, which states that the PRC "will go through separately the necessary formalities for [the] application [of treaties that are not listed in the Annexes to this Note] to the Macao [SAR] if it so decided."[65] The Respondent argues that Laos would have had to have been notified separately if the BIT were to be extended to the Macao SAR and it was not.[66] The Respondent also notes that Article 138 of the Macao SAR Basic Law requires consultation with the Macao SAR before a decision regarding treaty application, and points to the absence of evidence in this case that the Macao SAR has indeed been consulted.[67]

59. The Respondent rejects the argument of the Claimant that the 1999 Notification relates only to multilateral treaties by stating that: (a) the Overview of the UN Treaty Collection ("**UNTC**") does not distinguish between the different locations as to where the 1999 Notification is deposited; (b) the UNTC covers both multilateral and bilateral treaties; (c) the capacity of the UN to register, file and record treaties is not distinct as between bilateral and multilateral treaties; (d) Article 102 of the UN Charter requires "treaties" and "international agreements" to be registered with the Secretariat before parties to such treaties or agreements can invoke them before an organ of the UN, and, while neither the UN Charter nor the regulations define either term, the Secretariat defers to the definition of Member States submitting such instruments for registration; and (e) there is no distinction with regard to the depositary practice for bilateral and multilateral treaties.[68] The Respondent further notes that the requirements for the deposit of

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61 Respondent's Memorial on Jurisdiction, ¶ 32; Hearing Transcript, pp. 15-16.

62 Hearing Transcript, pp. 20, 148-149.

63 Respondent's Memorial on Jurisdiction, ¶ 41.

64 Respondent's Memorial on Jurisdiction, ¶ 42; Hearing Transcript, pp. 18-19.

65 Respondent's Memorial on Jurisdiction, ¶¶ 41, 43; Hearing Transcript, p. 19.

66 Respondent's Memorial on Jurisdiction, ¶¶ 43, 53(5); Hearing Transcript, p. 26.

67 Respondent's Memorial on Jurisdiction, ¶¶ 43, 53(6), 78; Hearing Transcript, pp. 59-60.

68 Respondent's Reply on Jurisdiction, ¶ 42, referring to the UNTC at http://treaties.un.org; UN Charter: Chapter XVI: Miscellaneous Provisions (RA-28); Definition key terms used in the UNTC at http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements (RA-29); Notes verbales from the Legal Counsel relating to the depositary practice and the registration of treaties

instruments does not limit the UN Secretary-General to acting as depositary for multilateral treaties alone (in spite of the focus on multilateral treaties by the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties[69]) as evidenced by the phrase "deposit of binding instruments."[70]

60. Further, the Respondent submits that the reference to "multilateral treaties" in the UN document containing the 1999 Notification does not change the *effect* of the PRC's notification in which the PRC expressly refers to international agreements, and draws no distinction between multilateral or bilateral treaties.[71] The Respondent also argues that the Claimant's submission that the notification only applies to treaties that are to be deposited with the Secretary-General as depositary is irrelevant because that is an external reference and what should be considered is the intent of the PRC as expressed in the 1999 Notification, *i.e.*, that the Treaty is not listed as one that extends to the Macao SAR.[72]

61. In the Respondent's view, there exists an important body of practice as well as authority regarding the qualification of the rule of automatic succession (or extension) of treaties when it comes to certain types of treaties or circumstances, *e.g.*, "personal" or "bilateral" treaties.[73] According to the Respondent, the 1999 Notification drew a distinction between (a) treaties that apply to Macao by virtue of the application to the entire Chinese territory (including Macao) as a result of their character (*e.g.*, treaties concerning foreign affairs or defense); and (b) treaties that applied to Macao before 20 December 1999, the date of transfer of sovereign rights.[74] To determine whether treaties concluded by the PRC but not included in the 1999 Notification

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pursuant to Article 102 of the UN Charter, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements (RA-30).

69 *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev. 1, United Nations, New York, 1999, ¶¶ 277, 285 (1999) ("**Summary of UNSG Depositary Practice**") (RA-03).

70 Respondent's Reply on Jurisdiction, ¶ 43, referring to the Communication from the Legal Counsel of the United Nations in relation to the requirements for the deposit of instruments of ratification, acceptance, approval, accession and the like with the Secretary-General dated 11 March 2002 (Ref: LA41TR/221/1) (RA-31); see also Summary of UNSG Depositary Practice (RA-03).

71 Hearing Transcript, pp. 149, 155-156.

72 Hearing Transcript, pp. 149-150.

73 Respondent's Post-Hearing Submission, ¶¶ 17-19.

74 Respondent's Post-Hearing Submission, ¶ 20.

extend to Macao, the Respondent considers that it is necessary to refer to the treaty-making powers of Macao under the Joint Declaration and the Macao SAR Basic Law.[75]

62. The Respondent emphasizes the fact that both instruments recognize Macao's treaty-making powers in economic and cultural matters.[76] The Respondent argues that "[u]nder these conditions, there can be no doubt that bilateral investment treaties and other commercial treaties concluded by China with third countries do not automatically apply to Macao under the positive aspect of the basic rule [of Article 15] but are instead the object of an exception to such rule."[77]

63. The Respondent cites Article 20(5) of the VCLT which states that a State is deemed to have accepted a reservation if it has raised no objection within twelve months after either being notified of the reservation or expressing consent to the treaty, whichever is later.[78] The Respondent notes that Laos did not object to the 1999 Notification within the stipulated twelve months.[79]

64. The Respondent stresses that a state's unilateral declaration can create legal obligations,[80] regardless of the declaration's form.[81] The Respondent contends that good faith binds States to international obligations that are created by a unilateral declaration and that interested States are entitled to demand that such obligations be respected.[82] The Respondent argues that paragraph

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75 Respondent's Post-Hearing Submission, ¶ 20; Joint Declaration (RE-11); Basic Law of the Macao SAR (RE-09).

76 Respondent's Post-Hearing Submission, ¶ 20; Respondent's Memorial on Jurisdiction, ¶ 27; Articles 106 and 112 of the Basic Law of the Macao SAR (RE-09); Joint Declaration (RE-11); Hearing Transcript, pp. 147-148

77 Respondent's Post-Hearing Submission, ¶ 21.

78 Respondent's Memorial on Jurisdiction, ¶ 44, referring to Article 20(5) of the VCLT (RE-07), which provides:

> "[…] unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

79 Respondent's Memorial on Jurisdiction, ¶ 44, referring to Article 20(5) of the VCLT (RE-07); Hearing Transcript, p. 27.

80 Respondent's Memorial on Jurisdiction, ¶¶ 49-51, referring to the *Nuclear Tests Case (New Zealand v. France)*, Judgment, I.C.J. Reports 1974 (20 Dec. 1974) ¶¶ 43, 45-47 ("***Nuclear Tests Case***") (RA-05) and Summary of Judgment in the *Nuclear Tests Case*, p. 99 (RA-06); Mr. Victor R. Cedeño, "First Report on Unilateral Acts of States," (A/CN.4/486), (1998) 2 YBILC (Part One), p. 327, ¶¶ 59, 86, 89 ("**Cedeño**") (RA-07); Hearing Transcript, pp. 24-25.

81 Respondent's Memorial on Jurisdiction, ¶ 52, referring to Cedeño, ¶ 85 (RA-07).

82 Respondent's Memorial on Jurisdiction, ¶ 54, referring to the *Nuclear Tests Case*, at ¶ 54 (RA-05); Hearing Transcript, p. 25.

IV of the 1999 Notification entitles Laos to rely on the PRC's unilateral declaration and supports its legitimate expectation that the BIT not be extended to the Macao SAR until the PRC made a notification to this effect.[83]

65. The Respondent notes that Laos accepted the position of the PRC by not objecting to it or otherwise taking any action with regard to it over the years.[84] From the above, the Respondent contends that the Contracting Parties had effectively established a different intention from the customary rule in Article 29 of the VCLT.[85]

66. The Respondent clarifies that, contrary to the contention of the Claimant, reservations can apply in the bilateral context and are not explicitly excluded by the VCLT.[86] It also distinguishes the present case from those cited by the Claimant, by noting that those cases involved reservations being proposed prior to or during the signing of the bilateral treaties.[87] Respondent stresses in any case that it relies on the reservation as a unilateral declaration that gives rise to legitimate expectations on the part of the other party and, correspondingly, to legal implications such as estoppel by convention.[88] The Respondent also argues that, under public international law, the unilateral declaration of a state can amount to a reservation and satisfy the "otherwise established" exception contained in Article 29 of the VCLT.[89]

67. The Respondent points out that the BIT entered into force in 1993 at a time when Macao was a dependent territory of Portugal. In 1999, when the PRC assumed sovereignty over Macao and established the Macao SAR, the PRC could not have extended the application of the BIT to Macao because the governmental powers of the Macao SAR were established in the Macao SAR Basic Law.[90] It further notes that trade and investment policy operate separately as

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83 Respondent's Memorial on Jurisdiction, ¶¶ 53, 60-64, referring to the *Nuclear Tests Case*, ¶ 57 (RA-05); Hearing Transcript, p. 26.

84 Respondent's Memorial on Jurisdiction, ¶¶ 56-57; Respondent's Reply on Jurisdiction, ¶ 31.

85 Respondent's Reply on Jurisdiction, ¶ 31.

86 Respondent's Reply on Jurisdiction, ¶ 29, referring to Dörr & Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2012), p. 241 ("**Dörr and Schmalenbach**") (RA-26).

87 Respondent's Reply on Jurisdiction, ¶ 29.

88 Respondent's Reply on Jurisdiction, ¶ 29.

89 Respondent's Memorial on Jurisdiction, ¶¶ 45-47, referring to Dörr and Schmalenbach, pp. 493-494 (RA-26); Summary of UNSG Depositary Practice, ¶¶ 277, 285 (1999) (RA-03); Corten & Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) (Oxford University Press), p. 738 ("**Corten & Klein**") (RA-04); see also Hearing Transcript, pp. 20, 22-24, referring to Dörr and Schmalenbach, pp. 500-501.

90 Respondent's Memorial on Jurisdiction, ¶¶ 71-72.

between Mainland China and the Macao SAR.[91] This is illustrated, the Respondent contends, by the fact that the Macao SAR entered into separate BITs with the Netherlands and Portugal after 1999.[92]

68. The Respondent clarifies that the issue of the territorial application of the BIT to the Macao SAR involves and is intended to involve consideration of the PRC Constitution and the Macao SAR Basic Law, as established by legal authority and references in the BIT to municipal law.[93] The Respondent notes that Article 18 of the Macao SAR Basic Law provides that PRC national laws must be listed in Annex III if they are to be incorporated in the laws of the Macao SAR.[94] On this basis, the BIT has never been extended to the Macao SAR and therefore can only have effect in Mainland China.[95]

69. In response to the argument of the Claimant that the PRC could have prevented the default application of the "moving treaty frontiers" rule by expressly excluding Macao from the territorial scope of the BIT when it was executed in 1993, as the PRC and Portugal had already entered into the Joint Declaration on the issue of Macao at that time, the Respondent states that: (a) in 1993, the PRC did not have the jurisdiction to state the position of Macao; and (b) the Joint Declaration of the PRC and Portugal entered into in 1987 contains provisions—namely, Articles 3, 4, and 5 and Annex II—regarding the autonomy of Macao that were still being negotiated and had not yet been finalized in 1993, making it impossible to ascertain the effect of this Joint Declaration at that time.[96] Moreover, the Claimant contends that the Joint Declarations entered into by the PRC for Macao and Hong Kong with Portugal and the United Kingdom respectively oblige it to maintain their capitalist systems and respect their autonomy.[97]

70. The Respondent also notes that the Claimant relies on the exception in the Agreement between the Government of the Russian Federation and the PRC on the Promotion and Reciprocal Protection of Investments ("**PRC/Russia BIT**") concerning its application to the Macao SAR.[98] The Respondent argues that, in that case, the PRC merely reiterated its position as enunciated in

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[91] Respondent's Memorial on Jurisdiction, ¶¶ 73-75.

[92] Respondent's Memorial on Jurisdiction, ¶¶ 73-75.

[93] Respondent's Memorial on Jurisdiction, ¶¶ 67-70, referring to Corten & Klein, pp. 737-738 (RA-04), the Preamble and Articles 7 and 12 of the Treaty.

[94] Respondent's Memorial on Jurisdiction, ¶ 76.

[95] Respondent's Memorial on Jurisdiction, ¶ 76.

[96] Respondent's Reply on Jurisdiction, ¶ 26, referring to the Joint Declaration (RE-11).

[97] Respondent's Reply on Jurisdiction, ¶ 41.

[98] PRC/Russia BIT, signed 9 November 2006 (CLA-90).

the 1999 Notification; it chose to create the exception in the text of the treaty itself.[99] The Respondent asserts that this does not undermine or nullify the legal effect of the 1999 Notification,[100] and is "consistent with the position adopted by China since the resumption of sovereignty over Hong Kong and Macao in 1997 and 1999, respectively."[101]

71. In response to the argument of the Claimant that the Respondent's interpretation of the BIT would be contrary to the purpose of the investment treaty regime, in that it would deny Hong Kong and Macao investors the protection available to other Chinese investors, the Respondent submits that by the provisions of the Macao SAR Basic Law, Macao is given full autonomy of its economic affairs, including the power to enter into agreements with other States in the field of economics and trade (Articles 136 and 138 of the Macao SAR Basic Law).[102] This internal arrangement, the Respondent claims, evidences the intention of the PRC, enunciated in the 1999 Notification, to preclude the automatic application of the "moving treaty frontiers" rule in relation to both the PRC's bilateral and multilateral treaties entered into before the handover.[103] This is not inconsistent with the purposes of the investment treaty regime, the Respondent argues, because the economic structure and development of the PRC and Macao was indisputably different in 1999.[104]

72. In response to the Claimant's argument that the Respondent's interpretation would have a wide impact as it would be applicable to all Chinese BITs, the Respondent submits that the *Claimant's* interpretation would have the effect of rendering over 130 BITs automatically applicable to Hong Kong and Macao; something that was never contemplated.[105] This number exceeds the number of BITs each SAR has entered into in its history.[106] It also brings the application of the BIT under an exception to Article 15 of the VCST by radically changing the condition of its operation.[107] The Respondent points out that the Macao SAR has the autonomy

[99] Respondent's Reply on Jurisdiction, ¶ 40.

[100] Respondent's Reply on Jurisdiction, ¶ 40.

[101] Respondent's Post-Hearing Submission, ¶ 26.

[102] Respondent's Reply on Jurisdiction, ¶ 26.

[103] Respondent's Reply on Jurisdiction, ¶ 26.

[104] Respondent's Reply on Jurisdiction, ¶ 26.

[105] Respondent's Reply on Jurisdiction, ¶ 39; Hearing Transcript, pp. 58-59.

[106] Respondent's Reply on Jurisdiction, ¶ 39.

[107] Hearing Transcript, pp. 58, 147-148.

to enter into its own BITs with other States,[108] and, like Hong Kong, it *has* entered into its own BITs with other States.[109]

73. With reference to BITs with third states concluded by both the PRC and Macao as well as BITs with third States entered into by the PRC and Hong Kong, the Respondent notes that none contain an express provision extending them to the Macao or Hong Kong SARs, respectively.[110] The Respondent places particular emphasis on the PRC/Netherlands BIT in which the Netherlands expressly extended it to cover the Netherlands Antilles and Aruba whereas the PRC did not similarly extend it to cover Macao or Hong Kong.[111]

74. The Respondent also submits that (a) before and after the resumption of sovereignty, the PRC, Hong Kong, and Macao have each entered into BITs with the *same* third States; (b) the territorial definition in the BITs clearly indicates that Macao and the Hong Kong SARs have the power to enter into BITs to cover their own territory notwithstanding that the PRC has also entered into BITs with the same third States. This indicates that the territorial limit of the PRC BITs are confined to Mainland China.[112] The Respondent also points out that different forms of dispute resolution provisions have been resorted to by the PRC, Hong Kong and Macao.[113]

75. It is the Respondent's submission that, if the PRC BITs would, by reason of the "moving treaty frontiers" rule, automatically extend to Macao and Hong Kong after the resumption of sovereignty, the PRC would not allow the SARs to enter into BITs with the same third States with which it has concluded treaties.[114] Nor would that be necessary.[115] It would lead to "legal chaos" for foreign investors in the PRC, Macao and Hong Kong.[116]

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108 Respondent's Reply on Jurisdiction, ¶ 26.

109 Respondent's Reply on Jurisdiction, ¶ 39.

110 Respondent's Post-Hearing Submission, ¶ 25; Macao/Netherlands BIT (CLA-128); Macao/Portugal BIT (CLA-129); PRC/Netherlands BIT (CLA-130); PRC/Portugal BIT (CLA-131).

111 Respondent's Post-Hearing Submission, ¶ 25.

112 See Respondent's Post-Hearing Submission, ¶¶ 31-34 for the territorial definitions contained in the PRC, Hong Kong and Macao BITs, which the Respondent claims, show that irrespective of the timing of the BITs into which it has entered, the PRC has chosen to maintain the position set forth in the two Notifications and not to extend any BITs to Macao or Hong Kong.

113 Respondent's Post-Hearing Submission, ¶ 27.

114 Respondent's Post-Hearing Submission, ¶ 30.

115 Respondent's Post-Hearing Submission, ¶ 30.

116 Respondent's Post-Hearing Submission, ¶ 30.

76. The Respondent further argues that its interpretation of the 1999 Notification is consistent with the PRC's "one country, two systems" policy in that it aligns with the economic and legal independence of the Macao SAR from Mainland China.[117] It contends, furthermore, that it is the position of the Claimant that contradicts this policy and would, in the long run, adversely affect the economic development of the SARs.[118] The Respondent submits that the interests of Laos would not be affected by its position because Macao and Laos did not have a treaty prior to the handover in 1999.[119]

77. The Respondent rebuts the Claimant's reliance on Gallagher & Shan for its interpretation on the grounds that: (a) the passage cited by the Claimant refers to the issue of "treaty coverage on persons (and entities)" which is different from the territorial coverage of a treaty; (b) the passage is based on the ICSID case of *Tza Yap Shum v. The Republic of Peru*, which stands for the proposition that investors should not be denied protection under Chinese BITs if the term "autonomy" in the Macao SAR Basic Law is properly construed, which under the circumstances of this case, supports the Respondent's position on the exception to the automatic extension of treaties; and (c) the decision in *Tza Yap Shum*—which it notes has been severely criticized—is distinguishable because it dealt with the issue of the nationality of a *natural* person, which is not an issue in the present case.[120]

78. The Respondent notes that the PRC is a unitary state and therefore the "federal clause" exception, whereby treaties entered into by individual federated States do not automatically bind the entire federation, is not applicable to it.[121] The Respondent nevertheless likens the PRC to a federation, as its three territorial units (namely the Mainland, the Hong Kong SAR, and the Macao SAR) have their own legal, economic, and judicial systems.[122] The SARs are largely

[117] Respondent's Reply on Jurisdiction, ¶ 26.

[118] Respondent's Reply on Jurisdiction, ¶ 35.

[119] Respondent's Reply on Jurisdiction, ¶ 36.

[120] Respondent's Reply on Jurisdiction, ¶ 37, referring to the Journal of World Investment & Trade, Volume 10, Number 6, December 2009, "Queries to the Recent ICSID Decision on Jurisdiction *Upon the Case of Tza Yap Shum v. Republic of Peru*: Should the PRC-Peru BIT 1994 be Applied to Hong Kong SAR under the 'One Country Two Systems' Policy", Chen An; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, February 12, 2009 ("***Tza Yap Shum***") (CLA-70/RA-10).

[121] Respondent's Memorial on Jurisdiction, ¶¶ 79-81, referring to *Oppenheim's International Law*, 9th ed. (1992) Vol. 1, ¶ 76 (RA-11); Corten & Klein, p. 746 (RA-12).

[122] Respondent's Memorial on Jurisdiction, ¶ 82.

autonomous from the Mainland and have the right to be consulted before treaties to which the PRC is a party are extended to them.[123]

79. The Respondent also argues that, prior to the handover to the PRC, Portugal treated Macao as a dependent territory. The International Law Commission ("**ILC**") noted that the "moving treaty frontiers" rule does not necessarily apply to the case of a dependent territory.[124]

(b) The Claimant's Position

80. The Claimant notes that it is uncontested that Macao became part of the territory of the PRC following the handover from Portugal on 1 January 1999.[125] It notes that the decision of the PRC to structure its governance of Macao as an SAR is a matter of domestic law, distinct from and irrelevant to the international law issue of whether Macao falls within the sovereignty of the PRC.[126]

81. The Claimant contends that whether the PRC/Laos BIT extends to Macao requires an application of the "moving treaty frontiers" rule, enshrined in Article 29 of the VCLT,[127] according to which, unless a different intention is established, a treaty must be understood as applicable automatically and of its own force in respect of any territory newly acquired by one of its parties.[128] It is the Claimant's case that the PRC treaties in force as of the date of the handover of Macao automatically apply to the entirety of the territory over which the PRC exercised its sovereignty, including Macao, absent any indication from the PRC to the contrary.[129]

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123 Respondent's Memorial on Jurisdiction, ¶ 82.

124 Respondent's Memorial on Jurisdiction, ¶¶ 83-84, referring to the Report of the International Law Commission on the work of its twenty-sixth session, 6 May-26 July 1974, reproduced in A/9610/Rev. 1, *Yearbook of the International Law Commission,* 1974, vol. II (Part One), 157, p. 208 ("**ILC Commentary 1974**") (RA-13).

125 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 227.

126 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 227.

127 Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 228-229, referring to the VCLT (RE-07); Odendahl, "Article 29: Territorial Scope of Treaties", in Dörr and Schmalenbach, p. 498 (CLA-102); ILC Commentary 1974, p. 208 ("**Odendahl**") (RA-13); Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009), pp. 392, 393 ("**Villiger**") (CLA-116).

128 Claimant's Response, ¶ 4; see also Hearing Transcript, pp. 157-160.

129 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 230.

82. The Claimant submits that Article 29 of the VCLT represents an applicable rule of customary international law.[130] The Claimant notes that Laos and the PRC are parties to the VCLT.[131] The Claimant also points out that Laos accepts that the exceptions contained in Article 29 of the VCLT are those that apply to this case.[132]

83. According to the Claimant, the rule in Article 29 of the VCLT is reflected, in part, in Article 15 of the VCST.[133] However, the Claimant contends that there is no evidence of the requisite consistent State practice or *opinio juris* to support the notion that all of the VCST's provisions reflect customary international law.[134] In particular, the Claimant argues that the exceptions to the rule in Article 15 of the VCST that differ from the customary rule reflected in Article 29 of the VCLT cannot be considered to reflect customary international law.[135] The Claimant notes that Laos and the PRC have not ratified the VCST.[136]

84. The Claimant states that even if the exceptions under Article 15 of the VCST applied as a matter of customary international law, which it denies, they would not preclude the automatic extension of the BIT to Macao in 1999.[137] Article 15 looks only to the language and application of the Treaty and not to the internal constitutional arrangements in a given State.[138] Moreover, the threshold for establishing the exceptions is a high one.[139]

85. Concerning the first exception, the Claimant argues that the Treaty contains no territorial limits; nor does it limit the category or territorial origin of investors entitled to its protection.[140]

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130 Claimant's Response, ¶¶ 9-13; Hearing Transcript, pp. 71, 168. The Claimant emphasizes that it is not the case that the customary rule in Article 29 of the VCLT applied only at the time the BIT was executed in 1993, and that its application is supplanted by Article 15 of the VCST for the purposes of determining the BIT's territorial scope in 1999 and thereafter. Rather, the Claimant asserts that the principle in Article 29 means generally that, *at any given time*, a State is bound by a treaty in respect of any territory of which it is sovereign. The application of the customary rule in Article 29 means that a territorial change after the entry into force of a treaty alters the treaty's frontiers going forward. (Claimant's Response, ¶¶ 14-18)

131 Claimant's Response, ¶ 3.

132 Claimant's Response, ¶¶ 26.

133 Claimant's Response, ¶¶ 20-25.

134 Claimant's Response, ¶ 3; Hearing Transcript, pp. 73-74, 98, 161.

135 Claimant's Response, ¶¶ 3, 28-32.

136 Claimant's Response, ¶ 3; Hearing Transcript, p. 74.

137 Claimant's Response, ¶ 44.

138 Claimant's Response, ¶ 35.

139 Claimant's Response, ¶ 36; Hearing Transcript, pp. 71-72.

140 Claimant's Response, ¶ 37.

86. Concerning the second exception, the Claimant submits that the extension of the BIT to the Macao SAR is not incompatible with its object and purpose which is to "encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contacting State[.]"[141] In the Claimant's view, allowing Macanese investors to benefit from the protections of the BIT is fundamentally compatible with the object and purpose as is extending the protections of the BIT to foreign investors who have invested in what is indisputably part of the territory of the PRC.[142]

87. Third, the Claimant argues that including Macao within the scope of application of the BIT does not radically change the conditions for the Treaty's operation, because (a) the only change effected is that Laos must provide investors from Macao the same protection and guarantees required for investors from Mainland China;[143] (b) this kind of change is simply the normal consequence of the application of the "moving treaty frontiers" rule and as such cannot constitute a "radical change"; if mere expansion were enough to constitute a "radical change", the exception would "swallow" the rule;[144] (c) this applies also in the case of bilateral treaties which are not distinguished from multilateral treaties in Articles 29 of the VCLT or Article 15 of the VCST; the PRC was Laos's treaty partner before 1999, and it remains so afterwards.[145]

88. According to the Claimant, it is uncontested between the Parties that there are two exceptions to Article 29 of the VCLT; namely that a "different intention" with regard to the territorial scope of the BIT "appears from the Treaty" or "is otherwise established".[146] The Claimant argues that the Respondent carries the evidentiary burden of establishing the PRC's "different intention",[147]

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141 Claimant's Response, ¶ 38, citing the Preamble of the Treaty.

142 Claimant's Response, ¶ 38.

143 Claimant's Response, ¶ 39.

144 Claimant's Response, ¶ 40; Hearing Transcript, p. 162.

145 Claimant's Response, ¶¶ 42-43. The Claimant distinguishes the present situation from that under the context of Article 34 of the VCST which deals with the case of "Succession of States in Cases of Separation of Parts of a State" and includes the same "radical change of conditions for the operation of the treaty proviso as found in Article 15. There, the Claimant notes that "the question is whether one or more completely new States will succeed, in whole or in part, to the predecessor's treaty obligations. In contrast, Article 15 applies where territory has been transferred from one State to another; accordingly, the States in question remain the same at all times, with the only change being that their territory is either enlarged or contracted. […] Where there is the creation of a new State 'very different from itself,' the 'personal nature' of a bilateral treaty may very well be an issue, because continuity of the treaty obligations would force the treaty partner into a reciprocal relationship with the successor, a completely new entity to which it has not agreed to be bound. In contrast, in the Article 15 paradigm, the identity of both bilateral treaty parties remains the same at all time." (Claimant's emphasis).

146 Claimant's Rejoinder on Jurisdiction, ¶ 12.

147 Claimant's Rejoinder on Jurisdiction, ¶ 12.

which must be established by evidence providing a "sufficient degree of certainty" that would overcome the default position.[148]

89. The Claimant asserts that the Treaty does not provide for the territorial limitation of its application or otherwise express a "different intention" or an intention to depart from the default customary rule.[149]

90. The Claimant rejects the Respondent's contention that the Preamble, Articles 7, 11 or 12 of the Treaty can be invoked to establish the first exception.[150] It disputes the Respondent's position that the reference to domestic law in Article 12 of the Treaty is relevant to the territorial scope of the Treaty;[151] Article 12 refers to "internal legal procedures" solely in the context of the entry into force of the Treaty but is silent on the application of the Treaty once effective, as well as on its territorial scope.[152]

91. Although the BIT was signed in 1993, or six years prior to the handover of Macao from Portugal to the PRC, the Claimant contends that both Parties to the BIT were aware—during both the negotiation and the conclusion of the BIT—that the PRC would resume the exercise of its sovereignty over Macao in 1999.[153] On this basis, the Claimant notes that either Party could have expressly excluded Macao from the scope of the BIT.[154]

92. The Claimant relies upon the explicit exclusion of Hong Kong and Macao from the PRC/Russia BIT to show that the PRC adopts express language excluding its SARs from the territorial scope of treaties if it in fact has the intention to do so, which was not the case here.[155]

93. The Claimant contests the argument of the Respondent that the PRC did not have the jurisdiction to state the position of Macao at the time of concluding the Treaty, as it was signed

148 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 231, referring to Karagiannis, "Article 29, Convention of 1969" in Corten & Klein ("**Karagiannis**") (CLA-100).

149 Claimant's Rejoinder on Jurisdiction, ¶ 13; Hearing Transcript, p. 77.

150 Hearing Transcript, p. 77.

151 Hearing Transcript, p. 78.

152 Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 235-236, referring to Respondent's Memorial on Jurisdiction, ¶¶ 69-70; Hearing Transcript, p. 78.

153 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 237, referring to the Basic Law of the Macao SAR, Preamble (RE-09).

154 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 237.

155 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 238, referring to Protocol to the PRC/Russia BIT (CLA-90); Claimant's Rejoinder on Jurisdiction, ¶ 13; Hearing Transcript, pp. 80, 163.

before the handover.[156] It contends that the PRC had the jurisdiction to state its *own* position on the future territorial scope of the Treaty.[157] In response to the Respondent's argument that the Parties could not know in 1993 how the Joint Declaration would be effected as the negotiations relating to the handover were still being conducted at that time, the Claimant notes that the Joint Declaration had been in effect since 1987 and the parties knew that Chinese sovereignty would resume over Macao in 1993, which means that the PRC could have already provided for an exception to the "moving treaty frontiers" rule in the Treaty.[158]

94. The Claimant contends that Laos has provided no evidence establishing the intention to exclude Macao from the scope of the BIT, or to demonstrate that a "different intention" has been "otherwise established."[159]

95. The Claimant rejects the Respondent's characterization of the 1999 Notification as a unilateral declaration that prevents the BIT from applying to Macao.[160]

96. First, the Claimant notes that the 1999 Notification applies only to multilateral treaties for which the UN Secretary-General is depositary.[161] The PRC/Laos Treaty is a bilateral treaty that does not involve the UN Secretary-General in any capacity. Therefore, it is not surprising that it is not included in the list annexed to the 1999 Notification—no bilateral investment treaties are included on the list—,[162] and the formalities for the application of a treaty to Macao as set out in Paragraph IV of the 1999 Notification do not apply to the Treaty.[163] The Claimant contends that a contrary interpretation would effectively deny all investors from Macao and Hong Kong the protections enjoyed by their PRC counterparts, which would be incompatible with the purposes of both the investment treaty regime and the "one country, two systems" policy of the PRC.[164]

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156 Claimant's Rejoinder on Jurisdiction, ¶ 14.

157 Claimant's Rejoinder on Jurisdiction, ¶ 14; Hearing Transcript, p. 81.

158 Claimant's Rejoinder on Jurisdiction, ¶ 15; Hearing Transcript, pp. 81-82.

159 Claimant's Rejoinder on Jurisdiction, ¶ 24.

160 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 241, referring to Respondent's Memorial on Jurisdiction, ¶¶ 38-59.

161 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 242, referring to UN Status of Multilateral Treaties (CLA-115); Hearing Transcript, p. 84.

162 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 242, referring to UN Status of Multilateral Treaties (CLA-115); Hearing Transcript, p. 84.

163 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 243; Hearing Transcript, pp. 85-86.

164 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 244, referring to Gallagher & Shan, *Chinese Investment Treaties, Policies and Practice* (2009) ("**Gallagher & Shan**") (CLA-99).

97. The Claimant rejects the Respondent's argument that the Treaty was deposited with the UN Secretary-General and contends that the Respondent is confusing (a) the registration function of the UN Secretariat (pursuant to Article 102 of the UN Charter, which requires all UN members to register treaties to which they are a party with the UN Secretariat), which covers both multilateral and bilateral treaties[165] and (b) the treaty depository function of the UN Secretary-General, which is open only to multilateral and regional treaties but not to bilateral treaties.[166] In other words, "[t]he fact that the Treaty is included in the UNTC is simply a function of the Treaty having been *registered* with the United Nations, not of the Secretary-General's *depository* function."[167] In this case, the 1999 Notification referred only to treaties that were deposited with the Secretary-General, a category that necessarily excludes the Treaty by virtue of it being a bilateral treaty.[168]

98. In response to the Respondent's argument that the manner in which the 1999 Notification is treated by the UN does not change its effect, the Claimant argues that to accept this, the Tribunal would effectively have to find that the UN somehow misrepresented the context of the PRC's communication.[169] In any event, the Claimant submits that even within the text of the PRC's notification, reference is made to the UN Secretary-General's depositary function, which applies to multilateral instruments.[170]

99. Second, the Claimant contends that reservations do not apply to bilateral agreements since any valid reservation would necessarily modify the treaty for both parties.[171] Thus, the alleged failure by Laos to object to the 1999 Notification is irrelevant.[172] But even if reservations could apply to bilateral agreements, the Claimant notes that the 1999 Notification did not refer to the Treaty it purported to modify, and was not communicated directly to Laos, the other

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165 Claimant's Rejoinder on Jurisdiction, ¶ 20, referring to UN Charter, Article 102 (RA-28); Hearing Transcript, p. 86.

166 Claimant's Rejoinder on Jurisdiction, ¶ 21; Hearing Transcript, pp. 86-87.

167 Claimant's Rejoinder on Jurisdiction, ¶ 22 (Claimant's emphasis); Hearing Transcript, pp. 86-87.

168 Claimant's Rejoinder on Jurisdiction, ¶ 23.

169 Hearing Transcript, pp. 163-164.

170 Hearing Transcript, pp. 164-165.

171 Claimant's Rejoinder on Jurisdiction, ¶ 25; Hearing Transcript, pp. 87-88.

172 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 245, referring to Aust, *Modern Treaty Law and Practice* (2008) (Cambridge University Press), pp. 131-132 (CLA-94); Respondent's Memorial on Jurisdiction, ¶ 43; Hearing Transcript, pp. 88, 90.

Contracting State.[173] According to the Claimant, these are fundamental requirements attaching to treaty reservations under international law.[174]

100. Third, the Claimant contends that the 1999 Notification does not qualify as a "unilateral declaration" that limited the territorial scope of the Treaty because, as explained above, the 1999 Notification does not apply to bilateral treaties.[175] The Claimant further notes that, as the 1999 Notification does not even refer to the Treaty, the intention of the PRC to bind itself through the alleged unilateral declaration could not have been "clearly established."[176]

101. Therefore, it could not have been assumed that the 1999 Notification would limit the territorial scope of the Treaty.[177]

102. The Claimant dismisses the Respondent's reliance on domestic law provisions on the basis that international law takes precedence over domestic law in determining the application of treaties and, correspondingly, that domestic laws do not affect the international obligations of a State.[178] On the same basis, the Claimant disputes the Respondent's argument that the internal arrangements between the PRC and the Macao SAR encompassed in the Macao SAR Basic Law establish the PRC's intention as regards the scope of the Treaty (*i.e.*, that Macao has full autonomy to manage its economic affairs and thus the automatic application of the "moving treaty frontiers" rule is excluded).[179] The Claimant stresses that the PRC never expressed such an intention on the international plane, and reliance on a State's internal structure cannot

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173 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 246, referring to the VCLT, Article 23(1) (RE-07); UN Guide to Practice on Reservations to Treaties (2011), § 3.1.5.2 (CLA-112); UN International Law Commission, Draft Articles of the Law of Treaties with Commentary (1966) ("**ILC Commentary 1966**"), Commentary on Article 18, notes 3 & 4, p. 208 (CLA-114); Article 23(1) of the VCLT (RE-07); Claimant's Rejoinder on Jurisdiction, ¶ 25.

174 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 246, referring to the VCLT, Art. 2(1)(d) (RE-07); United Nations Guide to Practice on Reservations to Treaties (2011), § 3.1.5.2 (CLA-112); ILC Commentary 1966 (CLA-114); Article 23(1) of the VCLT (RE-07); Claimant's Rejoinder on Jurisdiction, ¶ 25.

175 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 247, referring to the *Nuclear Tests Case*, ¶ 53 (RA-05); Hearing Transcript, pp. 87-88.

176 Claimant's Rejoinder on Jurisdiction, ¶ 26

177 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 247.

178 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 248, referring to Schaus, "Article 27, Convention of 1969," in Corten & Klein, p. 700 ("**Schaus**") (CLA-105); Hearing Transcript, p. 91.

179 Claimant's Rejoinder on Jurisdiction, ¶ 28.

demonstrate to the requisite high degree of certainty that a State's intention to exclude the operation of the "moving treaty frontiers" rule has been "otherwise established."[180]

103. On this point, the Claimant stresses that the Respondent's position has the effect of making the territorial scope of treaties dependent on internal governmental organization and subject to shifts therein.[181] It notes that this would also have the effect of equating the delegation of economic autonomy and autonomy in entering into agreements with foreign states to automatic exceptions under the "moving treaty frontiers" rule, which it contends is an untenable result.[182] In any case, the Claimant notes that the Macao SAR Basic Law does not, on its face, provide for the exclusion of Macao from the bilateral treaties of the PRC that were in force at the moment of the handover.[183]

104. The Claimant defends its reliance on Gallagher & Shan by stating that (a) paragraph 2.48 of this source applies to "entities" incorporated in the SARs, as applicable here; (b) paragraph 2.45 is not premised on *Tza Yap Shum*; and (c) paragraph 2.45 refers to the SAR "investors" generally and is not limited to investors who are natural persons.[184]

105. The Claimant argues that the fact that the PRC and Macao entered into two bilateral agreements with the same third States almost a decade after the BIT entered into force, cannot impact the application of the "moving treaty frontiers" rule to the BIT as of 1999.[185] It is the Claimant's position that there is no evidence to suggest that the four treaties in question—PRC/Portugal BIT (2005), PRC/Netherlands BIT (2001), Macao/Portugal BIT (2000), Macao/Netherlands BIT (2008)—conflict or are mutually exclusive; to the contrary, the Claimant argues that they establish a complementary regime.[186] The PRC treaties do not contain language referring to or carving out Macao and the later treaties do not contain language superseding the former

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180 Claimant's Rejoinder on Jurisdiction, ¶ 28, referring to Karagiannis, p. 737 (CLA-100); Hearing Transcript, pp. 91-92.

181 Claimant's Rejoinder on Jurisdiction, ¶ 29; Hearing Transcript, p. 92.

182 Claimant's Rejoinder on Jurisdiction, ¶ 29.

183 Claimant's Rejoinder on Jurisdiction, ¶ 30.

184 Claimant's Rejoinder on Jurisdiction, ¶ 32 n. 52.

185 Claimant's Response, ¶ 46; the Netherlands/Macao BIT (2008) (CLA-128); Portugal/Macao BIT (2000) (CLA-129); Netherlands/PRC BIT (2001) (CLA-130); Portugal/PRC BIT (2005) (CLA-131).

186 Claimant's Response, ¶ 47; see also Hearing Transcript, pp. 94-96.

treaties.[187] This contrasts with the explicit carve-out contained in the PRC/Russia BIT with regard to the Macao and Hong Kong SARs.[188]

106. The Claimant characterizes the Macao/Netherlands and Macao/Portugal BITs as supplemental agreements that apply only in the territory of the Macao SAR.[189] The only consequence of this supplemental regime is that Macanese investors can file for arbitration under the PRC or Macao treaty.[190] Dutch or Portuguese investors complaining of breaches in Macao, however, can only bring claims against the PRC under the PRC treaties and against Macao under the Macao treaties.[191] The same does not apply with respect to bringing claims against Macao under the PRC/Laos Treaty because there is no supplemental Laos treaty with Macao.[192]

107. The Claimant also submits that the existence of supplemental Macao treaties does not conflict with the object and purpose of the PRC treaties: extending the PRC treaties to Macao ensures that Macanese investors enjoy dual sets of protection.[193] By contrast, not extending the PRC treaties to Macao would deny Macanese investors the protection of 130 BITs concluded by the PRC, leaving them the protection of only two BITs concluded by Macao,[194] and undermining the "one country, two systems" policy.[195]

108. The Claimant relies on the *Tza Yap Shum* decision in which the tribunal, after hearing evidence on the topic of the Hong Kong SAR's power to conclude investment treaties, found that there was nothing inconsistent between the parallel treaty regimes of Hong Kong and the PRC.[196]

109. The Claimant contends that the Respondent's admission that the "federal clause exception" does not apply here resolves this issue.[197] Alternatively, it contends that the rationale behind the

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187 Claimant's Response, ¶ 47.

188 Claimant's Response, ¶ 47.

189 Claimant's Response, ¶ 48.

190 Claimant's Response, ¶ 49; Claimant's Rejoinder on Jurisdiction, ¶ 31.

191 Claimant's Response, ¶ 49.

192 Claimant's Response, ¶ 49.

193 Claimant's Response, ¶ 50; Claimant's Rejoinder on Jurisdiction, ¶ 32.

194 Claimant's Response, ¶ 50; the Claimant notes that there is a serious question over the ability of the SARs to conclude international agreements under international law that has yet to be tested. Accordingly, by denying investors from the SARs access to protection under the PRC treaties, SAR investors could be deprived of all protections (Claimant's Response, ¶ 51).

195 Claimant's Rejoinder on Jurisdiction, ¶ 32.

196 Claimant's Response, ¶ 51; Hearing Transcript, p. 96.

"federal clause exception" is irrelevant to this case because this Treaty does not have a federal clause provision, thereby requiring the Tribunal to resort to the default rule of customary international law.[198]

110. The Claimant rejects the Respondent's characterization of the 1999 handover as a transfer of a dependent territory from one administrative power to another. According to the Claimant, the handover in fact represented the resumption by the PRC of the exercise of its sovereignty over Macao.[199] But even were the Respondent's characterization of the 1999 handover accurate, which the Claimant denies, it states that the "moving treaty frontiers" rule would continue to apply by analogy.[200]

B. WHETHER SANUM QUALIFIES AS AN INVESTOR UNDER THE TREATY

1. Whether the Claimant is established under the municipal laws of the PRC

(a) The Respondent's Position

111. The Respondent notes that Article 1(2) of the BIT requires an investor that is a juridical person to be "established in accordance with the laws and regulations of each contracting State,"[201] which it says is indisputably the PRC in this case.[202] The Respondent contends that the Claimant is established in accordance with the laws and regulations of the Macao SAR and not the PRC.[203] As a result, the Claimant does not meet the definition of "investor" in the BIT and thus, the Tribunal lacks jurisdiction *ratione personae*.[204]

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197 Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 251-252, referring to Respondent's Memorial on Jurisdiction, ¶ 81 where it states that "[b]ecause the PRC is a unitary state, the principles pertaining to the 'federal clause' exception, as traditionally understood, are not applicable."; Hearing Transcript, pp. 92-93.

198 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 253, referring to Respondent's Memorial on Jurisdiction, ¶ 79; Karagiannis, p. 748 (CLA-100); ILC Commentary 1966, Commentary on Article 25, note 4, p. 213 (CLA-114).

199 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 254, referring to Respondent's Memorial on Jurisdiction, ¶¶ 25, 85.

200 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 254, referring to the ILC Commentary 1974, p. 209 (RA-14).

201 Respondent's Memorial on Jurisdiction, ¶¶ 88-89; Hearing Transcript, p. 28.

202 Respondent's Memorial on Jurisdiction, ¶ 89.

203 Respondent's Memorial on Jurisdiction, ¶ 86.

204 Respondent's Memorial on Jurisdiction, ¶ 86.

112. The Respondent clarifies that Mainland China applies PRC laws while the Macao SAR applies Macanese laws.[205] It then notes that the Claimant was not incorporated in accordance with the applicable PRC Company Law,[206] which does not apply to the SARs of Hong Kong and Macao.[207] For PRC law to be applicable to the Macao SAR, the Government of the PRC would have to have listed this law in Annex III to the Macao SAR Basic Law, which it did not do.[208]

113. The Respondent also argues that the Macao SAR Basic Law, which was promulgated by the PRC Congress on 31 March 1993, provided for a legal system applicable to the Macao SAR different and separate from the PRC legal system.[209] In conjunction with the aforementioned PRC Company Law, the Macao SAR Basic Law evidences that the PRC and the Macao SAR have different laws with regard to the incorporation of a company.[210]

114. The Respondent further maintains that the international community recognizes the separate legal systems of the PRC—specifically, PRC law as applicable to Mainland China and Macanese laws as applicable to the Macao SAR, as well as Hong Kong laws applicable to the Hong Kong SAR.[211] The Respondent gives the example of commercial arbitrations, where parties who choose either Hong Kong law or Macao law as the governing law do not expect their choice to translate to PRC law.[212]

(b) The Claimant's Position

115. The Claimant notes that the Parties agree that Sanum was established pursuant to the laws of the Macao SAR on 14 July 2005.[213]

116. The Claimant notes that SARs are jurisdictions separate from the PRC, but contends that their laws form part of PRC law for the purposes of the Treaty.[214] It argues that a contrary view

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205 Respondent's Memorial on Jurisdiction, ¶ 91.

206 Respondent's Memorial on Jurisdiction, ¶¶ 92-93.

207 Respondent's Memorial on Jurisdiction, ¶¶ 92-93.

208 Respondent's Memorial on Jurisdiction, ¶ 98.

209 Respondent's Memorial on Jurisdiction, ¶ 94.

210 Respondent's Memorial on Jurisdiction, ¶ 95; Hearing Transcript, pp. 29-30, 61-62.

211 Respondent's Memorial on Jurisdiction, ¶ 96; Hearing Transcript, p. 30.

212 Respondent's Memorial on Jurisdiction, ¶ 96.

213 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 265, referring to Claimant's Amended Notice, ¶ 15; Exhibit A to Claimant's Amended Notice; Respondent's Memorial on Jurisdiction ¶ 87; Hearing Transcript, p. 103.

would effectively exclude Macao and Hong Kong investors from the protection of BITs worded similarly to the Treaty.[215]

117. The Claimant maintains that the term "laws and regulations" of the PRC, as referred to in the Treaty, refers to a State comprised of autonomous regions with their own legal regimes and must be taken to include the laws of all such sub-units falling within the entire territory over which that State exercises its sovereignty, unless a different intention is apparent or established.[216] The Claimant highlights that the laws of the separate jurisdictions apply within the territory over which the PRC exercises its sovereignty and the absence of a legal or factual basis to impose a more restrictive definition to such laws.[217]

118. The Claimant also argues that, contrary to the intention expressed in the Preamble to the Treaty, a more restrictive interpretation of the Treaty would lead to an imbalance in the territorial scope of the protections offered by the host States, in that Laotian investors would receive Treaty protection in the SARs of Hong Kong and Macao, while Hong Kong and Macao investors would be denied similar coverage in Laos.[218]

2. Whether the Claimant is an "economic entity"

(a) The Respondent's Position

119. The Respondent contends that the Claimant does not meet the requirement of being an "economic entity," as set forth in Article 1(2) of the BIT for the following reasons: (a) an "economic entity" must have economic or commercial activities within the PRC; (b) the BIT was not intended to protect shell companies like the Claimant; (c) the nationality of the "economic entity" is to be determined by whether its management seat and control are located

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214 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 266, referring to Gallagher & Shan, ¶ 2.76 (2009) (CLA-99); Hearing Transcript, pp. 103-104.

215 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 267.

216 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 268, referring to the ILC Commentary 1966, Commentary on Article 25, note 4, p. 213; notes 1-3, p. 213 (CLA-114); Hearing Transcript, pp. 104-105.

217 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 269, referring to Respondent's Memorial on Jurisdiction, ¶ 91.

218 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 270, referring to the Preamble of the PRC/Laos Treaty (Ex. D to Amended Notice); Hearing Transcript, pp. 75, 162-163.

within the PRC; and alternatively, (d) the BIT is not intended to protect the investments of non-Contracting States.[219]

120. The Respondent first notes that the requirement in the Treaty that an "investor" be an "economic entity" means that an entity must have economic activities related to the investment that is the subject of a claim in order to qualify as an investor. This evidences an intention to exclude mere shell companies from the definition of an "investor."[220]

121. Concerning the nationality of the "economic entity", the Respondent first contends that, subject to the wording and interpretation of the Treaty, there are three criteria by which the nationality of a company can typically be determined: (a) place of incorporation; (b) seat or *siège social*; and (c) place of effective control.[221]

122. The Respondent submits that the second criterion—the seat or *siège social*—pertains to the description of "economic entity."[222] According to the Respondent, this means that the place in which the economic activities are conducted must be the State in which the company is incorporated.[223] It further argues that to allow a shell corporation to conduct its economic activities in third States and yet avail itself of the BIT protections of the State in which it is merely incorporated would be tantamount to treaty shopping, which the Contracting Parties did not intend to permit under the Treaty.[224] Moreover, the economic activities must pertain to the investment that is the subject of the claim in question under the Treaty.[225]

123. The Respondent disagrees with the majority in *Tokios Tokelès v. Ukraine* which adopted a purposive interpretation of the BIT and meaning of "investor" under Article 1(2) of that treaty.[226] The majority concluded that the treaty "extended its protections to entities incorporated in third countries using the nationality of the individuals who controlled the enterprise (or the management seat of the entity that controlled the enterprise) to determine the

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[219] Respondent's Memorial on Jurisdiction, ¶ 101.

[220] Respondent's Memorial on Jurisdiction, ¶¶ 102-105.

[221] Respondent's Memorial on Jurisdiction, ¶¶ 106-107.

[222] Respondent's Memorial on Jurisdiction, ¶ 108.

[223] Respondent's Memorial on Jurisdiction, ¶ 109.

[224] Respondent's Memorial on Jurisdiction, ¶ 109.

[225] Respondent's Memorial on Jurisdiction, ¶ 110.

[226] Respondent's Memorial on Jurisdiction, ¶ 111, referring to *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004 ("***Tokios Tokelès***") (RA-14).

nationality of the claimant."[227] The Respondent notes that in construing the BIT preamble of that case, the tribunal found that the BIT was intended to "create and maintain favourable conditions for the investment of investors of one state in the territory of the other,"[228] which shows that the tribunal did not limit its consideration to the place of incorporation.[229] The Respondent argues that considering only the place of incorporation would be even less appropriate in this case, as the "investor" is defined as an "economic entity."[230]

124. The Respondent notes that the majority of the *Tokios Tokelès* tribunal declined to impose the "origin of capital" requirement.[231] The Respondent observes that the dissent in that case characterized this position as contrary to the object and purpose of the ICSID Convention and system.[232] Here, the Respondent notes that even if the BIT contains no "origin of capital" requirement, the reference to an "economic activity" evidences that the object and purpose of the BIT is to protect investments belonging to a national of a Contracting State only and not those belonging to the national of a third State that has established a shell company in a Contracting State.[233]

125. The Respondent reiterates that international law determines the nationality of an investor by more than the place of incorporation and considers other factors such as the seat of management and the financial control of the corporation.[234]

(b) The Claimant's Position

126. The Claimant contends that Sanum clearly falls within the broad definition of "economic entity."[235] The Claimant rejects the contention of the Respondent that the term "economic

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227 Respondent's Memorial on Jurisdiction, ¶ 111.

228 Respondent's Memorial on Jurisdiction, ¶ 111, referring to *Tokios Tokelès*, ¶ 31 (RA-14).

229 Respondent's Memorial on Jurisdiction, ¶ 112, referring to *Autopista v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, September 27, 2001, ¶ 107 ("***Autopista***").

230 Respondent's Memorial on Jurisdiction, ¶ 112, referring to *Autopista*, ¶ 107.

231 Respondent's Memorial on Jurisdiction, ¶ 113, referring to *Tokios Tokelès*, ¶ 77 (RA-14).

232 Respondent's Memorial on Jurisdiction, ¶ 114, referring to *Tokios Tokelès*, ¶ 6 of Dissenting Opinion of Professor Prosper Weil (RA-14).

233 Respondent's Memorial on Jurisdiction, ¶ 115.

234 Respondent's Memorial on Jurisdiction, ¶¶ 119-120, referring to the International Law Commission, Fifty-eighth Session, Draft articles on Diplomatic Protection Adopted by the Drafting Commission on second reading, Art. 9, A/CAN/L.684 (2006) (RA-16); OECD Benchmark Definition of Foreign Investment (Draft) – 4th Edition, DAF/INV/STAT2006)2/REV.3, 2007 (RA-17).

235 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 264.

entity" in Article 1(2) was intended to exclude "entities that are mere shell companies" from the coverage of the Treaty.[236]

127. First, the Claimant contends that the fundamental rule of treaty interpretation—that the text is to be construed "in accordance with the *ordinary meaning* to be given to the terms"—applies when there is no indication that the parties intended to assign a special meaning to a treaty term.[237] As applied to this case, Sanum therefore meets the definition of an "economic entity," as it is a private company that was incorporated to pursue investment opportunities and participate in all commercial and industrial sectors allowed by law.[238]

128. Second, the Claimant notes that the BIT does not expressly indicate an origin of capital requirement, and submits that the Respondent has provided neither evidence nor authority for its contention that the Contracting States intended to restrict the definition of protected investors.[239] The Claimant contends that tribunals cannot impose extra-textual limits on the scope of BITs[240] but should strictly adhere to the treaty terms.[241] The Claimant notes that the BIT in this case only requires that an economic entity be established pursuant to the laws of a Contracting State, which means that the inquiry ends once the State of incorporation is ascertained.[242]

129. The Claimant contests the reliance of the Respondent on the dissenting opinion in *Tokios Tokelės* on the basis that this opinion relied heavily on the facts of that case and the purpose of ICSID arbitration, considerations which are not present in this case.[243] The Claimant also

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[236] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 257, referring to Respondent's Memorial on Jurisdiction, ¶ 105.

[237] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 258, referring to Article 31(1) and (4) of the VCLT (RE-07) (Claimant's emphasis).

[238] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 259, referring to *Economic Definition*, Oxford English Dictionary (CLA-96); *Entity Definition*, Oxford Dictionaries (CLA-97); Exhibit A to Amended Notice, Article 2; Hearing Transcript, pp. 106-107.

[239] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 260, referring to Respondent's Memorial on Jurisdiction, ¶¶ 101-110, 115; Hearing Transcript, p. 107.

[240] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 260, referring to *Tokios Tokelės*, ¶ 36.

[241] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 261, referring to *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, ¶ 109 (CLA-76); *Saluka Investments BV v. The Czech Republic*, Partial Award (UNCITRAL, 17 March 2006), ¶¶ 197, 239, 241 (CLA-66); Hearing Transcript, pp. 108-109.

[242] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 260, referring to *ADC Affiliate Limited and ADC & ADMCA Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 357 (CLA-3).

[243] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 262, referring to *Tokios Tokelės*, ¶¶ 5, 9, 23, 27 of Dissenting Opinion of Professor Prosper Weil (CLA-77); Hearing Transcript, pp. 107-108.

dismisses the reliance of the Respondent on cases potentially dealing with piercing the corporate veil because such issue is irrelevant to this case.[244]

130. Finally, the Claimant contends that the term "economic entities" was intended to broaden the scope of treaty coverage, in view of the more general requirement in investment treaties that investors be "natural and legal persons" and the fact that the PRC laws do not actually assign legal personality to all entities, even if they are established for business purposes.[245]

C. WHETHER SANUM BRINGS INVESTMENT-RELATED CLAIMS UNDER THE BIT

(a) The Respondent's Position

131. The Respondent submits that Article 8(1) and 8(3) of the BIT require that a dispute involving the quantification of the compensation for expropriation arises in connection with an investment in the territory of a Contracting State.[246]

132. The Respondent notes that the Claimant has only submitted the articles of association of Savan Vegas and Paksong Vegas (Laos companies in which Sanum has a 60% ownership and Laos has a 20% ownership) as evidence of its investment in Laos.[247] The Respondent notes that the contribution of the Claimant for its shares takes the form of loans that are being repaid annually from casino proceeds. It contends that this contribution does not meet the requirement of Article 1(1)(b) of the BIT, which includes "shares in companies or other forms of interest in such companies" in its definition of investment.[248]

133. The Respondent rejects the Claimant's submission that its investment consists of "investing in real property; employing its know-how and acquiring other tangible assets in order to establish and maintain gaming facilities described above, and in obtaining concession[s] from the

[244] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 263, referring to Respondent's Memorial on Jurisdiction, ¶ 116 (referring to *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970 (RA-15)).

[245] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 264, referring to Gallagher & Shan, ¶¶ 2.72, 2.80 (CLA-99); Hearing Transcript, p. 109.

[246] Respondent's Memorial on Jurisdiction, ¶ 123.

[247] Respondent's Memorial on Jurisdiction, ¶ 123.

[248] Respondent's Memorial on Jurisdiction, ¶ 122.

[R]espondent which accorded its investment enterprises exclusive rights to operate gaming facilities in five provinces."[249]

134. The Respondent first contests the Claimant's argument that it has invested in movable or immovable property assets in the territory of Laos, pursuant to Article 1(1)(a) of the BIT, on the grounds that the said property rights belong not to Sanum but to the local companies that are to operate the gaming facilities.[250]

135. Second, the Respondent notes that it cannot identify any "know-how of Sanum employed in Lao PDR" or "other tangible assets" that would meet the definition of an investment, and further notes that the "concessions" to which Sanum refers were actually accorded to its investment enterprise—namely, Savan Vegas and Paksong Vegas, and not to it.[251]

136. Last, the Respondent contends that the two PDAs do not qualify as investments, because they replace existing PDAs (concluded on 11 April 2006 and amended on 26 July 2006) to which Sanum is not a party and from which Sanum cannot derive rights.[252] Moreover, the Respondent notes that "[n]o specific right was granted to Sanum under the PDAs," as the PDAs merely (a) express the intention of the Parties to cooperate on project development (Article 4, PDAs); (b) involve Laos granting development rights to both Sanum and ST (Article 2, PDAs); and (c) provide that the development project area is to be considered as part of the PDA "after the company has completely developed the land area of 50 hectares allowed by the Government." (Article 2(2), PDAs).[253]

137. The Respondent also notes that the PDAs only contemplate the conclusion of future contracts upon the establishment of a joint venture (Article 6, PDAs) or a lease agreement for the concession area (Article 4(4), PDAs).[254] It contends that the shareholders' rights, the gaming license, and lease agreement were granted not to the Claimant but to Savan Vegas and Paksong Vegas, the local vehicles.[255]

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[249] Respondent's Memorial on Jurisdiction, ¶ 124, referring to Amended Notice, ¶ 115.

[250] Respondent's Memorial on Jurisdiction, ¶¶ 124-125, referring to Amended Notice, ¶ 115.

[251] Respondent's Memorial on Jurisdiction, ¶ 126, referring to Amended Notice, ¶ 115.

[252] Respondent's Memorial on Jurisdiction, ¶ 127.

[253] Respondent's Memorial on Jurisdiction, ¶ 127.

[254] Respondent's Memorial on Jurisdiction, ¶ 127.

[255] Respondent's Memorial on Jurisdiction, ¶ 127.

138. The Respondent argues that the rights arising out of the PDAs cannot be taken as "claims for money or to any performance having an economic value (Article 1(1)(c) of the BIT)," and that the PDAs themselves do not legitimately give rise to expectations regarding financial value because they do not guarantee the formation of a joint venture or the granting of a gaming license.[256]

(b) The Claimant's Position

139. The Claimant contends that the text of the Treaty neither excludes indirect investments from its coverage nor provides a basis on which to distinguish between the operating entities and Sanum for the purposes of defining qualifying "investments."[257]

140. Sanum highlights the substantial investments it has made in the various Laotian enterprises and projects, including (a) capital investments exceeding US$ 85 million; (b) being a majority shareholder in Savan Vegas and Paksong Vegas; (c) ownership stakes in the Thanaleng, Lao Bao, and Ferry Terminal slot clubs; and (d) using its industry expertise and business know-how to generate returns and advance its different enterprises.[258]

141. The Claimant stresses that Article 1(1) defines "investments" to include "*every kind of asset* invested,"[259] and notes that the restriction that the Respondent seeks to impose on this provision would be fundamentally unfair to the Claimant, especially in view of its substantial contributions to Laos.[260]

142. The Claimant rebuts the Respondent's contention that the PDAs do not qualify as investments because they do not constitute contractual guarantees and therefore cannot form the basis of

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256 Respondent's Memorial on Jurisdiction, ¶ 127.

257 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 273. The Claimant also cites cases in which investment treaty tribunals have found all investments, including indirect investments, to be encompassed by broad language in the relevant treaties (*see* Claimant's Statement of Claim and Response on Jurisdiction, ¶ 273 n. 578); Hearing Transcript, p. 110.

258 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 273, referring to *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 137 ("***Siemens***") (CLA-71); *Mobil Corporation et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, ¶ 165 (CLA-49); *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶¶ 378-80 (CLA-33); *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶¶ 123-124 (CLA-40).

259 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 272, referring to PRC/Laos Treaty, Article 1 (Ex. D to Amended Notice) (Claimant's emphasis); Hearing Transcript, p. 110.

260 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 273.

legitimate expectations. The Claimant argues that the relevant contracts did in fact contain guarantees, in the form of the Lao Government granting development rights to the respective casino companies and promising to issue the required licenses for their operation.[261] The Claimant further notes that international tribunals have considered contractual rights to be "assets," just like tangible property, where a bilateral investment treaty has defined "investments" broadly.[262]

143. The Claimant submits that Laos has cited no authority to establish the relevance of the method by which Sanum invested in the local companies to the issue of whether its investments are covered under the BIT.[263] The Claimant contends that the loans extended by Sanum to the local companies fall under the category of "claim[s] to money" under Article 1(1) of the Treaty.[264] The Claimant notes that the loans that form part of continuing financing arrangements of an investment and that are interposed on a non-regular basis have been recognized as protected investments.[265]

D. WHETHER LAOS CONSENTED TO THE ARBITRATION OF THE CLAIMANT'S CLAIMS UNDER THE BIT

1. Article 8 of the BIT

(a) The Respondent's Position

144. The Respondent argues that the ordinary meaning of Article 8(3) establishes that Laos did not consent to the arbitration of Sanum's claims under the BIT.

145. It notes that Article 8(1) first imposes a six-month negotiation period on the parties.[266] If the negotiation is unsuccessful, then the BIT assigns Laotian courts general jurisdiction to hear any

261 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 274; Savan Vegas PDA, Articles 2(1), 3, 8(10) (C-004); Paksong Vegas PDA, Articles 2(1), 3, 8(10) (C-005).

262 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 274, referring to *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award August 20, 2007, ¶ 7.5.18 (CLA-23); Hearing Transcript, pp. 110-111.

263 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 275.

264 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 275, referring to *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, ¶¶ 77, 81-83 (CLA-19); Hearing Transcript, p. 111.

265 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 275, referring to *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 214 (CLA-69).

266 Respondent's Memorial on Jurisdiction, ¶¶ 131-132; Hearing Transcript, pp. 33-35.

dispute connected with the investment (Article 8(2))[267] and an ad hoc arbitral tribunal the more specific jurisdiction of hearing only those "dispute[s] involving the amount of compensation for expropriation"[268] and not "dispute[s] involving expropriation."[269]

146. Accordingly, it is the Respondent's position that all of the Claimant's other claims—*i.e.*, the breach of the fair and equitable treatment standard, expropriation, and breach of contract—are excluded from these proceedings.

147. In reliance on Article 31(1) of the VCLT that requires a treaty to be interpreted according to the ordinary meaning of its terms, the Respondent contends that the Parties have consented to international arbitration only for the quantum of an expropriation, and are required by the BIT to submit all other disputes, including the issue of whether an expropriation has occurred in the first place, to the local courts of the host State.[270] The Respondent relies on three arbitral tribunal decisions that have interpreted arbitration clauses in treaties providing for disputes on the "amount of compensation" only to be determined by international arbitration.[271] The Respondent contends that the Claimant's argument on this matter requires a departure from and an enlargement of the actual wording of the text.[272]

148. The Respondent also argues that the limited scope of Article 8(3) is confirmed when read in the context of the expropriation clause (Article 4) and Preamble of the BIT.[273]

149. The Respondent notes that Article 4(1) of the BIT defines the term "expropriation" and enumerates the conditions that must attach to an expropriation,[274] while Article 4(2) of the BIT

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267 Hearing Transcript, p. 35.

268 Respondent's Memorial on Jurisdiction, ¶ 132; Respondent's Reply on Jurisdiction, ¶ 47; Hearing Transcript, pp. 35-36.

269 Respondent's Reply on Jurisdiction, ¶ 47.

270 Respondent's Memorial on Jurisdiction, ¶¶ 133-135.

271 Respondent's Memorial on Jurisdiction, ¶¶ 133-135, relying on *Berschader v. Russian Federation*, Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004, ¶¶ 152-158 (Apr. 21, 2006) (involving the Belgium/Luxembourg-Russian BIT of 1989) ("***Berschader***") (RA-18); *RosInvest Co. UK Ltd. v. Russian Federation* (RosInvest), Arb. Inst. of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 110 (Oct. 2007) (involving the UK-Russian BIT of 1989) ("***RosInvest***") (RA-19); *Austrian Airlines v. Slovak Republic* (Austrian Airlines), UNCITRAL, Final Award, ¶¶ 96-99 (Oct. 9, 2009) (involving the Austrian-Czech BIT of 1990) ("***Austrian Airlines***") (RA-20); Hearing Transcript, pp. 36-38.

272 Respondent's Reply on Jurisdiction, ¶ 47.

273 Respondent's Memorial on Jurisdiction, ¶ 137; Hearing Transcript, p. 38.

274 Respondent's Memorial on Jurisdiction, ¶ 138; Hearing Transcript, p. 38.

defines the amount of compensation that must accompany an expropriation.[275] It then contends that the Respondent's consent to international arbitration applies only to disputes involving Article 4(2) and not Article 4(1).[276]

150. The Respondent also notes that the Preamble of the BIT and the "generally recognized principles of international law accepted by both Contracting States," referred to in Article 8(7) of the BIT, further confirm the Respondent's interpretation of Article 8(3);[277] namely, that the scope of the arbitration clause and the clause giving jurisdiction to Laotian courts must be understood against the principle of "mutual respect of sovereignty." The principle of "mutual respect of sovereignty, equality and mutual benefit" as affirmed in the Preamble and embodied in the "principles of international law accepted" by both the PRC and Laos under Article 8(7) of the Treaty constitute part of the Five Principles of Pacific Coexistence that both Contracting States have recognized.[278]

151. In this case, the Respondent argues that the principle of mutual respect of sovereignty mandates respecting the Contracting States' choice to give exclusive jurisdiction to their respective judicial organs over the disputes connected to an investor's investments under Article 8(2), save for that relating to the compensation amount for an expropriation (Article 8(3)).[279]

152. The Respondent then argues that the common treaty practice of Laos and the PRC, as well as the treaty practice of each of these States with other States, further confirms its interpretation. It notes that the PRC has committed to respecting the sovereignty of Laos in its ratification of the International Declaration on the Neutrality of Laos dated 23 July 1962.[280] The Respondent also notes that preambles of other BITs signed by Laos, such as those with Australia and Indonesia, also refer to the principle of respect for the mutual independence and sovereignty of States.[281]

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275 Respondent's Memorial on Jurisdiction, ¶ 139; Hearing Transcript, p. 38.

276 Respondent's Memorial on Jurisdiction, ¶ 140; Respondent's Reply on Jurisdiction, ¶ 47; Hearing Transcript, p. 39.

277 Respondent's Memorial on Jurisdiction, ¶¶ 141-142; Respondent's Reply on Jurisdiction, ¶ 47.

278 Respondent's Memorial on Jurisdiction, ¶ 143.

279 Respondent's Memorial on Jurisdiction, ¶ 144.

280 Respondent's Memorial on Jurisdiction, ¶ 146, referring to the Department of State Bulletin, Vol. XLVII, No. 1207 dated 13 August 1962 (RE-13).

281 Respondent's Memorial on Jurisdiction, ¶ 147, referring to Preamble, Laos/Australia BIT signed on 6 April 1994 (RE-14) and Laos/Indonesia BIT signed on 18 October 1994 (RE-15).

153. It submits that several BITs signed by the PRC also refer to the principle of mutual respect of sovereignty,[282] and limit the scope of arbitral jurisdiction to only those disputes involving the quantum of an expropriation claim while assigning the resolution of all other disputes to the local courts of the host State.[283]

154. The Respondent cautions the Tribunal against relying on the findings of other arbitral tribunals or state courts that have interpreted narrow consent clauses broadly in order to allow the investor to arbitrate expropriation claims.[284] The Respondent argues that none of the bilateral investment treaties in those cases incorporate the principle of mutual respect of sovereignty, as does the BIT here.[285] The application of the principle of mutual respect of sovereignty obliges the Tribunal to respect the Contracting States' choice of submitting disputes of a foreign investor to local courts.[286]

155. The Respondent further cites the notification made by the PRC on 7 January 1993, pursuant to Article 24(5) of the ICSID Convention, as to the jurisdiction of ICSID, in which the PRC stated that it "would only consider submitting to the jurisdiction of disputes over compensation resulting from expropriation and nationalization."[287]

156. The Respondent rejects any argument that the Claimant may make with regard to Article 8(3) being construed as containing a fork-in-the-road clause that would operate to exclude international arbitration once a foreign investor has submitted to Laotian courts any dispute

[282] Respondent's Memorial on Jurisdiction, ¶ 148, referring to Preamble, the PRC/Mongolia BIT 1991 (RE-16) and Preamble, the PRC/Australia BIT 1988.

[283] Respondent's Memorial on Jurisdiction, ¶ 148, referring to Article 8(3) of the PRC/Mongolia BIT 1991 (RE-16).

[284] Respondent's Memorial on Jurisdiction, ¶ 149; Hearing Transcript, pp. 39-41, referring to *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb. Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007 (Mar. 20, 2009) (involving the Spanish-Russian BIT of 1991) ("***Renta 4***") (RA-21) (the Respondent argues that in that case the tribunal was able to find jurisdiction because the arbitration clause contained a reference to the expropriation clause which did not contain a split between the principle of expropriation and quantum of expropriation); *Tza Yap Shum* (CLA-70/RA-10) (the Respondent notes that the treaty in this case does not contain the restriction of the principle of mutual respect of sovereignty as is contained in the Treaty); *Czech Republic v. European Media Ventures*, 2007 EWHC 2851 (Comm), involving the Belgium/Luxembourg-Czech BIT (1992) ("***European Media Ventures***") (RA-22) (the Respondent notes that it does not have the award in this case).

[285] Respondent's Memorial on Jurisdiction, ¶ 149, referring to *Renta 4* (RA-21); *Tza Yap Shum* (CLA-70/RA-10); *European Media Ventures*, (RA-22); Hearing Transcript, pp. 41-42.

[286] Hearing Transcript, pp. 42-43.

[287] Respondent's Memorial on Jurisdiction, ¶ 150, referring to Notification of the People's Republic of China to ICSID pursuant to Article 25(4) of the ICSID Convention dated 9 January 1993 (RE-17).

connected to an investment.[288] It clarifies that Article 8(3) mandates an interpretation under which international arbitration is excluded only when the investor submits to Laotian courts a dispute on the amount of compensation for expropriation, which is the only claim that can ever be arbitrated.[289]

(b) The Claimant's Position

157. The Claimant rejects the Respondent's interpretation of Article 8(3) of the Treaty.

158. The Claimant relies on *Tza Yap Shum*, which contains language similar to that of the BIT.[290] There, the tribunal found that the phrase "dispute involving the amount of compensation for expropriation" (as set out in Article 8(3) of the Treaty) simply meant that the dispute must *include* the determination of the amount of compensation but must not necessarily be limited to it.[291] The tribunal noted that the phrase evinced that the parties had consented to arbitrate all issues pertinent to the determination of the amount of damages, which necessarily includes whether damages must be awarded at all.[292]

159. The Claimant contends that this interpretation is consistent with the language of Article 4(1) of the Treaty, which sets out standards for the determination of whether an expropriation has taken place. It is thus clear, the Claimant argues, that whether an expropriation has occurred is an assessment that is a necessary element of any claim "involving the amount of compensation for expropriation."[293] The Claimant submits that the term "involving" is broad and extends the Tribunal's jurisdiction beyond disputes in which the only point of dispute is quantum.[294]

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288 Respondent's Memorial on Jurisdiction, ¶¶ 151-154; Hearing Transcript, pp. 43-45. (In this way, the Respondent seeks to distinguish the findings of the tribunal in *Tza Yap Shum.* That tribunal, the Respondent says, was motivated to interpret the jurisdictional clause broadly because it contained a fork-in-the-road provision such that if an investor submitted its dispute on the principle of expropriation to a local court, it was barred from access to international arbitration on the quantum of expropriation. The Respondent argues that this is not the case under the PRC/Laos Treaty).

289 Respondent's Memorial on Jurisdiction, ¶¶ 151-154; Hearing Transcript, pp. 43-45.

290 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281; Hearing Transcript, pp. 123-125; *Tza Yap Shum* (CLA-70/RA-10).

291 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281, referring to Respondent's Memorial on Jurisdiction, ¶ 134; *Tza Tap Shum* (CLA-79).

292 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281.

293 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281; *Tza Tap Shum*, ¶ 152 (CLA-79/RA-10); Hearing Transcript, p. 117.

294 Hearing Transcript, p. 117.

160. The Claimant argues that a contrary interpretation would render Article 4(1) meaningless, because the standards set out in Article 4(1) for determining an unlawful expropriation do not strictly fit within a dispute restricted to the amount or quantum of damages.[295] The Claimant further notes that, contrary to the contention of the Respondent, there can be no distinction between the question of whether the investor received "appropriate and effective compensation" under Article 4(2) and the question of whether an expropriation occurred under Article 4(1), as the former is an element of the latter.[296] The Claimant further points out that clauses like Article 4(1) and 4(2)—variants of which can be found in many investment arbitration treaties, including those with broad dispute resolution provisions—do not relate to the forum for making expropriation claims but merely set out the conditions for lawful expropriation and the standard for compensation.[297]

161. The Claimant maintains that Article 8(1) and 8(2) of the BIT do not have the effect of designating the local courts as the exclusive forum for the resolution of disputes apart from the quantum of expropriation, as the Respondent claims, because Article 8(1) provides for the amicable settlement of disputes and Article 8(2) gives the parties the option of submitting the dispute to the courts of the host State after the designated waiting period.[298]

162. The Claimant cites to courts and tribunals that have interpreted treaty provisions similar to Article 8(3) to confer jurisdiction over the question of whether an expropriation has occurred.[299]

163. The Claimant contests the Respondent's reliance on, what the Claimant characterizes as, "the only three cases in which tribunals declined to read such clauses as conferring jurisdiction over disputes as to the existence of an expropriation".[300] The Claimant further contends that those

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[295] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 282.

[296] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 283; Hearing Transcript, pp. 119-120.

[297] Claimant's Rejoinder on Jurisdiction, ¶ 39; Hearing Transcript, p. 120.

[298] Claimant's Rejoinder on Jurisdiction, ¶ 38.

[299] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 284; Claimant's Rejoinder on Jurisdiction, ¶ 36, citing: (1) *Tza Yap Shum*, at 151 (CLA-70/RA-10); (2) *European Media Ventures*, ¶ 44 (RA-22) (see also Hearing Transcript, pp. 128-129); (3) *Quasar de Valors (formerly Renta 4 S.V.S.A. et al.) v. The Russian Federation*, Award on Preliminary Objections (SCC 20 March 2009), at 5, 20–21 (RA-21) ("***Quasar de Valors***") (see also Hearing Transcript, pp. 125-128); (4) *Franz Sedelmayer v. The Russian Federation*, Arbitration Award (SCC, 7 July 1998), at 9, 71–73 (CLA-34) (see also Hearing Transcript, p. 129); and (5) *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶¶ 70, 76, 116–118, 29–133 (CLA-64) (see also Hearing Transcript, p. 129).

[300] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 285, referring to the Respondent's reliance on (1) *Austrian* Airlines, ¶ 102 (RA-20); (2) *Berschader*, ¶¶ 152-158 (RA-18); and, (3) *RosInvest*, ¶ 110 (RA-19).

decisions would not in any case support a similar outcome in this case, as they can be distinguished.[301] For instance, none of them contain fork-in-the-road provisions in their dispute settlement clauses.[302] In addition, the Claimant contends that five of the tribunals that have interpreted clauses like Article 8 have done so expansively.[303]

164. Further, the Claimant argues that the interpretation of the Respondent disregards the context of Article 8(3).[304] The Claimant submits that a proper reading of Article 8(2) of the PRC/Laos Treaty is that an investor is entitled to submit its dispute to the State courts, but that it will be barred from seeking arbitration of its expropriation claim if it in fact pursues this option.[305] The Claimant asserts that the Respondent's contention that an investor must first submit the issue of whether an expropriation has occurred to the domestic courts effectively deprives the investor of access to arbitration; its opportunity to arbitrate the dispute will be foreclosed by its submission of the issue of expropriation to the domestic courts.[306]

165. The Claimant contends that Article 8(2) and 8(3) provide an investor two options if the dispute cannot be settled through negotiation within six months.[307] Article 8(3) contains a fork-in-the-road provision.[308] The Claimant asserts that had the Contracting Parties intended to require the investor to litigate whether an expropriation had occurred before submitting the question of quantum to a tribunal, they would not have stipulated that "*either*" process could begin after six months.[309]

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[301] Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 285-286. Concerning the Respondent's reliance on (1) *Austrian Airlines,* the Claimant notes that unlike the Treaty in this case, the BIT in that case explicitly stated that an investor could only challenge an expropriation before the local authorities (RA-20) (see also Hearing Transcript, p. 130); (2) *Berschader*, the Claimant notes that the panel had considered the phrase "amount or mode of compensation" after it had already concluded that it lacked jurisdiction on an entirely separate ground and its conclusions on the scope of the arbitration clause were 'superfluous' *obiter dicta* (see also Hearing Transcript, pp. 130-131) (RA-18); and, (3) *RosInvest*, the Claimant notes, *inter alia*, that that decision did not consider whether the word 'payment' may lead to consideration of the reality of its predicate: 'expropriation' (RA-19); see also Hearing Transcript, pp. 131-132.

[302] Hearing Transcript, p. 129.

[303] Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 280-284; Claimant's Rejoinder on Jurisdiction, ¶ 36; see also Hearing Transcript, p. 129.

[304] Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 287-288.

[305] Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 287-288.

[306] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 289, referring to *Tza Yap Shum*, ¶¶ 154-161 (CLA-70/RA-10).

[307] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 290.

[308] Hearing Transcript, pp. 117, 120.

[309] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 290.

166. The Claimant also disagrees with the Respondent's contention that the fork-in-the-road bar in Article 8(3) merely precludes an investor who has submitted a dispute over the quantum of compensation to a domestic court from bringing the same claim before an arbitral tribunal.[310] First, the Claimant notes that Article 8(3) categorically states that arbitration shall not be permitted if the investor has submitted the dispute "involving the amount of compensation for expropriation" to the local courts; a statement that can only make sense if Article 8 permits an investor to choose between litigating and arbitrating all aspects of its expropriation claim.[311]

167. Second, the Claimant notes that the determination of the fact of an expropriation and the amount of compensation for an expropriation are linked in the Treaty, so that a court could not determine one issue without also determining the other.[312]

168. Third, the Claimant contends that the Respondent's interpretation renders the right to arbitration illusory, which in turn defeats the object of the Treaty to encourage investment.[313]

169. And finally, the Claimant contends that the principle of mutual respect for sovereignty is not undermined by holding a State to the commitments it made for the benefit of its treaty partner.[314] On a broader but related note, the Claimant also contends that the Respondent has not expounded as to how the "principle of mutual respect for sovereignty, equality and mutual benefit," as contained in the Preamble of the BIT supports its interpretation.[315] The Claimant points out that investment treaties with expansive dispute resolution provisions contain similar language.[316]

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[310] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 291, referring to Respondent's Memorial on Jurisdiction ¶¶ 151-154.

[311] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 292; Hearing Transcript, pp. 121-122.

[312] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 293.

[313] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 294, referring to *Tza Yap Shum*, ¶ 153 (CLA-70/RA-10); *RosInvest*, ¶ 130 (RA-19); *Amco v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction, September 25, 1983, ¶ 24 (CLA-7); Hearing Transcript, pp. 117-118, 121-122.

[314] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 295, referring to *Case of the S.S.'Wimbledon' (U.K. v.Japan)*, 1923 (ser. A) No. 1, Judgment (P.C.I.J., 17 August 1923), p. 25 (CLA-84); *CME Czech Republic B.V. v. The Czech Republic*, Partial Award (UNCITRAL 13 September 2001), ¶ 533 (CLA-21); *Quasar de Valors*, ¶ 31 (RA-21); Lalive, "The First World Bank Arbitration (*Holiday Inns v Morocco*)—Some Legal Problems," *British Yearbook of International Law* (1980), at 158 (CLA-101); Hearing Transcript, pp. 119-120.

[315] Claimant's Rejoinder on Jurisdiction, ¶ 37.

[316] Claimant's Rejoinder on Jurisdiction, ¶ 37; referring to the Australia/Pakistan BIT (CLA-119) and the Australia/India BIT as examples (CLA-120); Hearing Transcript, p. 119.

2. Article 3(2) of the BIT

(a) The Respondent's Position

170. The Respondent rejects the Claimant's attempt, based on Article 3(2) of the BIT, to import the arbitration clauses contained in BITs entered into by Laos with third States to this dispute so as to widen this Tribunal's jurisdiction.[317]

171. The Respondent argues that the most favored nation ("**MFN**") clause under the BIT does not encompass dispute settlement for the following reasons: (a) the scope of the MFN clause is limited to "fair and equitable treatment" and "protection" and does not refer to dispute settlement;[318] and (b) the context of Article 3(2) of the BIT confirms that the MFN clause does not apply to dispute settlement.[319]

172. First, the Respondent contends that the plain meaning of Article 3(2) is that the MFN clause is limited to "fair and equitable treatment" and "protection" as listed in Article 3(1), which does not cover access to international arbitration.[320] The Respondent notes that, for an MFN clause to enlarge the scope of an arbitration clause, its wording must be broad enough to include arbitration proceedings.[321]

173. The Respondent argues that "fair and equitable and full protection and security" clause is a standard term in most modern BITs that has appeared in such treaties since the 19th century, including in the first Chinese model BIT and other BITs contemporary to that at issue here.[322] The Respondent stresses that the term "protection" refers to the "protection and security" standard.[323] The Respondent therefore concludes that the scope of the MFN clause is restricted

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[317] Respondent's Memorial on Jurisdiction, ¶¶ 155-157, referring to the Amended Notice, ¶ 2, pp. 119-123, 126.

[318] Respondent's Memorial on Jurisdiction, ¶ 158; Hearing Transcript, pp. 47-48.

[319] Respondent's Memorial on Jurisdiction, ¶ 158.

[320] Respondent's Memorial on Jurisdiction, ¶ 159, referring to Amended Notice, ¶ 2, pp. 119-123, 126; Hearing Transcript, p. 48.

[321] Respondent's Memorial on Jurisdiction, ¶ 159, referring to *RosInvest*, ¶ 110 (RA-19); Hearing Transcript, pp. 151-152 (referring to *Tza Yap Shum*, ¶ 126) and pp. 152-153 (referring to *RosInvest* and the distinction made in that case between investments or investors in applying the MFN clause).

[322] Respondent's Reply on Jurisdiction, ¶ 50.

[323] Respondent's Reply on Jurisdiction, ¶ 51, referring to Gallagher & Shan, pp. 134-135 (RA-34); Hearing Transcript, p. 151.

to Article 3(1), which is "fair and equitable treatment" with the "protection" indicated therein having no relation to access to international arbitration.[324]

174. The Respondent argues that the context of Article 3(2) confirms its non-application to dispute settlement.[325] The specific reference in Article 3(2) to Article 3(1) manifests the clear intention of the Contracting States that "the MFN clause would import only [the] more favorable substantive treatments from third-party treaties, and not arbitration or other dispute resolution provisions."[326]

175. In the Respondent's view, Article 3(2) would have specifically referred to Article 8 if the Contracting States' intention was to be able to import an arbitration clause from another treaty to expand the consent in Article 8(3) of the BIT, which is not the case here.[327] The Respondent therefore contends that the jurisdiction of the Tribunal is limited to that specified in Article 8(3) of the BIT.[328]

176. The Respondent submits that the principle of mutual respect for sovereignty, as referenced in both the Preamble and Article 8(7) of the BIT, precludes the expansive interpretation of the MFN clause.[329] The Respondent contends that a broad application of the MFN to enlarge access to arbitration would directly violate the agreement of the Contracting States to limit the scope of permissible arbitration.[330]

177. The Respondent stresses that the Contracting Parties assigned disputes of the kind brought by the Claimant exclusively to the courts of the Contracting States, pursuant to Article 8(2) of the BIT.[331] To allow the Claimant to import broader consent clauses that would allow it to arbitrate claims for breach of the fair and equitable treatment standard, breach of contract, and liability for expropriation, would circumvent the Contracting States' agreement on this matter.[332]

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[324] Respondent's Reply on Jurisdiction, ¶ 53; Hearing Transcript, pp. 49-50.

[325] Respondent's Memorial on Jurisdiction, ¶ 161.

[326] Respondent's Memorial on Jurisdiction, ¶ 162.

[327] Respondent's Memorial on Jurisdiction, ¶ 162.

[328] Respondent's Memorial on Jurisdiction, ¶ 162.

[329] Respondent's Memorial on Jurisdiction, ¶¶ 163-164.

[330] Respondent's Memorial on Jurisdiction, ¶ 165.

[331] Respondent's Memorial on Jurisdiction, ¶ 165.

[332] Respondent's Memorial on Jurisdiction, ¶ 166.

178. The Respondent emphasizes that "an MFN clause cannot change the scope, *ratione materiae*, of the jurisdiction of an arbitral tribunal."[333] The Respondent distinguishes this case from other cases in which the consent clauses were broader than that found in Article 8(3) and over which the tribunals had *ratione materiae* jurisdiction for all of the disputes brought by the claimant.[334]

(b) The Claimant's Position

179. The Claimant contends that the MFN clause of Article 3(2) extends the jurisdiction of the Tribunal to claims for the breach of the obligation of fair and equitable treatment, as enshrined in Article 3(1); the guarantee of free transfer of payments in Article 5; and other protections that are imported from more favorable bilateral investment treaties, including the Claimant's right to have its expropriation claim resolved through international arbitration.[335]

180. The Claimant rejects the Respondent's contention that any right imported through Article 3(1) is limited to the substantive entitlements in Article 3(1), thereby excluding dispute settlement.[336]

181. First, the Claimant contends that the "protection" that Article 3(1) accords to investments extends to all protections provided in the Treaty—including access to international arbitration—and not merely substantive ones.[337] Moreover, Article 3(2) promises no less favorable treatment and protection for "activities associated with such investments." The Claimant argues that the settlement of disputes is an "activity" associated with an investment.[338] The Claimant further argues that arbitration clauses are highly valued by investors and are considered essential to the range of protection offered in investment treaties.[339]

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[333] Respondent's Memorial on Jurisdiction, ¶ 167, referring to *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17), Decision on Jurisdiction, June 21, 2011, Concurring and Dissenting Opinion of Brigitte Stern ("***Impregilo***") (RA-24).

[334] Respondent's Memorial on Jurisdiction, ¶ 167, referring to *Impregilo* (RA-24).

[335] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 297; Hearing Transcript, p. 132.

[336] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 298.

[337] Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 299-300. The Claimant also argues that such a reading is consistent with the Preamble to the Treaty which includes the protection of investment as one of its primary purposes. Claimant's Statement of Claim and Response on Jurisdiction, ¶ 300; Hearing Transcript, pp.133-134, 144.

[338] Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 300-301, referring to *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, October 24, 2011, ¶ 73 (CLA-38); Hearing Transcript, p. 135.

[339] Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 301-302, referring to *RosInvest*, ¶¶ 130, 132 (RA-19); *AWG Group Ltd. v. Argentine Republic*, Decision on Jurisdiction (UNCITRAL, 3 August 2006), ¶ 59 ("***AWG Group***") (CLA-9); *Gas Natural SGD, S.A. v. The Argentine Republic*, ICSID Case

182. The Claimant contests the Respondent's attempt to restrict the term "protection" to "full protection and security." It points out that the full protection and security standard obliges the State to provide the investor with access to justice, just as the fair and equitable treatment standard entitles the investor to have its claims adjudicated by an impartial decision maker.[340] The Claimant further argues that this obligation gains particular significance when the investor brings claims for unfair treatment by the domestic courts; it is only by bringing its claims before an international tribunal that the investor will have access to the standard of justice required under the fair and equitable treatment standard.[341]

183. Second, the Claimant contends that tribunals that have considered broad MFN clauses, such as the one at issue here, have authorized the importation of dispute resolution clauses.[342] The Claimant rejects the Respondent's argument that those cases contained broader arbitration clauses than the Treaty. It argues that the principle underlying the decisions of those tribunals applies here, *i.e.*, that the less favorable treatment bestowed on the Claimant by the Respondent has been prejudicial and has effectively foreclosed access to international arbitration.[343]

184. The Claimant highlights, in particular, the *RosInvest* case, in which the tribunal noted that the MFN clause permitted the importation of the dispute resolution clause because it was a procedural option that offered the investor protection from interference with the use and enjoyment of the investment.[344] It contends that the reasoning of the *RosInvest* tribunal applies

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No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction, June 17, 2005, ¶ 29 ("***Gas Natural***") (CLA-36); Hearing Transcript, p. 133.

340 Claimant's Rejoinder on Jurisdiction, ¶ 42, referring to Dr. Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* 101-103 (Martinus Nijhoff Publishers, 2013) (CLA-125); Hearing Transcript, pp. 133-134, see also p. 170 where the Claimant states that the right of access to justice is included under either formulation of the standard, *i.e*., "full protection and security" or "protection".

341 Claimant's Rejoinder on Jurisdiction, ¶ 42, referring to *Frontier Petroleum Serv. Ltd. v. Czech Republic*, Final Award (UNCITRAL, 12 November 2010), ¶ 263 (CLA-35); Hearing Transcript, pp. 134-135.

342 Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 303-304, referring to *RosInvest*, ¶¶ 126, 130, 136 (RA-19); *Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000, ¶¶ 54, 56 ("***Maffezini***") (CLA-46); *Gas Natural*, ¶¶ 9, 31 (CLA-36); *Siemens*, ¶¶ 102-103 (CLA-71); *National Grid PLC v. Argentine Republic*, Decision on Jurisdiction (UNCITRAL, 20 June 2006), ¶ 93 (CLA-53); *Camuzzi International S.A. v. República Argentina*, ICSID Case No. ARB/03/7, Decision of the Arbitral Tribunal on Jurisdictional Objections, June 10, 2005, ¶¶ 16-17, 28 and 34(iii) (CLA-17); *AWG Group*, ¶¶ 57, 68 (CLA-9).

343 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 306; Hearing Transcript, pp. 136-137.

344 Claimant's Rejoinder on Jurisdiction, ¶ 43, referring to *RosInvest*, ¶ 128 (RA-19).

here, where interference with the "activities associated with such investments" (Article 3(2)) would also require access to the procedural option of international arbitration.[345]

185. The Claimant rejects as irrelevant and speculative the Respondent's contention that (a) the MFN clause would have specifically referred to Article 8 of the Treaty if it were meant to apply to arbitration; and (b) importing a broader arbitration clause would award the Claimant a right specifically foreclosed.[346] As regards the latter argument, the Claimant notes that the Treaty does not list arbitration or any other dispute resolution mechanism as an exception to the MFN clause.[347]

E. WHETHER *LIS PENDENS* AND THE DOCTRINE AGAINST THE ABUSE OF PROCESS BAR THE CLAIMS OF THE CLAIMANT

(a) The Respondent's Position

186. The Respondent alleges that the Claimant's 7 June 2013 Amended Notice is an attempt to add to these proceedings the claims from the Lao Holdings Arbitration. The Respondent contends that this "duplication of claims submitted before two separate Tribunals must be procedurally barred."[348] In its view, prior to the submission of the Amended Notice, the claims were separate, and their incorporation in this arbitration has caused the Respondent prejudice in its selection of arbitrators and the preparation of its defenses.[349]

187. The Respondent contends that Lao Holdings was specifically created to own Sanum so that two BIT arbitrations could be filed against the Respondent.[350] The Respondent notes that it rejected the Claimant's efforts to consolidate the two arbitrations.[351] That the Claimant now seeks to consolidate these cases by importing its claims in the Lao Holdings Arbitration into this arbitration is a "patent abuse of process."[352]

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[345] Claimant's Rejoinder on Jurisdiction, ¶ 44; Hearing Transcript, p. 137 (see also Hearing Transcript, pp. 143-146 for further discussion on *RosInvest*).

[346] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 307, referring to Respondent's Memorial on Jurisdiction, ¶¶ 162, 166.

[347] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 307, referring to *RosInvest*, ¶ 135 (RA-19); *Gas Natural*, ¶ 30 (CLA-36).

[348] Respondent's Memorial on Jurisdiction, ¶ 168.

[349] Respondent's Memorial on Jurisdiction, ¶ 168; Hearing Transcript, pp. 153-154.

[350] Respondent's Memorial on Jurisdiction, ¶ 169.

[351] Respondent's Memorial on Jurisdiction, ¶ 169.

[352] Respondent's Memorial on Jurisdiction, ¶ 169.

188. Second, the Respondent notes that the doctrine of *lis pendens* prevents identical claims from being brought against the same party.[353] The Respondent argues that it should not be forced to defend the same claims twice before different arbitral tribunals.[354] The Respondent notes that the procedural timetables of both arbitrations provide for defenses to be raised at separate times.

189. The Respondent refers to the inequality and inefficiency of the Respondent having to defend a different argument based on different evidence in the later proceedings as the Claimant would be able to modify its argument based on the defense of the Respondent in the earlier proceedings.[355]

190. Lastly, the Respondent maintains that procedural equality prevents the Claimant from having "two bites at the cherry," and notes that the rule of *lis pendens* has as its primary purpose the prevention of dual verdicts on the same claims.[356]

191. The Respondent then notes that "[n]ow that Claimant Sanum has spelled out in 170 pages its full amendments, [it] further objects under Articles 17 and 22 of the UNCITRAL Rules and requests that the arbitrator deny the amendments."[357] By way of providing context to this claim, it reiterates that Lao Holdings was specifically created in January 2012 to enable the Claimant to avail of the protections accorded under the Netherlands/Laos BIT,[358] and that Lao Holdings made untrue statements in order to ensure that the ICSID tribunal had jurisdiction *ratione temporis* to decide its claims.[359] It characterizes the amendment of the Claimant's claims in this case as a further "attempt to manipulate the investment arbitration system."[360]

192. In response to the contention of the Claimant that it had to amend its Notice because of the refusal of the Respondent to consolidate the two cases, the Respondent notes that the requested

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353 Respondent's Memorial on Jurisdiction, ¶ 170; Hearing Transcript, pp. 52-53.

354 Respondent's Memorial on Jurisdiction, ¶ 170.

355 Respondent's Memorial on Jurisdiction, ¶ 170.

356 Respondent's Memorial on Jurisdiction, ¶¶ 171-172, referring to Born, *International Commercial Arbitration*, Vol. II, Wolters Kluwer, page 2949 [2009] ("**Born**") (RA-25).

357 Respondent's Reply, ¶ 11.

358 Respondent's Reply, ¶¶ 3-5.

359 Respondent's Reply, ¶¶ 7-10.

360 Respondent's Reply, ¶ 11.

amendment was not to enhance efficiency but was intended, rather, to transfer claims arising under the Netherlands/Laos BIT to this case.[361]

193. The Respondent highlights that Article 17 of the 2010 UNCITRAL Rules allows the Tribunal to avoid "unnecessary delay and expense and to provide a fair and efficient process"[362] and that Article 22 of the UNCITRAL Rules allows the Tribunal to reject an amendment that causes "delay" and "prejudice."[363] The Respondent points to the effort exerted and costs incurred in the Lao Holdings Arbitration, and notes that the Claimant had sought the production of documents in this case to be used in the Lao Holdings Arbitration.[364]

194. It also notes that Article 22 of the 2010 UNCITRAL Rules prevents an amendment in this case because this amendment falls outside the jurisdiction of the Tribunal, as shown by (a) the initial decision of the Claimant to file separate claims under the Netherlands/Laos BIT and the PRC-Laos BIT, respectively; and (b) the allegedly limited scope of the PRC/Laos BIT, which the Respondent claims applies only to claims regarding the quantum of expropriation.[365] As further proof of the alleged lack of jurisdiction of the Tribunal over the claims the Claimant wishes to introduce in this arbitration, the Respondent points to an allegedly private dispute—between Sanum and its local partner—that it contends does not belong in an investment arbitration.[366]

(b) The Claimant's Position

195. The Claimant contends that the doctrine of *lis pendens* is inapplicable in this case because there is no identity of parties and claims in the two cases.[367] It further submits that *lis pendens* provides a ground for staying one proceeding until the other has terminated. It argues that there are no grounds to support a stay in this case as the resolution of one case will not resolve the other and, moreover; the simultaneous conduct of both cases actually enhances efficiency.[368]

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[361] Respondent's Reply, ¶ 12.

[362] Respondent's Reply, ¶¶ 13-14; Hearing Transcript, p. 53.

[363] Respondent's Reply, ¶¶ 15, 17.

[364] Respondent's Reply, ¶ 17.

[365] Respondent's Reply, ¶¶ 18-19; Hearing Transcript, p. 53.

[366] Respondent's Reply, ¶ 20.

[367] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 310, referring to *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2001, ¶¶ 89-89 (CLA-10); Hearing Transcript, p. 141.

[368] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 310, referring to Born, at 2933 (RA-25).

196. The Claimant rejects the Respondent's allegation that the Claimant is committing an abuse of process. It argues that Laos chose to have two separate proceedings in this case; Sanum had proposed to consolidate the proceedings prior to the selection of arbitrators in both cases.[369] It notes that Laos has benefited from seeing the Claimant's detailed arguments in both proceedings before having to file its defense.[370] The Claimant also argues that the two claimant parties have the right to bring claims under two different treaties as they are from different States and have separate rights under the treaties.[371]

197. Finally, the Claimant contends that the amendment of its Notice to include claims in the Lao Holdings arbitration could not have prejudiced the Respondent in its selection of arbitrators, given that Laos has been able to appoint the same arbitrator in both proceedings.[372] The Claimant also points out that the amendment of its Notice was discussed at the first procedural hearing, agreed upon by the Parties, and memorialized by the Tribunal in its Procedural Order No. 1.[373]

198. As to the Respondent's contention that the Amended Notice should be rejected pursuant to 2010 UNCITRAL Rules 17 and 22, the Claimant raises four points. First, the Claimant contends that this argument is untimely, given that Laos did not object to this amendment when the process for this amendment was discussed and adopted, when the allegedly detailed Amended Notice was filed, or when the Respondent filed its Response on Jurisdiction.[374] The Claimant insists that "Laos cannot complain of an 'abuse of process' when it agreed to the process."[375]

199. Second, the Claimant asserts that the 2010 UNCITRAL Rules neither prohibit nor require that a notice of arbitration be amended prior to the presentation of a claimant's case in the opening memorial, and argues that Article 22 typically applies not to the notice of arbitration, but to the adding or supplementing of claims after the submission of the claim or counterclaim.[376]

369 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 311; Hearing Transcript, pp. 139, 141, 172-173.

370 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 311.

371 Hearing Transcript, p. 140.

372 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 311; the Claimant also submits that it attempted to have the same tribunal constituted to hear the two cases (Hearing Transcript, pp. 139, 140).

373 Claimant's Rejoinder on Jurisdiction, ¶ 46, referring to Procedural Order No. 1, at 4; Hearing Transcript, p. 140.

374 Claimant's Rejoinder on Jurisdiction, ¶ 48; Hearing Transcript, p. 142.

375 Claimant's Rejoinder on Jurisdiction, ¶ 48.

376 Claimant's Rejoinder on Jurisdiction, ¶ 49.

200. Third, the Claimant notes that neither its Amended Notice nor its Statement of Claim has caused unfairness, prejudice, or delay; both submissions predated the Respondent's filing of any pleadings in this matter.[377] As to the Respondent's claims concerning the Lao Holdings Arbitration, the Claimant contends that the Respondent's work in that case need not be duplicated and is in fact directly applicable to the present matter.[378] The Claimant also points out that any inefficiency or added costs resulting from the parallel litigation can be attributed to the refusal of the Respondent to consolidate the two arbitrations.[379]

201. Fourth, the Claimant contends that the Respondent has not explained its argument under Article 22, that the Lao Holdings claims fall outside the jurisdiction of this Tribunal, and questions the relevance of what it describes as the Respondent's speculation as to why the Claimant filed two separate arbitrations.[380]

VI. RELIEF REQUESTED

202. The Respondent requests that:

i) The Tribunal decline jurisdiction because Sanum is not a qualified investor under the BIT.

ii) The Tribunal decline jurisdiction because the claims brought are not investment related claims.

iii) The Tribunal decline jurisdiction because the Respondent did not consent to arbitrate Sanum's claims under the BIT.

iv) In the alternative, the Tribunal dismisses the several claims introduced into this arbitration by the Amended Notice filed 7 June 2013, incorporating the duplicative claims previously made in the Holdings arbitration.

v) The Tribunal issue an award of the Respondent's costs incurred in connection with this arbitration, including Laos' legal fees and other costs, and Laos' share of the fees and expenses of the Tribunal and the Administrative Centre.

[377] Claimant's Rejoinder on Jurisdiction, ¶ 50.

[378] Claimant's Rejoinder on Jurisdiction, ¶ 50.

[379] Claimant's Rejoinder on Jurisdiction, ¶ 51.

[380] Claimant's Rejoinder on Jurisdiction, ¶ 52.

203. The Claimant requests an award:

i) Dismissing the Respondent's objections to the Tribunal's jurisdiction in their entirety;

ii) Awarding Sanum its costs and expenses of this proceeding, including attorneys' fees, in an amount to be determined in the course of this proceeding by such means as the Tribunal may direct; and

iii) Ordering such other relief as may be just and appropriate in the circumstances.

VII. THE TRIBUNAL'S ANALYSIS

A. APPLICABLE LAW

204. It is common ground between the Parties that public international law is the applicable law. It is also undisputed that the VCLT is binding upon Laos and the PRC.

B. WHETHER THE CLAIMANT IS COVERED BY THE TREATY

1. Whether the Treaty extends to the Macao SAR

205. The question of the application or non-application of the PRC/Laos BIT to the Macao SAR is central to the question of jurisdiction. The Claimant considers that it applies, while the Respondent argues that it does not. If the Respondent is correct, the case stops as the Tribunal would have no jurisdiction and would not need to examine the other objections to jurisdiction. If the Claimant is correct, the Tribunal must continue its mission by examining the other objections to jurisdiction.

(a) The theoretical analysis of the relevance of the 1999 Notification to the Secretary-General of the UN

206. One of the main arguments relied upon by the Respondent is that the 1999 Notification to the UN Secretary-General contains the list of treaties that the PRC intended to extend to the Macao SAR. In the Respondent's Memorial on Jurisdiction, it states:

> Similarly, the 1999 Notification regarding the Macao SAR, which the PRC filed on 13 December 1999 and on which Lao PDR has been relying, provides:

> "[…] *IV.* ***<u>With respect to other treaties that are not listed in the Annexes to this Note, to which the People's Republic of China is or</u>*** will ***<u>become a Party, the Government of the People's Republic of China will go through separately the necessary formalities for their application to the Macao Special Administrative Region if it so decided</u>***."

The BIT is not listed in the two Annexes referred to in the 1999 Notification. Thus, it was not extended to the Macao SAR.[381]

207. The Claimant has answered this argument by underlining that it ignores an important difference between multilateral treaties and bilateral treaties:

> […] on its face, the Notification did not intend to cover the universe of international agreements to which the PRC is a party. Rather, as is evident from the official record, the Notification applied only to multilateral treaties for which the UN Secretary-General acts as depositary: "By a notification dated 13 December 1999, the Government of the People's Republic of China informed the Secretary-General of *the status of Macao in relation to treaties deposited with the Secretary-General*." The PRC-Laos Treaty, however, is not such an instrument: it is a bilateral treaty with regard to which the Secretary-General plays no role. Thus, contrary to what Respondent argues, no conclusion about the territorial scope of the Treaty can be drawn from the fact that it does not appear in the lists, annexed to the Notification, of multilateral PRC treaties that would apply to Macau after the handover. In fact, none of the PRC's numerous bilateral agreements (or multilateral agreements with other depositaries) is included in those annexes, because there was no reason to notify the Secretary-General of purported territorial limitations for treaties where he plays no role.[382]

208. In its Reply on Jurisdiction, the Respondent tried to explain that there is no difference between multilateral and bilateral treaties[383] as can be seen from the fact that the bilateral treaties are also published in the UNTS, and to support this line of argument, it cited Article 102 of the UN Charter, which provides:

> 1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be **registered** with the Secretariat and **published** by it.
> 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.[384]

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381 Respondent's Memorial on Jurisdiction, ¶¶ 41-42 (Respondent's emphasis).

382 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 242 (Claimant's emphasis).

383 Respondent's Reply on Jurisdiction, ¶ 42; Notes verbales from the Legal Counsel relating to the depositary practice and the registration of treaties pursuant to Article 102 of the UN Charter, <u>http://treaties.un.org/Pages/Overview.aspx?path=overview /definition/page1_en.xml#agreements</u> (emphasis added) (RA-30).

384 UN Charter: Chapter XVI: Miscellaneous Provisions (RA-28) (emphasis addded).

209. The Tribunal must, however, emphasize that such an approach ignores the fundamental difference between the role of the UN as depositary and its role as an instance of registration. The role as depositary concerns exclusively multilateral treaties; the role as instance of registration concerns bilateral treaties. In both situations, the UN ensures the publication of the treaties. It is not because multilateral treaties and bilateral treaties are all published in the UNTS that the roles played upwards by the UN are not to be differentiated. When acting as depositary, the UN Secretary-General plays an important role as far as reservations to multilateral treaties are concerned, while no question of reservation arises in relation to bilateral treaties.

210. The Tribunal cannot therefore accept this line of argument by the Respondent. The Tribunal finds that the 1999 Notification has no relevance as far as bilateral treaties are concerned. As such, it does not need to enter into an examination of the Respondent's arguments to the effect that the 1999 Notification could be considered either as a reservation to the application of Article 29 of the VCLT or as a binding unilateral declaration according to which the PRC/Laos BIT—not being mentioned among the multilateral treaties listed therein—is not applicable to the Macao SAR.

211. The Respondent's reliance on the 1999 Notification being of no avail, the Tribunal must analyze the legal parameters that are applicable in this case.

(b) The relevance of Article 29 of the VCLT and Article 15 of the VCST

The Parties' Positions

212. The Parties have invoked both Article 29 of the VCLT and Article 15 of the VCST.

213. As the written and oral submission of the Parties were far from exhaustive on these Articles, at the end of the Hearing on Jurisdiction, the Tribunal sought clarification from the Parties on the following point:

> The respective roles, if any, of Article 29 of the [VCLT] and Article 15 of the [VCST] in relation to the application or non-application of the PRC/Laos Treaty to the Macau SAR.

214. It is useful to reproduce here these two articles. Article 29 of the VCLT reads 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. (emphasis added)

215. Article 15 of the VCST reads as follows:

> **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)

216. The Respondent summarizes its position on the respective roles of Articles 15 and 29 as follows:

> Respondent submits its analysis on Question I in two parts. The first part establishes that Article 15 of the [VCST] is an expression of customary international law (A). The second part establishes that both Article 29 and Article 15 are applicable to this case as they are both expressions of customary international law and their co-existence is not incompatible (B).[385]

217. The conclusion of the Respondent's analysis is that:

> […] there can be no doubt that bilateral investment treaties and other commercial treaties concluded by China with third countries do not automatically apply to Macao under the positive aspect of the basic rule but are instead the object of an exception to such rule.[386]

218. The Claimant, for its part, argues the following:

> Article 29 is applicable to the PRC-Laos Treaty both because the PRC and Laos are parties to the VCLT and because Article 29 undeniably represents the applicable rule of customary international law. In contrast, neither the PRC nor Laos has ratified the [VCST]. […] [T]here is no evidence of the requisite consistent State practice or *opinio juris* to support the notion that its provisions reflect customary international law. In particular, the aspect of Article 15 of the [VCST] that differs from the customary rule reflected in Article 29—its exceptions—cannot be considered to reflect customary international law. […] Even if the exceptions in Article 15 were somehow deemed to constitute applicable law, the PRC-Laos Treaty does not fall under its exceptions.[387]

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385 Respondent's Post Hearing Submission, ¶ 2.

386 Respondent's Post Hearing Submission, ¶ 21.

387 Claimant's Response, ¶¶ 3, 6.

The Tribunal's Analysis

219. It is common ground that both the PRC and Laos are parties to the VCLT. It is also common ground that neither the PRC nor Laos are parties to the VCST. The customary nature of Article 15 is controversial between the Parties: they both accept that the general rule of the "moving treaty frontiers" of Article 15 of the VCST is customary, but the Claimant argues that the exceptions to Article 15 are not customary.

i) Both Article 29 of the VCLT and Article 15 of the VCST are rules of customary international law

220. It is undisputed by the Parties that Article 29 in its entirety has the force of binding customary international law.[388] As this is not controversial the Tribunal does not consider that it needs to make lengthy developments to support this statement of law.

221. By contrast, although there is unanimity or "quasi-unanimity" among the doctrine to consider that Article 15 also represents customary international law, in view of the diverging analyses presented by the Parties, the Tribunal will elaborate at some length on this question.

222. The Tribunal first notes that the ILC, in its 1974 Commentary on Draft Article 14 (which became Article 15) of the VCST, is explicit that the "moving treaty frontiers" rule was a pre-existing customary rule.[389] In the same sense, Mr. Yasseen, the president of the ILC Drafting Committee that prepared the text of the VCST, declared: "This principle is a generally recognized principle of international law; it is observed in the practice of States and can be considered as part of customary international law."[390]

223. The Tribunal also cites some authors who have written on this issue, for example, Philippe Cahier explains that Article 15 "corresponds to State practice, was adopted without modification

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[388] Respondent's Post-Hearing Submission, ¶ 2; Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 228-232; Claimant's Rejoinder on Jurisdiction, ¶¶ 11-12; Hearing Transcript, pp. 14:1-22; 71:1-73:14.

[389] ILC Commentary 1974, at pp. 208-209 (RA-13); see also Hearing Transcript, pp. 158-160, 169-170.

[390] Yasseen, "La Convention de Vienne sur la succession d'Etats en matière de traités," AFDI, 1978, at p. 92 (RA-40). [English translation provided by the Tribunal, the original French being: "Ce principe est un principe généralement reconnu du droit international; il est observé dans la pratique des Etats et peut être considéré comme faisant partie du droit international coutumier."]

by the Conference and simply codifies a customary rule."[391] Also, in a course given at the Hague Academy of International law on "La succession d'Etats" in a Section entitled "L'existence de règles coutumières : la portée juridique des Conventions",[392] it was noted that there are some rules whose customary value are contested: "I. Les règles à l'égard desquelles existent des controverses doctrinales",[393] but that others clearly have customary value: "III. Les règles des Conventions qui ont indéniablement une valeur coutumière".[394] Among the latter was included: "la règle coutumière de la variabilité des limites territoriales d'application des traités".[395]

224. The Claimant has admitted that Article 15 is customary as far as the general rule is concerned but submits that the exceptions are not customary. The Tribunal notes that the Claimant has not provided any reason in support of this position and the Tribunal has found no indication that such a dichotomy can be made; the doctrine on the customary character of Article 15 has never made such distinction but has referred to the rule as a whole.

ii) The rules are not incompatible, but merely deal with different moments in the evolution of a situation

225. Article 15 explains and regulates what happens at the moment of transition from one sovereign to another whereas Article 29 prescribes what the general situation is outside of a transitional period, whether a territory has undergone a transition or not. In other words, the rule of Article 15 can correctly be described as the "moving treaty frontiers" rule. The rule of Article 29 does not deal with a situation of change,[396] but only states the general principle of international law

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391 Cahier, pp. 73-74 (RA-39) [English translation provided by the Tribunal, the original French being: "[…] correspond à la pratique des Etats, il a été adopté sans changement par la Conférence et il ne fait que codifier une règle coutumière."]

392 Stern, *La succession d'Etats*, Hague Academy of International Law Collected Courses, t. 262, 2000 ("**Stern**") (CLA-140). [English translation from the French: "State Succession" and "The existence of customary rules: the legal scope of the Conventions"]

393 Stern, at p. 147 (CLA-140). [English translation from the French: "The rules whose customary nature is controversial"]

394 Stern, at p. 164 (CLA-140). [English translation from the French: "The rules of the Conventions that have an undeniably customary nature"]

395 Stern, at p. 169 (CLA-140). [English translation from French: "The customary international law rule of the moving treaty frontiers".]

396 See for example, Odendahl, p. 489 : "[…] questions of State succession are not covered by Article 29." (CLA-102). See, in the same sense, Doehring, The Scope of the Territorial Application of Treaties: Comments on Article 25 of the ILC's 1966 Draft Articles on the Law of Treaties (1967) 27 *Z.a.o.R.V.* 483, pp. 488-489: "The draft [Article 25 that became Article 29] gives no answer as to the legal situation created when, in the course of the application of a treaty, a change occurs in the national boundaries of a State." (CLA-133).

related to the territorial extension of a State's sovereignty, which can be described as the principle of the territorial application of a State's legal order.

226. Of course, this does not mean that the two rules do not have an extremely close relationship, which explains why they were not always clearly distinguished by the Parties. The situation described in Article 29 can be the result of the application of Article 15, or, it can also be seen the other way around, *i.e.*, that Article 15 regulates the transition in the way it does, because this is the normal result of the territorial application of the law. This was indeed emphasized in The Hague Academy course on State Succession already mentioned:

> This rule [Article 15] is but an application, in a given succession process, namely the transfer of a portion of territory between two States which remain in existence, of the general principle on the territorial application of treaties or, in other words, of the rules on the distribution of competences among States.[397]

227. This is also indicated by the ILC, when discussing the draft article that was to become Article 15:

> As to the rationale of the rule, it is sufficient to refer to the principle embodied in article 29 of the [VCLT] under which, unless a different intention is established, a treaty is binding upon each party in respect of its entire territory. This means generally that at any given time a State is bound by a treaty in respect of any territory of which it is sovereign, but is equally not bound in respect of territory which it no longer holds.[398]

228. In other words, the two rules exist side-by-side, Article 15 being the corollary of Article 29 and Article 29 being a consequence of Article 15.

iii) The exceptions to Article 15 of the VCST are encompassed in the exceptions to Article 29 of the VCLT

229. This close relationship explains indeed why the exceptions to the two rules are in fact very similar—contrary to what the Claimant argued—as can be seen from what has been emphasized in the two Articles in paragraphs 214 and 215 above.

230. In both Articles, the non-application of a treaty to the whole territory can only result from the treaty itself or if it is otherwise established. The reasons for the non-application of a treaty to an

[397] Stern, p. 169. [English translation provided by the Tribunal, the original French being: "Cette règle n'est que la mise en oeuvre, dans un processus successoral spécifique, le transfert d'un territoire entre deux Etats dont chacun reste identique à lui-même, du principe général de l'application territoriale des traités, autrement dit des règles de répartition des compétences entre Etats."]

[398] ILC Commentary 1974, p. 208(3) (RA-13).

expanded territory at the moment of a succession are more limited than the reasons for the non-application of a treaty to the entire territory, but are included in them. Indeed, automatic succession applies unless it appears from the treaty itself or is otherwise established that such a result would not be appropriate *for one of two reasons*: either because such succession would be incompatible with the object and the purpose of the treaty or because it would radically change the conditions of its operation. As far as the non-application of a treaty to the whole territory is concerned, it is sufficient that such non-application results from the treaty or, *for whatever reason*, the State sees fit to decide such non-application: for example, the PRC and the Russian Federation decided that the PRC/Russia BIT would not apply to the Macao SAR, for no stated reason.

231. This analysis means that in order to ascertain whether or not the PRC/Laos BIT applies to the Macao SAR, Article 15 of the VCST with its exceptions as well as Article 29 of the VCLT with its exceptions—which are two faces of the same coin—are relevant.

(c) The Tribunal's analysis of the concrete situation of the PRC/Laos BIT

232. 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 the Macao SAR due to the paucity of factual elements presented by the Parties: there were no affidavits from the PRC, Laos or the Macao SAR, which could probably have been obtained from the respective authorities.

233. Moreover, the response to a question raised by a member of the Tribunal during the Hearing on Jurisdiction did not clarify the matter. The question was the following:

> So, my question is: Has there been any negotiation, any list of bilateral treaties? I'm very surprised that this does not exist […][399]

234. The response from counsel for the Respondent was the following:

> Now, as to your question of the lists of treaties that, on the one hand, have been entered into by China, there is, to my knowledge, no list, no official list […][400]

235. The response from counsel for the Claimant was similar:

> There is no evidence in the record that any similar Notification in any way, shape, or form was made by China in respect of the category of bilateral investment treaties. It's not in the record. It didn't happen.[401]

[399] Hearing Transcript, p. 56:23-25.

[400] Hearing Transcript, p. 60:12-14.

236. The Tribunal, being left with no actual information on the status of the PRC/Laos BIT must analyze the situation by application of the relevant rules: Article 15 of the VCST and Article 29 of the VCLT. In the Tribunal's view, the conditions of Article 15 shall be verified first, as the transition came first in the chronology of events relevant to the issue of whether the Treaty applies or not.

237. The Tribunal will therefore turn first to Article 15 of the VCST and apply the rule developed in the framework of the international law on State succession. It is well known that it is the PRC's contention that no transfer of sovereignty took place in December 1999, since it merely "resumed" its exercise of sovereignty over Macao, as it did over Hong Kong. The Tribunal wants to put it beyond doubt that its approach does not contradict this position of the PRC when it applies the rules on State succession. Indeed, as explained by an author in relation to Hong Kong (an explanation that also applies to Macao), "there is little doubt that the 'transition' on 1 July 1997 largely comports with the definition of 'state succession'—as 'the replacement of one state by another in the responsibility for the international relations of territory'—and that the issues raised as a result of this event are generally covered within the branch of international law which 'deals with the legal consequences of change of sovereignty over territory.'"[402]

238. The central question is: Does the PRC/Laos BIT enter into the general rule or the exceptions to Article 15 and Article 29? If the general rule applies, the BIT will be applicable to the Macao SAR; if one of the exceptions applies, the BIT will not be applicable to the Macao SAR. The general rule—*i.e.*, the extension of the treaty to the whole territory, at the moment of a transfer of sovereignty or at any time—applies if none of the exceptions are satisfied. In order to ascertain whether or not the general rule applies, a negative approach must be adopted, *i.e.* an approach that verifies first whether any of the exceptions apply. If the answer is negative, it can be asserted that the applicable rule is the general rule of extension of the treaty to the new part of the territory, or in the case there is no succession, to the whole territory.

i) <u>Does it appear from the PRC/Laos BIT that it was not extended to the Macao SAR at the moment of recovery of sovereignty by the PRC, because the application of the Treaty to that territory would be incompatible with the object and purpose of the Treaty?</u>

239. The object and purpose of the BIT is stated in the Preamble in the following terms:

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401 Hearing Transcript, p. 85:4-7.

402 Mushkat, in "Hong Kong and Succession of Treaties", *ICLQ*, 1997, pp. 191-197 ("**Mushkat**").

> [The two Contracting States] desiring to encourage, protect, and create favorable conditions for investment by investors […] 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, [h]ave agreed as follows […][403]

240. The purpose is twofold: to protect the investor and develop economic cooperation. The Tribunal does not find—and no element has been provided by the Respondent to that effect—that the extension of the PRC/Laos BIT could be contrary to such a dual purpose. In fact, the larger scope the Treaty has, the better fulfilled the purposes of the Treaty are in this case: more investors—who would not otherwise be protected—are internationally protected, and the economic cooperation benefits a larger territory that would otherwise not receive such benefit.

241. In other words, the Tribunal is satisfied that the extension of the PRC/Laos Treaty to the Macao SAR is not incompatible with its object and purpose, which again is to "encourage, protect and create *favorable conditions for investment* by investors of one Contracting State in the territory of the other Contracting State […] and for the purpose of the *development of economic cooperation* between both States […]".[404]

242. Allowing investors from the Macao SAR to benefit from the protections of the PRC/Laos Treaty is fundamentally compatible with this object and purpose, the more so that there is no other possibly competing BIT adopted by the Macao SAR with Laos.

ii) Is it otherwise established that the PRC/Laos BIT was not extended to the Macao SAR at the moment of recovery of sovereignty by the PRC, because the application of the Treaty to that territory would radically change the conditions for its operation?

243. The question which must be answered next is whether the extension of the PRC/Laos BIT to the Macao SAR radically changes the conditions of application of the Treaty. The Tribunal considers that this question is particularly relevant considering the different economic philosophy that pertains to Mainland China and the Macao SAR, which is illustrated by the famous formula "one country, two systems."

244. Concerning the question of bilateral treaties and whether or not a succession to them radically changes the conditions for their operation, there are two schools of thought.

245. For some States, the personal aspect of a bilateral treaty implies that the replacement of one State with another in a bilateral relationship radically changes the condition for its operation

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[403] Preamble to the PRC/Laos Treaty (Ex. D to Amended Notice).

[404] Preamble to the PRC/Laos Treaty (emphasis added) (Ex. D to Amended Notice).

with the consequence that the general rule of continuity should not apply. For other States, the continuity rule applies generally to bilateral treaties as well as to multilateral treaties, unless there are specific elements that lead to the conclusion that a change in the Contracting Parties would radically change the conditions for their operation.

246. The Tribunal notes first that Article 15 does not distinguish between multilateral and bilateral treaties. Second, the Tribunal considers that it would be excessive to say that all bilateral treaties are *so* personal, *so* related to *intuitu personae* questions that they cannot survive a State's succession. In other words, the Tribunal considers that it is necessary to consider the application of the general rule to bilateral treaties on a case-by-case basis.

247. In the case at hand, a specific element is the fact that the States Parties to the PRC/Laos BIT were States with planned economies, and that the extension of this BIT was to include a capitalist region. This could give some credibility to the argument that there is a fundamental change of circumstances which would call for the non-extension of the Treaty. Some doctrinal approaches would seem to support to such an argument. In The Hague Lecture on State Succession mentioned earlier, it was indicated that:

> […] political treaties constitute a specific category of treaties concluded *intuitu personae*, according to the characteristics of a specific State, such as treaties of alliance, or certain commercial **treaties concluded between States with a planned economy**. Their extinction in case of succession is, again, an application of a general principle of international law which is the fundamental change of circumstances."[405]

248. It can indeed be the case that when a treaty is concluded between two States with planned economies, the extension of such treaty to a capitalist economy would fundamentally change the conditions for its application if the treaty was based on features specific to a planned economy and irreconcilable with the liberal principles of a capitalist economy. The Tribunal, however, has not found in the Respondent's case any indication in this direction or any attempt to prove the existence of different conditions for the application of the PRC/Laos BIT in Mainland China and in the Macao SAR.

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[405] Stern, p. 170 (CLA-140) [English translation provided by the Tribunal, the original French being:

> "Les traités politiques constituent une catégorie spécifique de traités conclus *intuitu personae*, en fonction des caractéristiques d'un Etat précis, tels que des traités d'alliance, ou certains traités commerciaux conclus entre Etats à économie planifiée. Leur extinction en cas de succession apparaît, encore une fois, comme une mise en oeuvre d'un principe général du droit international qui est le *changement fondamental de circonstances*."] (emphasis added)

249. In the present case, it is the Tribunal's view that a treaty that would not be extended to the Macao SAR under Article 15 would be a treaty imposing "communist" values or institutions in the Macao SAR. This is very clear under the "one country, two systems" doctrine, which is reflected both in the respective Preambles of the Joint Declaration and the Basic Law of the Macao SAR.

250. The Preamble to the Joint Declaration affirms that "[t]he current social and economic systems in Macao will remain unchanged, and so will the life-style."[406] The Preamble to the Basic Law of the Macao SAR states that "[…] under the principle of "one country, two systems", the socialist system and policies will not be practiced in Macao."[407]

251. It appears that the treaties that will not be extended under the applicable principles are those whose application would endanger the capitalist system and the liberal way of life. Such is not the case of the PRC/Laos BIT; to the contrary.

252. Indeed, a comparison of the BITs of the Netherlands and Portugal entered into with the PRC (which are very similar to the PRC/Laos BIT) and the Macao SAR, respectively, show that they contain very similar provisions. For example, the articles on the settlement of investment disputes are the same but for one feature; this tends to prove that the rules of the PRC/Laos BIT can be considered as compatible with their application in the Macao SAR and do not need to be rejected for incompatibility with the capitalist economic system.[408]

253. It could also be said—and the Respondent presented arguments to this effect—that the automatic extension should not apply, as it has been *otherwise established* by the Joint Declaration[409] and the Macao's SAR Basic Law,[410] which both recognize Macao SAR's treaty-making powers in economic matters.

254. The Joint Declaration deals in the following manner with the treaties of the PRC (the second paragraph of this Article has been reproduced in Article 138 of the Basic Law of the Macao SAR):

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406 Joint Declaration (RE-11).

407 Basic Law of the Macao SAR (RE-09).

408 A similar analysis has been performed as far as the resumption of the sovereignty of the PRC over Hong Kong by Mushkat (p. 169): "[…] the transfer of sovereignty over Hong Kong cannot be deemed a 'fundamental change' that 'radically transforms' the nature of the territory, allowing claims of *rebus sic stantibus*" to refute continuity of the applicable treaty regime."

409 Joint Declaration (RE-11).

410 Basic Law of the Macao SAR (RE-09).

> **VIII**
> Subject to the principle that foreign affairs are the responsibility of the Central People's Government, the Macao [SAR] may on it's own, using the name "Macao, China", maintain and develop relations and conclude and implement agreements with states, regions and relevant international or regional organizations in the appropriate fields, such as the economy, trade, finance, shipping, communications, tourism, culture, science and technology and sports. […]
>
> The application to the Macao [SAR] of international agreements to which the [PRC] is a member or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the [SAR], and after seeking the views of the government of the [SAR].

255. Based on these articles, the Respondent argued that the automatic extension provided for in Article 15 has to be rejected as it was otherwise provided by the Joint Declaration and the Basic Law of the Macao SAR.

256. According to the Tribunal, this argument merits consideration as it could appear at first sight that the PRC and Portugal have provided for a specific way to deal with the extension of international agreements of the PRC to the Macao SAR, and have therefore superseded the automatic extension provided for as the general rule in Article 15 of the VCST.

257. The Tribunal notes at the outset that the Basic Law of the Macao SAR in and of itself, as an internal law, cannot be considered as legally capable of modifying the international rule set out in Article 15. It is well known that "the binding character of treaties is determined by international law, which on this point takes precedence over internal law."[411]

258. The Tribunal, however, considers that the same is not true of the Joint Declaration which can be considered an international treaty and, more precisely, a devolution treaty, by which the two States involved in a process of succession decide the modalities of such succession.

259. Before entering into a consideration of the legal value of such a devolution treaty, the Tribunal wishes to focus on the meaning of Article VIII of the Joint Declaration, reproduced word-for-word in Article 138 of the Basic Law of the Macao SAR, as the Parties presented diverging interpretations of these articles. The Tribunal recalls the main elements of Article VIII: "The application to the Macao [SAR] of international agreements […] shall be decided by the Central People's Government […] after seeking the views of the government of the Region."

260. The Respondent principally relied on this article for the proposition that, because the Macao SAR was not consulted by the PRC before the Treaty was extended to its territory, the Treaty

[411] Schaus, in Corten & Klein, p. 700 (CLA-105).

has no application to Macanese investors. Indeed the Respondent places great weight on the fact that the views of the Macao SAR in relation to the PRC/Laos BIT have never been requested:

> To my knowledge, neither in Macao nor in Hong Kong has the local government been consulted over a possible extension of an International Treaty upon the request of the Central Government. Beijing has never consulted or has never asked the Government, either the executive body or the legislative body, over the potential application in Macao of treaties to which China has entered into […][412]

261. The Claimant has a radically different reading of the same language:

> What Laos has said is that this means that you don't apply the customary rule until the PRC actually consults with the Macao SAR. But, in fact, the more consistent reading with respect to the customary rule is—and supported by the text here, is that, in fact, the customary rule applies until such time if and when the PRC decides to actually make explicit a contrary intention, and at that juncture should take the step of consultation.[413]

262. In other words, according to the Respondent, the PRC/Laos BIT could only have been extended after seeking the views of the Macao SAR Government; and, according to the Claimant, the PRC/Laos BIT is to be presumed applicable to the Macao SAR until the PRC Government decides, after consulting the Macao SAR, that it does not apply. The Tribunal considers that neither of these lines of reasoning stands scrutiny.

263. The Claimant's analysis is not coherent with the basic rule of interpretation of treaties embodied in Article 31 of the VCLT, requiring that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The wording of Article VIII of the Joint Declaration is to the effect that the treaties will be applied *when* the PRC Government so decides and not that they will be applied *unless* the PRC Government so decides.

264. But the Respondent's analysis, although coherent with the wording of the text, does not bring about the result sought by the Respondent. This is so because of the legal nature of the Joint Declaration, which can be considered as a devolution treaty.[414]

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412 Hearing Transcript, p. 60:4-11.

413 Hearing Transcript, p. 93:8-15.

414 By analogy, it can be mentioned that the Joint Declaration concerning Hong Kong has been registered as a treaty in the UN. See Slinn, Aspects juridiques du retour de Hong Kong à la Chine, *AFDI*, 1996 (p. 274): "Le côté délicat de la question du statut de l'arrangement se reflète dans l'emploi du titre «Déclaration commune» plutôt que de celui d'«accord», encore que l'instrument ait été enregistré par les deux parties comme un accord international conformément à l'article 102 de la Charte de l'ONU."

265. Such treaties can only bind third parties if they apply the customary principles of international law. This was explained in The Hague Course on State Succession. One of the customary rules on State succession is the rule of the "*effet relatif des traités*", the consequences of which were described in the following manner:

> Bien entendu, cette règle signifie simplement que les traités de dévolution s'ils donnent des solutions différentes de celles qui sont prévues par les règles de la succession d'Etats ne s'imposent pas aux Etats tiers ; si ces traités mettent en œuvre les solutions résultant du droit coutumier, la manière dont la succession d'Etats est réglée s'impose aux Etats tiers, parce qu'ils sont tenus au respect du droit international. Là encore la règle n'apparaît que comme une transposition, dans le domaine de la succession d'Etats, d'une des règles de base du droit des traités, qui est la règle de l'effet relatif des traités, codifiée à l'article 57 de la Convention de Vienne sur le droit des traités.[415]

266. This was also underscored in relation to the Joint Declaration between the PRC and Great Britain concerning Hong Kong by an author, who said that "[n]otwithstanding the reasonableness of the Hong Kong formula or the 'devolutionary' function of the Sino-British Joint Declaration, questions may be posed in relation to the binding effect on third parties."[416]

267. As pointed out by the Claimant during the Hearing on Jurisdiction, no element has been submitted to the Tribunal to indicate that Laos was informed of such an internal procedure or whether such procedure was ever enforced:

> […] there is actually no evidence in the record about the actual practice of the PRC with respect to this consultation, internal procedure, none. So, we actually have no evidence about when it has been invoked, in what circumstance it has been invoked, whether it's a law on the books and doesn't reflect practice—nothing. We have nothing on that.[417]

[English translation from the French: "The delicate aspect of the question of the status of the arrangement is reflected in the use of the title "Joint Declaration" rather than "Agreement", even though the instrument was registered by the two parties as an international agreement pursuant to Article 102 of the UN Charter."] The same is possibly true for this Joint Declaration, but the Tribunal was provided with no information to that effect.

415 Stern, p. 169 (CLA-140). [English translation from the French: "Of course, this rule simply means that if devolution treaties adopt different solutions to those foreseen by the rules of State succession, those solutions do not bind third States; if the treaties adopt solutions that conform with customary international law, the manner by which the State succession is governed does apply to third States because they are obliged to abide by international law. There again the rule only appears as a transposition, in the domain of State succession, of one of the fundamental rules of the law of treaties, which is the rule of the relative effect of treaties, codified by Article 57 of the VCLT."]

416 Mushkat, p. 194.

417 Hearing Transcript, p. 90:19-25.

268. In other words, Laos, having not been informed that its treaty with the PRC would only be extended after a procedure of consultation—which in fact never seems to have been enforced—, cannot claim that such an agreement between the PRC and Laos could set aside the international rule applicable to a bilateral treaty between itself and the PRC.

269. In the absence of convincing elements to the contrary, the Tribunal is left with no other option but to consider that, by application of Article 15 of the VCST, the PRC/Laos BIT must be deemed to have been extended to the Macao SAR. This provisional conclusion has to be verified and confirmed by the analysis of the application to the situation of Article 29 of the VCLT which has broader exceptions than the ones included in Article 15 of the VCST.

iii) Does it appear from the PRC/Laos BIT that it is not applicable to the whole territory?

270. The Tribunal notes, on the one hand, that the PRC/Laos BIT does not contain an express provision stating that *it applies to the Macao SAR*. But this is not necessary as the principle of territorial extension of the State's legal order embodied in Article 29 applies, unless otherwise indicated.

271. The Tribunal further notes, on the other hand, that it is also evident that the PRC/Laos BIT has *not expressly excluded its application to the Macao SAR*, as has, for example, been the case of the Protocol accompanying the PRC/Russia BIT entered into in 2006.[418] This Protocol expressly provides that "[u]nless otherwise agreed by both Contracting Parties, the Agreement does not apply to" the Macao SAR.[419] Both Parties mentioned during the Hearing on Jurisdiction the fact that the Treaty does not mention that it does not apply to the entire territory.

272. In the morning session, counsel for the Respondent stated:

> And the principle reads as follows: "Treaties are binding upon the entire territory, unless it's provided otherwise in the Treaty and intention appears in the Treaty or is otherwise established." We have been through the Treaty together. It does not provide for a definition of the territory. So, the principle would be, under Article 29, that unless it is otherwise intended by the Parties or by—here, by China, then it should apply to the entire territory of China.[420]

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418 PRC/Russia BIT (CLA-90).

419 PRC/Russia BIT (CLA-90).

420 Hearing Transcript, p. 14:14-22.

273. In the afternoon session, counsel for the Claimant echoed this statement:

> Now, you heard Ms. Willems this morning, I think confirm this when she stated, "There is no provision as to restriction of territory." On this we agree.[421]

274. This element should, however, not be overestimated as it might simply be explained by the fact that the PRC/Laos BIT was signed in 1993, and that at that time it would not have made sense to exclude the Macao SAR which was not then a part of the Chinese territory under PRC sovereignty. By contrast, with respect to the PRC/Russia BIT, which was signed in 2006, it made sense to deal with the question of the extension of the BIT to Macao. As stated by Mark Villiger:

> A general presumption is established that, when a State concludes a treaty, the latter applies to the entire territory of the State, and individual areas and territories **need only be mentioned** where there is a special reason for doing so, in particular **to exclude them** from the treaty's application. […] If there are territorial changes, the treaty continues, in principle, to apply to the entire territory; different intentions would have to be renegotiated with, or at least be tacitly approved by, the other parties."[422]

275. It is a fact that no intention to exclude the Macao SAR from the application of the PRC/Laos BIT has been transmitted by the PRC to Laos, at least none that the Tribunal has been made aware of.

276. On the other hand, the return of Macao to Chinese sovereignty was not a unforeseen event; it had been negotiated for a relatively long period of time. The first step was the establishment of diplomatic relations between the PRC and Portugal on 8 February 1979, which permitted the launching of negotiations between the two countries on the future of Macao. Official negotiations began in June 1986 in Beijing and gave birth to the Joint Declaration of 1987 which entered into force on 15 January 1988. The Joint Declaration states that Macao will return to the PRC's sovereignty on 20 December 1999, and organizes the transitory period.[423]

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[421] Hearing Transcript, p. 77:12-14.

[422] Villiger, pp. 392-393 (emphasis added) (CLA-116).

[423] This information is public and is derived from an article by Goy, *La rétrocession de Macau*, AFDI, 1997, pp. 271-285. See also Claimant's Rejoinder: "[…] it *was* clear in 1993 that both Portugal and the PRC recognized that the former's administration over Macau would cease, thereby restoring full Chinese sovereignty over its territory" (¶ 15) (Claimant's emphasis). See also the Hearing Transcript, p. 80:2-9, where counsel for the Claimant stated:

> "So, there is no dispute that six years before the Treaty was signed, the PRC had concluded in 1987 the Joint Declaration with Portugal which provided that the Government of the People's Republic of China will resume the exercise of sovereignty over Macao with effect from 20 December 1999. And as the Tribunal's aware, it's a

Thus, at the moment of the conclusion of the PRC/Laos BIT, it was already common knowledge that in a few years' time, Macao would be under the PRC's sovereignty.

277. This factual situation means that no definite conclusion can be drawn either from the silence of the Treaty on its extension to the Macao SAR, or its silence on the non-extension of the Treaty to the Macao SAR.

iv) Is it otherwise established that the PRC/Laos BIT is not applicable to the whole territory?

278. This question in fact turns on the meaning of the existence of two sets of BITs by the same foreign country—Laos—one with the PRC and one with the Macao SAR. The question thus raised is whether the possibility of co-existence of a PRC-BIT and a Macao SAR-BIT with the same third State "otherwise establishes" that the PRC/Laos BIT cannot apply to the Macao SAR.

279. Having been made aware of the existence of two instances where there co-exists a BIT with the PRC and with the Macao SAR, the Tribunal asked, at the close of the Hearing on Jurisdiction, for clarification on that point. As indicated by the President of the Tribunal:

> [I]t has been brought to our attention […] that there are two—in the case of Portugal and the Netherlands, there are actually treaties entered into by Macao with these countries and also with China. […] [I]t would be helpful to us if you could analyze the text of these four treaties in terms of any relationship between the two and how they [work] or don't together.[424]

280. The motivation for this question was to ascertain whether the analysis of these BITs could give some "otherwise established" indications on the respective role of these two series of treaties and, for example, help to ascertain whether the existence of one necessarily excluded the existence of the other.

281. An initial remark must be made by the Tribunal. The four treaties—the PRC/Portugal, PRC/Netherlands, Macao/Portugal, Macao/Netherlands treaties—were concluded after the handover of Macao to the PRC in 1999. As such, they do not call for the application of Article 15 of the VCST, but only of Article 29 of the VCLT. Interestingly, in the case of Portugal, the Macao/Portugal BIT preceded the PRC/Portugal BIT by five years, while in the case of the

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pretty detailed Declaration about the intent of the two Parties with respect to the transfer of sovereignty in 1999".

[424] Hearing Transcript, p. 176:7-13.

Netherlands, the PRC/Netherlands BIT was concluded seven years prior to the Macao/Netherlands BIT.

282. This sequence of events—a PRC-BIT followed by a Macao-BIT with the same third country, and a Macao-BIT followed by a PRC-BIT with the same third country—has been analyzed by the Claimant as indicating that "there is no evidence that the PRC considered duplicate treaties between itself and Macau on the one hand and third States on the other to be contradictory or mutually exclusive."[425]

283. The Tribunal considers this analysis compelling.

284. A first point which was has come to light is that the territorial scope of the two series of BITs is not the same.

285. In the PRC/Portugal BIT signed in 2005, the territorial scope is as follows:

> **Article 1(2)b)**
> For the Macao Special Administrative Region of the People's Republic of China, the territory comprised by the Macao peninsula and the islands of Taipa and Coloane.

286. In the Macao SAR/Portugal BIT signed in 2000, the territorial scope is as follows:

> **Article 1(4)**
> The term "territory" means the territory in which the Parties have, in accordance with international law and their national laws, sovereign rights or jurisdiction, including land territory, territorial sea and air space above them, as well as those maritime areas adjacent to the outer limits of the territorial sea, including seabed and subsoil thereof […]

287. In the PRC/Netherlands BIT signed in 2001, the territorial scope is as follows:

> **Article 1 (4)**
> For the purpose of this Agreement, the term "territory" means respectively:
> - For the People's Republic of China, the territory of the People's Republic of China, the People's Republic of China, the People's Republic of China, the People's Republic of China (including the territorial sea and air space above it) as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of exploration of and exploitation of resources of the seabed and its sub-soil and superjacent water resources in accordance with Chinese law and international law.

425 Claimant's Response, ¶ 47.

288. In the Macao SAR/Netherlands BIT signed in 2008, the territorial scope is as follows:

> **Article 1(c)(ii)**
> - in respect of the Macao Special Administrative Region of the People's Republic of China, the territory is peninsula of Macau and the islands of Taipa and Coloane.

289. The Respondent draws the following conclusions from the comparison of the territorial scope of the two series of BITs:

> The territorial definition in the BITs clearly indicates that the Macao [SAR] [has] the power to enter into BITs to cover [its] own territory notwithstanding the fact that China has also entered into BITs with these same third states. This indicates that the territorial limit of the Chinese BITs [is] confined to Mainland China.[426]

290. The Tribunal does not accept this conclusion. It can indeed also mean, with as much if not more logic, that the PRC-BIT applies to the whole territory including the Macao SAR, while the Macao SAR-BIT is confined to the territory of Macao but cannot extend to Mainland China.

291. Another argument put forward by the Respondent is that the overlapping of the PRC and Macao BITs with the same third State would bring about "legal chaos for foreign investors."[427]

292. In the Tribunal's view, the superposition of instruments of protection does not bring about chaos, but rather better protection to foreign investors. The Tribunal agrees with the Claimant when it states that "[t]he fact that the PRC authorized Macau to enter into the bilateral investment treaties at issue does not otherwise establish an intention that its own BITs should not extend to the territory of Macau; it is equally consistent with a supplemental regime of protection for Macanese investors, above and beyond that provided by the PRC treaties."[428]

293. If one takes the example of the two BITs with Portugal, it is apparent that Article 9 of the PRC-BIT and Article 8 of the Macao-BIT are very similar, with a difference being that the PRC-BIT gives a further option to the investor—in addition to the choice of the competent national courts and an *ad hoc* arbitration tribunal under the rules of UNCITRAL—to resort to ICSID arbitration:

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426 Respondent's Post-Hearing Submission, ¶ 27.

427 Respondent's Post-Hearing Submission, ¶ 30.

428 Claimant's Response, ¶ 48 (Claimant's emphasis).

Macao SAR/Portugal BIT, 2000	PRC/Portugal BIT, 2005
Article 8 1 – Disputes between an investor of one Contracting Party and the other Contracting Party relating to an investment in the first area of the second will be resolved through negotiations. 2 – If the dispute cannot be resolved in accordance with the preceding paragraph within six months from the date on which one of the litigants have requested in writing, the investor may choose to submit the dispute to one of the following instances: a) The competent courts of the Contracting Party in whose area the investment is located; or b) At an ad hoc arbitral tribunal established in accordance with the rules of arbitration of the United Nations Commission for Trade and Development (UNCITRAL), which are then in force	Article 9 1. Any dispute concerning investments between a Party and an investor of the other Party should as far as possible be settled amicably between the parties in dispute. 2. If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other State, be submitted at the choice of the investor to: a) the competent court of the Party that is a party to the dispute; b) arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID); c) an ad hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or other arbitration rules.

294. The Tribunal does not consider that the concomitant application of these two BITs would lead to "legal chaos". The more dispute settlement options an investor has, the better it is protected, and the more enhanced the economic cooperation will be between the concerned States.

295. In the Tribunal's view, the existence of two treaties facilitates rather than hinders the fulfillment of the goals of the BITs, which are the protection of the foreign investors and the economic development of the host State. The Tribunal notes that the same analysis was performed by the tribunal in the *Tza Yap Shum* case, where it stated that "Hong Kong's power to conclude its own

investment promotion and protection treaties with countries wherewith China also has entered into a BIT is not necessarily redundant."[429]

296. The Respondent has presented another argument, based on the Macao SAR's autonomy in economic matters, to support the view that the PRC/Laos BIT does not apply to the Macao SAR, *i.e.*, "[t]he very fact that Macao has entered into no BIT with Laos reveals that the Macao SAR under its autonomy has chosen not to enter into any investment protection treaty with Laos."[430]

297. The Tribunal is not convinced by such reasoning. In its view, it is also possible to make the argument to the contrary: that the Macao SAR has not entered into a BIT with Laos because it considered that its investors were sufficiently protected by the PRC/Laos BIT?

298. A last mention should be made of a remark made by the Claimant related generally to the object and purpose of BITs. After stating that "there is thus no conflict where extending the PRC treaties to Macau ensures that Macanese investors enjoy dual sets of protections in the two instances discussed above", the Claimant added that:

> […] the object and purpose is not served by denying Macanese investors the protection of the 130 BITs concluded by the PRC—in circumstances where there is no statement or convincing evidence mandating the contrary conclusion from either the PRC or the Macau SAR – and leaving them to avail themselves of only two bilateral treaties that Macau has concluded on its own behalf.[431]

299. Of course, the Tribunal limits its finding to the specific PRC/Laos BIT, which it has analyzed on the basis of the few factual elements provided to it and in application of the relevant rules of international law. Other conclusions might be arrived at with other factual circumstances surrounding other BITs.

300. The Tribunal concludes therefore that the PRC/Laos BIT is applicable to the Macao SAR.

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429 *Tza Yap Shum*, ¶ 76 (CLA-70/RA-10).

430 Respondent's Post-Hearing Submission, ¶ 37.

431 Claimant's Response, ¶ 50 (Claimant's emphasis). See also, in the same sense, Claimant's Statement of Claim and Response on Jurisdiction, ¶ 244, where the Claimant states that the Respondent's position:

> "[…] would categorically deny all investors from Macau and Hong Kong the protections generally afforded to other Chinese investors worldwide. Such an outcome is not only inconsistent with the purposes of the investment treaty regime, it is incompatible with China's "one country, two systems" policy, which was created to enhance—not diminish—the protections afforded to investors and other denizens of the SARs."

2. Whether Sanum qualifies as an investor under the Treaty

(a) Whether Claimant is established under the municipal laws of the PRC

301. The Parties disagree as to whether the reference to "the laws and regulations of each contracting State" in Article 1(2)(b) of the Treaty should be understood in the sense of covering the full territorial extension of each State or, in the case of the PRC, of excluding the Macao SAR and the Hong Kong SAR.

302. The Respondent's argument for excluding the SARs is based on the existence of three different legal regimes in the State of China: one for Mainland China and one for each of the SARs. These regimes include different company laws and the company law of Mainland China does not apply to the SARs. For the Tribunal, the issue is not how many laws or legal regimes there are in the PRC and whether the investor has been established under one or the other, but whether an economic entity established under any one of such legal regimes is an economic entity established in accordance with the laws and regulations of the PRC. In other words, should the Tribunal include a territorial limitation in interpreting the scope of Article 1(2)(b)?

303. The language of the Treaty does not differentiate between economic entities in accordance with the legal regime under which they were established. There is no difference of treatment between the two States. The Preamble affirms the desire "to encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State […]". The Tribunal has already decided that the Treaty applies to all the territory over which the PRC is sovereign. It is consequent with that decision that an economic entity established under the laws applicable in any part of the territory of the PRC is to be considered to have been established under the laws and regulations of the PRC.

304. The Respondent has placed particular emphasis on the mutual respect of the sovereignty of the parties recorded in the Preamble of the Treaty. There is no doubt that the PRC has sovereignty over the Macao SAR and the Hong Kong SAR; it would not be respectful of that sovereignty for the Tribunal to consider that laws enacted in either of the two SARs are not enacted in the PRC.

305. Therefore, the Tribunal concludes that the Claimant is an economic entity established in accordance with the laws and regulations of the PRC as required by Article 1(2)(b) of the Treaty.

(b) Whether Sanum qualifies as an "economic entity" within the meaning of the Treaty?

306. The Respondent has interpreted the term "economic entity" as showing the intent of the Contracting Parties to the Treaty to exclude shell companies. Respondent contends that, in order to qualify as an economic entity, an investor must perform some economic activities in the State the protection of which the investor seeks and not in third States. In addition, these activities need to pertain to the investment that is the subject of the claim. The Respondent has related these conditions for an investor to qualify as such under the Treaty to the criteria used to ascertain the nationality of a company. For the Respondent, "economic entity" is concerned with the criterion of the seat of a company; the concept of "economic entity" encompasses more than the concept of incorporation. It is the Respondent's contention that mere incorporation does not in and of itself determine the nationality of an investor.

307. The Tribunal has difficulty in reading these limitations into the Treaty. As pointed out by the Claimant, Chinese treaties are drafted so as to include entities that may not be separate legal entities with their own legal personality. The concept of "economic entity" contemplates a wider array of entities than the concept of corporation and is related to the particularities of the Chinese legal system. Rather than a limitation on the concept of investor, "economic entity" is a wider term that may include entities that are engaged in economic activities but without separate legal personality.

308. The Tribunal also has difficulty with the connection allegedly intended by the Treaty between the concept of nationality and economic entity. The Treaty requires that the economic entity be incorporated in the PRC or Laos. To extend the criteria to define nationality through the use of "economic entity" in the definition of investor is a far-fetched exercise in interpreting the text of the Treaty. It is hardly consonant with the canons of interpretation under the VCLT to which both Contracting Parties subscribe.

309. The search for a convenient place of incorporation is common practice whether for fiscal reasons or for the network of investment treaties a country may have concluded. There is nothing wrong *per se* in this search. As stated by the *Aguas del Tunari, S.A. v. Republic of Bolivia* tribunal:

> It is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.[432]

310. In the same vein the *Phoenix Action Ltd v. The Czech Republic* tribunal articulated the position as follows:

> International investors can of course structure *upstream* their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment.[433]

311. However, tribunals have rejected the practice of so-called treaty shopping when a company is incorporated in a certain jurisdiction after a dispute has arisen in order for the investor to avail itself of access to arbitration that it otherwise would not have:

> [A]n international investor cannot modify *downstream* the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed.[434]

312. The Respondent has not argued that this was the case in the dispute before the Tribunal.

313. The Respondent has relied extensively on the separate opinion in *Tokios Tokelès*. The Respondent has submitted that the decision in *Tokios Tokelès* was wrong. It is not for this Tribunal to determine whether the majority of that tribunal or the dissenting arbitrator was correct. Suffice it to say here that *Tokios Tokelès* is irrelevant to the matter before this Tribunal. The Claimant is not controlled by nationals of Laos who incorporated it in the Macao SAR and now claim protection under the Treaty against their own State; that is not the issue here.

314. The Respondent has affirmed that, "[t]he purpose and object of this BIT is to protect nationals of one State when investing in the other. It is not to extend the protection to investors and capital from outside the two States."[435] The Claimant is an economic entity national of the PRC. The Respondent itself has recognized that the Treaty does not include origin-of-capital requirements. Therefore, this argument of the Respondent is without merit.

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432 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, ¶ 330(d).

433 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, ¶ 94 ("***Phoenix***") (emphasis in original).

434 *Phoenix*, ¶ 95 (emphasis in original).

435 Respondent's Memorial on Jurisdiction, ¶ 118.

315. To conclude, the Tribunal determines that Sanum qualifies as an investor under the Treaty.

3. Whether the Claimant has made an investment in Laos

316. The Respondent contends that the Claimant has not made an investment in Laos because it did not directly invest in Laos and because the contributions made in relation to the shares owned in Savan Vegas and Paksong Vegas were "apparently made by loans that are being repaid annually from proceeds of the casino."[436] The Tribunal will proceed to consider whether indirect investments qualify as investments under the BIT and, if this is the case, whether contributions made in the form of loans to the local companies qualify as investments.

317. For ease of reference the Tribunal reproduces here Article 1(1) of the BIT. It reads as follows:

> The term 'investments' means every kind of asset invested by investors of one contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the Latter, including mainly,
> (a) movable and immovable property and other property rights;
> (b) shares in companies or other forms of interest in such companies;
> (c) a claim to money or to any performance having an economic value;
> (d) copyrights, industrial property, know-how and technological process;
> (e) concessions conferred by law, including concessions to search for or to exploit natural resources.

318. The definition is wide-ranging and open. First, while certain investments are highlighted, the list is not exclusive. It is a list of the investments that the parties to the BIT considered to be the main investments covered, but not exclusively covered, under the Treaty. Second, the term "investments" is defined as "every kind of asset invested". Third, the term "investments" is not qualified by any adjective such as "direct". More importantly, it would be surprising that the parties would have intended to exclude indirect investments and at the same time include among the "main" investments "shares in companies or other forms of interest in such companies". This provision covers the common business practice of foreign investors using local companies as vehicles to channel the investment, as occurred in this instance.

319. The Tribunal notes that the Respondent has not supported its argument with any reference to decisions of arbitral tribunals and has not rebutted or contested the arguments of the Claimant set forth in its Statement of Claim and Response on Jurisdiction other than observing in general that certain submissions have not been dealt with as "a result of their irrelevance or non-

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[436] Respondent's Memorial on Jurisdiction, ¶ 123.

application to this case and hence the absence of a refutation must not be taken as an admission to as the correctness of the assertions."[437]

320. As to the contributions made to the companies in the form of loans, Article 1(1) of the Treaty does not specify the form in which the contributions must be made to qualify as an investment, whether in the form of loans or equity. On the other hand, Article 1(1) explicitly includes in the definition "a claim to money" as one of the main items to be considered as investments. Loans are undoubtedly "claims to money" that qualify as investments, as long as they are invested, which is undoubtedly the case here. Sanum alleges also that it has employed its know-how in the hotel and gaming facilities industry.[438]

321. The Tribunal therefore concludes that Sanum has made an investment protected by the PRC/Laos BIT.

4. Whether Laos Consented to Arbitrate Sanum's Claims under the Treaty

(a) Whether the Respondent has consented to arbitrate Sanum's claims under Article 8 of the Treaty

322. The issues before the Tribunal are whether access to arbitration is available to the investor before it has recourse to the local courts, and whether the investor may have recourse to arbitration to determine whether an expropriation has occurred. It will be useful to reproduce here the terms of Article 8 of the Treaty and the related paragraphs 1 and 2 of Article 4.

323. Article 8 provides:

> 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 1, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provision of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.

[437] Respondent's Reply on Jurisdiction, ¶ 23.

[438] Amended Notice, ¶ 115.

324. The relevant paragraphs of Article 4 read as follows:

> 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.

325. The Parties disagree as to whether a Chinese investor may have access to arbitration prior to having recourse to the competent courts of Laos. According to the Respondent, Article 8(2) means that the parties to the Treaty agreed that "no other forum was offered to hear Chinese investor claims, but Laotian local courts. The same would apply to Laotian investors' claims against China."[439] This reading of Article 8(2) would completely eliminate access to arbitration in respect of any dispute, including disputes in respect of the quantum of compensation provided for in Article 8(3).

326. The structure of Article 8 follows a logical sequence: first amicable negotiation, second recourse to the competent courts or on certain matters access to arbitration. Access to arbitration is optional; the dispute "may be submitted at the request of either party to an ad hoc arbitral tribunal." The investor or the State may submit a dispute to arbitration involving the amount of compensation if negotiation on this matter is not successful. Article 8(3) does not provide that access to arbitration by either party to the dispute on the amount of compensation is subject to prior recourse to the Laotian courts. Under Article 8(2), the Parties to the dispute are not obliged to submit their dispute to the local courts, they are simply "entitled" to do so. In any case, the investor or the State would be entitled to have recourse to the local courts irrespective of whether the Treaty provided for it.

327. The Parties disagree on the scope of Article 8(3) and on the relationship between Article 8 and Article 4. For the Respondent, Article 8 is clear: it limits access to arbitration in respect of "a dispute involving the amount of compensation for expropriation." The Respondent argues that its interpretation of Article 8(3) is further confirmed by the notification made by the PRC on 7 January 1993, pursuant to Article 24(5) of the ICSID Convention, as to the jurisdiction of

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[439] Respondent's Reply on Jurisdiction, ¶ 47(2).

ICSID. According to that notification, the PRC "would only consider submitting to the jurisdiction of disputes over compensation resulting from expropriation and nationalization."[440]

328. As far as the notification is concerned, the Tribunal notes that it is settled case-law that such notification is for informative purposes only and cannot be considered as a legal obligation to narrow or broaden an otherwise accepted consent to jurisdiction.[441]

329. Looking then at the "ordinary meaning" of this disposition, as it has to do in accordance with the rules of interpretation of the VCLT, the Tribunal considers that the terms of Article 8(3) indicate that the jurisdiction of the Tribunal is more limited than the dispute clauses found in many BITs. Article 8(3) refers to "disputes involving the amount of compensation for expropriation" and it does not simply refer to disputes involving an expropriation. As a first impression the text of this provision would seem to restrict the jurisdiction of the Tribunal to matters related to the amount of compensation due in instances of expropriation. However, other readings are possible. The term "involving" has a wider meaning than other possible terms such as "limited to" which could have been used if the intention of the State Parties had been to limit the jurisdiction of the Tribunal exclusively to disputes on the amount of compensation. "To involve" means "to wrap", "to include", terms that are inclusive rather than exclusive. This wider reading of Article 8(3) would seem more consistent with the other provisions of the Treaty as we will see shortly. It is also consistent with how a similar provision was interpreted by the *Tza Yap Shum* tribunal.

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

331. The second sentence of Article 8(3) denies access to arbitration if the party concerned has resorted to "the competent court of the Contracting State accepting the investment." The Respondent has argued that this sentence in Article 8(3) refers to recourse to the competent court for a dispute involving the amount of compensation for expropriation and not generally to

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440 Respondent's Memorial on Jurisdiction, ¶ 150.

441 Schreuer, *The ICSID Convention: A Commentary* (2001) (Cambridge University Press), pp. 342-347: "[…] notifications under Art. 25(4) are for purposes of information only and are designed to avoid misunderstanding." (p. 344); see also *Tza Yap Shum*, ¶¶ 163-165; *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004, ¶¶ 135-147; see also *Kaiser Bauxite v. Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction, July 6, 1975, ¶¶ 23, 24.

recourse to a competent court. While this is arguably coherent in the context of Article 8, it is difficult to accommodate in the wider context of Article 4(1).

332. In accordance with Article 4(1), to establish whether an expropriation had taken place, a competent court would need to decide whether the action of Laos meets the four conditions set forth in that paragraph. The fourth condition is "appropriate and effective compensation." Thus if Articles 8 and Article 4(1) are read together, an investor who would have recourse to a competent court to determine whether an expropriation has occurred would be precluded from submitting the dispute on the amount of compensation to international arbitration because the competent court would have already determined the compensation. There is an overlap between the conditions to be met by an expropriation under the Treaty and the Respondent's reading of Article 8(3) in isolation of its context. The Respondent has ignored completely this overlap and has assumed that the jurisdiction may be split between the local courts and an arbitral tribunal. Indeed, the Respondent has argued that "[t]he liability/quantum split under Article 8(2) and (3) is consistent with the substantive split under Article 4(1) and 4(2)."[442] The alleged neat relationship between the two Articles ignores the result that emerges from the preceding analysis by the Tribunal.

333. The Respondent's interpretation would leave Article 8(3) without effect. The task of the Tribunal is to interpret the Treaty in such a way that all the provisions of the Treaty have effect even if specific provisions do not refer to each other. The principle of *effet utile* requires international courts and tribunals to interpret international rules "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 a meaning can be attributed to every part of the text."[443] This principle of interpretation has been applied by investment arbitration tribunals and other international tribunals.

334. To illustrate how the principle has been applied, the Tribunal refers to the decision of the ICSID tribunal in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, which explained:

> Nothing is better settled, as a canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning.[444]

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[442] Respondent's Reply on Jurisdiction, ¶ 47(3).

[443] Gardiner, *Treaty Interpretation* (2008) (Oxford University Press), p. 149.

[444] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 27, 1990, ¶ 40.

335. It has since then been confirmed in a great number of investment awards, which refer to the:

> […] cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.[445]

336. Other arbitral tribunals have faced the task of interpreting similar treaty provisions and the Parties have adduced their decisions in this proceeding. As noted by the Respondent, there is a split among the awards that have interpreted such provisions. The Respondent has pointed out that in their Preambles, none of the BITs underlying the cases of *Tza Yap Shum*, *European Media Ventures* or *Renta 4* adduced by the Claimant in support of its arguments include the following sentence found in the Preamble of the Treaty: "to encourage, protect and create favorable 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." (Respondent's emphasis). The Respondent has emphasized the importance of these principles:

> When applied—how do we apply the principle of respect of sovereignty to international arbitration and international investment arbitration? Well, those principles, when applied to international investment law, and in particular dispute resolution, should and—when applied to international arbitration, foreign investor-State arbitration, push the Tribunal, oblige the Tribunal to respect the choice of domestic jurisdiction clause that is inserted in the Contract.[446]

337. Counsel to Respondent concluded by saying that "a purposive approach does not allow this Arbitral Tribunal to go beyond the wording of the Article 8(3) of the BITs."[447]

338. The Tribunal is not convinced that the reference to these principles in the Preamble of the Treaty is sufficient to explain the differences in the interpretation of the jurisdictional clause by the arbitral tribunals concerned. More importantly, the Tribunal is unconvinced that the

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[445] *Eureko B.V. v. Republic of Poland*, Partial Award (*Ad hoc*, 19 August 2005), ¶ 248; see also *e.g.*, Noble Ventures v. Romania, ICSID Case No. ARB/01/11, Award of October 12, 2005, ¶ 50; or *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of July 27, 2006, ¶ 132; *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction of December 30, 2010, ¶¶ 104-114; *Tidewater Inc. and others v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction of February 8, 2013, ¶ 134.

[446] Hearing Transcript, p. 42:16-23.

[447] Hearing Transcript, p. 43:9-11.

presence of these principles in the Preamble of the Treaty may override the conclusions of the Tribunal in the analysis of the text of Article 8. In the instant case, to follow the reasoning of the Respondent would mean to justify leaving without effect a clause of the Treaty on the basis of the purpose of the Treaty.

339. The purpose and object of the Treaty covers two distinct aspects: the protection of investments and the development of economic cooperation between both States. The balance between these two aspects must be borne in mind by the Tribunal in the analysis of the text of the Treaty, but it does not mean that the Tribunal needs to give preponderance to one aspect over the meaning of a particular clause of the Treaty or leave a clause without effect. The purpose of a treaty as set forth in its preamble may be useful to resolve doubts in its interpretation but it would not justify leaving without effect a clause of the treaty.

340. To explain the different conclusions reached by arbitral tribunals, the existence or absence of fork-in-the-road clauses in the underlying BIT is, in the view of the Tribunal, a more relevant factor, and it is a factor taken into consideration by these tribunals. Indeed, in none of the BITs underlying the cases relied upon by the Respondent is there a fork-in-the-road clause that would limit the investor's access to arbitration if the investor had recourse first to the local courts to determine whether an expropriation had actually occurred. As stated in the opening statement of Claimant's counsel at the Hearing on Jurisdiction:

> Most importantly, I will note at the outset that none of them [of the cases relied on by the Respondent] involve—have fork-in-the-road clauses in their dispute-resolution clauses, and that makes an enormous difference because, as I've shown, having the fork-in-the-road clause makes it impossible for an investor to do what Laos says they want the Treaty says it ought to do, which is first bring a claim for expropriation to the Laos courts and then wholly bring the question of compensation/quantum to a Tribunal.[448]

341. As in the case of the Treaty, the Spain/Russia BIT and the PRC/Peru BIT include fork-in-the-road provisions. In reaching its decision on the meaning of the first sentence of Article 8(3) in the latter, the tribunal in *Tza Yap Shum* stated:

> In the opinion of the Tribunal to rule otherwise would eviscerate the provision relating to ICSID arbitration since, in accordance with the final sentence of Article 8(3), to have recourse to tribunals of the State recipient of the investment would definitely preclude the possibility to accede to arbitration under the ICSID Convention.[449]

[448] Hearing Transcript, pp. 129:21-130:3.

[449] *Tza Yap Shum*, ¶ 188 (CLA-70/RA-10) [English translation provided by the Tribunal. The English translation provided by the Claimant is inaccurate].

342. For the reasons explained above, the Tribunal shares this view and concludes that the Respondent has consented to arbitrate claims of expropriation under Article 8 of the Treaty.

(b) Whether the Respondent has consented to arbitrate Sanum's claims under Article 3(2)

343. The question before the Tribunal is whether the MFN clause in the Treaty grants an independent basis for the Tribunal to determine whether an expropriation has occurred and to determine whether the other substantive breaches of Treaty obligations claimed by Sanum have occurred. The Tribunal has already determined that it has jurisdiction as to whether an expropriation has occurred under Article 8 and need not further consider this matter under Article 3(2).

344. Article 3(2) reads as follows:

> The treatment and protection as mentioned in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.

345. Article 3(1) provides:

> Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.

346. The Parties disagree as to whether the sentence "shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State" refers to the standard of fair and equitable treatment and full protection and security or whether it extends to all protections provided in the Treaty, including access to international arbitration.

347. On the one hand, the Respondent contends that "protection" refers to protection and security and not to all the substantive protections under the Treaty. On the other hand, the Claimant has argued that the most natural reading of the term "protection" is that "it extends to *all* of the protections provided in the Treaty."[450]

[450] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 300 (Claimant's emphasis).

348. The Claimant has also argued that "activities associated with such investments" include the management, maintenance, use, enjoyment, disposal of investments and the settlement of disputes involved in protecting such investments.[451] Claimant adduces multiple awards to support different aspects of this reading of "activities associated with such investments."[452] Respondent has not addressed this point in its Reply and has simply insisted that Article 3(1) refers to protection and security and bears no relation to access to international arbitration.

349. The interpretation of the MFN clause has been subject to discrepant views since the decision on jurisdiction of the *Maffezini* tribunal.[453] Therefore, it is not difficult for the parties to a dispute to find prior decisions in support of their conflicting positions. The Tribunal is not obliged to follow any particular prior decision but it cannot ignore the arguments of the Parties and the decisions they have used to support them. Therefore, before entering into the analysis of the MFN clause in the Treaty, the Tribunal considers it appropriate to make two general observations related to the cases of *RosInvest* and *Tza Yap Shum* that figure prominently in the Parties' arguments.

350. First, notwithstanding the variety of approaches adopted by arbitral tribunals, those tribunals show concern for the reach of their interpretations and seek to limit their effect.

351. Second, general pronouncements of arbitral tribunals need to be considered cautiously in the context of the cases in which they were made. For instance, in the series of cases involving Argentina, access to arbitration is subject first to submitting the dispute to the ordinary courts and after 18 months an investor may proceed to arbitration even if a court decided the dispute and the investor was dissatisfied with the result. The Respondent has distinguished the instant case from the Argentine cases because the underlying treaties contained broader arbitration clauses than the dispute resolution clause found here, and the tribunals merely remove threshold requirements for accessing arbitration"[454] The Tribunal agrees with the limited relevance of the Argentine cases.

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[451] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 300.

[452] Claimant's Statement of Claim and Response on Jurisdiction, ¶ 300.

[453] *Maffezini* (CLA-46).

[454] Respondent's Memorial on Jurisdiction, ¶ 167.

352. Third, Claimant has drawn the attention of the Tribunal to the award on jurisdiction in the *RosInvest* case and to that tribunal's finding that the MFN clause permitted importation of a dispute resolution clause. However, this finding needs to be treated with some reservation in view of the caution the *RosInvest* tribunal showed when it considered the MFN clause. It stated:

> […] *without entering into the much more general question whether MFN-clauses can be used to transfer arbitration clauses from one treaty to another*, the Tribunal concludes that, for the specific wording of Article 3(1) of the UK-Soviet BIT, and for the specific purpose of arbitration with regard to expropriation, the wide wording of Article 8 of the Denmark-Russia BIT is not applicable.[455]

353. The tribunal reached this conclusion on the effect of an expropriation on the treatment of an investment and then continued to analyze a separate provision on the treatment of the investor and stated: "*Again limiting its considerations to the possible application of the MFN-clause to arbitration regarding expropriation*, the terms '*use*' and '*enjoyment*' in paragraph (2) lead the Tribunal to different conclusions from those reached with regard to paragraph (1)."[456]

354. Fourth, the tribunal in *Tza Yap Shum* conducted an extensive analysis of the history of MFN clauses and of the MFN clause in the PRC/Peru BIT. The dispute settlement clause in that treaty follows closely the text of Article 8 of the Treaty except that in Article 8(3) of the Peru/PRC BIT there is the following additional sentence: "Any dispute related to other matters between the investor of any Contracting Party and the other Contracting Party may be submitted to ICSID if the parties to the dispute so agree."[457] The *Tza Yap Shum* tribunal in its analysis of this Article 8(3) gave particular weight to the fact that the parties had contemplated in that article the possibility of submitting other matters to arbitration but only if the parties would agree beforehand. In view of the need for a further specific agreement, the tribunal rejected the claimant's arguments to extend through the MFN clause access to arbitration in respect of disputes over the other alleged breaches of the Peru/PRC BIT.[458]

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455 *RosInvest*, ¶ 129 (emphasis added) (RA-19).

456 *RosInvest*, ¶ 130 (emphasis added) (RA-19).

457 [English translation from the Spanish provided by the Tribunal]

458 *Tza Yap Shum*, ¶ 216.

355. Before turning to the MFN clause in the Treaty it will be useful to recall the claims advanced by the Claimant under the Treaty MFN clause. In the Amended Notice, the Claimant has invoked its right under Article 3(2) of the Treaty:

> […] to receive treatment no less favorable than the Respondent has accorded to the investors of third States, such as the Netherlands, the Republic of Korea, France, Sweden, Switzerland, Denmark, the United Kingdom, Germany and Australia, in respect of its right to seek compensation for a breach of either the autonomous treaty standard of fair and equitable treatment or alternative standards of treatment no less favorable, such as Article 8 of the Laos-Germany BIT. Article 2(3) of the Laos-Sweden-BIT, or Article 6 of the Laos-Japan BIT, through recourse to binding, independent, international arbitration.
>
> In addition, and in the alternative, should Article 8(3) of the instant Treaty be construed in such a manner as to in any way curtail or limit the access that a Chinese investor would otherwise enjoy (had it been a national of the Netherlands, the Republic of Korea, France, Switzerland, the United Kingdom, Sweden, Denmark, Australia or Germany), including the availability of access to arbitration under the Treaty itself, Sanum hereby invokes its right to receive treatment no less favorable than the Respondent has accorded to these third country investors, under Article 3(2) of the Treaty, as well.[459]

356. The Tribunal observes that, in its Statement of Claim and Response on Jurisdiction, under the heading "Article 3(2) Grants Authority to the Tribunal To Hear All of Sanum's Claims", the Claimant analyzes Article 3(2) of the Treaty but it does not include any analysis of the dispute settlement clauses in the BITs through which allegedly the MFN clause would operate. There is no analysis or specific preference expressed for any of them. While the BITs referred to by the Claimant are part of the record before the Tribunal, it would have been of assistance to the Tribunal had the analysis of Article 3(2) been complemented by an analysis of the dispute settlement clauses in the BITs listed in the Amended Notice.

357. The MFN clause in Article 3(2) refers to the treatment and protection in Article 3(1). Article 3(1) provides for fair and equitable treatment and protection of investments and activities associated with investments of investors. The Claimant has argued in favor of a broad meaning of the term "protection" under Article 3(1). On the other hand, the Claimant seems to realize that the term "protection" as used in Article 3(1) of the Treaty has a limited meaning. Indeed, the Claimant argues that, under the BITs of Laos with Germany, Korea and the United Kingdom, Laos has agreed to accord "full protection and security" and this obligation offers investors broader protection than that afforded under Article 3(1) of the Treaty. The Claimant does not discuss the implications of this statement for its reading of Article 3(1). In the view of

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[459] Amended Notice, ¶¶ 122-123.

the Tribunal, this argument shows that the Claimant considers it necessary to have recourse to the MFN clause to reach the level of protection afforded by the addition of the terms "full" and "security". In other words, the Claimant's argument on the application of the MFN clause contradicts the Claimant's broad reading of the term "protection" in Article 3(1) as including all protections under the Treaty. If this were the case, there would be no need to have recourse to the MFN clause to enjoy wider protection.

358. Thus, the position advanced by the Claimant requires the Tribunal, to (a) extend "protection" under Article 3(1) to all protections provided for in the Treaty; (b) extend through Article 3(2) the reach of Article 3(1); and, (c) go a step further and extend the reach of this clause to include access to arbitration in respect of disputes over a breach of all protections under the Treaty. Article 3(1) is limited in its scope and does not include the traditional formula of *full* protection and *security*, as the Claimant itself recognizes. In addition, to read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses. Therefore, the Tribunal finds that it has no jurisdiction for claims submitted under Article 3(2) of the Treaty.

5. Whether the Doctrines of *Lis Pendens* and Against the Abuse of Process Bar the Claims of the Claimant

359. The Respondent contends that the Claimant has committed an abuse of process by submitting, as part of the Amended Notice, claims already made before in the Lao Holdings Arbitration. The Respondent further argues that these claims are inadmissible on grounds of *lis pendens*. The Respondent has requested that the Tribunal reject the amendments the Claimant has made in its Statement of Claim and Response on Jurisdiction on the basis of Articles 17 and 22 of the 2010 UNCITRAL Arbitration Rules.

360. According to Article 17(1) of the Rules:

> […] the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

361. Article 22 reads as follows:

> During the course of the arbitral proceedings, a party may amend or supplement its claim or defense, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defense, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defense falls outside the jurisdiction of the arbitral tribunal.

362. The Tribunal will address whether there have been delays or prejudice caused by the Amended Notice; whether the Respondent had the opportunity to present its case; whether *lis pendens* is an obstacle to admission of the claims in the Amended Notice; whether the amended claims are within the jurisdiction of the Tribunal; and, whether the Claimant has abused the process.

363. Is the Amended Notice a cause for delay? Procedural Order No. 1 provided for the filing of an Amended Notice within ten days of the date of that order. The Amended Notice was filed on June 7, 2013 within the prescribed time. Therefore, it is self-evident that the Tribunal may not consider the Amended Notice to have caused any inappropriate delay.

364. Has each Party had the opportunity to present its case? Suffice it to say here that the Amended Notice not only was filed in good time but also was filed nearly two months before the Statement of Claim and the Respondent's Memorial on Jurisdiction.

365. Has the Amended Notice caused prejudice? It is undisputed that the Claimant offered to consolidate the two proceedings and the Respondent refused. Whatever the reasons for the Respondent's refusal, the Respondent is now precluded from claiming that it has been prejudiced. Whether it has or not is not a matter for the Tribunal to elucidate since consolidation was an option available to the Respondent.

366. Are the claims introduced in the Amended Notice inadmissible on the grounds of *lis pendens* since they are the subject of a parallel proceeding? The Lao Holdings Arbitration is based on a different BIT and the claimant parties are related but different. The mere fact that the subject matter of the dispute may in some aspects overlap with these proceedings is not sufficient reason to reject the claims as inadmissible. As to the jurisdiction of the Tribunal, to the extent that the Tribunal has determined that it has jurisdiction to consider only the expropriation claims before it, that jurisdiction encompasses only the expropriation claims that may be before the Lao Holdings tribunal.

367. Does the pursuit of overlapping claims in two different arbitral tribunals established under two different BITs by different parties constitute an abuse of process? As already observed above, it is undisputed that the Respondent refused to consolidate this proceeding and the Lao Holdings Arbitration. This fact is sufficient ground for the Tribunal to consider that there is no abuse of process.

368. To conclude, the Tribunal determines that the expropriation claims in the Amended Notice are properly before this Tribunal.

VIII. COSTS

369. Each Party has requested that the costs of the proceedings, including its own costs, be borne by the other. The Tribunal reserves this question for consideration and decision along with the merits of the dispute.

IX. DECISION

370. For the reasons set out above the Tribunal decides:

i) That the PRC/Laos BIT does apply to the Macao SAR.

ii) That Sanum is a protected investor under the BIT and its claims are investment-related.

iii) That the Tribunal has jurisdiction to arbitrate only the expropriation claims of Sanum under Article 8(3) of the BIT.

iv) That it has no jurisdiction to arbitrate Sanum's other claims by application of Article 3(2) of the BIT.

v) To reject the Respondent's request to dismiss claims introduced by the Amended Notice which allegedly duplicate claims made in the Laos Holdings Arbitration.

vi) To consider and decide the Parties' requests in respect of costs together with the merits of the dispute.

Dated this 13th day of December 2013, Singapore:

Professor Bernard Hanotiau
Arbitrator

Brigitte Stern

Professor Brigitte Stern
Arbitrator

Dr. Andrés Rigo Sureda
Presiding Arbitrator

Annexe 3

to the Expert Report
of Professor Simon Chesterman

AGREEMENT

between
The Government of the People's Republic of China
and
The Government of the Lao People's Democratic
Republic
Concerning the Encouragement and Reciprocal Protection
of Investments

The Government of the People's Republic of China and the Government of the Lao People's Democratic Republic(hereinafter referred to as Contracting States),

Desiring to encourage, protect and create favorable 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,

Have agreed as follows:

Article 1

For the purpose of this Agreement,

1. The term "investments" means every kind of asset invested by investors of one Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the Latter, including mainly.
   (a) movable and immovable property and other property rights;
   (b) shares in companies or other forms of interest in such companies;
   (c) a claim to money or to any performance having an economic value;
   (d) copyrights, industrial property, know-how and technological process
   (e) concessions conferred by law, including concessions to search for or to exploit natural resources.
2. The term "investors" means:
   in respect of both Contracting States:
   (a) natural persons who have nationality of each Contracting State;
   (b) economic entities established in accordance with the laws and regulations of each contracting State.

3. The term "return" means the amounts yielded by investments, such as profits, dividends, interests, royalties or other legitimate income.

Article 2

1. Each Contracting State shall encourage investors of the other Contracting State to make investments in its territory and admit such investments in accordance with its laws and regulations.
2. Each contracting State shall grant assistance in and provide facilities for obtaining visas and work permits to nationals of the other Contracting State to or in the territory of the Former in connection with activities associated with such investments.

Article 3

1. Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.
2. The treatment and protection as mentioned in Paragraphs 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.
3. The treatment and protection as mentioned in paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a third State based on customs union, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.

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.
3. Investors of one Contracting State who suffer losses in respect of their investments in the territory of the other Contracting State owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting State, if it takes relevant measures, treatment not less favorable than that accorded to investors of a third State.

Article 5

1. Each Contracting State shall, subject to its laws and regulations, guarantee investors of the other Contracting State the transfer of their investments and returns held in the territory of the one Contracting State, including :
   (a) profits, dividends, interests and other legitimate income;
   (b) amounts from total or partial liquidation of investments;
   (c) payments made pursuant to a loan agreement in connection with investment;
   (d) royalties resulting from Article 1;
   (e) payments of technical assistance or technical service fee; management fee;
   (f) payments in connection with projects on contract;
   (g) earnings of nationals of the other Contracting State who work in connection with an investment in the territory of the one Contracting State.
2. The transfer mentioned above shall be made at the prevailing exchange rate of the Contracting State accepting investment on the date of transfer.

Article 6

If a Contracting State or its Agency makes payment to an investor under a guarantee it has granted to an investments of such investor in the territory of the other Contracting State, such other Contrating State shall recognize the transfer of any right or claim of such investor to the former Contracting State of its Agency and recognize the subrogation of the former Contracting State of its Agency to such right or claim. The subrogated right or claim shall not be greater than the original right or claim of the said investor.

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.
3. Such tribunal shall be comprised of three arbitrators. Within two months from the date on which either Contracting State receives a written notice requesting arbitration from the other Contracting State, each Contracting State shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a third arbitrator who is a national of a third State which has diplomatic relations with both Contracting States. The third arbitrator shall be appointed by the two Contracting States as Chairman of the arbitral tribunal.
4. If the arbitral tribunal has not been constituted within four months from the date of the receipt of a written notice for arbitration, either Contracting State may, in the absence of any agreement, invite the President of the International Court of Justice to appoint the arbitrator(s) who has or have not yet been appointed. If the President is a national of either Contracting State or is otherwise prevented from discharging the said function, the next most senior member of the International Court of Justice who is not a national of either Contracting State shall be invited to make the necessary appointment(s).
5. The arbitral tribunal shall determine its own procedure. The tribunal shall reach its award in accordance with the provisions of this Agreement and the principles of international law recognized by both Contracting States.
6. The tribunal shall reach its award by a majority of votes. Such award shall be final and binding on both Contracting States. The tribunal shall, upon the request of either Contracting Sate, explain the reasons of its award.
7. Each Contracting State shall bear the cost of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and the tribunal shall be borne in equal parts by the Contracting States. The tribunal may, however, in its decision, direct that a higher proportion of costs shall be borne by one of the two Contracting States.

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.
4. Such an arbitral tribunal shall be constituted for each individual case in the following way : each party to the dispute shall appoint an arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting States as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite the Secretary General of the International Center for Settlement of Investment Disputes to make the necessary appointments.
5. The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center for Settlement of Investment Disputes.
6. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both Contracting States shall commit themselves to the enforcement of the decision in accordance with their respective domestic laws.
7. The tribunal shall adjudicate the dispute in accordance with the law of the Contracting State accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepted by both Contracting States.

8. Each party to the dispute shall bear the cost of its appointed member of the tribunal and of its representation in the proceedings. The cost of the appointed Chairman and the remaining costs shall be borne in equal parts by the parties to the dispute. The tribunal may, however. in its decision. direct that higher proportion of costs shall be borne by one of the two parties.

Article 9

If the treatment to be accorded by one Contracting State in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other Contracting State is more favorable than the treatment provided for in this Agreement. the more favorable treatment shall be applicable.

Article 10

This Agreement shall apply to investments which are made prior to or after its entry into force by investors of either Contracting State. Such investments shall be approved in accordance with the laws and regulations of the Contracting State in the territory of the Latter.

Article 11

1. The representatives of the two Contracting States shall hold meeting from time to time for the purpose of;
   (a) reviewing the implementation of this Agreement;
   (b) exchanging legal information and investment opportunities;
   (c) resolving dispute arising out of investments;
   (d) forwarding proposals on promotion of in vestment;
   (e) studying other issues in connection with investments.

2. Where either Contracting State requests consultation on any matters under paragraph 1 of this Article, the other Contracting State shall give prompt response and the consultation shall be held alternatively in Beijing and in Vientiane.

Article 12

1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting States have notified each other in writing that their respective

internal legal procedures have been fulfilled. and shall remain in force for a period of ten years.

2. This Agreement shall continue in force if either contracting State fails to give a written notice to the other Contracting State to terminate this Agreement one year before the expiration specified in paragraph 1 of this Article.

3. After the expiration of the initial ten-year period. either Contracting State may at any time thereafter terminate this Agreement by giving at least one year's written notice to the other Contracting State.

4. With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 11 shall continue to be effective for a further period of ten years from such date of termination.

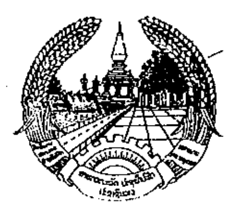
IN WITNESS WHEREOF, the duly authorized representatives of their respective Governments have signed this Agreement.

Done in duplicate at Vientiane on January 31, 1993 in the Lao, Chinese and English languages, the three texts being equally authentic. In case of divergency, the English text shall prevail.

For the Government of the People's Republic of China	For the Government of the Lao People's Democratic Republic
钱其琛	

Annexe 4

to the Expert Report
of Professor Simon Chesterman



LAO PEOPLE' S DEMOCRATIC REPUBLIC

Peace Independence Democracy Unity Prosperity

Ministry of Foreign Affairs

00058
No. ____/AE.TD.4

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 Special Administrative Region.

The Ministry of Foreign Affairs has the further honour to inform the Embassy that the Lao Government is of the view that the Agreement does not extend to Macau Special Administrative Region 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 Special Administrative Region as well as the fact that the Agreement itself is silent on its extension to Macau Special Administrative Region, 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.

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.

Vientiane, 7 January 2014

The Embassy of the People's Republic of China

Vientiane

Annexe 5

to the Expert Report
of Professor Simon Chesterman

中华人民共和国大使馆

第 003/14 号

中华人民共和国大使馆向老挝人民民主共和国外交部致意，并谨就外交部 00058/AE.TD.4 号照会答复如下：

根据《中华人民共和国澳门特别行政区基本法》，经中央人民政府具体授权，澳门特别行政区政府可自行与外国和地区签订和履行投资协定；中央人民政府缔结的双边投资协定原则上不适用于澳门特别行政区，除非在征询特别行政区政府意见、并同有关缔约方协商后另行做出安排。

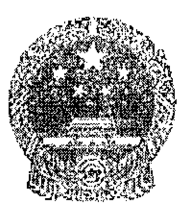
鉴此，1993 年 1 月 31 日在万象签订的《中华人民共和国政府和老挝人民民主共和国政府关于鼓励和相互保护投资协定》不适用于澳门特别行政区，除非中老双方将来另行作出安排。

顺致最崇高的敬意。

中国大使馆（印）

二〇一四年一月九日于万象

TRANSLATION



EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA

No. 003/14

The Embassy of the People's Republic of China present our compliments to the Ministry of Foreign Affairs of the People's Democratic Republic of Laos, and our reply to the Ministry of Foreign Affairs Note No. 00058/AE. TD. 4 is as follows:

In accordance with the 《Basic Law of the Macau Special Administrative Region of the People's Republic of China》, the Government of Macau Special Administrative Region, 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 the Macau Special Administrative Region, 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 Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments》 concluded in Vientiane on 31 January 1993 is not applicable to

the Macau Special Administrative Region 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.

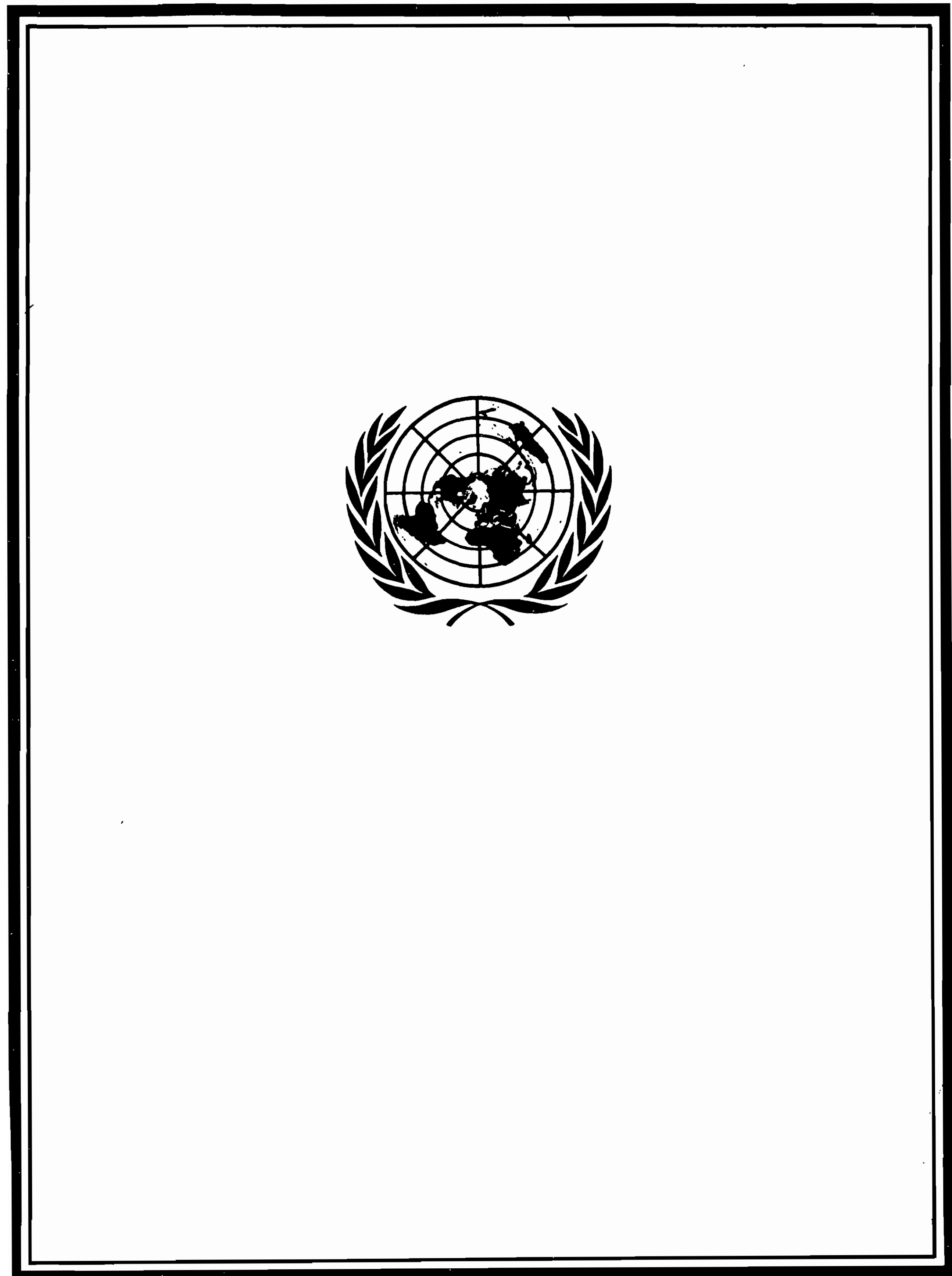
Embassy of China (Seal)
[Seal of the Embassy of the People's Republic of China in the People's Democratic Republic of Laos is affixed]

9 January 2014 in Vientiane

Certified true translation by:
Mrs Chin-Puar Yow Hoy, 03 FEB 2014
a certificated interpreter
Chin Puar Yow Hoy

Annexe 6

to the Expert Report
of Professor Simon Chesterman



UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

CONFERENCE DES NATIONS UNIES
SUR LE DROIT DES TRAITES

聯合國條約法會議

КОНФЕРЕНЦИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ
ПО ПРАВУ ДОГОВОРОВ

CONFERENCIA DE LAS NACIONES UNIDAS
SOBRE EL DERECHO DE LOS TRATADOS

VIENNA CONVENTION
ON THE LAW OF TREATIES

CONVENTION DE VIENNE
SUR LE DROIT DES TRAITES

維也納條約法公約

ВЕНСКАЯ КОНВЕНЦИЯ
О ПРАВЕ МЕЖДУНАРОДНЫХ ДОГОВОРОВ

CONVENCION DE VIENA
SOBRE EL DERECHO DE LOS TRATADOS

VIENNA CONVENTION ON THE LAW OF TREATIES

UNITED NATIONS
1970

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1: OBSERVANCE OF TREATIES

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

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. This rule is without prejudice to article 46.

SECTION 2: APPLICATION OF TREATIES

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

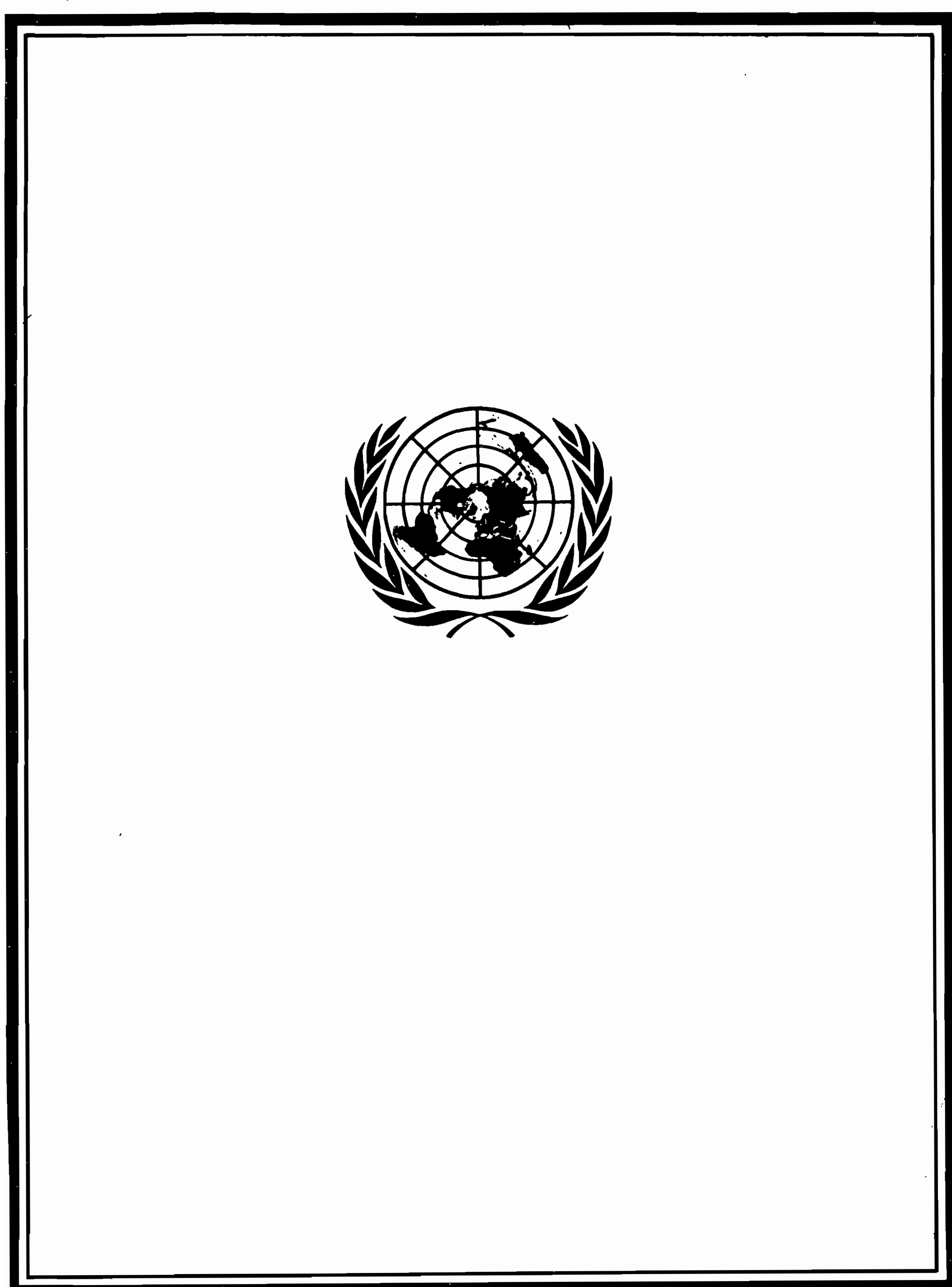
Article 29

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.

Annexe 7

to the Expert Report
of Professor Simon Chesterman



VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES

CONVENTION DE VIENNE SUR LA SUCCESSION D'ÉTATS EN MATIÈRE DE TRAITÉS

اتفاقية فيينا لخلافة الدول في المعاهدات

关于国家在条约方面的继承的维也纳公约

ВЕНСКАЯ КОНВЕНЦИЯ О ПРАВОПРЕЕМСТВЕ ГОСУДАРСТВ В ОТНОШЕНИИ ДОГОВОРОВ

CONVENCIÓN DE VIENA SOBRE LA SUCESIÓN DE ESTADOS EN MATERIA DE TRATADOS

VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES

UNITED NATIONS
1978

PART II

SUCCESSION IN RESPECT OF PART OF TERRITORY

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.

Annexe 8

to the Expert Report
of Professor Simon Chesterman

Government Printing Bureau

[Chinese Version] [Portuguese Version]

Joint Declaration - Annex I - Annex II

Joint declaration of the Government of the People's Republic of China and The Government of the Republic of Portugal on the question of Macao

The Government of the People's Republic of China and the Government of the Republic of Portugal have reviewed with satisfaction the development of the friendly relations between the two Governments and peoples since the establishment of diplomatic relations between the two countries and agreed that a proper negotiated settlement by the two Governments of the question of Macao, which is left over from the past, is conducive to the economic growth and social stability of Macao and to the further strengthening - of the friendly relations and cooperation between the two countries. To this end, they have, after talks between the delegations of the Governments, agreed to declare as follows:

1. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that the Macao area (including the Macao Peninsula, Taipa Island and Coloane Island, hereinafter referred to as Macao) is Chinese territory, and that the Government of the People's Republic of China will resume the exercise of sovereignty over Macao with effect from 20 December 1999.

2. The Government of the People's Republic of China declares that in line with the principle of one country, two systems, the People's Republic of China will pursue the following basic policies regarding Macao :

> **1**. In accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, the People's Republic of China will establish a Macao Special Administrative Region of the People's Republic of China upon resuming the exercise of sovereignty over Macao.
>
> **2**. The Macao Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China, and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government. The Macao Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication.
>
> **3**. Both the Government and the legislature of the Macao Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held in Macao. Officials holding principal posts will be nominated by the chief executive of the Macao Special Administrative Region for appointment by the Central People's Government. Public servants (including police) of Chinese nationality and Portuguese and other foreign nationalities employment. Portuguese and other foreign nationals may be appointed or employed to hold certain public posts in the Macao Special Administrative Region.
>
> **4**. The current social and economic systems in Macao will remain unchanged, and so will the life - style. The laws currently in force in Macao will remain basically unchanged. All rights and freedoms of the inhabitants and other persons in Macao, including those of the person, of speech, of the press, of assembly, of association, of travel and movement, of strike., of choice of occupation, of academic research, of religion and belief, of communication and the ownership of property will be ensured by law in the Macao Special Administrative Region.
>
> **5**. The Macao Special Administrative Region will on it's own decide policies in the fields of culture, education, science and technology and protect cultural relics in Macao according to law. In addition

to Chinese, Portuguese may also be used in organs of government and in the legislature and the courts in the Macao Special Administrative Region.

6. The Macao Special Administrative Region may establish mutually beneficial economic relations with Portugal and other countries. Due regard will be given to the economic interests of Portugal and other countries in Macao. The interests of the inhabitants of Portuguese descent in Macao will be protected by law.

7. Using the name " Macao, China ", the Macao Special Administrative Region may on it's own maintain and develop economic and cultural relations and in this context conclude agreements with states, regions and relevant international organizations.
The Macao Special Administrative Region Government may on it's own issue travel documents Government may on it's own issue travel documents for entry into and exit from Macao.

8. The Macao Special Administrative Region will remain a free port and a separate customs territory in order to develop it's economic activities. There will be free flow of capital. The Macao Pataca, as the legal tender of the Macao Special Administrative Region, will continue to circulate and remain freely convertible.

9. The Macao Special Administrative Region will continue to have independent finances. The Central People's Government will not levy taxes on the Macao Special Administrative Region.

10. The maintenance of public order in the Macao Special Administrative Region will be the responsibility of the Macao Special Administrative Region Government.

11. Apart from displaying the national flag and national emblem of the People's Republic of China, the Macao Special Administrative Region may use a regional flag and emblem of it's own.

12. The above-stated basic policies and the elaboration of them in Annex I to this Joint Declaration will be stipulated in a Basic Law of the Macao Special Administrative Region of the People's Republic of China by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

3. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that, during the transitional period between the date of the entry into force of this Joint Declaration and 19 December 1999, the Government of the Republic of Portugal will be responsible for the administration of Macao. The Government of the Republic of Portugal will continue to promote the economic growth of Macao and maintain its social stability, and the Government of the People's Republic of China will give its cooperation in this connection.

4. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that in order to ensure the effective implementation of this Joint Declaration and create appropriate conditions for the transfer of government in 1999, a Sino-Portuguese Joint Liaison Group will be set up when this Joint Declaration enters into force, and that it will be established and will function in accordance with the relevant provisions of Annex II to this Joint Declaration.

5. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that land leases in Macao and other related matters will be dealt with in accordance with the relevant provisions of the Annexes to this Joint Declaration.

6. The Government of the People's Republic of China and the Government of the Republic of Portugal agree to implement all the preceding declarations and the Annexes which are a component part of the Joint Declaration.

7. This Joint Declaration and it's Annexes shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing. This Joint Declaration and it's Annexes shall be equally binding.

Done in duplicate at Beijing on 1987 in the Chinese and Portuguese languages, both texts being equally authentic.

For the Government of the People's Republic of China.

For the Government of the Republic of Portugal.

ANNEX I

ELABORATION BY THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA OF ITS BASIC POLICIES REGARDING MACAO

I - II - III - IV - V - VI - VII - VIII - IX - X - XI - XII - XIII - XIV

The Government of the People's Republic of China elaborates the basic policies of the People's Republic of China regarding Macao as set out in paragraph 2 of the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao as follows :

I

The Constitution of the People's Republic of China stipulates in Article 31 that the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions. In accordance with this Article, the People's Republic of China shall, upon the resumption of the exercise of sovereignty over Macao on 20 December 1999, establish the Macao Special Administrative Region of the People's Republic of China. The National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Macao Special Administrative Region of the People's Republic of China, stipulating that after the establishment of the Macao Special Administrative Region the socialist system and socialist policies shall not be practised in the Macao Special Administrative Region and that the current social and economic systems and life-style in Macao shall remain unchanged for 50 years.

The Macao Special Administrative Region shall be directly under the authority of the Central People's Government of the People's Republic of China, and shall enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government. The Macao Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication. The Central People's Government shall autorise the Macao Special Administrative Region to conduct on it's own those external affairs specified in Section VIII of this Annex.

II

The executive power of the Macao Special Administrative Region shall be vested in the Government of the Macao Special Administrative Region. The Government of the Macao Special Administrative Region shall be composed of local inhabitants. The chief executive of the Macao Special Administrative Region shall be appointed by the Central People's Government on the basis of the results of elections or consultations to be held in Macao. Officials holding principal posts (equivalent to Assistant-Secretaries, procurator-general and principal officer of the police service) shall be nominated by the chief executive of the Macao Special Administrative Region for appointment by the Central People's Government.

The executive authorities shall abide by the law and shall be accountable to the legislature.

III

The legislative power of the Macao Special Administrative Region shall be vested in the legislature of the Macao Special Administrative Region. The legislature shall be composed of local inhabitants, and the majority of it's members shall be elected.

After the establishment of the Macao Special Administrative Region, - the laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, save for whatever therein may contravene the Basic Law or subject to any amendment by the Macao Special Administrative Region legislature.

The legislature of the Macao Special Administrative Region may enact laws in accordance with the provisions of the Basic Law and legal procedures, and such laws shall be reported to the Standing Committee of the National

People's Congress of the People's Republic of China for the record. Laws enacted by the legislature of the Macao Special Administrative Region which are in accordance with the Basic Law and legal procedures shall be regarded as valid.

The legal system of the Macao Special Administrative Region shall consist of the Basic Law, the laws previously in force in Macao and the laws enacted by the Macao Special Administrative Region as above.

IV

Judicial power in the Macao Special Administrative Region shall be vested in the courts of the Macao Special Administrative Region. The power of final adjudication shall be exercised by the court of final appeal in the Macao Special Administrative Region. The courts shall exercise judicial power independently and free from any interference, and shall be subordinated only to the law. The judges shall enjoy the immunities appropriate to the performance of their functions.

Judges of the Macao Special Administrative Region courts shall be appointed by the chief executive of the Macao Special Administrative Region acting in accordance with the recommendation of the independent commission composed of local judges, lawyers and noted public figures. Judges shall be chosen by reference to their professional qualifications. Qualified judges of foreign nationalities may also be invited to serve as judges in the Macao Special Administrative Region. A judge may only be removed for inability to discharge the functions of his office, or for behaviour incompatible with the post he holds, by the chief executive acting in accordance with the recommendation of a tribunal appointed by the president of the court of final appeal, consisting of not fewer than three local judges. The removal of judges of the court of final appeal shall be decided upon by the chief executive in accordance with the recommendation of a review committee consisting of members of the Macao Special Administrative Region legislature. The appointment and removal of judges of the court of final appeal shall be reported to the Standing Committee of the National People's Congress for the record.

The prosecuting authority of the Macao Special Administrative Region shall exercise procuratorial functions as vested by law, independently and free from any interference.

The system previously in force in Macao for appointment and removal of supporting members of the judiciary shall be maintained.

On the basis of the system previously operating in Macao, the Macao Special Administrative Region Government shall make provisions for local lawyers and lawyers from outside Macao to practise in the Macao Special Administrative Region.

The Central People's Government shall assist or authorise the Macao Special Administrative Region Government to make appropriate arrangements for reciprocal juridical assistance with foreign states.

V

The Macao Special Administrative Region shall, according to law, ensure the rights and freedoms of the inhabitants and other persons in Macao as provided for by the laws previously in force in Macao, including freedom of the person, of speech, of the press, of assembly, of demonstration, of association (e. g. to form and join non-official associations), to form and join trade unions, of travel and movement, of choice of occupation and work, of strike, of religion and belief, of education and academic research ; inviolability of the home and of communication, and the right to have access to law and court ; rights concerning the ownership of private property and of enterprises and their transfer and inheritance, and to obtain appropriate compensation for lawful deprivation paid without undue delay : freedom to marry and the right to form and raise a family freely.

The inhabitants and other persons in the Macao Special Administrative Region shall all be equal before the law, and shall be free from discrimination, irrespective of nationality, descent, sex, race, language, religion, political or ideological belief, educational level, economic status or social conditions.

The Macao Special Administrative Region shall protect, according to law, the interests of residents of Portuguese descent in Macao and shall respect their customs and cultural traditions.

Religious organizations and believers in the Macao Special Administrative Region may carry out activities as before for religious purposes and within the limits as prescribed by law, and may maintain relations with religious

organizations and believers outside Macao. Schools, hospitals and charitable institutions attached to religious organizations may continue to operate as before. The relationship between religious organizations in the Macao Special Administrative Region and those in other parts of the People's Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.

VI

After the establishment of the Macao Special Administrative Region, public servants (including police) of Chinese nationality and Portuguese and other foreign nationalities previously serving in Macao may all remain in employment and continue their service with pay, allowances and benefits no less favourable than before. Those of the above-mentioned public servants who have retired after the establishment of the Macao Special Administrative Region shall, in accordance with regulations currently in force, be entitled to pensions and allowances on terms no less favourable than before, and irrespective of their nationality or place of residence.

The Macao Special Administrative Region may appoint Portuguese and other foreign national previously serving in the public service in Macao or currently holding Permanent Identity Cards of the Macao Special Administrative Region may also invite Portuguese and other foreign nationals holding public posts in the Macao Special Administrative Region shall be employed only in their individual capacities and shall be responsible exclusively to the Macao Special Administrative Region.

The appointment and promotion of public servants shall be on the basis of qualifications, experience and ability. Macao's previous system of employment, discipline, promotion and normal rise in rank for the public service shall remain basically unchanged.

VII

The Macao Special Administrative Region shall on it's own decide policies in the fields of culture, education, science and technology, such as policies regarding the languages of instruction (including Portuguese) and the system of academic qualifications and the recognition of academic degrees.

All educational institutions may remain in operation and retain their autonomy. They may continue to recruit teaching and administrative staff and use teaching materials from outside Macao. Students shall enjoy freedom to pursue their education outside the Macao to pursue their education outside the Macao Special Administrative Region shall protect cultural relics in Macao according to law.

VIII

Subject to the principle that foreign affairs are the responsibility of the Central People's Government, the Macao Special Administrative Region may on it's own, using the name " Macao, China ", maintain and develop relations and conclude and implement agreements with states, regions and relevant international or regional organizations in the appropriate fields, such as the economy, trade, finance, shipping, communications, tourism, culture, science and technology and sports. Representatives of the Macao Special Administrative Region Government may participate, as members of the delegations of the Government of the People's Republic of China, in international organizations or conferences in appropriate fields limited to states and affecting the Macao Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People's Government and the organization or conference concerned, and may express their views in the name of " Macao, China ". The Macao Special Administrative Region may, using the name " Macao, China ", participate in international organizations and conferences not limited to states.

Representatives of the Macao Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in negotiations conducted by the Central People's Government at the diplomatic level directly affecting the Macao Special Administrative Region.

The application to the Macao Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances of each case and the needs of the Macao Special Administrative Region and after seeking the views the People's Republic of China is not a party but which are implemented in Macao is not a party but which are implemented in Macao may remain implemented in the Macao Special Administrative Region. The Central People's Government shall, according to the circumstances and the needs, authorise or assist the Macao Special Administrative Region of other relevant international agreements.

The Central People's Government shall, in accordance with the circumstances of each case and the needs of the Macao Special Administrative Region, take steps to ensure that the Macao Special Administrative Region shall continue to retain it's status in an appropriate capacity in those international organizations in which Macao is a participant in one capacity or another, but of which the People's Republic of China is not a member.

Foreign consular and other official or semi-official missions may be established in the Macao Special Administrative Region with the approval of the Central People's Government. Consular and other official missions established in Macao by states which have established formal diplomatic relations with the People's Republic of China may be maintained. According to the circumstances of each case, consular and other official missions in Macao of states having no formal diplomatic relations with the People's Republic of China may either be maintained or changed to semi-official missions. States not recognised by the People's Republic of China can only establish non-govermental institutions.

IX

The following categories of persons shall have the right of abode in the Macao Special Administrative Region and be qualified to obtain Permanent Identity Cards of the Macao Special Administrative Region :

- The Chinese nationals who were born or who have ordinarily resided in Macao before or after the establishment of the Macao Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Macao of such Chinese nationals :
- The Portuguese who were born in Macao or who have ordinarily resided in Macao before or after the establishment of the Macao Special Administrative Region for a continuous period of 7 years or more and who, in either case, have taken Macao as their place of permanent residence ; and
- The other persons who have ordinarily resided in Macao for a continuous period of 7 years or more and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region, and persons under 18 years of age who were born of such persons in Macao before or after the establishment of the Macao Special Administrative Region.

The Central People's Government, shall authorise the Macao Special Administrative Region Government to issue, in accordance with the law, passports of the Macao Special Administrative Region of the People's Republic of China to all Chinese nationals who hold Permanent Identity Cards of the Macao Special Administrative Region, and other documents of the Macao Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the Macao Special Administrative Region.

The above passports and travel documents of the Macao Special Administrative Region shall be valid for all states and regions and shall record the holder's right to return to the Macao Special Administrative Region.

For the purpose of travelling to and from the Macao Special Administrative Region, inhabitants of the Macao Special Administrative Region may use travel documents issued by the Macao Special Administrative Region Government, or by other competent authorities of the People's Republic of China, or of this fact stated in their travel documents as evidence that the holders have the right of abode in the Macao Special Administrative Region.

Entry into the Macao Special Administrative Region by inhabitants of other parts of China shall be regulated in an appropriate way.

The Macao Special Administrative Region may apply immigrations controls on entry into, stay in and departure from the Macao Special Administrative Region by persons from foreign states and regions.

Unless restrained by law, holders of valid travel documents shall be free to leave the Macao Special Administrative Region without special authorization.

The Central People's Government shall assist or authorise the Macao Special Administrative Region Government to negotiate and conclude visa abolition agreements with the states and regions concerned.

X

The Macao Special Administrative Region shall decide it's economic and trade policies on it's own. As a free port and a separate customs territory, it shall maintain and develop economic and trade relations with all states and

regions and continue to participate in relevant international organizations and international trade agreements, such as the General Agreement on Tariffs and Trade and agreements regarding international trade in textiles. Export quotas, tariff preferences and other similar arrangements obtained by the Macao Administrative Region shall be enjoyed exclusively by the Macao Special Administrative Region shall have the authority to issue it's own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin.

The Macao Special Administrative Region shall protect foreign investments in accordance with the law.

The Macao Special Administrative Region may, as necessary, establish official and semi-official economic and trade missions in foreign countries, reporting the establishment of such missions to the Central People's Government for the record.

XI

After the establishment of the Macao Special Administrative Region, the monetary and financial systems previously practised in Macao shall remain basically unchanged. The Macao Special Administrative Region shall decide it's monetary and financial policies on it's own. It shall safeguard the free operation of the financial institutions and the free flow of capital within, into and out of the Macao Special Administrative Region.No exchange control policy shall be applied in the Macao Special Administrative Region.

The Macao Pataca, as the legal tender of the Macao Special Administrative Region, shall continue to circulate and remain freely convertible. The authority to issue Macao currency shall be vested in the Macao Special Administrative Region Government. The Macao Special Administrative Region Government may authorise designated banks to perform or continue to perform the functions of it's agents in the issuance of Macao currency. Macao currency bearing references inappropriate to the status of Macao as a special administrative region of the People's Republic of China shall be progressively replaced and withdrawn from circulation.

XII

The Macao Special Administrative Region shall draw up on it's own it's budget and taxation policy. The Macao Special Administrative Region shall report it's budget and final accounts to the Central People's Government for the record. The Macao Special Administrative Region shall use it's financial revenues exclusively for it's own purposes and they shall not be handed over to the Central People's Government shall not levy taxes on the Macao Special Administrative Region.

XIII

The Central People's Government shall be responsible for the defense of the Macao Special Administrative Region.

The maintenance of public order in the Macao Special Administrative Region shall be the responsibility of the Macao Special Administrative Region Government.

XIV

Legal leases of land granted or decided upon before the establishment of the Macao Special Administrative Region and extending beyond 19 December 1999, and all rights in relation to such leases shall be recognised and protected according to law by the Macao Administrative Region. Land leases approved or renewed after the establishment of the Macao Special Administrative Region shall be dealt with in accordance with the relevant land laws and policies of the Macao Special Administrative Region.

ANNEX II

ARRANGEMENTS FOR THE TRANSITIONAL PERIOD

I. SINO-PORTUGUESE JOINT GROUP
II. SINO-PORTUGUESE LAND GROUP
MEMORANDUM

MEMORANDUM

In order to ensure the effective implementation of the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao and create appropriate conditions for the transfer of government of Macao, the Government of the People's Republic of China and the Government of the Republic of Portugal have agreed to continue their friendly cooperation during the transitional period between the date of the entry into force of the Joint Declaration and 19 December 1999.

For this purpose, the Government of the People's Republic of China and the Government of the Republic of Portugal have agreed to set up a Sino-Portuguese Joint Liaison Group and a Sino-Portuguese Land Group in accordance with the provisions of paragraphs 3, 4 and 5 of the Joint Declaration.

I. SINO-PORTUGUESE JOINT GROUP

1. The Joint Group shall be an organ for liaison, consultation and exchange of information between the two Governments. It shall not interfere in the administration of Macao, nor shall it have any supervisory role over that administration.

2. The functions of the Joint Liaison Group shall be :

a) To conduct consultations on the implementation of the Joint Declaration and it's Annexes;

b) To exchange information and conduct consultations on matters relating to the transfer of government of Macao in 1999;

c) To conduct consultations on actions to be taken by the two Governments to enable the Macao Special Administrative Region to maintain and develop external economic, cultural and other relations;

d) To exchange information and conduct consultations on other subjects as may be agreed by the two sides.

Matters on which there is disagreement in the Joint Liaison Group shall be referred to the Governments for solution through consultations.

1. Each side shall designate a leader of ambassadorial rank and four other members of the group. Each side may also designate experts and supporting staff as required, whose number shall be determined through consultations.

2. The Joint Liaison Group shall be established on the entry into force of the Joint Declaration and shall work within three months after it's establishment. It shall meet in Beijing, Lisbon and Macao alternately in the first year of work. Thereafter, it shall have it's principal base in Macao. The Joint Liaison Group shall continue it's work until 1 January 2000.

3. Members, experts and supporting staff of the Joint Liaison Group shall enjoy diplomatic privileges and immunities of such privileges and immunities as are compatible with their status.

4. The working and organizational procedures of the Joint Liaison Group shall be agreed between the two sides through consultations within the guidelines laid down in this Annex. The work of the Joint Liaison Group shall remain confidential unless otherwise agreed.

II. SINO-PORTUGUESE LAND GROUP

1. The two Governments have agreed that, with effect from the entry into force of the Joint Declaration, land leases in Macao and related matters shall be dealt with the following provisions :

a) Leases of land granted previously by the Portuguese Macao Government that expire before 19 December 1999, except temporary leases and leases for special purposes, may, in accordance with the relevant laws and regulations currently in force, be extended for a period expiring not later than 19 December 2049, with a premium be collected.

b) From the entry into force of the Joint Declaration until 19 December 1999 and in accordance with the relevant laws of land may be granted by the Portuguese Macao Government for terms expiring not later than 19 December 2049, with a premium to be collected.

c) The total amount of new land, including fields reclaimed from the sea and undeveloped land, to be granted under Section II, paragraph 1 (b) of this Annex shall be limited to 20 hectares a year. The Land Group may, on the basis of the proposals of the Portuguese Macao Government, examine any change in the above-mentioned quota and make decisions accordingly.

d) From the entry into force of the Joint Declaration until 19 December 1999, all incomes obtained by the Portuguese Macao Government from granting new leases and renewing leases shall, after deduction of the average cost of land production, be shared equally between the Portuguese Macao Government and the future Government of the Macao Special Administrative Region. All the income so obtained from land by the Portuguese Macao Government, including the amount of the above-mentioned deduction, shall be used for financing land development and public works in Macao. The Macao Special Administrative Region Government's share of land income shall serve as a reserve fund of the Government of the Macao Special Administrative Region and shall be deposited in banks incorporated in Macao and, if necessary, may be used by the Portuguese Macao Government for land development and public works in Macao during the transitional period with the endorsement of the Chinese side.

2. The Sino-Portuguese Land Group shall be an organ for handling land leases in Macao and related matters on behalf of the two Government.

3. The functions of the Land Group shall be :

a) To conduct consultations on the implementation of Section II of this Annex ;

b) To monitor the amount and terms of land granted, divisions and use of income from land granted in accordance with the provisions of Section II, paragraph I of this Annex.

c) To examine proposals of the Portuguese Macao Government for drawing on the Macao Special Administration Region Government's share of income from land and to make recommendations to the Chinese side for decision.

d) Matters on which there is disagreement in the Land Group shall be referred to the two Governments for solution through consultations.

4. Each side shall designate three members of the Land Group. Each side may also designate experts and supporting staff as required, whose number shall be determined through consultations.

5. Upon the entry into force of the Joint Declaration, the Land Group shall be established and shall have it's principal base in Macao. The Land Group shall continue it's work until 19 December 1999.

6. Members, experts and supporting staff of the Land Group shall enjoy diplomatic privileges and immunities or other privileges and immunities or other privileges and immunities as are compatible with their status.

7. The working and organizational procedures of the Land Group shall be agreed between the two sides through consultations within the guideline laid down in this Annex.

(To be exchanged between the two sides)

MEMORANDUM

In connection with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao signed this days, the Government of the People's Republic of China declares :

The inhabitants in Macao who come under the provisions of the Nationality Law of the People's Republic of China, whether they are holders of the Portuguese travel or identity documents or not, have Chinese citizenship.

Taking account of the historical background of Macao and it's realities, the competent authorities of the Government of the People's Republic of China will permit Chinese nationals in Macao previously holding Portuguese travel documents to continue to use these documents for traveling to other states and regions after the establishment of the Macao Special Administrative Region. The above-mentioned Chinese nationals will not be entitled to Portuguese consular protection in the Macao Special Administrative Region and other parts of the People's Republic of China.

MEMORANDUM

In connection with the Joint Declaration of the Government of the Republic of Portugal and the Government of the People's Republic of China on the Question of Macao signed this day, the Government of the Republic of Portugal declares:

In conformity with the Portuguese legislation, the inhabitants in Macao who, having Portuguese citizenship, are holders of a Portuguese passport on 19 December 1999 may continue to use it after this date. No person may acquire Portuguese citizenship as from 20 December 1999 by virtue of his or her connection with Macao.

Joint Declaration - Annex I - Annex II

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Annexe 9

to the Expert Report
of Professor Simon Chesterman

CHINESE INVESTMENT TREATIES

Policies and Practice

Norah Gallagher
Wenhua Shan

provision, an investor could try to seek confirmation of the position at the time of investment. Most Chinese BITs do not require covered companies to have legal personality, and some of them expressly state that they apply to economic entities irrespective of whether or not they are for profit, or whether or not their liabilities are limited. Public entities are explicitly covered in some BITs. Earlier Chinese BITs include a special limitation on Chinese investors demanding special approval or qualification granted by the government, which has been abandoned in its later BIT practice. Finally, corporate entities in Chinese SARs are likely to be protected under Chinese BITs, by way of the three tests.

D. Territorial Application

2.81 As can be seen above, the definition of 'investment' and covered 'companies', by either incorporation or seat, usually requires them to be in the 'territory' of a contracting party. The relevance of the definition of territory is therefore evident. None of the Chinese Model BITs, however, has defined this term. Rather, it is defined in some actual BITs. The Finland BIT 2004, for example, defines the term at Article 1(1) as meaning the

> 'territory' of either Contracting Party, including the land area, internal water and territorial sea and the airspace above them under the sovereignty of that Contracting Party, as well as any maritime area beyond the territorial sea of that Contracting Party, over which that Contracting Party exercises sovereign rights and jurisdiction in accordance with domestic and international law.[193]

2.82 There are also some Chinese BITs that include a separate definition of territory for each contracting state. Thus the 2005 BLEU BIT defines 'territory' as:

> a) the territory of the People's Republic of China (including the territorial sea and air space above it) as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of exploration for and exploitation of resources of the seabed and its sub-soil and superjacent water resources in accordance with Chinese law and international law;
>
> b) the territory of the Kingdom of Belgium and to the territory of the Grand-Duchy of Luxemburg, as well as to the maritime areas, i.e. the marine and underwater areas which extend beyond the territorial waters of the Kingdom of Belgium upon which it exercises, in accordance with international law, its sovereign rights and its jurisdiction for the purpose of exploring, exploiting and preserving natural resources.[194]

[193] It has been noted that such provision has the main purpose not to describe the land territories of the parties but to indicate that their 'territories' include maritime zones over which the parties exercise jurisdiction. See UNCTAD, Key Issue I, at 132.

[194] See also Bosnia and Herzegovina BIT. The territorial limitations of an investment were considered by tribunals in the SGS cases. Both tribunals took a robust view and confirmed that the services provided by SGS, although largely outside the host state, did fall within the definition of investment in the treaty. *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.

2.83 It is interesting to note the minor distinction in the definition for Chinese territory where the applicable law is 'Chinese law and international law', whilst only 'international law' is the law applied in defining the territory of Belgium and Luxembourg. The significance of such a variation would depend on where the investment was actually made and whether there was any question of disputed sovereignty in that area.

2.84 The UK BIT has a special provision, which aims at the extension of the territorial application of the treaty. Article 10 of the treaty states:

> At the time of signature of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the government of the United Kingdom are responsible, as may be agreed by the Contracting Parties by Exchange of Notes.[195]

2.85 Such territories include, for example, the British Virgin Islands and British Cayman Islands, from which there are significant investments in China. However, so far no such exchange of notes has taken place between the UK and China with regard to extension of application to such territories.[196] The two islands might be even more attractive to potential foreign investors in China if such exchange of notes took place.

2.86 With the one exception of the Russia BIT 2006, no Chinese BIT has excluded from its scope of application Hong Kong, Macau, and Taiwan, which are legally part of Chinese territory. The Russia BIT expressly excludes its application to Chinese SARs including both Hong Kong and Macau. It states that:

> 1. Unless otherwise agreed by both Contracting Parties, the Agreement does not apply to the Hong Kong Special Administrative Region of the People's Republic of China and the Macao Special Administrative Region of the People's Republic of China.[197]

2.87 Other Chinese BITs are, in principle, applicable to the three SARs. There are, however, complications in those areas. Among the three regions, Taiwan has not yet been reunited with the mainland and is in fact running the region on its own.

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[195] UK BIT, Art 10.

[196] This is confirmed by correspondence with the Legal Advisor's Office of the FCO, London. Such exchange of notes did take place, for example, with regard to the UK–Sri Lanka BIT, which extended the BIT application to Hong Kong thus covering Hong Kong companies under the treaty. The extension resulted in the first ICSID case, the *AAPL v Sri Lanka*, in which the jurisdiction of a tribunal was based on host state consent expressed in a BIT involved a Hong Kong company which had invested in Sri Lanka. See *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of the Tribunal 21 June 1990, reprinted in 6 ICSID Review 526, 543–8 (1991). See also Dissenting Opinion of 15 June 1990, id, at 582–5. See also Dolzer and Stevens, n 110 above, at 43.

[197] See Russia BIT Protocol, Ad Art 1.

Indeed, it has entered into a few investment treaties with other states.[198] The other two regions, namely Hong Kong and Macau, have been returned to China (from the UK and Portugal respectively) and have become SARs of China. As mentioned above, unlike other regions in mainland China, SARs enjoy a high degree of autonomy as well as executive, legislative, and judicial powers including final judiciary.[199] Also, the two SARs can enter into international agreements in a number of economic areas including investment and trade.[200] In practice, Hong Kong SAR has already signed a dozen BITs in its own name (Hong Kong, China).[201] A further complication is that, under the SAR basic laws, certain formalities have to be complied with before international treaties signed by the Central government are applied to Hong Kong.[202] The provision in the Hong Kong Basic Law, for example, goes as follows:

Article 153

> The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.[203]

2.88 The Basic Law thus requires the central government to: a) consult the Hong Kong government, and then: b) decide in accordance with the circumstances and needs of the region whether or not to extend the treaty in question ro the SAR. Since it appears that none of these formalities has been complied with for any of the Chinese BITs, it may be argued that, technically, those BITs are not as yet applicable to the SARs.

2.89 However, all the aforementioned concepts and rules are those of Chinese domestic law, which cannot be invoked to justify failure to perform treaty obligations.[204]

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[198] Since most states only recognise the People's Republic of China with Taiwan being part of it, only a few small countries have entered into BITs with Taiwan authorities. The treaties can be found at <http://www.unctadxi.org/templates/DocSearch____779.aspx> (visited on 26 May 2008).

[199] See eg Hong Kong Basic Law, Art 2.

[200] Id, Art 151.

[201] The treaties can be found at <http://www.unctadxi.org/templates/DocSearch____779.aspx> (visited on 26 May 2008).

[202] See Basic Law of the Hong Kong Special Administrative Region of People's Republic of China (adopted on 4 April 1990 by the Seventh National People's Congress of the PRC and came into effect on 1 July 1997), Art 153(1). See also Basic Law of the Macua Special Administrative Region of People's Republic of China (adopted at the First Session of the Eighth National People' s Congress of the People's Republic of China on 31 March 1993 and entered into effect on 20 December 1999), Art 138(1).

[203] Basic law of Hong Kong SAR, Art 153.

[204] Art 27 of the Vienna Convention on the Law of Treaties stipulates that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Art 46.'

As a result, if there is a dispute between a foreign investor in Hong Kong and the SAR government, the foreign investor could rely on the BIT (or the SAR BIT if there is one) to sue the Chinese government (or the Hong Kong SAR government).[205] Likewise, Hong Kong (or Macau investors) should also be able to invoke Chinese BITs to protect their interests abroad, as Mr Tza Yap Shum did against the Peruvian government.

2.90 Nevertheless, it would be advisable for the Chinese government to complete the required domestic law procedures, to avoid any doubt as to the applicability of such BITs to the SARs. Alternatively, if the Chinese government does not want these BITs to apply to SARs, it should make it clear in the relevant treaty, as it did in the Russia BIT. In fact, the recent Mexico BIT in a footnote to the definition of the territory of China confirms that the governments of Hong Kong and Macau SARs 'can separately negotiate and sign' BITs.[206] A plain-meaning interpretation suggests that the footnote merely confirms an existing power of the two SARs, namely the power to enter into international investment treaties.[207] However, an 'effective' interpretation may lead to the conclusion that the footnote implies that the present treaty shall not apply to the two SARs. For greater clarity the Russian BIT approach is therefore preferred.

E. Temporal Application

2.91 The scope of application of a BIT has a temporal dimension. The temporal application of Chinese BITs involves aspects such as the commencement, duration, and termination of such treaties, which are normally dealt with in one article towards the end of the BIT. Another issue is whether the BIT applies to investment made before the BIT is concluded, which can be found in different places in each BIT.

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[205] Indeed, the 2007 Seychelles BIT makes it clear that both Contracting Parties are responsible for actions or omission of their subordinate entities including 'any other entity over which the Contracting Party exercises the control, the representation or the responsibility of its international affairs, or its sovereignty consistent with its internal legislation.' This should clearly include SARs such as Hong Kong and Macau.

See Seychelles BIT, Art 2.

[206] Indeed, this has been explicitly stated in the Mexico BIT concluded in 2008. The BIT states in a footnote that: Authorized by the Central government of the People's Republic of China, the governments of Hong Kong and Macao Special Administrative Regions can separately negotiate and sign the Agreement on the Promotion and Reciprocal Protection of Investments with the government of United Mexican States by themselves'.

[207] If this line of interpretation is adopted, and if Mexico has also signed BITs with the two SARs, mutual investments between Mexico and the two SARs might enjoy 'double protections' from both the Chinese BIT and the BIT with the SAR concerned.

Annexe 10

to the Expert Report
of Professor Simon Chesterman

The successions in relation to East Timor demonstrate that the law of state succession and commercial obligations has progressed from the 1978 and 1983 Conferences. Unlike some participants at the two conferences, international decision makers, such as UNTAET, have embraced agreements concluded prior to a succession as a tool to consolidate expectations about the impact of that succession on commercial arrangements. More broadly, international law no longer confines the policy of self-determination to decolonization and may promote this policy in other forms of succession. Global order is supported by pragmatic adjustments of obligations rather than by doctrinal prescriptions for the continuity or termination of all obligations.

CHAPTER 6

HONG KONG AND MACAU

The restorations of Hong Kong by the United Kingdom of Great Britain and Northern Ireland in 1997 and of Macau by the Portuguese Republic in 1999 to the People's Republic of China (the PRC) were the least disruptive contemporary successions. In both transfers, international commercial obligations and arrangements were only affected minimally and investor confidence was preserved. Few, if any, inequitable outcomes were inflicted on direct and indirect participants.

1. HONG KONG

Hong Kong is 414 square miles with a population of about 5.7 million people. It comprises the Hong Kong and Lan Tau Islands, off the southern coast of the PRC, the Kowloon Peninsula, which is connected geographically to the PRC, and more than 200 other smaller islands. Hong Kong is a major commercial, trading and financial center.[1] In 1997, its total exports were HK$1,456 bn. and imports were HK$1,615 bn.[2]

Hong Kong was the sovereign territory of China for centuries. In the 19th century, Great Britain sold opium to the Chinese in an effort to reverse the trade imbalance that resulted from the high British demand for Chinese goods and the limited need for British goods in China. The government of Imperial China imposed a ban on the import of opium, which caused the British to start the First Opium War against China. This war ended with the Treaty of Nanking in 1842, in which China ceded Hong Kong Island to Great Britain. At the end of the Second Opium War, the Treaty of Peking

[1] *See* Hurst Hannum, Autonomy, Sovereignty and Self-Determination 129 (1996).

[2] *See* World Trade Organization, Trade Policy Review: Hong Kong, China 95–100 (Nov. 11, 1998) [hereinafter Hong Kong Trade Review].

in 1860 was signed, pursuant to which China ceded a further four square miles in the southern tip of the Kowloon Peninsula. Britain subsequently took advantage of Japan's defeat of China in the war of 1894 to 1895 and concluded the Convention Respecting an Extension of the Hong Kong Territory 1898 (the Convention of Peking). Under the Convention of Peking, China granted Britain a 99-year lease of an additional 373 square miles adjacent to Kowloon, an area now called the "New Territories."[3] These New Territories constitute more than 90 percent of the total land area of Hong Kong,[4] and supply much of the water and electricity used by Kowloon and Hong Kong Island.[5]

After China underwent succession from the Qing Dynastic rule to a communist state, which was renamed the People's Republic of China, it began pressing the international law claim that the three treaties concluded with Great Britain were invalid because they were "unequal treaties." The PRC also claimed that the British only occupied Hong Kong temporarily. After the PRC's accession to the United Nations in 1972, it notified the United Nations to remove Hong Kong from the list of territories that came under the supervision of the Special Committee on Colonialism, claiming that Hong Kong was part of the PRC.[6]

In spite of the protests of the PRC, the United Kingdom continued to govern Hong Kong. By the Charter of April 5, 1843, the Island of Hong Kong had been constituted as a colony under English law. The Order in Council of October 20, 1898, had added the New Territories to the colony and the Order in Council of December 27, 1898, had incorporated the Walled City of Kowloon

[3] Convention Respecting an Extension of the Hong Kong Territory 1898, *reprinted in* PETER WESLEY-SMITH, UNEQUAL TREATY 1989–1997 191–93 (1980).

[4] *See* Order in Council Providing for the Government of Territories Adjacent to Hong Kong Leased Under the Convention of June 9, 1898, Oct. 20, 1898, *reprinted in* NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG 247 (1991) (declaring the New Territories to be part of Hong Kong).

[5] *See* HANNUM, *supra* note 1, at 130; MINERS, *supra* note 4, at 3.

[6] *See* MINERS, *id.* at 4–6; WESLEY-SMITH, *supra* note 3, at 164–90.

into the colony.[7] The people of Hong Kong accepted these British legal documents as the constitutional documents of the territory. They also complied with the authority of the local government as well as the ultimate authority of the United Kingdom government. English common law applied in Hong Kong. The highest court in the judiciary was the Privy Council of the United Kingdom, which could overrule decisions handed down by the Hong Kong courts.

In *Winfat Enterprise (H.K.) Co. v. Attorney-General of Hong Kong*, the plaintiff land developers brought an action against the Hong Kong government for compulsorily acquiring, in 1981, land that the plaintiff claimed to own at the time of this acquisition. The plaintiffs sought compensation that took into account the potential development value of the land.[8] The Hong Kong government argued that they were bound by Section 12 of the Crown Lands Resumption Ordinance to disregard the development value of the land in determining the compensation amount. The land developer argued, *inter alia*, that the Convention of Peking 1898 provided that land that was required for official purposes to be bought at a fair price, and that expropriation was prohibited.

The Privy Council accepted that the compensation that the Hong Kong government had paid was less than the open market value of the land. However, Lord Diplock stated:

> What the High Court and Court of Appeal of Hong Kong are bound to enforce in the New Territories is the municipal law of Hong Kong made in the manner authorized by the Constitution as a British colony that has been granted to Hong Kong by the British Crown as sovereign of those territories for the duration of the cession.[9]

[7] Order in Council, Oct. 20, 1898; Order in Council, Dec. 27, 1899, *both reprinted in* WESLEY-SMITH, *supra* note 3, at 194–97; *see also* MINERS, *supra* note 4, at 54–63.

[8] Winfat Enters. (HK) Co. v. Attorney-General of Hong Kong, [1985] A.C. 733 (Eng. Privy Council).

[9] *Id.* at 747.

1.2. The Impact of the Succession of Hong Kong on Commercial Obligations

The succession of Hong Kong had a minimal impact on commercial obligations. Commercial treaty obligations were generally preserved. Article 153 of the Basic Law of Hong Kong provides that international agreements to which the PRC is, or becomes a party to, would apply to Hong Kong if so decided by the government of the PRC, after seeking the views of the Hong Kong government. Article 153 also provides that international agreements to which the PRC is not a party, but which were previously implemented in Hong Kong prior to the its restoration to the PRC, would continue to have legal effect in the Hong Kong SAR after the handover. Article 153 further states that the government of the PRC shall, as necessary, authorize or assist the government of the Hong Kong SAR to make appropriate arrangements for the application of other relevant international agreements to the Hong Kong SAR.

The Sino-British Joint Liaison Group reviewed the international agreements constituting Hong Kong's membership in more than 40 organizations. It decided that Hong Kong would continue to participate in 31 of them, and determined that there were ten other organizations in which the Sino-British Joint Liaison Group's approval was not required for Hong Kong SAR's participation. This latter group included the Organization for Economic Cooperation and Development and the Asia-Pacific Economic Cooperation. The Hong Kong SAR also continued to participate in the World Trade Organization after July 1, 1997.[19] The Sino-British Joint Liaison Group also reviewed the multilateral and bilateral treaties to which the United Kingdom was a party prior to the transfer of Hong Kong, and determined that more than 200 multilateral agreements would continue to apply to the Hong Kong SAR even if the PRC was not a signatory.

The Sino-British Joint Liaison Group, however, identified 180 bilateral agreements signed by the United Kingdom that previously extended to Hong Kong that would not apply to the Hong Kong SAR. These treaties generally related to air services, extradition, investment promotion, criminal matters, recognition and the enforce-

[19] *See* Hong Kong Trade Review, *supra* note 2, at 28.

ment of judgments. The Sino-British Joint Liaison Group drafted model agreements for the Hong Kong government to conclude with individual bilateral partners, with a view of effecting the continuation of the substance of the agreements.[20]

On June 20, 1997, the Permanent Representative of the PRC sent a Note to the Secretary-General of the United Nations. Annex I of this Note listed treaties to which the PRC was a member prior to the transfer of Hong Kong. This Note stated that these treaties would apply to the Hong Kong SAR. The Note explained that among these treaties, some related to foreign affairs and defense and, by their nature, must apply to the whole territory. Annex II of the Note listed treaties to which the PRC was not a party but which applied to Hong Kong prior to July 1. These treaties in Annex II would continue to apply to the Hong Kong SAR following the succession of Hong Kong. The Note also recorded that China had carried out all formalities required for the continuity of the treaties in the Annexes.[21]

On the same day, the Permanent Representative of the United Kingdom sent a separate Note to the Secretary-General expressing support for the Note and Annexes from China. The U.K. Note also listed the treaties that the United Kingdom would no longer be bound by in relation to Hong Kong following the succession on July 1, 1997. This Note stated that the respective depositories of the treaties had been formally notified of this position.[22] At the request of the PRC and the U.K. Permanent Representatives to the United Nations, the U.N. Secretary-General circulated the two notes to all

[20] *See* Wai, *supra* note 10, at 54–72 (listing treaties that were decided by the United Kingdom and China to apply to the Hong Kong SAR, as provided by the Constitutional Affairs Branch, Hong Kong Government, Nov. 1996); Miguel Santos Neves, *The External Relations of the Hong Kong Special Administrative Region, in* Hong Kong in Transition, *supra* note 11, at 271, 288–92.

[21] Note from the Permanent Representative, People's Republic of China, to the Secretary-General, United Nations, June 20, 1997, 36 I.L.M. 1675 (1997).

[22] Note from the Permanent Representative, United Kingdom, to the Secretary-General, United Nations, June 20, 1997, 36 I.L.M. 1684 (1997).

the Permanent Missions of the members states of the United Nations for their information on June 27, 1997, three days prior to the transfer of Hong Kong to the PRC.[23]

Hong Kong's treaty partners accepted these arrangements by the Sino-British Joint Liaison Group. In 1992, the United States of America passed the United States-Hong Kong Policy Act, which provided the legal basis under U.S. law for the continuation of Hong Kong's independent legal relationship with the United States.[24] Under Section 103(3) of this Act, Hong Kong is regarded by the United States as a nonsovereign entity and is treated as a territory that is fully autonomous from China with respect to economic and trade matters. Similarly, Japan accepted that the Hong Kong government had the capacity to conclude binding international agreements that would continue after succession. In preparation for the succession, Japan and Hong Kong concluded the Agreement for the Promotion and Protection of Investment on June 20, 1997, which provided for bilateral investment protections and explicitly stated that the agreement would remain in force for 15 years, long after Hong Kong's succession.[25]

The impact that Hong Kong's succession could have had on its public debt is speculative. From 1989 to July 1, 1997, Hong Kong did not have any public debt. As such, the issue of Hong Kong's succession to public debt did not arise. If Hong Kong had had public debt, the Hong Kong government would probably have remained responsible for the debt. The Hong Kong government was fiscally independent from the United Kingdom prior to succession, and remained fiscally independent from the government of the PRC after succession. As a result of this continuing fiscal independence, any public debt owed by Hong Kong would probably not have been terminated on succession or passed to the United Kingdom or the PRC.

[23] Note from the Secretary-General, United Nations, June 27, 1997, 36 I.L.M. 1675 (1997).

[24] United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701–5732.

[25] Agreement Between the Government of Japan and the Government of Hong Kong for the Promotion and Protection of Investment 1997, art. 15(2), 36 I.L.M. 1423 (1997).

Commercial obligations arising in connection with local Hong Kong laws, such as obligations related to laws relating to taxation or tariffs, were generally unaffected by the succession. For example, in 1996, the government of Hong Kong passed the Intellectual Property (World Trade Organization Amendments) Ordinance to comply with its international obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). In 1998, the government of Hong Kong reported to the World Trade Organization that the transfer of sovereignty from the United Kingdom to the PRC did not alter this legislation and Hong Kong continued to meet the standards for intellectual property protections in the TRIPS Agreement.[26]

As a result of the elaborate measures that the governments of Hong Kong, the United Kingdom and the PRC took to stabilize expectations *inter se* and with their treaty partners about the continuity or termination of obligations, courts in other states found the policies of their executive branches, in regard to Hong Kong's succession, to be sufficiently clear to give legal effect to them under domestic law. In *Edwards v. Canada*,[27] the appellant was a Canadian citizen whose source of income was salary earned as a pilot with Veta Ltd., a wholly owned subsidiary of Cathay Pacific Airways Ltd., which was incorporated, registered and resident in Hong Kong. In 1986, China and Canada had concluded an Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Between Canada and the People's Republic of China (the Canada-PRC Tax Treaty). The appellant argued that on Hong Kong's succession to China on July 1, 1997, the Canada-PRC Tax Treaty extended to Hong Kong, and therefore, from that date, his income should have been exempt from taxation in Canada. The Canadian government argued that the treaty did not extend to the Hong Kong SAR and therefore Edwards had been properly taxed on his income from July 1, 1997.

[26] Hong Kong Trade Review, *supra* note 2, at 27, 30.

[27] Edwards v. Canada, [2003] F.C.J. No. 1508 (Can. Ct. App. 2003); Edwards v. Canada, 2002 A.C.W.S.J. 4959 (Can. Tax Ct. 2002).

PRC and Portugal signed a secret agreement promising "reasonable cooperation" by both parties in the governance of Macau. In 1972, the PRC formally objected to the United Nations characterizing Macau as a colony. Following the Carnation Revolution in Portugal in 1974, Portugal renounced all its overseas colonies and territories.

From around this time, the PRC and Portugal agreed that Macau was the territory of the PRC. It was simply a matter of time before the various outstanding issues were negotiated and resolved. In 1979, the PRC and Portugal concluded a second secret agreement stipulating that Macau was a territory of the PRC under Portuguese administration.[32] Following the successful negotiation of the Joint Declaration on Hong Kong, the Chinese turned to negotiating a similar devolution agreement with Portugal concerning Macau in 1986. After four rounds of negotiations, China and Portugal signed the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau (the Joint Declaration on Macau) on March 26, 1987. Pursuant to this Joint Declaration on Macau, Macau was returned to Chinese rule on December 20, 1999. The substance articles of the Joint Declaration on Macau was very similar to the Joint Declaration on Hong Kong. These articles provided that the Macau would be designated as a SAR and would enjoy a "high degree of autonomy." The Macau SAR would maintain its current economic system, independent finances and separate customs territory. It would also have the power to enter into economic relations and agreements with other states, territories and international organizations. A Sino-Portuguese Joint Liaison Group was to be established to implement the Joint Declaration on Macau.[33]

[32] *See* Wang, *supra* note 30, at 179–80; Luke, *supra* note 30, at 724–25; Shipp, *supra* note 30, at 81–101.

[33] Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macau 1987, art. 2, Annex I, arts. VIII, X, Annex II, *reprinted in* SHIPP, *supra* note 30, at 129–42; *available at* Macau SAR Government Printing Bureau, http://www.imprensa.macau.gov.mo/bo/i/88/23/dc/declconj_e.htm (last visited Aug. 3, 2005).

Following the Joint Declaration on Macau, the People's Congress of the PRC adopted the Basic Law of the Macau Special Administrative Region of the Republic of China (the Basic Law of Macau) in 1993. Like the Basic Law of Hong Kong SAR, the Macau SAR was to have independent finances, separate monetary systems from China, and the power to enter into international relations and agreements. This "capitalist way of life" is guaranteed for 50 years.[34] Through devolution agreements and domestic legislation to give these agreements effect under national law, the PRC and Portugal ensured that the transfer of Macau back to China would be as smooth as the transfer of Hong Kong. On December 20, 1999, Macau was fully restored to PRC sovereignty after over 400 years of colonial domination.

2.2. The Impact of Macau's Succession on Commercial Obligations

China and Portugal and their trading partners recognized that Macau had the capacity to enter into international relations even though it was not a sovereign state. They also accepted that this capacity endured Macau's devolution to China. Their consensus ensured the continuity of some important treaties and commercial obligations. Macau was a member of the WTO prior to Macau's succession and remained a member after December 20, 1999.[35] Macau also remained bound by the General Agreement on Tarrifs and Trade, to which it was a party as of January 11, 1991.[36] The numerous laws that Macau enacted prior to succession relating to intellectual property protections remained in force following succession, thereby minimizing disruptions to international trade relating to intellectual property.[37] Had Macau incurred external debt prior to its

[34] The Basic Law of Macau Special Administrative Region of the People's Republic of China, arts. 5, 103–120, 135–141, *translated in* Shipp, *supra* note 30, at 143–71, *available at* Macau SAR Government Printing Bureau, http://www.imprensa.macau.gov.mo/bo/i/1999/leibasica/index_uk.asp (unofficial translation) (last visited Aug. 3, 2005).

[35] *See* World Trade Organization, Trade Policy Review: Macau, China 7 (2001) [hereinafter Macau Trade Review].

[36] *See id.* at 11.

[37] *See id.* at 19.

succession, this debt would have been the responsibility of the Macau government in accordance with Article 60 of the Organic Statute of Macau.[38] Such debt would probably have remained the responsibility of the government of the Macau SAR after succession, pursuant to Article 104 of the Basic Law of Macau.[39]

Contractual obligations binding on the Macau government prior to succession continued to be respected by the government of the Macau SAR. Since 1962, the Sociedade de Turismo e Diversoes de Macau, a private company, held the exclusive casino franchise in Macau. On July 23, 1997, the Macau government renewed the contract till 2001. The government of Macau SAR did not claim that concession had been terminated as a result of Macau's succession.[40]

3. CONDITIONING FACTORS

The successions of Hong Kong and Macau hardly affected commercial arrangements and are, in this respect, the smoothest successions in recent history.[41] Most disruptions related to noncommercial matters such as the protection of human rights, including the right of abode in Hong Kong. Economic conditions in Hong Kong, the region and the world were not affected negatively by these successions. The recession that affected Hong Kong in 1997 was due to contagion from the "Asian Flu," i.e., knock-on effects from the economic downturn in Thailand, rather than its restoration to the PRC.

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[38] Organic Statute of Macau, art. 60 (stating that "interest, repayment of loans and other financial obligations resulting from contracts or legislation . . . shall be financial obligations of the territory of Macau[.]").

[39] Basic Law of Macau, art. 104 ("The Macau Special Administrative Region shall have independent finances.").

[40] *See* MACAU TRADE REVIEW, *supra* note 35, at 16.

[41] *But cf.*, Xiaobing Xu & George Wilson, *The Hong Kong Special Administrative Region as a Model of Regional External Autonomy*, 42 CASE W. RES. J. INT'L L. 1, 27–28 (2000) (noting that Chinese foreign policy guidance caused some disruptions. Immediately after the transfer of Hong Kong, the Hong Kong SAR was instructed by China to leave the Asian Productivity Organization because

These successions of Hong Kong and Macau contrast against many of the other successions after the Second World War, which did disrupt global order. Participants generally accepted the devolution agreements concerning Hong Kong and Macau. This acceptance of devolution agreements was a significant departure from the international practice relating to decolonizations in Africa, in which newly independent states relied on the Nyerere doctrine to repudiate, with varying degrees of success, devolution agreements. There were no disputes about succession to debt obligations in Hong Kong and Macau, unlike the disagreements in relation to the dissolution of the Socialist Federal Republic of Yugoslavia (the SFRY). Contractual relations remained stable in the Hong Kong and Macau SARs by comparison, the dissolution of the SFRY was followed by significant disruptions to contractual obligations. These disruptions led to lawsuits before several national and international courts, and are discussed in Chapter 8. The direct participants in the successions of Hong Kong and Macau reached amicable and lasting agreements on the transfer of territory, unlike the decades-long feud over East Timor following Indonesia's annexation.

Six reasons explain why the successions of Hong Kong and Macau did not disrupt the international system. First, the overarching factor in Hong Kong's and Macau's successions is that these successions were consensual. The United Kingdom and Portugal were willing to restore Hong Kong and Macau respectively to the PRC. The consent of a predecessor state to relinquish sovereignty creates a vastly different dynamic from the nonconsensual successions, which can be mired in disagreements between successor and predecessor states.

The United Kingdom was willing to relinquish sovereignty over Hong Kong because its strategic interests in Hong Kong had changed over time. The military goals of Great Britain as an imperial power were no longer relevant to the United Kingdom. The economic goals of the United Kingdom in regard to Hong Kong could be served without having sovereign control over Hong Kong. More importantly, there was a prior binding international agreement obliging the United Kingdom to return the New Territories. As a generally law-

abiding member of the international community, the United Kingdom could not repudiate this unambiguous agreement without significant diplomatic costs. If the United Kingdom returned the New Territories to the PRC, the United Kingdom had to consider returning the rest of Hong Kong as well, which was integrated with, and dependent on, the New Territories.

Similarly, Portugal's imperialistic ambitions came to an end with its Carnation Revolution in 1974. Close bilateral ties between the PRC and Portugal allowed a solution to the problem of the status of Macau to be negotiated. By the 1980s, Portugal's principal interest in Macau was financial. Wang suggests that Portuguese officials only sought to "make as much money as possible" from Macau.[42] These financial interests could be protected by designating Macau as an SAR and did not require Portugal to retain sovereignty over Macau.

The second important factor contributing to the smooth successions of Hong Kong and Macau to the PRC was the length of time that international decision makers had to prepare for these successions. The succession of Hong Kong occurred after 15 years of preparations between the Chinese and British. These preparations involved high-level negotiations in 1982 and constant dialogue through the Sino-British Joint Liaison Group. Succession negotiations between the PRC and Portugal began incrementally and then proceeded intensely from around 1985. These negotiations benefited from the succession model that had been used in the devolution of Hong Kong. These long periods for negotiations allowed many difficult issues to be discussed and resolved by finding common ground or accepting pragmatic compromises. Notably, Portugal was keen to avoid its decolonization disasters in Africa and East Timor.[43] By providing sufficient time prior to a succession for international decision makers to reach consensus on the commercial outcomes of that succession, many post succession conflicts can be avoided.

[42] Wang, *supra* note 30, at 192–93.

[43] *See* Judith Krebs, *One Country, Three Systems? Judicial Review in Macau After Ng Ka Ling*, 10 PAC. RIM. L. & POL'Y 111, 122–23 (2000).

In contrast, in cases of nonconsensual succession, such as Indonesia's invasion of East Timor or the dissolution of the SFRY, there is little, if any, time prior to the succession for the predecessor and successor states and other decision makers to reconcile their competing interests. Consequently, conflicts tend to emerge in the aftermath of nonconsensual successions.

Lengthy preparations for a succession also provide time for third-party participants to receive and interpret signals from direct participants. These third parties can then adjust their expectations in regard to the territory in question. In the ideal scenario, when the succession finally occurs, international expectations about the outcomes of that succession would have already stabilized. In this way, the disruptions that can result from mismatched expectations are minimized. In the restoration of Hong Kong, all participants knew from 1984 that July 1, 1997 would be the date of succession. Prior to that date of succession, the PRC and the United Kingdom formally and informally notified their multilateral and bilateral partners of their intentions concerning continuity or termination of treaties, thereby minimizing disagreements with these partners after the succession of Hong Kong.

Third, the successions of Hong Kong and Macau were virtually seamless because the interests of direct participants in these successions converged. The differences between the negotiating positions of the PRC, Portugal and the United Kingdom should not be understated. Nevertheless, there was much common ground on which to build agreements. Many commentators agree that the overriding concerns of direct participants in Hong Kong's and Macau's successions were to reassure the business community and to minimize disruptions to the network of commercial arrangements.[44] If busi-

[44] *See* Robert Morgan, *The Transition of Sovereignty to the People's Republic of China and the Arbitration Regime in Hong Kong*, 12–5 MEALEY'S INTL. ARB. REP. 16 (1997) (noting the Solicitor General of Hong Kong's concern in 1995 that there should not be a legal vacuum on succession which would be very damaging the Hong Kong's reputation as a business center); Michael Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275, 308–09 (1999); Yash Ghai, *The Continuity of Laws and Legal Rights and Obligations in the SAR*, 27 HONG KONG L.J. 136, 137 (1997); Wang, *supra* note 30, at 180.

ness and trade in Hong Kong and Macau were disrupted by their successions, both the successor and predecessor states would be deprived of their principal anticipated benefit. This overriding common interest in preserving the commercial value of Hong Kong and Macau enabled negotiating parties to conclude devolution agreements that protected existing commercial obligations and preserved investor confidence.

Fourth, direct participants in the successions of Hong Kong and Macau reached consensus on the outcomes of succession because their bargaining powers were roughly equal. Adler and Silverstein argue that great imbalances in power tend to undermine negotiations rather than lead to outcomes in the power ordinate's favor.[45] This was the situation in the devolution agreements in British Africa, where the perception of being coerced into the agreements in exchange for independence allowed many successor states to repudiate the devolution agreements after their succession. The perception of a power imbalance had also led the PRC to claim that the treaties ceding Hong Kong and Portugal were void as unequal treaties.

By the time the PRC negotiated the Joint Declarations on Hong Kong and the Joint Declaration on Macau, it attained a similar level of international power as the United Kingdom and Portugal. The PRC, the United Kingdom and Portugual regarded the final outcomes as the best compromises that could be reached and recognized that the costs of renegotiating or repudiating their succession agreements would far outweigh any possible further advantages that could be obtained. Importantly, the international community regarded the Joint Declarations as binding on the United Kingdom, Portugal and the PRC. The international community accordingly adjusted their expectations in accordance with the Joint Declarations.

The fifth factor contributing to the stability of commercial arrangements concerning Hong Kong and Macau was the governance of Hong Kong and Macau as autonomous territories both

[45] Robert Alder & Eliott Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 16–19 (2000).

prior to and after their successions.[46] In most successions, the structures of power and control of one sovereign state over the territories in question were dismantled, and in their place were assembled new structures of governance connecting the territory to another sovereign state. Because Hong Kong and Macau were largely self-governing and remained so even after succession, the structures of governance did not have to be completely changed. Instead, the structures of internal governance were only modified to account for the replacement of one ultimate sovereign authority with another. By limiting the changes to the structures of governance, disruptions to commercial obligations that result from such changes can be minimized.

Sixth, the influence of third parties cannot be understated. Powerful third parties, such as investor states and corporations, had deep vested interests in the smooth transition of sovereignty in Hong Kong and Macau.[47] In 1995, Hong Kong was the 13th largest trading partner of the United States. Two-way trade exceeded $24 bn. In 1996, 426 U.S. companies had their regional headquarters or offices in Hong Kong.[48] Similarly, Japan had a large stake in preserving the commercial value of Hong Kong through Hong Kong's succession. In 1994, Japanese direct investment in Hong Kong was $13.3 bn., and Hong Kong imports from Japan were valued at $25 bn. 122 Japanese companies had set up their regional headquarters in Hong Kong and 388 Japanese companies had set up regional offices there.[49]

Although the Macau market was smaller, the value of its imports was still notable. In 1999, Macau's imports from the United States

[46] *See* Neves, *supra* note 20, at 272–73.

[47] *See* Neves, *supra* note 20, at 280–88; Xu & Wilson, *supra* note 41, at 31–38.

[48] *See* Secretary of State, United States-Hong Kong Policy Act Report, Part I.A (Mar. 31, 1996), *available at* http://www.usconsulate.org.hk/ushk/pi960331.htm (last visited Aug. 3, 2005); *see also* Richard Soloman, U.S. Policy Toward Hong Kong, Statement before the Subcommittee on East Asian Affairs and Pacific Affairs in the Senate Foreign Relations Committee, Apr. 2, 1992, *in* U.S. DEPARTMENT OF STATE DISPATCH, Apr. 6, 1992, at 277–79.

[49] *See* Wai, *supra* note 10, at 44.

were valued at 830.7 mn. MOP and imports from Japan were valued at 1 bn. MOP.[50] Exporters to Macau and other investors had strong incentives to ensure a smooth succession of Macau.

In order to protect their investments and export markets, the United States, Japan and other states and corporations applied a combination of direct and indirect pressure through formal and informal channels. Japan exerted considerable political influence on negotiations simply by virtue of its vast investments in Hong Kong. In April 1997 the Consul General of Japan in Hong Kong stated publicly that "Japan is very optimistic about Hong Kong," but he also "warned China to leave Hong Kong's systems and markets intact."[51]

The United States elected to pursue a less subtle strategy. Under the United States-Hong Kong Policy Act, recognition of Hong Kong's legal personality is subject to the proviso that the U.S. President may at any time issue a determination that Hong Kong is not sufficiently autonomous from China and, by an executive order, suspend the application of any U.S. laws that accord Hong Kong treatment different from that of China. Additionally, the Secretary of State is required by the Act to issue reports to Congress summarizing conditions in Hong Kong from March 31, 1993, to March 31, 2006.[52] This requirement applied direct pressure on Beijing to respect Hong Kong's autonomy even after the transfer of sovereignty in 1997.

Finally, the willingness of the creditors and investors to accept the arrangements by the Hong Kong and Macau Joint Liaison Groups concerning continuity or termination was critical. Had the creditors rejected the claims put forward by the Joint Liaison Groups, there could have been innumerable disputes in diplomatic arenas, international arbitration, tribunals and national courts. Different outcomes might have emerged from each of these arenas, thereby leading to

[50] *See* Direcaodos dos Servicos de Estatistica e Censos, External Trade, *available at* http://www.dsec.gov.mo/index.asp?src=/english_ncem/ncem1_main.asp (last visited Aug. 3, 2005).

[51] *See* Wai *supra* note 10, at 45.

[52] United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5731.

inconsistent outcomes. Such incoherence might have disrupted trade arrangements and affected investor confidence at a time when Hong Kong and Macau most needed to overcome their economic downturns caused by other extrinsic factors. The interests of the investors and creditors in ensuring continuity and certainty in commercial relationships were, however, aligned with similar interests by the predecessor and successor states. All participants thus accepted their succession plans in order to achieve continuity of global commercial cooperation.

4. APPRAISAL

The successions of Hong Kong and Macau measure favorably against the policies relating to state succession and commercial obligations.[53] Because the successions of Hong Kong and Macau were pursuant to international agreements that long provided for their devolution to the PRC, these successions were legitimate and the policy of preventing illegitimate successions was not implicated.

The successions of Hong Kong and Macau strongly promoted the policy of managing the impact of successions on commercial obligations. There were minimal disruptions to trade and other commercial arrangements. Disputes were preempted by careful planning by decision makers over decades, by involving third-party states and corporations with vested interests, and by disseminating agreements widely in the international community.

The policy of influencing substantive adjustments to support global order and sustainable growth was also promoted. Hong Kong and Macau became, on succession, Special Autonomous Regions with their commercial infrastructure intact. Adjustments to commercial arrangements were equitable because the obligations owed by the local governments of Hong Kong and Macau remained with the local governments. Additionally, the status of Hong Kong and Macau as SARs also respected the rights of self-determination of the people of Hong Kong and Macau to the extent that these peoples retained a degree of self-governance.

[53] *See supra*, Chapter 1, Section 4 (discussing community policies relating to state succession and commercial obligations).

Annexe 11

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of Professor Simon Chesterman

formally declared that as the continuation of the SFRY it would strictly abide by the SFRY's treaty obligations. This accorded with the wishes of other States that the FRY should abide by those obligations, albeit as one of the successor States of the SFRY. But other States were therefore faced with a dilemma: they wanted the FRY to respect the treaties, especially those on human rights, to which the SFRY had been a party, but they could not accept the FRY as a party on the basis of continuation of statehood. It was not only a matter of principle: acceptance of the FRY's assertion of continuation could have had an effect on the important question of succession to other rights and obligations of the SFRY, especially with regard to property and debts (see below). In 2000, the FRY accepted that it was not the continuation of the SFRY, and in 2003 changed its name to Serbia and Montenegro. In 2006 Montenegro seceded by agreement becoming an independent State and joining the United Nations. For Kosovo, see p. 17.

Czechoslovakia

At midnight on 31 December 1992, the State of Czechoslovakia was dissolved and succeeded by two States, the Czech Republic and Slovakia. Both declared themselves to be successors to Czechoslovakia and committed to fulfilling its treaty and other obligations.[39] In this they consciously applied the rules in Article 34 of the 1978 Convention. There was no suggestion that the Czech Republic, although the larger of the two new States, was the continuation of Czechoslovakia. The policy adopted by both States with regard to all *multilateral* treaties to which Czechoslovakia had been a party was that they would continue to bind each of the new States. In addition, each State regarded itself as a signatory of all those multilateral treaties that, before the dissolution, had been signed but not ratified. Hence, the 'velvet divorce'.

Bilateral treaties entered into by Czechoslovakia were regarded by the two new States as continuing to apply, except in so far as this would not be appropriate. For example, the application of certain treaties had always been limited to the territory of Slovakia, in particular the 1977 Czechoslovakia - Hungary Treaty regarding the Danube Dam Project. In the *Gabčíkovo - Nagymaros* case, the International Court of Justice decided that Article 12 of the 1978 Convention (succession does not, as such, affect territorial regimes) reflected a rule of customary international law and applied to the 1977 Treaty; thus the dissolution of Czechoslovakia did not affect the application of the 1977 Treaty to Slovakia, it becoming binding on Slovakia alone on the dissolution.[40]

The Czech Republic and Slovakia each had discussions with certain States which had had bilateral treaties with Czechoslovakia, seeking confirmation

[39] See the entries for the Czech Republic and Slovakia in *UN Multilateral Treaties*, 'Historical Information' (n. 18 above); V. Mikulka, 'The Dissolution of Czechoslovakia and Succession in Respect of Treaties' (1996) *Development and International Co-operation* 45–63.

[40] *Gabčíkovo - Nagymaros Project (Hungary v. Slovakia)*, *ICJ Reports* (1997), p. 3, paras. 116–24; 116 ILR 1, ILM (1998) 162.

that, unless there was a special reason, all the treaties would continue to apply to the two new States. The discussions were also an opportunity to consider whether some treaties might be terminated or be replaced by new ones, particularly taking into account the political changes that had taken place since the end of the communist regime.

Hong Kong and Macao

The circumstances of the handover of Hong Kong to China at midnight on 30 June 1997 were unique and do not provide much in the way of insight into the more usual treaty succession problems. Elaborate arrangements were made by China and the United Kingdom to enable treaty continuity after the return of Hong Kong to China, and to leave the Hong Kong Special Administrative Region (HKSAR) a large degree of autonomy in the conclusion of treaties in its own right. (For details, see Aust MTLP, pp. 386–91, and www.doj.gov.hk.)

Similar provisions were made for Macao.[41]

Succession to State property, archives and debts

As with the 1978 Vienna Convention, the Vienna Convention on the Succession of States in respect of State Property, Archives and Debts 1983 ('the 1983 Convention')[42] does not provide answers to all the myriad problems raised by the topic. Now twenty-six years old, it has received only seven of the fifteen ratifications needed for it to enter into force. They are those of the new States of Croatia, Estonia, Georgia, Macedonia, Slovenia and Ukraine, (as well as Liberia) which seemed to have believed (not unreasonably) that the 1983 Convention might help in the settlement of their own succession issues. That Convention began as an ILC draft, and contains many provisions representing progressive development of international law. It neither reflects customary law, nor makes new law that would be generally acceptable. It may be that the subject is just not amenable to prescriptive treatment. As with succession to bilateral treaties, it may be something that can only be dealt with mainly on a case-by-case basis.

One of the main flaws of the 1983 Convention is the heavy reliance throughout on equity as a guiding, but supplementary, principle for the distribution and apportionment of tangible property. This was entirely understandable as a matter of principle, but it contributed to the lack of effectiveness of the 1983 Convention, making it just too vague for application to specific situations. States have to agree on the distribution of assets, yet the 1983 Convention

[41] See the statement by China recorded in *UN Multilateral Treaties* (n. 18 above).

[42] ILM (1983) 298. For the treaty, the ILC draft and commentary, and an introduction, see A. Watts, *The International Law Commission 1949–1998*, Oxford, 1999, vol. II, pp. 1209–329. See also A. Aust, 'Limping Treaties: Lessons from Multilateral Treaty-making' (2003) NILR 243, at 254–5. Oppenheim has a summary of the Convention, at Oppenheim, pp. 237–40.

gives them no clear or precise guidance on how to do this. It also gives undue emphasis to the simpler case of former overseas territories, yet decolonisation was largely over by the time the 1983 Convention was adopted.

Former Yugoslav republics

So, the 1983 Convention was not a useful guide for the negotiations between the former Yugoslav republics on the complex problems of succession to State property, archives and debts, although the lengthy and difficult negotiations are instructive in understanding the problems and how they can best be met. The principle of equity was of little practical help.[43]

Until the fall of the Milošević regime, the negotiations dragged on, largely because the FRY maintained the attitude that it was not a successor State to the SFRY.[44] The 1983 Convention also gave further scope for delaying tactics. Article 8 provides that the 'State property' of the predecessor State is the property owned by it according to its internal law. The SFRY had claimed to be the most purist of all communist States in believing that it was the people who owned all property. Under the SFRY Constitution, property was therefore in 'social ownership', so replacing ownership by the State with ownership by society as a whole. It was therefore argued – rather Jesuitically – that either all property (including private property) was State property or that there was no State property that could be the subject of State succession. Eventually, on 29 June 2001, the five successor States concluded the Agreement on Succession Issues,[45] which entered into force in 2004. Although its articles on State archives were helpful, the rest were not of much assistance, the settlement of the issue of State debts being done by horse-trading, as graphically illustrated by the fifty pages of detailed annexes. The Agreement does not mention the 1983 Convention.

Membership of international organisations[46]

A new State will *not succeed* to membership of the United Nations or other international organisations if the predecessor State still exists. In 1947, India (an original Member of the United Nations in 1945) was partitioned into India and Pakistan. Since India was regarded by the General Assembly to be the continuation of India, the new State of Pakistan had to apply for membership. If, however, a new State is the result of the union of two States, at least one of which was a UN Member before the union, the new State will usually be accepted as a

[43] For an authoritative account of the problems experienced in the negotiations, see A. Watts, 'State Succession: Some Recent Practical Problems', in V. Goetz, P. Selmer and R. Wolfrum (eds.), *Liber Amicorum Günther Jaenicke*, Berlin, 1998, pp. 405–26.
[44] See p. 369 above. [45] See 2262 UNTS 251 (No. 40296); ILM (2002) 1.
[46] See J. Klabbers, *An Introduction to International Institutional Law*, Cambridge, 2nd edition, 2009, pp. 93–114.

Member under its new name, and without having to apply for membership. When the two Yemens joined together as one State, they retained one seat in the United Nations under the name of Yemen, no application for membership being required. Egypt and Syria were original Members, but had only one UN seat after they joined together in 1958 as the United Arab Republic. When they separated in 1961, Egypt continued as a Member under the name of the United Arab Republic (changing to the Arab Republic of Egypt in 1971), and Syria resumed its separate UN membership.[47]

When the Soviet Union broke up in 1991, following the precedent of India, the Russian Federation was accepted by the UN membership as the continuation of the Soviet Union and so did not have to apply for membership of the United Nations or other international organisations.[48] By contrast, twelve of the former Soviet republics each had to apply for UN membership, Belarus (previously the Byelorussian SSR) and Ukraine (previously the Ukrainian SSR) already being members in their own right.[49]

Since neither the Czech Republic nor Slovakia claimed to be the continuation of Czechoslovakia, they each had to apply for membership of international organisations, each becoming a Member of the United Nations in 1993.

Between 1991 and 1992, the Socialist Federal Republic of Yugoslavia (SFRY) broke up into five States: Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY). The first four applied for UN membership and were admitted between 1992 and 1993.[50] But the FRY's claim to be the continuation of the SFRY was rejected by the UN membership. In September 1992 the UN General Assembly decided that the FRY could not automatically continue the membership of the SFRY; it should apply for membership, and meanwhile could not take part in the work of the General Assembly.[51] For some years the FRY was in something of a legal limbo.[52] The consistent advice from successive UN Legal Counsel was that the effect of the General Assembly's decision was that the membership of 'Yugoslavia' was not terminated or suspended. But, its practical consequence was that FRY representatives could no longer take part in the work of the General Assembly and its subsidiary organs, or in conferences or meetings

[47] See the entry for United Arab Republic in *UN Multilateral Treaties* (n. 18 above).
[48] Y. Blum, 'Russia takes over the Soviet Union's Seat at the United Nations' (1992) EJIL 354.
[49] See pp. 186–7 above.
[50] Because of Greece's absurd objections to the simple name of 'Macedonia' (which is also the name of a northern Greek province), Macedonia was not admitted into the United Nations until 1993, and then only under the graceless title of '*the former* Yugoslavia Republic of Macedonia' (emphasis added), and sits with the 'T's. See also Aust MTLP, p. 420 on the Interim Accord 1995.
[51] See UNSC Res. 757, 777, 821 and 1074, and UNGA Res. 47/1. 47/229 and 48/88; ILM (1992) 1421.
[52] (1992) BYIL 655–8. See also the report of the Badinter Commission, 92 ILR 162 at 166. The ICJ elided the issue in *Genocide (Bosnia v. Yugoslavia)* (Provisional Measures), *ICJ Reports* (1993), p. 3, at pp. 20–3; 95 ILR 1; ILM (1993) 888. The full history of UN/FRY relations can be found in its judgment on the *Application for Revision of the 1996 Judgment, ICJ Reports* (2003), paras. 24–64. See also n. 54 below.

Annexe 12

to the Expert Report
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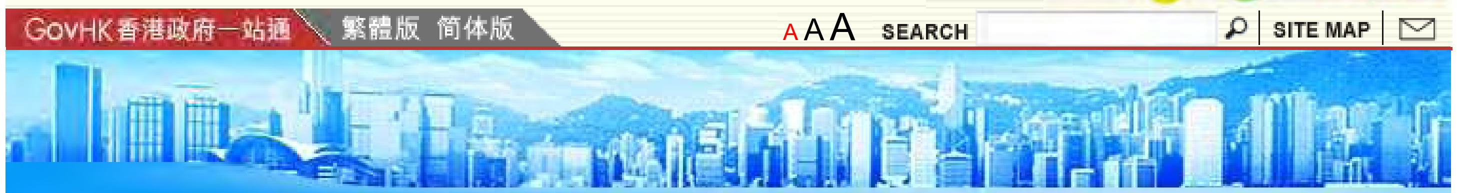

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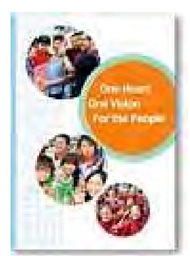


EQUAL OPPORTUNITIES (SEXUAL ORIENTATION) FUNDING SCHEME 2014-15

Demarcation of District boundary between Eastern and Wan Chai Districts

> Topical Issues > **The Joint Declaration**

The Joint Declaration

Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China have reviewed with satisfaction the friendly relations existing between the two Governments and peoples in recent years and agreed that a proper negotiated settlement of the question of Hong Kong, which is left over from the past, is conducive to the maintenance of the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries on a new basis. To this end, they have, after talks between the delegations of the two Governments, agreed to declare as follows:

1. The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.

2. The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997.

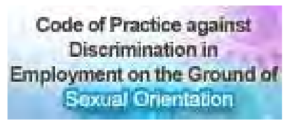
3. The Government of the People's Republic of China declares that the basic policies of the
People's Republic of China regarding Hong Kong are as follows:

(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong.
(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.

(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

(4) The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government. Chinese and foreign nationals previously working in the public and police services in the government departments of Hong Kong may remain in employment. British and other foreign nationals may also be employed to serve as advisers or hold certain public posts in government departments of the Hong Kong Special Administrative Region.

(5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative



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Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

(6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory.

(7) The Hong Kong Special Administrative Region will retain the status of an international financial centre, and its markets for foreign exchange, gold, securities and futures will continue. There will be free flow of capital. The Hong Kong dollar will continue to circulate and remain freely convertible.

(8) The Hong Kong Special Administrative Region will have independent finances. The Central People's Government will not levy taxes on the Hong Kong Special Administrative Region.

(9) The Hong Kong Special Administrative Region may establish mutually beneficial economic relations with the United Kingdom and other countries, whose economic interests in Hong Kong will be given due regard.

(10) Using the name of 'Hong Kong, China', the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations.
The Government of the Hong Kong Special Administrative Region may on its own issue travel documents for entry into and exit from Hong Kong.

(11) The maintenance of public order in the Hong Kong Special Administrative Region will be the responsibility of the Government of the Hong Kong Special Administrative Region.

(12) The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

4. The Government of the United Kingdom and the Government of the People's Republic of China declare that, during the transitional period between the date of the entry into force of this Joint Declaration and 30 June 1997, the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People's Republic of China will give its cooperation in this connection.

5. The Government of the United Kingdom and the Government of the People's Republic of China declare that, in order to ensure a smooth transfer of government in 1997, and with a view to the effective implementation of this Joint Declaration, a Sino-British Joint Liaison Group will be set up when this Joint Declaration enters into force; and that it will be established and will function in accordance with the provisions of Annex II to this Joint Declaration.

6. The Government of the United Kingdom and the Government of the People's Republic of China declare that land leases in Hong Kong and other related matters will be dealt with in accordance with the provisions of Annex III to this Joint Declaration.

7. The Government of the United Kingdom and the Government of the People's Republic of China agree to implement the preceding declarations and the Annexes to this Joint Declaration.

8. This Joint Declaration is subject to ratification and shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing before 30 June 1985. This Joint Declaration and its Annexes shall be equally binding.

Done in duplicate at Beijing on 19 December 1984 in the English and Chinese languages, both texts being equally authentic.

(Signed) For the Government of the United Kingdom of Great Britain and Northern Ireland	(Signed) For the Government of the People's Republic of China

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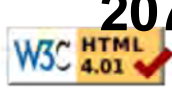
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Annexe 13

to the Expert Report
of Professor Simon Chesterman

Oliver Dörr
Kirsten Schmalenbach
Editors

Vienna Convention on the Law of Treaties

A Commentary

entails territorial changes is State succession.[72] Jurisprudence of international courts regarding the 'moving treaty frontier' rule to be applied in these cases does not exist. However, there are many examples of States practice.

> One example is the case of Newfoundland, a British dominion which became a province of Canada in 1949. Concerning the territorial scope of the treaties concluded by Canada the Canadian government, it was stated that "Newfoundland became part of Canada by a form of cession and that, consequently, in accordance with the appropriate rules of international law [...] Newfoundland became bound by treaty obligations of general application to Canada".[73]

31 The 'moving treaty frontiers' rule, however, also has **certain limits**. Depending on the object or the purpose of the treaty, a territorial change may render its execution impossible. In this case, the rule does not apply.

> Art 26 Harvard Draft took into account these limits. It read: "A change in the territorial domain of a State, whether by addition or loss of territory, does not, in general, deprive the State of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as a result of the change."[74]

Treaties providing for an objective territorial regime, such as demilitarization treaties, may serve as an example. If a States Parties loses the territory in question, it no longer has the capacity to apply the treaty. In such a case, the provision on the impossibility of performance (→ Art 61) may be invoked. The State concerned may terminate or withdraw from the treaty. The obligations which it had to fulfil cease to exist and may only be transferred to another State according to the law of State succession.[75]

32 **In States practice**, especially when a territorial change is carefully planned, the territorial scopes of each of the treaties concluded by the States involved in a territorial change are determined in detail.[76] When Hong Kong became a Special Administrative Region of China with effect of 1 July 1997, the governments of China and the United Kingdom sent a note to the Secretary-General determining the application of treaties to the territory of Hong Kong. In 1984, China and the United Kingdom had agreed that Hong Kong would enjoy a high degree of autonomy, except in foreign and defence affairs, which would be the responsibility of China. Furthermore, international agreements to which China was not a party but which

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[72] One of the few authors to point out the close relationship between territorial changes and State succession is *RY Jennings* General Course on Principles of International Law (1967) 121 RdC [illegible]

[73] (1968) 6 CanYIL 276.

[74] See Harvard Draft 657 *et seq*.

[75] See *Klein* (n 3) 943.

[76] For further examples of States practice in the case of a transfer of territory, see *AMJ Heijmans* The Netherlands and State Succession with Regard to Treaties in *HF van Panhuys* (ed) International Law in the Netherlands (1978) 405, 410 *et seq*.

were implemented in Hong Kong would continue to be implemented in Hong Kong.[77] Therefore, the note read as follows:

> "I. The treaties listed in Annex I to this Note, to which the People's Republic of China is a party, will be applied to the Hong Kong Special Administrative Region with effect from 1 July 1997 as they:
> (i) are applied to Hong Kong before 1 July 1997; *or*
> (ii) fall within the category of foreign affairs or defence or, owing to their nature and provisions, must apply to the entire territory of a State; or
> (iii) are not applied to Hong Kong before 1 July 1997 but with respect to which it has been decided to apply them to the Hong Kong Special Administrative Region with effect from that date (denoted by an asterisk in Annex I).
>
> II. The treaties listed in Annex II to this Note, to which the People's Republic of China is not yet a party and which apply to Hong Kong before 1 July 1997, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997.
>
> The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997."[78]

33 In **cases of State succession**, the 'moving treaty frontiers' rule and the law on State succession are usually applied simultaneously. A good example is the reunification of Germany. The German Democratic Republic (GDR) ceased to exist as a sovereign State, and its territory was integrated into the Federal Republic of Germany (FRG).[79] From the point of view of the FRG an enlargement of its territory took place. At the same time, the FRG became the successor State of the GDR.

> Consequently, the Unification Treaty[80] provided for two different rules. Art 11 applied the 'moving treaty frontiers' rule by stating that treaties concluded by the FRG, except for some agreements listed in an annex, became binding upon the territory of the former GDR ('moving treaty frontiers' rule). Art 12 dealt with the treaties concluded by the former GDR. It stated that the FRG would enter into consultation with each one of the States Parties in order to decide together on the continuation, amendment or extinction of the treaty in question (special rules on State succession).[81]

[77] For further information, see *R Mushkat* The International Legal Status of Hong Kong under Post-Transitional Rule (1987) 10 Houston JIL 1, 14 *et seq.*

[78] Letter of Notification of Treaties Applicable to Hong Kong after 1 July 1997, Deposited by the Government of the People's Republic of China with the Secretary-General of the United Nations on 20 June 1997, 36 ILM 1675.

[79] For further details, see *K Hailbronner* Legal Aspects of the Unification of the Two German States (1991) 2 EJIL 18–41.

[80] 1990 Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity 30 ILM 457.

[81] For further details concerning the application of Art 12, see *D Papenfuß* The Fate of the International Treaties of the GDR Within the Framework of German Unification (1998) 92 AJIL 469–488.

Annexe 14

to the Expert Report
of Professor Simon Chesterman

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Legal System of the Hong Kong Special Administrative Region

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ESSAYS

THE LEGAL SYSTEM OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

THE HONORABLE J.F. MATHEWS, C.M.G., J.P.*

1. INTRODUCTION

1997 will be a momentous year for Hong Kong — a year dominated by the great and historic event: the transfer of sovereignty from Britain to the People's Republic of China on July 1. It will be a year in which Hong Kong people become the inhabitants of the Hong Kong Special Administrative Region of the People's Republic of China — a year in which the vision "one country, two systems" will move from the theoretical to the actual, and the soothsayers will be confronted with their predictions — both gloomy and glowing.

The legal system is at the heart of the concept of "one country, two systems." In this paper, I will outline the essential features of Hong Kong's current and future legal systems; I will describe the legal work that has been done to ensure a smooth transition; and I will give my personal assessment of the changes that will take place in the months and years to come.

2. THE PRESENT LEGAL SYSTEM

American lawyers will find much that is familiar to them in the law and its practice in Hong Kong. I refer to the content of the law; the underlying values and ideals of the common law; and the nature of the legal profession in Hong Kong.

The underlying values and ideals of the common law are

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epitomized in the concept of the rule of law. The Governor of Hong Kong has referred to *two bedrock principles* underpinning his program. The first is the economic principle that Hong Kong must first create wealth before spending a share of it on improving its public services. The second is the rule of law. Let me quote what the Governor said about the rule of law in a speech he made in 1994:

> The rule of law is essential for Hong Kong's future. It begins with individuals and their right to seek the protection of the Courts, in which justice is administered by impartial judges. It protects the freedom of individuals to manage their affairs without fear of arbitrary interference by the Government or the improper influence of the rich and powerful. Its starting point is the individual but it encompasses the whole of society. For the business community in particular, the rule of law is crucial. Without it, there is no protection against corruption, nepotism or expropriation. Only under the rule of law are businessmen guaranteed the level playing field and the competitive environment which they need.[1]

There are several vital principles under the umbrella of the rule of law, all of which are alive and well in Hong Kong. One is that laws operate separately from the political system; they are published and are accessible; and they provide a degree of certainty and predictability as to how disputes are to be resolved. A second principle is that everyone, no matter what station, is subject to the law, and that a person can only be punished for conduct that is a breach of the law. A third principle is that of equality before the law: no one receives better or worse treatment under the law because of his or her status, wealth, race, and so on. A fourth principle is that the settlement of disputes is in the hands of judges who are independent of the executive and who are not subject to pressure from any source in carrying out their duties.

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[1] Governor Christopher Patten, 1994 Policy Address, *in Looking Far Beyond the Final Thousand Days of British Rule*, S. CHINA MORN. POST, Oct. 6, 1994, at 6.

Hong Kong's commitment to the rule of law is underpinned by the existence of justiciable human rights. The Hong Kong Bill of Rights Ordinance, enacted in 1991, allows anyone to challenge pre-existing laws, or current government policies and practices, as being inconsistent with the Ordinance. In addition, laws enacted after the Bill of Rights Ordinance can be challenged under Hong Kong's main constitutional instrument, the Letters Patent, if they are thought to be inconsistent with the International Covenant on Civil and Political Rights.

3. The Future

I have described the essential nature of Hong Kong's *current* legal system. But what of the future? On July 1, 1997, Hong Kong will become a Special Administrative Region ("S.A.R.") of the People's Republic of China ("P.R.C."). The transfer of sovereignty, the future administration of Hong Kong, and the preservation of Hong Kong's economic, political, and legal systems, are governed by the Sino-British Joint Declaration signed in December 1984, a binding international treaty registered with the United Nations. For fifty years beyond 1997 it guarantees "one county, two systems." Except in respect of defense and foreign affairs, which will be the responsibilities of the Central People's Government, the S.A.R. will enjoy a high degree of autonomy. It will have its own government and legislature composed of local inhabitants. It will retain the status of a free port and separate customs territory. Its independent role in economic and trade fields will be preserved. The Hong Kong S.A.R. will mirror, in all significant institutions and policies, the Hong Kong of today.

The Joint Declaration guarantees the continuance of the legal system. This is repeated in the Basic Law — the law enacted by the National People's Congress of the P.R.C. as the constitutional framework for Hong Kong as from July 1, 1997. Article 8 of the Basic Law is worth citing in full:

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

There are specific guarantees in the Joint Declaration and Basic Law relating to the legal system, including:

- An independent judiciary with security of tenure;
- The use of the English language, in addition to Chinese, in the courts;
- Reliance on precedents from other common law jurisdictions;
- An independent public prosecution service;
- The continuing ability of overseas lawyers and law firms to practice in Hong Kong;
- A Hong Kong based Court of Final Appeal, which will replace the Privy Council in London as the final appellate court for Hong Kong; and
- Requirement that the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

4. Preparing for the Future

These guarantees of the continuity of our legal system are of crucial importance to the community. But that continuity can only be realized in practice through the work being done to prepare for the transition of the legal system. Hong Kong has prepared itself, and prepared itself well, for the legal aspects of the transition in a number of vital areas.

4.1. Bilingual Laws

One historic and unique task we are undertaking is the production of bilingual laws. In the past, legislation in Hong Kong was enacted only in the English language. But since 1989 all new Ordinances have been drafted in English and Chinese, with both texts equally authentic. Work is also in hand to translate into Chinese the Ordinances which were enacted in English only. There are about twenty-one thousand pages of such legislation. We have authenticated nearly half of them. In view of the progress made and the remaining work to be done, I am confident that we will have a fully bilingual statute book by the

transfer of sovereignty.

4.2. Localization of Laws

The localization of law is needed because a number of the laws of Hong Kong are United Kingdom statutes which have been extended to Hong Kong. Many of these cover areas of major importance to Hong Kong, such as civil aviation, merchant shipping, and copyright. These statutes will cease to have effect in Hong Kong after June 1997. Therefore, it will be necessary to "localize" them — that is, to replace them by legislation enacted in Hong Kong.

We are achieving this through a number of localization Ordinances. We have already enacted many of these, and I am reasonably confident that our work in this area will be completed before July 1, 1997.

4.3. Adaption of Laws

Another exercise is under way to ensure that all local Ordinances are in conformity with the Basic Law. We need to comb through all our Ordinances — numbering around 640 — to pick up all points that may conflict with the Basic Law. Many of these involve simple changes of language: "Governor" to become "Chief Executive" and dropping the word "Royal," for example. Other changes will involve substantive and, in some instances, complex questions.

So far, adaptation proposals covering about 470 Ordinances have been handed over to the Chinese side in about 130 papers. We aim to hand over proposals for the remaining Ordinances in the near future. As most of those are uncontroversial, it should not be difficult for agreement to be reached on the substance of these proposals.

We have also sought to discuss with the Chinese side the mechanism for bringing the necessary adaptation provisions into force on July 1, 1997. It is essential that the modalities for the adaptation of laws are made known at an early date and that the necessary amendments to individual ordinances are achieved in a proper and timely manner. Exchanges of views between experts of the two sides have been held, and I look forward to a satisfactory outcome.

It is clear that a great deal of work has been done in the two areas of localization and adaptation of laws, and more remains to

be done. My department is pushing ahead with the work and our programs will allow us to complete the work in a timely fashion. I am confident that as a result of our work, the integrity of the Hong Kong statute book will be maintained after June 30, 1997.

4.4. *International Rights and Obligations*

Another important area of the work in preparing for the transition is that of 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. These arrangements cover such fields as civil aviation, merchant shipping, private international law, protection of labor standards, and customs cooperation. We needed to take action in order to ensure the continued application of these arrangements after June 30, 1997.

The Sino-British Joint Liaison Group has established a Sub-Group on International Rights and Obligations in order to carry out this task. The work is nearing completion. 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, such as the World Trade Organization, the Customs Cooperation Council, the International Maritime Organization, and the World Intellectual Property Organization. Work on the mechanism needed to effect the continued application of these treaties has either been done or is now taking place in the Joint Liaison Group.

Over the years Britain also extended a large network of *bilateral* agreements to Hong Kong in a variety of practical areas, for example, air services, extradition, and enforcement of judgments in civil and commercial matters. On July 1, 1997, all these agreements will automatically lapse, unless renegotiated to continue beyond 1997. This would have serious implications. For example, if Hong Kong had no extradition agreements, we could not seek the return of fugitive criminals to stand trial in Hong Kong and, more importantly, criminals or those accused of serious criminal offenses who fled to Hong Kong could not lawfully be extradited. Hong Kong could become a haven for the world's crooks.

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. A number of bilateral agreements have already been signed. These include fifteen air services agreements, eleven investment promotion and protection agreements, six surrender of fugitive offenders agreements, and one mutual legal assistance agreement. Further agreements have been cleared or are awaiting clearance in the Joint Liaison Group for signature. 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. Many of these agreements will need to be supported by new domestic legislation, for example those in respect of surrender of fugitive offenders, mutual legal assistance, and transfer of sentenced persons. The necessary bills are being prepared and promoted with a view to their enactment before the transfer of sovereignty.

4.5. *Mutual Understanding*

Another necessary task in relation to the transition is that of enhancing mutual understanding with our legal counterparts in the People's Republic of China and establishing a good working relationship with them. After 1997, two different legal systems will co-exist in China. It is most important that lawyers and officials should get to know how the two systems work. Strengthening the contacts and exchanges between the two sides over legal issues will bring mutual benefits springing from greater understanding. Channels for achieving these goals include organizing visits to and from China, and holding briefings for visitors from China.

In 1995, my department organized a total of twenty incoming visits and ten outgoing visits. One of these was my own visit to Beijing and Shanghai, where I had the opportunity to discuss many issues of common interest. In 1996, there were forty-one incoming visits and nine outgoing ones. I am convinced that these contacts will help to foster the mutual understanding that is essential to a smooth transition.

5. THE ADOPTION OF EXISTING LAWS

As I mentioned earlier, Article 8 of the Basic Law provides that the laws previously in force in Hong Kong shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region. We have been reviewing the existing Hong Kong laws in order to ascertain how the relevant provisions should be adapted to comply with the Basic Law. Most adaptation amendments only involve changes of terminology, for example, replacing "Governor" with "Chief Executive."

We are disappointed by the recent decision of the Standing Committee of the National People's Congress that twenty-four existing Ordinances wholly or in part contravene the Basic Law and, to the extent of that contravention, should not be adopted as the laws of the Special Administrative Region. Those provisions include three sections in the Bill of Rights Ordinance, and the provisions relating to freedom of assembly and freedom of association in the Societies Ordinance and the Public Order Ordinance.

There is no legal basis for the assertion that those provisions contravene the Basic Law. On the contrary, the freedom of assembly and the freedom of association currently provided for in the Societies Ordinance and the Public Order Ordinance are themselves guaranteed by the Basic Law. Mr. C.H. Tung, who will be the Chief Executive of the Special Administrative Region, has promised that new legislation will be put forward in due course to replace the repealed provisions, and this will take account of the views of the Hong Kong public as expressed through a consultation exercise. We hope the resulting legislative proposals will reflect the wish of the community to preserve civil liberties in line with the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as currently applied to Hong Kong. Those provisions, as promised in the Joint Declaration and Basic Law, will remain in force after the transfer of sovereignty.

6. A PERSONAL ASSESSMENT

I mentioned earlier that 1997 will bring some changes to the law. Let me now give my personal assessment of the main changes

that will occur.

6.1. *The Introduction of a Detailed Written Constitution*

Hong Kong's current constitution is based on the Letters Patent and Royal Instructions, which are broadly framed documents which trace their origins to late 19th century models produced in London for use in a wide diversity of territories. This constitution will be replaced as from July 1 this year, when the Basic Law comes into operation. That document, which contains 160 articles and three annexes, is a detailed constitutional framework for the Hong Kong Special Administrative Region for the next fifty years. Hong Kong will, for the first time, have a modern constitution and one specifically written for it.

This will have great significance for our legal system. The Basic Law is not simply a statement of intentions nor is it a policy document. It will be part of Hong Kong's domestic law and a law which touches so much of Hong Kong's way of life. It will be a law which the Hong Kong courts and judges will have to apply, uphold, and interpret. Lawyers will need to have a full and confident familiarity with it.

Litigants will be able to base their arguments on provisions in the Basic Law and challenge actions that are believed to be inconsistent with them. Judicial review of government administrative action will take on a new lease of life.

Working with and understanding the Basic Law will present a new experience for the legal profession and for the courts. The Basic Law will create a new era of constitutional law and constitutional litigation. The profession will need to abandon ingrained ways of thinking and to adapt to this new legal order. I have every confidence in its ability to do so.

6.2. *The Appellate System*

As from July 1 this year, appeals to the Judicial Committee of the Privy Council will not be possible. Instead, Hong Kong will have its own Court of Final Appeal. The fact that this court will be in Hong Kong, not Beijing, and will be composed of judges imbued with the values of the common law, is one of the most reassuring aspects of "one country, two systems."

Much work has already been done to prepare for the setting up of the court. The legislation needed to establish the court was enacted in 1995, following a Sino-British agreement made in June

of that year. Detailed rules governing the procedures of the Court have been drafted and are being considered by a working group set up by the Judiciary and including representatives of the Law Society, Bar Association, and my department.

The Sino-British agreement on the Court of Final Appeal, made in June 1995, provided that the team designate of the Hong Kong Special Administrative Region should be responsible for the preparation for the establishment of the Court of Final Appeal on July 1, 1997, with the British side (including relevant Hong Kong Government departments) participating in the process and providing its assistance.

Now that the Chief Executive (designate) has been appointed, it will be possible for this agreement to be implemented. The establishment on July 1, 1997, of a strong Court of Final Appeal is a development that is important for the continuity of our judicial system. The British side, including relevant government departments, will provide full assistance in this process.

6.3. *The Greater Use of Chinese in Hong Kong Courts*

The process of using Chinese in the courts has been a gradual one. It started in the magistracy in 1974, and later was extended to some proceedings in the higher courts. Provided that necessary amendments in respect of the language ability of jurors are enacted before July 1 this year, it should be possible by that date for all courts and tribunals to operate in Chinese in all types of proceedings.

The language to be used in court proceedings is governed by the Official Languages Ordinance. That Ordinance provides that, subject to certain transitional provisions, a judge may use either or both of the official languages (Chinese and English) in any proceeding, or a part of any proceeding, before him as the judge thinks fit. It then goes on to state that, regardless of which language the judge chooses to use, a party to, a witness in, and a legal representative in, any proceeding or a part of any proceeding may use either or both of the official languages. In other words, a judge could decide to use Chinese when hearing evidence and English when giving directions to a jury. And a legal representative before him could choose to use either language as he or she thought fit. No one is therefore required to abandon the use of English in court.

The bilingual laws program and the increasing use of Chinese

in the courts are of immeasurable value to the community, for they remove a language barrier, help to de-mystify the law, and promote the ideal that the law belongs to the people. For the first time, the vast majority of Hong Kong's population will have access to the law in their own language. And if they are ever involved in a court case, it will be possible for the proceedings to be heard in their own language. These worthy developments can, I believe, be achieved without compromising the quality or integrity of our legal system.

6.4. *The Increasing Links Between the Legal System of Hong Kong and the Legal System of the People's Republic of China*

The concept of "one country, two systems" implies one country and two *legal* systems. Two entirely different legal systems will co-exist within the same country. However, there will inevitably be growing links between the systems. Given the economic and social ties between the two jurisdictions, this is to be welcomed, but we also need to ensure that the interface between the two legal systems does not undermine the integrity of the S.A.R.'s common law system.

The Hong Kong Special Administrative Region will need to have effective mechanisms in place for mutual legal assistance, including the surrender of fugitive offenders between it and the rest of China. These arrangements must be based firmly on proper legal procedures. Once they are in place, it will be possible to enforce Hong Kong judgments and arbitral awards in the mainland and vice versa; to serve in one jurisdiction judicial documents issued in the other jurisdiction; and to obtain from one jurisdiction the surrender of a fugitive who is found in the other.

Alongside these mechanisms for legal cooperation, there will be a continuing expansion of contacts between lawyers from the mainland and Hong Kong, and increasing understanding by those lawyers of the two different systems. Again, this can only be to the benefit of both jurisdictions.

7. CONCLUSION

The changes to Hong Kong's legal system that I have highlighted will not, I believe, alter in any fundamental way the fabric of the law. The changes will be part of the change from a British dependent territory to a Special Administrative Region, with its

own legal system and way of life separate from those of China.

The work that the Hong Kong Government has done to prepare for 1997 has been directed toward the smooth transfer of sovereignty, the preservation of our common law system, and the continued maintenance of the rule of law. Over the past years, we have worked to preserve and enhance the rule of law in Hong Kong and to make it a better place for all to live in, both now and in the future. Hong Kong is now well-prepared to realize the vision of "one country, two systems."

Annexe 15

to the Expert Report
of Professor Simon Chesterman

Speech by Secretary for Justice
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Following is the speech delivered today (November 18) by the Secretary for Justice, Mr Wong Yan Lung, SC, at a luncheon of the Chinese General Chamber of Commerce to commemorate the 20th Anniversary of the Sino-British Joint Declaration coming into effect:

Chairman Fok, Mr Zhou, ladies and gentlemen,

I would like to thank the Chinese General Chamber of Commerce for giving me the opportunity to share with you a general review on the occasion of the 20th Anniversary of the coming into effect of the Sino-British Joint Declaration. In this address, I will only talk about the law, which is my profession and the steps and measures that have been taken to ensure the continuity of the legal system, the rule of law and the independence of the Judiciary in Hong Kong after the Joint Declaration came into effect. I will also review the effectiveness of such steps and assess the future development in these aspects.

But, first of all, it may be helpful if I refresh your memory of the main features of the Joint Declaration.

The Sino-British Joint Declaration

Content of the Joint Declaration

The Joint Declaration consists of only eight paragraphs, plus three Annexes. Its key purpose, of course, was to provide that the Chinese Government would resume the exercise of sovereignty over Hong Kong with effect from July 1, 1997.

As Mr Zhou Nan has said just now, "One Country, Two Systems" is the key concept of the Joint Declaration. The Chinese Government stated 12 "basic policies" regarding Hong Kong, and emphasised that these would remain unchanged for 50 years. These basic policies included the decision to establish, in accordance with Article 31 of the PRC Constitution, a Hong Kong Special Administrative Region, which would enjoy a high degree of autonomy, except in foreign and defence affairs, which were to be the responsibilities of the Central People's Government.

Those basic policies were further elaborated in Annex I of the Joint Declaration. And most important, of course, was the provision for the enactment by the National People's Congress of a Basic Law of the Hong Kong SAR, as stipulated by the main text and Annex I of the Joint Declaration.

Annex II set out the arrangements for the Sino-British Joint Liaison Group.

Annex III contained provisions relating to land leases granted in Hong Kong both before and after the entry into force of the Joint Declaration, and the establishment and functions of a Land Commission.

At the international level, the Sino-British Joint Declaration was a remarkably successful way to resolve problems left over from history. Its implementation required not only many practical steps, but also many legal arrangements and corresponding measures so as to ensure the continuity of the legal system and the stability of the society.

In 1985 when the Joint Declaration was signed, all of Hong Kong's hundreds of ordinances were expressed only in the English language. In order to prepare for reunification, it was decided that all our laws should be bilingual, and that all of our courts should be able to operate in either English or Chinese.

The process of producing an authentic Chinese text for hundreds of ordinances was extremely challenging. Given the many obscure English terms used in the law, many new Chinese expressions had to be invented. Nonetheless, the mammoth task, which lasted about 10 years, was finished shortly before reunification, thanks to the hard work of my colleagues in the Department of Justice. Starting from 1989, all new legislation has been produced in bilingual form.

Legislation was also passed enabling all courts to operate in either Chinese or English, at the choice of the court itself. Even where English is used, translation to and from Chinese is of course available where a party or witness needs it.

Localisation of laws

As I mentioned earlier, the Joint Declaration provided that the laws currently in force in Hong Kong will remain basically unchanged. Annex I of the Joint Declaration further states that the laws previously in force in Hong Kong shall be maintained, save for any that contravene the Basic Law, and subject to any amendment by the Hong Kong SAR legislature.

This theme of continuity was reassuring. However, as the definition of "laws previously in force" did not include UK legislation that applied to Hong Kong, a lot of legislative work still needed to be done to achieve this. Before 1985, Hong Kong's law in many important areas was found in UK legislation. For example, its laws relating to civil aviation, merchant shipping and copyright were all UK laws.

The challenge was to ensure the continued application of those laws by re-enacting them as Hong Kong legislation before reunification. Again, that challenge was taken up, and the task of localising the laws was completed before July 1, 1997. As a result, there was no legal gap resulting from the disapplication of UK laws.

International rights and obligations

The international rights and obligations that applied to Hong Kong also called for action. 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 multilaterals were of particular importance to Hong Kong's status as an international trade and financial centre. A sub-group of the Sino-British Joint Liaison Group worked with a goal that China should take over those multilaterals in respect of Hong Kong, and on the mechanism for doing so. This goal was ultimately achieved after China and Britain made concerted efforts to submit diplomatic documents to the United Nations and other international organisations at the same time. By doing so, assurances were made that the more than 200 multilateral agreements previously in force in Hong Kong would continue to apply, and we can continue to participate in international organisations such as the WTO, the Customs Co-operation Council, and the International Maritime Organisation after 1997.

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. As a result of that agreement, negotiations for new bilaterals began and, by the time of reunification, Hong Kong had concluded more than 10 air services agreements, a handful of fugitive offenders agreements and one mutual legal assistance agreement. The process of developing further bilaterals is an ongoing one.

Establishment of the Court of Final Appeal

I must mention the courts of the SAR when talking about the arrangements for the transition. When the Joint Declaration came into force in 1985, the final avenue of appeal for cases heard in Hong Kong was the Privy Council in London. That position clearly could not survive the reunification. The Joint Declaration provided that the power of final judgment of the Hong Kong SAR should be vested in the HKSAR's own court of final appeal, which may as required invite judges from other common law jurisdictions to sit on that court.

The goal to be achieved was not only the establishment of the Court of Final Appeal in Hong Kong, but also its official operation on July 1, 1997.

The composition of the Court of Final Appeal was an issue of paramount importance. As I have just said, the Joint Declaration provided that the Court of Final Appeal may invite judges from other common law jurisdictions to sit on it. In September 1991, the Sino-British Joint Liaison Group decided that, for each hearing, the court should consist of the Chief Justice, three permanent judges, and a fifth judge who could either be a judge from another common law jurisdiction or a retired Hong Kong judge. This became known as the "4+1" formula.

After lengthy discussion by the Sino-British Joint Liaison Group, it was agreed that the legislation to establish the Court of Final Appeal could be passed before reunification, but the legislation should come into effect on July 1, 1997. The Hong Kong Court of Final Appeal Ordinance was finally enacted in August 1995, and this laid the foundation for the establishment of the Court of Final Appeal immediately after the reunification.

As I am sure you are aware, that court rapidly established an international reputation for its independence and professionalism. That in turn has helped the Hong Kong SAR to gain the confidence of international businessmen and investors.

Basic Law

The drafting of the Basic Law

The enactment of the Basic Law is at the core of the implementation of the Joint Declaration. The drafting of the Basic Law involved consultation and interaction between two places practising different legal systems. It was a long, thorough and historic process. The Basic Law Drafting Committee, under the chairmanship of Director Ji Pengfei, was established in 1985, and was assisted by the Basic Law Consultative Committee, which consisted of 180 Hong Kong people. Two drafts of the Basic Law were published, in April 1988 and in February 1989, for public consultation. More than 130 revisions were made after the

first and second consultations.

The final draft was adopted by the National People's Congress on April 4, 1990 and promulgated the same day by the President, Yang Shangkun.

The implementation of the Basic Law

The establishment of the Hong Kong SAR of the People's Republic of China on July 1, 1997 was a momentous event. So far as the legal system and rule of law is concerned, the implementation of the Basic Law has been a great success.

Before reunification, the colonial constitutional instruments were brief and rather antiquated. In contrast, the Basic Law is a detailed, modern constitution that creates many justiciable rights that did not previously exist.

Nevertheless, after the promulgation of the Basic Law, many people predicted the fall of Hong Kong after 1997. They said that opposition politicians would be jailed; that the constitutional guarantees vouchsafed to Hong Kong people would be worthless; and that fugitives surrendered to Hong Kong would be handed over to the Mainland. None of this has happened.

The fact is that the highly visionary concept of "One Country, Two Systems" is being faithfully implemented in the HKSAR. Hong Kong's legal system, based on the common law, the rule of law and an independent judiciary, remains intact under the new constitutional order although it is different from the system in the Mainland.

Legal system

The Basic Law faithfully reflects the Central Government's basic policies regarding Hong Kong. So far as the legal system is concerned, the essential feature of the Basic Law is continuity.

* The common law and laws previously in force are to be maintained, unless found inconsistent with the Basic Law or amended by the legislature.

* The independence of the judiciary is guaranteed, and judges are given full security of tenure.

* Hong Kong residents are assured of the right to bring legal proceedings against acts of the executive authorities.

These, and other guarantees, ensure that the rule of law prevails in Hong Kong.

The Basic Law not only safeguards the legal system and the political structure, but also provides constitutional guarantees in respect of the economy, education, science, culture, sports, religion, labour and social services. Government action or legislation in respect of any of these areas can therefore be challenged in court as being inconsistent with the Basic Law.

This is no longer a hypothetical possibility. Challenges alleging inconsistency with the Basic Law have often been brought, for example, in respect of:

* legislation to reduce civil servants' salaries

* the abolition of municipal councils

* legislation requiring social workers to be registered

* a statutory provision precluding an appeal to the Court of Final Appeal in respect of a lawyers' disciplinary decision.

These examples indicate that the rule of law, and constitutionalism, have not only survived reunification, but are stronger than ever.

Human rights

Of particular importance is Chapter III of the Basic Law. This contains 19 articles guaranteeing particular human rights, such as freedom of speech, freedom of association, freedom of religious belief and so on. Article 39 is of particular importance, since it provides for the continued application of the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong and their implementation through the laws of the Hong Kong Special Administrative Region.

At the international level, the six major human rights treaties continue to apply to Hong Kong, and the Hong Kong SAR Government continues to report regularly to the treaty monitoring bodies. The preparation of those reports is done entirely by the Hong Kong SAR Government. Hearings of the reports, and the monitoring bodies' concluding observations, are the subject of wide media coverage in Hong Kong.

Human rights are therefore protected at the domestic, constitutional and international levels. Again, this is not merely theoretical protection. Here are some examples of court challenges concerning the protection of human rights made in the past seven years.

* A provision in immigration legislation, the electoral arrangements for villages in the New Territories, and the system for allocating secondary school places, were all successfully challenged as improperly discriminating between males and females.

* Provisions making it an offence to desecrate the national or regional flags were unsuccessfully challenged on the basis of freedom of expression.

* A decision to refuse entry to a non-permanent resident who was returning to Hong Kong after a foreign visit was successfully challenged as being inconsistent with residents' right to travel and to enter Hong Kong.

These examples demonstrate that human rights are fully protected in Hong Kong.

Conclusion

More than eight years have now passed since reunification. The unique concept of "One Country, Two Systems" has naturally created novel challenges and occasional controversies. But, overall, the new constitutional order has been a resounding success.

This demonstrates how effectively the Chinese Government has implemented the Sino-British Joint Declaration. Twenty years after that instrument came into effect, we can see indeed what a firm foundation it created for the continuing prosperity and stability of Hong Kong under the visionary concept of "One Country, Two Systems".

The common law legal system of Hong Kong remains firmly in place; the rule of law is vigorously defended by the Government; the Judiciary is strong and independent; and fundamental human rights are fully protected. With these solid fundamentals in place, I believe that the prospects for the future are bright. In my capacity as the Hong Kong SAR's Secretary for Justice, I will

do my utmost to uphold the rule of law and social justice.

Thank you.

Ends/Friday, November 18, 2005
Issued at HKT 17:58

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Annexe 16

to the Expert Report
of Professor Simon Chesterman

MODERN TREATY LAW AND PRACTICE

THIRD EDITION

ANTHONY AUST

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CAMBRIDGE
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There is no need for a further treaty,[35] since the paragraph refers deliberately to an 'agreement', not to a treaty. Provided the purpose is clear, the agreement can take various forms,[36] including a decision adopted by a meeting of the parties. The Treaty of Rome 1957 establishing the European Economic Community, as amended, refers to the 'ECU' (European currency unit). When, in 1995, the member states decided to replace the ECU with the 'euro', instead of amending the EC Treaty, which would have involved a lengthy ratification procedure and parliamentary scrutiny, the heads of state and government of the member states recorded in the 'Conclusions' of their meeting in Madrid that:

> The specific name Euro will be used instead of the generic term 'ECU' used in the Treaty to refer to the European currency unit. The Governments of the fifteen Member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions.[37]

Under the (rather accident-prone) Ramsar Wetlands Convention 1971,[38] as amended in 1982 to include an amendment clause, the acceptance of 'two-thirds of the Contracting Parties' is needed for an amendment to come into force. However, it was not clear if the phrase referred to the contracting parties at the time the amendment was adopted, or at any given moment. Therefore, at a conference of the parties in 1990, a resolution was adopted that it should be interpreted to refer to the time of adoption of the amendment.

Under Article 1.F(c) of the Refugees Convention 1951,[39] if there are 'serious reasons' for considering that a person is 'guilty of acts contrary to the purposes and principles of the United Nations', he or she is not entitled to refugee status. On 17 December 1996, the UN General Assembly adopted, without a vote, a Declaration that terrorism is contrary to the purposes and principles of the United Nations.[40] This can be seen as a subsequent agreement about the interpretation of the UN Charter, and thus also of the Refugees Convention. It does not amount to an amendment of the Convention, nor is it legally binding. Nevertheless, it carries considerable weight in the interpretation of the Convention, and should therefore be taken into account also by national courts and tribunals.

[35] But see the Czech–UK Exchange of Notes 1996 on the Interpretation of the Consular Convention 1975: 'for the purposes of paragraph 3, Article 31 of the Vienna Convention on the Law of Treaties' (1967 UNTS 224 (No. 33638); UKTS (1997) 5).

[36] See the example given in R. Gardiner, 'Treaties and Treaty Materials: Role, Relevance and Accessibility', *ICLQ*, (1997): 643, 648–9.

[37] Conclusions of the Madrid European Council 1995 (*Bulletin of the EU*, 12 (1995), p. 10). For another example, see D. Howarth, 'The Compromise on Denmark', *Common Market Law Review*, (1994): 765.

[38] 996 UNTS 245 (No. 14583); ILM (1972) 963; UKTS (1976) 34 (for the consolidated text see UKTS (1996) 13). See M. Bowman, 'The Multilateral Treaty Amendment Process: A Case Study', *ICLQ*, (1995): 540, 552.

[39] 189 UNTS 137 (No. 2545); UKTS (1954) 39.

[40] A/RES/51/210.

Hong Kong and Macau

The circumstances of the handover of Hong Kong to China at midnight on 30 June 1997 were unique, and do not provide much in the way of insight into the more usual treaty problems. But because the arrangements made for the continuation after the handover of Hong Kong's existing treaty relations are of interest far beyond China and the United Kingdom, and will last for at least fifty years, they need to be explained in some detail. The regime for the Macau Special Administrative Region (SAR) is similar to that of the Hong Kong SAR.[70] Although both SARs are part of China, a special treaty regime – based on the principle of 'one country, two systems' – has been established for each of them. The experience of Hong Kong is the most instructive.

Continued application of treaties

It was essential that there should be substantial continuity in Hong Kong's treaty relations after the handover. As the United Kingdom's most economically developed colony, and one of the world's larger economies, a considerable number of bilateral and multilateral treaties already applied to Hong Kong, either by virtue of their extension by the United Kingdom (over 200) or because Hong Kong had become a party in its own right. It was thus important for the future health and development of the Hong Kong economy that the framework of treaties within which Hong Kong operated should continue, and that there should be no doubt as to which treaties would continue to apply after the handover. The matter was therefore approached in a highly methodical way.

The future status of Hong Kong was agreed between China and the United Kingdom in a treaty of 19 December 1984, entitled Joint Declaration on the Question of Hong Kong.[71] After handover, Hong Kong would have the status of a Special Administrative Region of China and be known as the 'Hong Kong Special Administrative Region' (HKSAR). It would enjoy a high degree of autonomy, except in foreign and defence affairs, which are the responsibility of the Central People's Government (CPG). Although the governing principles with regard to treaties were laid down, there was no mention of 'succession', since that might imply that China had previously validly ceded sovereignty to the United Kingdom, which China had never accepted. Section XI of Annex I to the Joint Declaration provides, in part, that:

> The application to the HKSAR of international agreements to which the People's Republic of China is or becomes a party shall be decided by the CPG, in

[70] See the statements by China (n. 3) and Portugal, recorded in *Multilateral Treaties Deposited with the Secretary-General* (*MTDSG*), see Historical Information.

[71] 1399 UNTS 33 (No. 23391); ILM (1984) 1366; (1985) UKTS 26. The Joint Declaration entered into force on 28 May 1985. See also P. Slinn, 'Le règlement sino-britannique de Hong-Kong', *AFDI*, (1985): 167; and P. Slinn, 'Aspects juridiques du retour de Hong-Kong à la Chine', *AFDI*, (1996): 273. See also *BYIL*, (1989): 593–8 and *BYIL*, (1997): 529–35.

1997.[78] In addition, the Basic Law (the Constitution of the HKSAR) provides that the provisions of the Covenant 'shall be implemented through the laws of the [HKSAR]' (i.e., Article 39 of the Basic Law). Information on the implementation in the HKSAR of the provisions of the Covenant is prepared by the HKSAR and transmitted by the CPG to the Human Rights Committee established by the Covenant. Reports on the HKSAR under those human rights treaties to which China is a party will be submitted as part of China's reports to the relevant treaty-monitoring bodies.[79]

Thus, with a few exceptions, multilateral treaties that had applied to Hong Kong before handover continue to apply thereafter in all essential respects.

On all matters concerning pre-handover multilateral treaties (except those to which the HKSAR is a party in its own right, such as the World Trade Organization Agreement), depositaries should, of course, communicate with the Chinese Foreign Ministry or the local Chinese embassy, *not* with the government of the United Kingdom.

Bilateral treaties with third states

Bilateral treaties between the United Kingdom and third states (i.e., other than China) which had been extended to Hong Kong, and treaties concluded by Hong Kong under entrustment, could, under the terms of the Joint Declaration, have continued to apply to the HKSAR. It is not necessarily a matter of great concern to other parties if a state succeeds to the rights and obligations under a multilateral treaty. But a bilateral treaty is the result of (often intense) bargaining, particularly if the subject is economic or commercial relations, or if it involves important aspects of sovereignty. Thus, as with newly independent states, it could not be assumed that a third state would be willing to accept that a bilateral treaty would continue to apply to the HKSAR, even with any necessary technical adjustments. It was therefore agreed in the JLG that *none* of the then existing bilateral treaties with third states would apply to the HKSAR after handover. Instead, a process was agreed by which, following specific agreement in the JLG, Hong Kong was entrusted by the United Kingdom to negotiate and conclude directly with third states the bilateral treaties which it would need in the future. Such treaties would then apply to the HKSAR after handover.

Thus, before handover a substantial number of states concluded treaties with Hong Kong on such matters as air services, investment promotion and protection, surrender of fugitive offenders, mutual legal assistance in criminal matters and transfer of

[78] See *MTDSG* (Historical Information) entry for China, n. 13. See also the UK Note of 1 July 1997 in *BYIL*, (1997): 537–8.

[79] It appears that the previous webpage has been replaced, and reports on the HKSAR under the relevant human rights treaties (as well as the part of the Chinese national report on the HKSAR) may now be found on the website of the Constitutional and Mainland Affairs Bureau, at: www.cmab.gov.hk.

prisoners,[80] even though sometimes the third state already had a treaty on the same subject with China. In some cases the treaties, such as air services agreements, replaced treaties between the third state and the United Kingdom to the extent to which they had applied to Hong Kong. Most of the replacement treaties concluded by Hong Kong recited in their preamble that the government of Hong Kong was 'duly authorised to conclude this Agreement by the sovereign government which is responsible for its foreign affairs'. Since the handover more bilateral treaties have been entered into by the HKSAR.

Legal effect of the arrangements for third states

The UN Secretary-General, as depositary of some fifty of the multilateral treaties applicable to the HKSAR, has accepted that the arrangements are effective, as have other depositaries. The parties to various treaties have also taken the same view. No party to a multilateral treaty has objected to the continued application of a treaty to the HKSAR. For example, the Assembly of the International Oil Pollution Compensation Fund agreed that the International Oil Pollution Compensation Fund Convention 1971[81] could continue to apply to the HKSAR even though China is not a party. A similar attitude has been exhibited by third states with respect to new bilateral treaties concluded by them with Hong Kong in the period leading up to the handover. Since they were all signed only after China had signified its approval in the JLG, and were designed to continue after the handover, they do not need further action by either China or the third state, and this was made abundantly clear to the negotiators of the third states.

Thus, despite the unique situation and its attendant difficulties – or perhaps because of them – the ingenious arrangements, devised by British and Chinese government lawyers, by which Hong Kong's treaty relations could be continued by the HKSAR, are more certain, effective and timely than those made for a normal post-colonial situation. A similar procedure was used for Macau.[82] It will be interesting to see whether the arrangements will provide a precedent for other comparable situations, such as for Taiwan, eventually.

(For the capacity of the HKSAR to enter into treaties in its own right, see page 64 above; and on the extension by China of treaties to the HKSAR, see above.)

[80] For example, the HKSAR–US Surrender of Fugitive Offenders Agreement 1996 (ILM (1997) 844); the HKSAR–US Transfer of Sentenced Persons Agreement 1997 (ILM (1997) 860); the HKSAR–Japan Investment Promotion and Protection Agreement 1997 (ILM (1997) 1425).

[81] 1110 UNTS 57 (No. 17146); UKTS (1978) 95.

[82] See the statements by China and Portugal, recorded in *MTDSG* (Historical Information).

Annexe 17

to the Expert Report
of Professor Simon Chesterman

AGREEMENT BETWEEN JAPAN AND THE PEOPLE'S REPUBLIC OF CHINA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of Japan and the Government of the People's Republic of China,

Desiring to strengthen economic cooperation between the two countries,

Intending to create favourable conditions for investment by nationals and companies of each country within the territory of the other country, by means of the favourable treatment for and the protection of investment, business activities in connection therewith and investments, and

Recognizing that the encouragement and reciprocal protection of investment will stimulate economic and technological exchanges between the two countries,

After the negotiations between the representatives of respective Governments,

Have agreed as follows:

Article 1

For the purposes of the present Agreement:

(1) The term "investments" comprises every kind of asset, used as investment by nationals or companies of one Contracting Party within the territory of the other Contracting Party in accordance with, or not in violation of the laws and regulations of the latter Contracting Party at the time of investment, including:

(a) shares and other types of holding of companies;

(b) claims to money or to any performance under contract having a financial value;

(c) rights with respect to movable and immovable property;

(d) patents of invention, rights with respect to trade marks, trade names, service marks and any other industrial property, and rights with respect to know-how; and

(e) concession rights including those for the exploration and exploitation of natural resources.

(2) The term "returns" means the amounts yielded by an investment, in particular, profit, interest, capital gains, dividends, royalties and fees.

(3) The term "nationals" means, in relation to one Contracting Party, physical persons possessing the nationality of that Contracting Party.

(4) The term "companies" means:

(a) in relation to Japan, corporations, partnerships companies and associations whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit; and

(b) in relation to the People's Republic of China, enterprises, other economic organizations and associations.

Companies constituted under the applicable laws and regulations of one Contracting Party and having their seat within its territory shall be deemed companies of that Contracting Party.

Article 2

1. Each Contracting Party shall within its territory promote as far as possible investment by nationals and companies of the other Contracting Party and admit such investment in accordance with the applicable laws and regulations of the former Contracting Party.

2. Nationals and companies of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than that accorded

to nationals and companies of any third country in respect of the admission of investment and the matters in connection therewith.

Article 3

1. The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall not be less favourable than that accorded to nationals and companies of any third country.

2. The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns and business activities in connection with the investment shall not be less favourable than that accorded to nationals and companies of the former Contracting Party.

3. The term "business activities in connection with the investment" referred to in the provisions of the present Article includes:

(a) the maintenance of branches, agencies, offices, factories and other establishments appropriate to the conduct of business activities;

(b) the control and management of companies which they have established or acquired;

(c) the employment and discharge of specialists including technical experts, executive personnel and attorneys, and other workers;

(d) the making and performance of contracts.

Article 4

The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and agencies both in pursuit and in defence of their rights shall

not be less favourable than that accorded to nationals and companies of the former Contracting Party or to nationals and companies of any third country.

Article 5

1. Investments and returns of nationals and companies of either Contracting Party shall receive the most constant protection and security within the territory of the other Contracting Party.

2. Investments and returns of nationals and companies of either Contracting Party shall not be subjected to expropriation, nationalization or any other measures the effects of which would be similar to expropriation or nationalization, within the territory of the other Contracting Party unless such measures are taken for a public purpose and in accordance with laws and regulations, are not discriminatory, and, are taken against compensation.

3. The compensation referred to in the provisions of paragraph 2 of the present Article shall be such as to place the nationals and companies in the same financial position as that in which the nationals and companies would have been if expropriation, nationalization or any other measures the effects of which would be similar to expropriation or nationalization, referred to in the provisions of paragraph 2 of the present Article, had not been taken. Such compensation shall be paid without delay. It shall be effectively realizable and freely transferable at the exchange rate in effect on the date used for the determination of amount of compensation.

4. Nationals and companies of either Contracting Party whose investments and returns are subjected to expropriation, nationalization or any other measures the effects of which would be similar to expropriation or nationalization, shall have the right of access to the competent courts of justice and

administrative tribunals and agencies of the other Contracting Party taking the measures concerning such measures and the amount of compensation in accordance with the applicable laws and regulations of such other Contracting Party.

5. The treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to the matters set forth in the provisions of paragraphs 1 to 4 of the present Article shall not be less favourable than that accorded to nationals and companies of any third country.

Article 6

Nationals and companies of either Contracting Party who suffer within the territory of the other Contracting Party damages in relation to their investments, returns or business activities in connection with their investment, owing to the outbreak of hostilities or a state of national emergency, shall, in case any measure is taken by the latter Contracting Party in relation to the outbreak of such hostilities or state of such national emergency, be accorded treatment no less favourable than that accorded to nationals and companies of any third country.

Article 7

If either Contracting Party makes payment to any of its nationals or companies under a guarantee it has assumed in respect of investments and returns in the territory of the other Contracting Party, such other Contracting Party shall recognize the transfer to the former Contracting Party of any right or claim of such national or company in such investments and returns on account of which such payment is made and the subrogation of the former Contracting Party to any claim or cause of action of such national or company arising in connection therewith. As regards the transfer of payment to be made to that former

Contracting Party by virtue of such transfer of right or claim, the provisions of paragraphs 2 to 5 of Article 5 and Article 8 shall apply mutatis mutandis.

Article 8

1. Nationals and companies of either Contracting Party shall be guaranteed by the other Contracting Party freedom of payments, remittances, and transfers of financial instruments or funds including value of liquidation of an investment between the territories of the two Contracting Parties as well as between the territories of such other Contracting Party and of any third country.

2. The provisions of paragraph 1 of the present Article shall not preclude either Contracting Party from imposing exchange restrictions in accordance with its applicable laws and regulations.

Article 9

The present Agreement shall also apply to investments and returns of nationals and companies of either Contracting Party acquired within the territory of the other Contracting Party in accordance with the applicable laws and regulations of such other Contracting Party prior to the entering into force of the present Agreement and on or after September 29, 1972.

Article 10

The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

Article 11

1. Any dispute between a national or company of either Contracting Party and the other Contracting Party with respect to investment within the territory of the latter Contracting Party shall, as far as possible, be settled amicably through consultation between the

parties to the dispute.

2. If a dispute concerning the amount of compensation referred to in the provisions of paragraph 3 of Article 5 between a national or company of either Contracting Party and the other Contracting Party or other entity, charged with the obligation for making compensation under its laws and regulations, cannot be settled within six months from the date either party requested consultation for the settlement, such dispute shall, at the request of such national or company, be submitted to a conciliation board or an arbitration board, to be established with reference to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965 (hereinafter referred to as "the Washington Convention"). Any dispute concerning other matters between a national or company of either Contracting Party and the other Contracting Party may be submitted by mutual agreement, to a conciliation board or an arbitration board as stated above. In the event that such national or company has resorted to administrative or judicial settlement within the territory of the latter Contracting Party, such dispute shall not be submitted to arbitration.

3. The arbitration board referred to in the provisions of paragraph 2 of the present Article shall be composed of three arbitrators, with each party appointing one arbitrator within a period of sixty days from the date of receipt by either party from the other party of a notice requesting arbitration of the dispute referred to in the provisions of paragraph 2 of the present Article, and the third arbitrator to be agreed upon as the President of the arbitration board by the two arbitrators so chosen within a further period of ninety days, provided that the third arbitrator shall not be a national of either Contracting Party.

4. If the third arbitrator is not agreed upon between the arbitrators appointed by each party within the period referred to in the provisions of paragraph 3 of the present Article, either party shall request the third party agreed upon in advance by both parties to appoint the third arbitrator who shall be a national of a third country which has diplomatic relations with both Contracting Parties.

5. The arbitral procedures shall be determined by the arbitration board with reference to the Washington Convention.

6. The decision of the arbitration board shall be final and binding. Execution of the decision of the arbitration board shall be governed by the laws and regulations concerning the execution of decision in force in the State in whose territories such execution is sought. The arbitration board shall state the basis of its decision and state the reasons at the request of either party.

7. Each party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the President of the arbitration board in discharging his duties and the remaining costs of the arbitration board shall be borne equally by the parties concerned.

8. When and after a case is submitted to the arbitration board referred to in the provisions of paragraph 2 of the present Article, no claim concerning such case shall be made between States.

Article 12

Companies of any third country in which nationals and companies of either Contracting Party have a substantial interest shall within the territory of the other Contracting Party be accorded, unless international agreement between such other Contracting Party and such third country concerning investment and protection of investments is in effect;

(1) treatment no less favourable than that accorded, within the territory of the latter Contracting Party, to companies of any third country in which nationals and companies of any other third country have a substantial interest with respect to the matters set forth in the provisions of paragraph 2 of Article 2, Article 3, paragraphs 1 to 4 of Article 5, Article and Article 9; and

(2) treatment no less favourable than that accorded, within the territory of the latter Contracting Party, to companies of any third country in which nationals and companies of the latter Contracting Party have a substantial interest with respect to the matters set forth in the provisions of Article 3, paragraphs 1 to 4 of Article 5, Article 6 and Article 9.

Article 13

1. Each Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Contracting Party may make with respect to any matter affecting the operation of the present Agreement.

2. Any dispute between the Contracting Parties as to the interpretation or application of the present Agreement, not satisfactorily adjusted by diplomacy, shall be referred for decision to an arbitration board. Such arbitration board shall be composed of three arbitrators, with each Contracting Party appointing one arbitrator within a period of sixty days from the date of receipt by either Contracting Party from the other Contracting Party of a note requesting arbitration of the dispute, and the third arbitrator to be agreed upon as the President by the two arbitrators so chosen within a further period of ninety days, provided that the third arbitrator shall not be a national of either Contracting Party.

3. If the third arbitrator is not agreed upon between the arbitrators appointed by each Contracting Party within the period referred to in the provisions of paragraph 2 of the present Article, the Contracting Parties shall request the President of the International Court of Justice to appoint the third arbitrator who shall not be a national of either Contracting Party.

4. The arbitration board shall reach its decisions by a majority of votes. Such decisions shall be final and binding.

5. The arbitral procedures shall be determined by the arbitration board.

6. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the President of the arbitration board in discharging his duties and the remaining costs of the arbitration board shall be borne equally by both Contracting Parties.

Article 14

Both Contracting Parties shall establish a Joint Committee, consisting of representatives of the Governments of both Contracting Parties, for the purpose of reviewing the implementation of the present Agreement and the matters related to investment between the two countries, holding consultations on the operation and the matters related to the operation of the present Agreement in connection with the development of legal systems or of policies of either or both of the two countries with respect to the receiving of foreign investment, and, as necessary, making appropriate recommendations to the Governments of both Contracting Parties. The Joint Committee shall meet alternately in Tokyo and Beijing at the request of either Contracting Party.

Article 15

1. The present Agreement shall enter into force on the thirtieth day after the date of exchange of notifications confirming that the procedures required under domestic laws for its entry into force have been completed in each country. It shall remain in force for a period of ten years and shall continue in force thereafter until terminated in accordance with the provisions of paragraph 2 of the present Article.

2. Either Contracting Party may, by giving one year's advance notice in writing to the other Contracting Party, terminate the present Agreement at the end of the initial ten-year period or at any time thereafter.

3. In respect of investments and returns acquired prior to the date of termination of the present Agreement, the provisions of Articles 1 to 14 shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed the present Agreement.

DONE at Beijing on the twenty-seventh day of August, 1988, in duplicate, in the Japanese, Chinese and English languages, each text being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Government of Japan:

For the Government of the People's Republic of China:

PROTOCOL

At the time of signing the Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment (hereinafter referred to as "the Agreement"), the undersigned have agreed upon the following provisions which shall form an integral part of the Agreement:

1. Nothing in the Agreement shall be construed so as to grant any right or impose any obligation in respect of copyright.

2. Nothing in the Agreement shall be construed so as to affect the obligations undertaken by either Contracting Party towards the other Contracting Party by virtue of the provisions of the Paris Convention for the Protection of Industrial Property of March 20, 1883, or of any subsequent revision thereof, so long as such provisions are in force between the Contracting Parties.

3. For the purpose of the provisions of paragraph 2 of Article 3 of the Agreement, it shall not be deemed "treatment less favourable" for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it is really necessary for the reason of public order, national security or sound development of national economy.

4. The provisions of paragraph 2 of Article 3 of the Agreement shall not prevent either Contracting Party from prescribing special formalities in connection with the activities of foreign nationals and companies within its territory, but such formalities may not impair the substance of the rights set forth in the aforesaid paragraph.

5. Either Contracting Party shall in accordance with its applicable laws and regulations give sympathetic consideration to applications for

the entry, sojourn and residence of nationals of the other Contracting Party who wish to enter the territory of the former Contracting Party and remain therein for the purpose of making investment and carrying on business activities in connection therewith.

6. Notwithstanding the provisions of Article 3 of the Agreement, either Contracting Party reserves the right to accord special tax advantages on the basis of reciprocity or by virtue of agreements for the avoidance of double taxation or for the prevention of fiscal evasion.

7. The provisions of paragraph 2 of Article 8 of the Agreement shall not affect the rights and obligations with respect to exchange restrictions, that either Contracting Party has or may have as a contracting party to the Articles of Agreement of the International Monetary Fund.

8. The provisions of paragraph 1 of Article 11 of the Agreement shall not be construed so as to prevent nationals and companies of either Contracting Party from seeking administrative or judicial settlement within the territory of the other Contracting Party.

9. The term "substantial interest" as used in the provisions of Article 12 of the Agreement means such extent of interest as to permit the exercise of control or decisive influence on the company. Whether an interest held by nationals and companies of either Contracting Party amounts to a substantial interest shall be decided in each case through consultations between the Contracting Parties.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed the present Protocol.

DONE at Beijing on the [illegible] day of August, 1988, in duplicate, in the Japanese, Chinese and English languages, all three texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Government of Japan:

For the Government of the People's Republic of China:

AGREED MINUTES

The undersigned wish to record the following understanding which they have reached during the negotiations for the Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment (hereinafter referred to as "the Agreement") signed today:

1. It is confirmed that, the provisions of the Agreement shall apply to assets related to offices of resident representatives established by nationals or companies of either Contracting Party within the territory of the other Contracting Party in accordance with, or not in violation of the laws and regulations of such other Contracting Party at the time of establishment.

2. Both Contracting Parties confirm that, "treatment less favourable" referred to in the provisions of paragraph 2 of Article 3 of the Agreement includes the measures taken in a discriminatory manner, which would restrict or impede following activities: the purchase of raw or auxiliary materials, of power or fuel, or of means of production or operation of any kind; the marketing of products inside or outside the country; the obtaining loans inside or outside the country; the introduction of technology; and the establishment of branches or offices of resident representatives outside the country. This paragraph shall not affect the provisions of paragraph 3 of Protocol of the Agreement.

3. It is confirmed that with reference to the provisions of Article 5 of the Agreement, the compensation referred to in the provisions of paragraph 3 of the aforesaid Article shall represent the equivalent of the value of the investments and returns affected at the time when expropriation, nationalization, or any

other measures the effects of which would be similar to expropriation or nationalization are publicly announced or when such measure are taken, whichever is the earlier, and shall carry an appropriate interest taking into account the length of time until the time of payment.

4. The term "without delay" referred to in the provisions of paragraph 3 of Article 5 of the Agreement shall not exclude a reasonable period of time neccssary for deciding amount, way of payment and so on.

Beijing, August. / , 1988

For the Government of Japan:

For the Government of the People's Republic of China:

Annexe 18

to the Expert Report
of Professor Simon Chesterman

Agreement

between the Government of Hong Kong and the
Government of Japan
for the Promotion and Protection of Investment

AGREEMENT BETWEEN THE GOVERNMENT OF HONG KONG AND THE GOVERNMENT OF JAPAN FOR THE PROMOTION AND PROTECTION OF INVESTMENT

The Government of Japan and the Government of Hong Kong, the latter having been duly authorized to conclude this Agreement by the Government of the sovereign state which is responsible for foreign affairs relating to Hong Kong (hereinafter referred to as "the Contracting Parties"),

Desiring to create favourable conditions for greater investment by investors of one Contracting Party in the area of the other,

Recognizing that the promotion and reciprocal protection of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in the areas of both Contracting Parties,

Having agreed as follows:

Article 1

For the purposes of this Agreement:

1. The term "area":

(a) in respect of Japan means the territory under its sovereignty, including its territorial sea;

(b) in respect of Hong Kong includes Hong Kong Island, Kowloon and the New Territories.

2. The term "companies" means:

(a) in respect of Japan, corporations, partnerships, companies and associations incorporated or constituted under the laws and regulations of Japan and having their seat within its area, whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit;

(b) in respect of Hong Kong, corporations, partnerships and associations incorporated or constituted under the law in force in its area, whether or not with limited liability, whether or not with legal personality and whether or not for pecuniary profit.

3. The term "investment" means every kind of asset and in particular, though not exclusively, includes:

(a) rights with respect to movable and immovable property;

(b) shares in and stock of a company and other types of holding of a company;

(c) claims to money or to any performance under contract having a financial value;

(d) intellectual property rights including undisclosed information, and trade names; and

(e) concession rights conferred by law or under contract, including those for the exploration and exploitation of natural resources.

A change in the form in which assets are invested does not affect their character as investments.

4. The term "investors" means:

(a) in respect of Japan:

(i) physical persons possessing the nationality of Japan; and

(ii) companies as defined in sub-paragraph (2)(a) of this Article;

(b) in respect of Hong Kong:

(i) physical persons who have the right of abode in its area; and

(ii) companies as defined in sub-paragraph (2)(b) of this Article.

5. The term "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

6. The term "business activities in connection with the investment" includes:

(a) the maintenance of branches, agencies, offices, factories and other establishments appropriate to the conduct of business activities;

(b) the control and management of companies established or acquired by investors;

(c) the employment of accountants and other technical experts, executive personnel, attorneys, agents and other specialists;

(d) the making and performance of contracts; and

(e) the use, enjoyment or disposal, in relation to the conduct of business activities, of investments and returns.

Article 2

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area and, subject to its rights to exercise powers conferred by its applicable laws and regulations, shall admit such investments.

2. Investors of either Contracting Party shall within the area of the other Contracting Party be accorded treatment no less favourable than that accorded to investors of any third party in respect of the matters relating to the admission of investments.

3. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party. Neither Contracting Party shall, in its area, in any way impair by unreasonable or discriminatory measures the business activities in connection with the investment of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

Article 3

Investors of either Contracting Party shall within the area of the other Contracting Party be accorded treatment no less favourable than that accorded to investors of the other Contracting Party or to investors of any third party with respect to investments, returns and business activities in connection with the investment.

Article 4

The treatment accorded by either Contracting Party within its area to investors of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and agencies at all levels both in pursuit and in defence of their rights shall be no less favourable than that accorded to investors of such Contracting Party or to investors of any third party.

Article 5

1. Investments and returns of investors of either Contracting Party shall not be subjected to deprivation or any measure having effect tantamount to such deprivation (hereinafter referred to as “deprivation”) in the area of the other Contracting Party except under due process of law, for a public purpose, on a non-discriminatory basis, and against compensation. Such compensation shall amount to the real value of the investments and returns at the time of the deprivation or when the impending deprivation became public knowledge, whichever is the earlier, disregarding any reduction in the value which might have been caused by the prospect of the deprivation, shall be paid without undue delay, shall carry an appropriate interest taking into account the length of time until the time of payment, and shall be effectively realizable, freely convertible and freely transferable.

2. Without prejudice to the provisions of Article 9, the investor affected shall have a right of access to the courts of justice or administrative tribunals or agencies of the Contracting Party making the deprivation, for reviewing the investor's case and the amount of compensation in accordance with the principles set out in this Article.

3. Where a Contracting Party deprives of its assets a company which is incorporated or constituted under the laws and regulations in force in any part of its area, and in which investors of the other Contracting Party hold shares or other interests, it shall ensure that the provisions of paragraphs 1 and 2 of this Article are applied to the extent necessary to guarantee compensation referred to in paragraph 1 of this Article in respect of their investments and returns to such investors of the other Contracting Party who hold those shares or other interests.

4. Investors of either Contracting Party shall within the area of the other Contracting Party be accorded treatment no less favourable than that accorded to investors of the other Contracting Party or to investors of any third party with respect to the matters set forth in the provisions of paragraphs 1, 2 and 3 of this Article.

Article 6

1. Investors of either Contracting Party who suffer within the area of the other Contracting Party damage in relation to their investments, returns or business activities in connection with the investment owing to the outbreak of hostilities or a state of national emergency such as revolution, revolt, insurrection or riot, shall be accorded treatment, as regards any measure to be taken by the other Contracting Party including restitution, compensation or other valuable consideration, no less favourable than that accorded to investors of the other Contracting Party or to investors of any third party. Resulting payments shall be effectively realizable, freely convertible and freely transferable.

2. Without prejudice to the provisions of paragraph 1 of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the area of the other Contracting Party resulting from:

(a) requisitioning of their property by its authorities, or

(b) destruction of their property by its authorities which was not required by the necessity of the situation,

shall be accorded restitution or reasonable compensation. Resulting payments shall be effectively realizable, freely convertible and freely transferable.

3. For the purpose of paragraph 2 of this Article, the term "authorities" includes in respect of Hong Kong the armed forces of the sovereign government which is responsible for its foreign affairs.

Article 7

1. Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted right to transfer their investments and returns out of and into the former Contracting Party, including the transfer of funds for payments, funds in repayment of loans, proceeds from sales, the proceeds of the total or partial liquidation of an investment, and the earnings of individuals allowed to work in an investment in its area.

2. Transfer of currency shall be effected without delay in any freely convertible currency.

Article 8

If either Contracting Party or its designated agency makes payment to any investor of that Contracting Party under indemnity, guarantee or contract of insurance given in accordance with the applicable laws and regulations of that Contracting Party in respect of investments and returns in the area of the other Contracting Party, such other Contracting Party shall recognize the transfer to the former Contracting Party or its designated agency of any right or claim of such investor in such investments and returns on account of which such payment is made and the subrogation of the former Contracting Party or its designated agency to any claim or cause of action of such investor arising in connection therewith. As regards payment to be made to that former Contracting Party or its designated agency and the transfer of such payment, the provisions of Article 5, Article 6 and Article 7 shall apply mutatis mutandis.

Article 9

1. Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter shall, as far as possible, be settled amicably through consultation between the parties to the dispute.

2. Any dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter, which has not been settled amicably, may, after a period of six months from written notification of the claim by either of the parties to the dispute, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that six months period, the dispute shall at the request of the investor concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify those Rules.

3. Paragraph 2 of this Article shall not be construed so as to prevent investors of either Contracting Party from seeking administrative or judicial settlement within the area of the other Contracting Party. In the event that an investor has resorted to administrative or judicial settlement within the area of the other Contracting Party of a dispute concerning an investment by such investor, the same dispute shall not be submitted to arbitration referred to in paragraph 2 of this Article.

4. In case a dispute arises out of an investment made by a company of either Contracting Party which is owned or controlled by investors of the other Contracting Party, investors of the other Contracting Party may submit the dispute to arbitration referred to in paragraph 2 of this Article on behalf of such company.

Article 10

This Agreement shall apply to all investments and returns of investors of one Contracting Party made within the area of the other Contracting Party in accordance with the applicable laws and regulations of the other Contracting Party, whether made before, on or after the date of entry into force of this Agreement.

Article 11

1. The Contracting Parties shall consult at the request of either of them on matters concerning the interpretation or application of this Agreement.

2. If any dispute arises between the Contracting Parties relating to the interpretation or application of this Agreement, the Contracting Parties shall in the first place try to settle it by negotiation.

3. If the Contracting Parties fail to reach a settlement of the dispute referred to in paragraph 2 of this Article by negotiation, the dispute, at the request of either Contracting Party, shall be submitted for decision to an arbitral tribunal which shall be constituted in the following manner:

(a) Within thirty days after receipt of a written request for arbitration, each Contracting Party shall appoint one arbitrator. A national of a State which can be regarded as neutral in relation to the dispute, who shall act as President of the tribunal, shall be appointed as the third arbitrator by agreement between the two arbitrators, within sixty days of the appointment of the second;

(b) If the third arbitrator is not agreed upon between the arbitrators appointed by each Contracting Party within the period specified in sub-paragraph (a) of this paragraph, the President of the International Court of Justice in a personal and individual capacity may be requested by either Contracting Party to make the necessary appointment within thirty days. If the President of the International Court of Justice considers that he or she is a national of a State which cannot be regarded as neutral in relation to the dispute, or he or she is otherwise prevented from appointing the said arbitrator, the Vice-President, or failing that, the most senior judge of the International Court of Justice who is not disqualified on that ground in the same capacity may be requested by either Contracting Party to make the appointment.

4. Unless otherwise agreed between the Contracting Parties, the tribunal shall determine the limits of its jurisdiction and establish its own procedure.

5. The tribunal shall use its best endeavours to reach a decision within sixty days after completion of the hearing or, if no hearing is held, after both Contracting Parties have completed their representations.

6. The decision of the tribunal shall be final and binding on the Contracting Parties.

7. Each Contracting Party shall bear the costs of the arbitrator appointed by it. The other costs of the tribunal shall be shared equally by the Contracting Parties including any expenses incurred by the President, the Vice-President or the most senior judge of the International Court of Justice in implementing the procedures set forth in sub-paragraph (b) of paragraph 3 of this Article.

Article 12

1. Article 3 shall not be construed so as to oblige either Contracting Party to extend to investors of the other Contracting Party special tax advantages accorded on the basis of reciprocity with a third party or by virtue of agreements for the avoidance of double taxation or for the prevention of fiscal evasion.

2. Notwithstanding the provisions of Article 3, the treatment accorded by either Contracting Party to investors of the other Contracting Party may be limited to treatment no less favourable than that which is accorded to investors of any third party in connection with:

(a) the conditions of registration of aircraft in the register of the competent authorities of either Contracting Party and matters arising from such registration, and matters related to or arising from the nationality of a ship; and

(b) the acquisition of a ship or of any interest in a ship.

3. Notwithstanding the provisions of Article 3, either Contracting Party may prescribe special procedural formalities in connection with the activities of foreign nationals and companies within its area, provided that such formalities may not impair the substance of the rights set forth in the provisions of Article 3.

Article 13

1. A company of a non-Contracting Party which is owned or controlled by investors of either Contracting Party shall within the area of the other Contracting Party be accorded:

(a) treatment no less favourable than that accorded to like companies owned or controlled by investors of any third party with respect to the matters set forth in paragraph 2 of Article 2; and

(b) treatment no less favourable than that accorded to like companies owned or controlled by investors of such other Contracting Party or by investors of any third

party with respect to the matters set forth in Article 3, paragraphs 1 to 3 of Article 5, Article 6 and Article 10.

2. Paragraph 1 of this Article does not apply if such non-Contracting Party and such other Contracting Party are signatories to an international agreement concerning the promotion and protection of investment which is applicable to the company of such non-Contracting Party.

Article 14

Notwithstanding the provisions of sub-paragraph (3) of Article 1, nothing in this Agreement shall be construed so as to derogate from the rights and obligations under international agreements relating to intellectual property rights to which they are parties.

Article 15

1. This Agreement shall enter into force on the date of an exchange of notes between both Contracting Parties notifying each other that their respective requirements necessary for the entry into force of this Agreement have been complied with.

2. This Agreement shall remain in force for a period of fifteen years and shall continue in force thereafter until terminated in accordance with the provisions of paragraph 3 of this Article.

3. Either Contracting Party may, giving one year's advance notice in writing to the other Contracting Party, terminate this Agreement at the end of the initial fifteen-year period or at any time thereafter.

4. In respect to investments and returns made prior to the date of termination of this Agreement, the provisions of Articles 1 to 14 shall continue to be effective for a further period of fifteen years from the date of termination of this Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Tokyo on the fifteenth day of May 1997, in duplicate, in the Japanese, Chinese and English languages, all three texts being equally authentic.

For the Government
of Hong Kong:

For the Government
of Japan:

PROTOCOL

At the time of signing the Agreement between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment (hereinafter referred to as "the Agreement"), the undersigned have agreed upon the following provisions which shall form an integral part of the Agreement:

1. Notwithstanding the provisions of paragraph 2 of Article 6 of the Agreement, the Government of Japan shall accord to investors of Hong Kong restitution or compensation subject to its laws and regulations.

2. Notwithstanding the provisions of paragraph 1 of Article 7 of the Agreement, the Government of Japan may, in exceptional financial or economic circumstances, impose exchange restrictions in accordance with its laws and regulations and in conformity with the Articles of the Agreement of the International Monetary Fund.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed this Protocol.

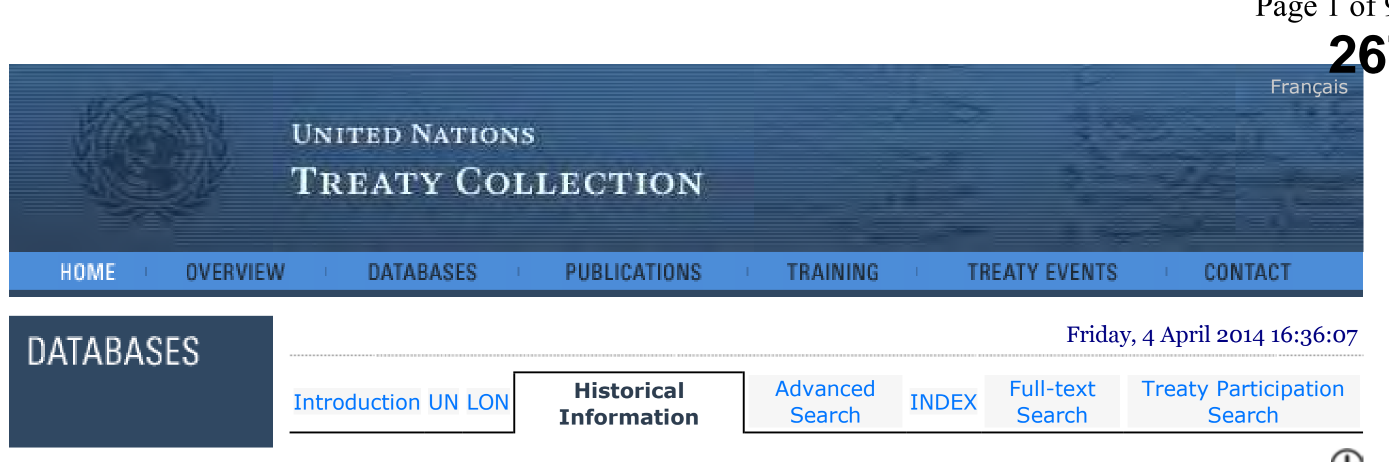
DONE at Tokyo on the fifteenth day of May 1997, in duplicate, in the Japanese, Chinese and English languages, all three texts being equally authentic.

For the Government
of Hong Kong:

For the Government
of Japan:

Annexe 19

to the Expert Report
of Professor Simon Chesterman



- Aruba
- Belarus
- Benin
- Bolivia (Plurinational State of)
- Bosnia and Herzegovina
- Burkina Faso
- Burma
- Cabo Verde
- Cambodia
- Cameroon
- Central African Republic
- China
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Curacao
- Czechoslovakia
- Czech Republic
- Democratic Republic of the Congo
- Denmark
- Egypt
- Estonia
- European Union
- Faroe Islands
- Fiji
- Germany
- Greece
- Hong Kong
- Indonesia

- Iran (Islamic Republic of)
- Lao People's Democratic Republic
- Latvia
- Libya
- Libyan Arab Jamahiriya
- Lithuania
- Macao
- Malaysia
- Maldives
- Micronesia (Federated States of)
- Moldova
- Montenegro
- Myanmar
- Namibia
- Netherlands
- Netherlands Antilles
- New Zealand
- Nicaragua
- Niue
- Palau
- Papua New Guinea
- Peru
- Portugal
- Republic of Moldova
- Russian Federation
- Serbia
- Serbia and Montenegro
- Slovakia
- Slovenia
- South Africa
- Sri Lanka
- St. Helena, Ascension, and Tristan da Cunha
- St. Helena and Dependencies
- St. Kitts and Nevis
- State of Palestine
- Suriname
- Syria
- The former Yugoslav Republic of Macedonia
- Tokelau Islands

- Uganda
- Ukraine
- United Arab Republic
- United Kingdom of Great Britain and Northern Ireland
- United Nations (International Criminal Tribunal for the former Yugoslavia)
- United Republic of Tanzania
- Venezuela (Bolivarian Republic of)
- Viet Nam
- Yemen
- Yugoslavia
- Yugoslavia (former)

Aruba

See notes 1 and 2 under "Netherlands" .

Belarus

Note 1.

Formerly: "Byelorussian Soviet Socialist Republic" until 18 September 1991.

Benin

Note 1.

Formerly: "Dahomey" until 2 December 1975.

Bolivia (Plurinational State of)

Note 1.

As from 9 April 2009. Formerly: "Bolivia".

Bosnia and Herzegovina

Note 1.

The Government of Bosnia and Herzegovina deposited with the Secretary-General notifications of succession to the Socialist Federal Republic of Yugoslavia to various treaties with effect from 6 March 1992, the date on which Bosnia and Herzegovina assumed responsibility for its international relations.

See also note 1 under "former Yugoslavia" .

For information on the treatment of treaty actions by predecessor States and successor States in the status tables, see Part C, "Status tables" of the "Introduction" to this publication.

Burkina Faso

Note 1.

Formerly: "Upper Volta" until 4 August 1984.

Burma

See note 1 under "Myanmar" .

Cabo Verde

Note 1.

Formerly: "Cape Verde" until 24 October 2013.

Cambodia

Note 1.

As from 3 February 1990, "Cambodia". Formerly, as follows: as from 6 April 1976 to 3 February 1990 "Democratic Kampuchea"; as from 30 April 1975 to 6 April 1976 "Cambodia"; as from 28 December 1970 to 30 April 1975 "Khmer Republic".

Cameroon

Note 1.

As from 4 February 1984 Cameroon (from 10 March 1975 to 4 February 1984 known as "the United Republic of Cameroon" and prior to 10 March 1975 known as "Cameroon".

Central African Republic

Note 1.

In a communication dated 20 December 1976, the Permanent Mission of the Central African Empire to the United Nations informed the Secretary-General that, by a decision of the extraordinary Congress of the Movement for the Social Development of Black Africa (MESAN), held at Bangui from 10 November to 4 December 1976, the Central African Republic had been constituted into the Central African Empire.

In a communication dated 25 September 1979, the Permanent Representative of that country to the United Nations informed the Secretary-General that, following a change of regime which took place on 20 September 1979, the former institutions of the Empire had been dissolved and the Central African Republic had been proclaimed.

China

Note 1.

Signatures, ratifications, accessions, etc., on behalf of China.

China is an original Member of the United Nations, the Charter having been signed and ratified on its behalf, on 26 June and 28 September 1945, respectively, by the Government of the Republic of China, which continued to represent China in the United Nations until 25 October 1971.

On 25 October 1971, the General Assembly of the United Nations adopted its resolution 2758 (XXVI), reading as follows:

"The General Assembly.

" *Recalling* the principles of the Charter of the United Nations,

" *Considering* that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter,

" *Recognizing* that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

" *Decides* to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."

The United Nations had been notified on 18 November 1949 of the formation, on l October 1949, of the Central People's Government of the People's Republic of China. Proposals to effect a change in the representation of China in the United Nations subsequent to that time were not approved until the resolution quoted above was adopted.

On 29 September 1972, a communication was received by the Secretary-General from the Minister for Foreign Affairs of the People's Republic of China stating:

"l. With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.

"2. As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of `China' are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to."

All entries recorded throughout this publication in respect of China refer to actions taken by the authorities representing China in the United Nations at the time of those actions.

Note 2.

By a notification on 20 June 1997, the Government of China informed the Secretary-General of the status of Hong Kong in relation to treaties deposited with the Secretary-General. The notification, in pertinent part, reads as follows:

"In accordance with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, signed on 19 December 1984 (hereinafter referred to as the Joint Declaration), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China. [For the full text of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984, see United Nation *Treaty Series* volume No.1399, p. 61, (registration number I-23391)].

It is provided in Section 1 of Annex I to the Joint Declaration, "Elaboration by the Government of the

People's Republic of China of its Basic Policies Regarding Hong Kong" and in Articles 12, 13 and 14 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China (hereinafter referred to as the Basic Law), that the Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibility of the Central People's Government of the People's Republic of China. Furthermore, it is provided both in Section XI of Annex I to the Joint Declaration and Article 153 of the Basic Law that international agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Administrative Region.

In this connection, on behalf of the Government of the People's Republic of China, I would like to inform Your Excellency as follows:

I. The treaties listed in Annex I to this Note [herein under], to w hich the People's Republic of China is a party, will be applied to the Hong Kong Special Administrative Region with effect from 1 July 1997 as they:

(i) are applied to Hong Kong before 1 July 1997; or (ii) fall within the category of foreign affairs or defence or, owing to their nature and provisions, must apply to the entire territory of a State; or

(iii) are not applied to Hong Kong before 1 July 1997 but with respect to which it has been decided to apply them to Hong Kong with effect from that date (denoted by an asterisk in Annex I). II. The treaties listed in Annex II to this Note [herein under], to which the People's Republic of China is not yet a party and which apply to Hong Kong before 1 July 1997, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997.

The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997.

III. The Government of the People's Republic of China has already carried out separately the formalities required for the application of the treaties listed in the aforesaid Annexes, including all the related amendments, protocols, reservations and declarations, to the Hong Kong Special Administrative Region with effect from 1 July 1997.

IV. With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application. For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within in the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State."

The treaties listed in Annexes I and II, referred to in the notification, are reproduced below.

Information regarding reservations and/or declarations made by China with respect to the application of treaties to the Hong Kong Special Administrative Region can be found in the footnotes to the treaties concerned as published herein. Footnote indicators are placed against China's entry in the status list of those treaties.

Moreover, with regard to treaty actions undertaken by China after 1 July 1997, the Chinese Government confirmed that the territorial scope of each treaty action would be specified. As such, declarations concerning the territorial scope of the relevant treaties with regard to the Hong Kong Special Administrative Region can be found in the footnotes to the treaties concerned as published herein. Footnote indicators are placed against China's entry in the status list of those treaties.

Annex I

(The treaties are listed in the order that they published in these volumes.)

Charter of the United Nations and Statute of the International Court of Justice :

- Charter of the United Nations, 26 June 1945; - Statute of the International Court of Justice, 26 June 1945;

- Amendment to Article 61 of the Charter of the United Nations, adopted by the General Assembly of the United Nations in resolution 2847 (XXVI) of 20 December 1971.

Privileges and Immunities, Diplomatic and Consular Relations :

- Convention on the Privileges and Immunities of the United Nations, 13 February 1946;

- Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, 21 November 1947; - Vienna Convention on Diplomatic Relations, 18 April 1961;

- Vienna Convention on Consular Relations, 24 April 1963.

Human Rights:

- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948;

- International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966;

- Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979;

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984;

- Convention on the Rights of the Child, 20 November 1989.

Narcotic Drugs and Psychotropic Substances :

- Convention on psychotropic substances, 21 February 1971;

- Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, 8 August 1975;

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988.

Health :

- Constitution of the World Health Organization, 22 July 1946.

International Trade and Development :

- Agreement establishing the Asian Development Bank, 4 December 1965;

- Charter of the Asian and Pacific Development Centre, 1 April 1982

Transport and Communications - Customs matters:

- Customs Convention on Containers, 2 December 1972*.

Navigation :

- Convention on the International Maritime Organization, 6 March 1948;

- Convention on a Code of Conduct for Liner Conferences, 6 April 1974.

Educational and Cultural Matters:

- Convention for the Protection of Products of Phonograms Against Unauthorized Duplication of their Phonograms, 29 October 1971.

Penal Matters :

- International Convention against the taking of hostages, 17 December 1979;

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973.

Law of the Sea:

- United Nations Convention on the Law of the Sea, 10December 1982.

Commercial Arbitration:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958.

Outer Space:

- Convention on the Registration of Objects Launched into Outer Space, 12 November 1974.

Telecommunications :

- Constitution of the Asia-Pacific Telecommunity, 27 March 1976.

Disarmament :

- Convention on Prohibitions or restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with protocols I, II and III), 10 October 1980;

- Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992.

Environment :

- Vienna Convention for the Protection of the Ozone Layer, 22 March 1985;

- Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987;

- Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 29 June 1990;

- Basenvention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 22 March 1989.

Annex II (The treaties are listed in the order that they are published in these volumes.)

Refugees and Stateless Persons:

- Convention relating to the Status of Stateless Persons, 28 September 1954.

Traffic in Persons :

- International Convention for the Suppression of the Traffic in Women and Children, 30 September 1921;

- Protocol amending the International Agreement for theSuppression of the White Slave Traffic, signed at Paris on 18 May 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, 4 May 1949;

- International Agreement for the Suppression of the "White Slave Traffic", 18 May 1904;

- International Convention for the Suppression of the White Slave Traffic, 4 May 1910.

Obscene Publications:

- Protocol to amend the Convention for the suppression of the circulation of, and traffic in, obscene publications, concluded at Geneva on 12 September 1923, 12 November 1947;

- International Convention for the Suppression of the Circulation of, and Traffic in Obscene Publications, 12 September 1923;

- Protocol amending the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910, 4 May 1949;

- Agreement for the Repression of Obscene Publications, 4 May 1910.

Transport and Communications - Custom matters:

- International Convention to Facilitate the Importation of Commercial Samples and Advertising Materials, 7 November 1952;

- Convention concerning Customs Facilities for Touring, 4 June 1954;

- Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material, 4 June 1954;

- Customs Convention on the Temporary Importation of Private Road Vehicles, 4 June 1954;

- Customs Convention on the Temporary Importati of Commercial Road Vehicles, 18 May 1956;

- Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats, 18 May 1956;

- European Convention on Customs Treatment of Pallets Used in International Transport, 9 December 1960.

Transport and Communications - Road Traffic :

- Convention on Road Traffic, 19 September 1949.

Educational and Cultural Matters

- Agreement of the Importation of Educational, Scientific and Cultural materials, 22 November 1950.

Status of Women

- Convention on the Political Rights of Women, 31 March 1953;

- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10 December 1962.

Penal Matters :

- Protocol amending the Slavery Convention signed at Geneva 25 September 1926, 7 December 1953;

- Slavery Convention, 25 September 1926;

- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956.

Environment :

- Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Copenhagen, 25 November 1992.

League of Nations:

- Convention and Statute on Freedom of Transit, 20 April 1921;

- Convention and Statute on the Regime of Navigable Waterways of International Concern, 20 April 1921;

- Declaration Recognizing the Right to a Flag of States Having no Sea-coast, 20 April 1921;

- Convention and Statute on the International Regime of Maritime Ports, 9 December 1923 ;

- International Convention relating to the Simplification of Customs Formalities, 3 November 1923.

See also note 2 under "United Kingdom of Great Britain and Northern Ireland" .

Note 3.

By a notification dated 13 December 1999, the Government of the People's Republic of China informed the Secretary-General of the status of Macao in relation to treaties deposited with the Secretary-General. The notification, in pertinent part, reads as follows:

Annexe 20

to the Expert Report
of Professor Simon Chesterman

Initiative and Implications of Hong Kong's Bilateral Investment Treaties*

ZENG Huaqun**

I. INTRODUCTION

In late 1950's, the first bilateral investment treaty (hereinafter BIT) was concluded between the Federal Republic of Germany and Pakistan, aiming at promotion and protection of international investment.[1] The Contracting Parties to the BITs are typically European countries and developing countries. Germany and other European States took the lead in this regard.[2] Gradually BITs are widely accepted by States around the world and have become the most popular form of investment treaty regime.[3]

In general a BIT is defined as an agreement concluded between two States in which each State agrees to offer certain protections to investors and investment from the other State.[4] In the more than half century, most BITs mimic, at least in broad strokes, the 1959 Draft International Convention on Investments Abroad (commonly known as the Abs-Shawcross Convention) and the Organization for Economic Cooperation and

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[1] The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments was concluded in 1959. It contains many substantive provisions that have become common in subsequent BITs. See Andrew Newcombe, Lluis Paradell, Law and Practice of Investment Treaties, Standards of Treatment, *Wolters Kluwer*, 42 (2009); Jason Webb Yackee, "Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties", 33 *Brooklyn J. Int'l L.* 405 (2008).

[2] Switzerland, France, Italy, United Kingdom, the Netherlands, and Belgium followed Germany's BIT practice in a relatively short time. See Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", 24 *The International Lawyer* 656-657 (1990).

[3] According to statistics of UNCTAD, there are 2750 BITs by the end of 2009. United Nations Conference on Trade and Development, World Investment Report 2010, 81. www.unctad.org 03/08/2010. For general picture of BIT practice, see UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, *United Nations* (2007). Latin American States, home of the Calvo Doctrine, shifted their position on BITs and began signing BITs in the late 1980s. Over the past two decades, they have signed more than 500 BITs with countries around the world. See Mary H. Mourra (ed.), Latin American Investment Treaty Arbitration, the Controversies and Conflicts, *Wolters Kluwer*, 1 (2009).

[4] Paul E. Comeaux, N. Stephan Kinsella, Protecting Foreign Investment under International Law, Legal Aspects of Political Risk, *Oceana Publications Inc.*, 101 and note 7 (1997).

Development (OECD) 1967 Draft Convention on the Protection of Foreign Property.[5] Due to their common origins, the terms used and subjects covered in different BITs appear remarkably similar over time and across countries.[6] In addition the Contracting Parties to the BITs are all sovereign States before the emergence of Hong Kong (HK) on its own as a newcomer in this scene.

According to provisions of the Sino-British Joint Declaration on the Question of Hong Kong (hereinafter the JD)[7] and the Basic Law of Hong Kong Special Administrative Region of the People's Republic of China (hereinafter the BL), the Hong Kong Special Administrative Region (hereinafter HKSAR) may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with foreign States and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.[8]

In the period of British rule, HK's international investment relations were conducted within the framework of the United Kingdom (UK)'s BITs.[9] UK had covered HK under a number of its BITs by way of territorial extension in exchange of notes. The legal effect of these UK's BITs in HK only continued until 30 June 1997. In order to maintain and develop HK's international investment relations after 1997, HK had two choices in the transition period (from 27 May 1985 to 30 June 1997): one was that HK negotiate and conclude BITs in its name with foreign countries in accordance with above provisions of the JD and the BL, and the other was that HK's international investment relations were covered by the framework of Chinese BITs.[10] HK chose the first one then. Considering the different economic and legal systems as well as different status in the international investment context between HK and Mainland China, the choice may better meet the specific needs of HK and serve the purpose of promoting and protecting international investment for HK.

On 19 November 1992, Agreement between Government of Hong Kong and Government of Kingdom of Netherlands on Promotion and Protection of Mutual

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[5] For the brief history of the BITs, see Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", 24 *The International Lawyer*, 656-661 (1990).

[6] Jason Webb Yackee, supra note 1, 415-416.

[7] Joint Declaration of Government of United Kingdom of Great Britain and Northern Ireland and the People's Republic of China on the Question of Hong Kong was formally signed on 19 December 1984 and came into force on 27 May 1985. The agreement was reprinted in 23 *ILM* 1371-1380 (1984).

[8] Art. 3, 9, 10, the JD; Section XI of Annex I of the JD; Art. 151, the BL. The key to the scope of HK's treaty-making power is the concept of "appropriate fields". The term itself is not defined, and it is necessary to examine all the provisions of the BL to determine in what areas Hong Kong may have capacity for external relations. See Yash Ghai, Hong Kong's New Constitutional Order, The Resumption of Chinese Sovereignty and the Basic Law, *Hong Kong University Press*, 435-436 (1997).

[9] For general picture of UK's BITs practice, see Eileen Denza & Shelagh Brooks, "Investment Protection Treaties: United Kingdom Experience", 36 *Int'l & Com. L. Q.*, 908-923 (1987).

[10] China has participated actively in negotiating BITs with foreign countries since earlier 1980's and there are 125 China-foreign BITs by the end of 2009, ranking only second to Germany (135 BITs) in the numbers of BITs concluded. United Nations Conference on Trade and Development, World Investment Report 2010, p.81. www.unctad.org 03/08/2010.

Investment (hereinafter HK-Netherlands BIT) was signed and entered into force on 1 September 1993.[11] As the first HK's BIT, HK-Netherlands BIT plays an important role of "*de facto* Model" in HK's earlier BIT practice for HK itself and its counterparts. The "*de jure* Model BIT", Model Agreement between the Government of Hong Kong and the Government of ...... For the Promotion and Protection of Investments (hereinafter HK Model BIT) was published in 1995,[12] following the traditional framework and general rules of BITs.[13] Comparing with "Treaty between the Government of the United States of America and Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment" (2004) (hereinafter 2004 US Model BIT),[14] HK's two BIT Models are succinct and fulfill the basic functions for its BIT practice.[15]

Upon the positive practice in accordance with the two Models, HK has concluded 14 BITs in its name with 15 foreign countries by 25 June 2010.[16] All of HK's counterparts to BITs are developed countries except Thailand.[17] HK's successful BIT

[11] Texts published in *Special Supplement No. 5 to the Hong Kong Government Gazette*, E27-53 (1992).

[12] The whole text of HK Model BIT published in Rudolf Dolzer, Margrete Stevens, Bilateral Investment Treaties, *Martinus Nijhoff Publishers*, 200-208 (1995).

[13] It seems that there are two types of BIT models: one is the European model, the traditional one; the other is the US model, including provisions on some new elements and complicated dispute settlement regime. There are 11 Articles in the HK Model BIT: Article 1: Definition; Article 2: Promotion and Protection of Investment and Returns; Article 3: Treatment of Investments; Article 4: Compensation for Losses; Article 5: Expropriation; Article 6: Transfer of Investments and Returns; Article 7: Exceptions; Article 8: Settlement of Investment Disputes; Article 9: Disputes between Contracting Parties; Article 10: Entry into force; Article 11: Duration and Termination. It is evident that the HK Model BIT follows European model. See also the typical European BIT Models: German Model Treaty-2008: Treaty between the Federal Republic of Germany and [.......] concerning the Encouragement and Reciprocal Protection of Investments (13 Articles in total); and Draft Agreement between the Government of the Republic of France and the Government of the Republic of [......] on the Reciprocal Promotion and Protection of Investments (2006) (11 Articles in total). For the preparation and purposes of the Model BITs, see Jeswald W. Salacuse, supra note 2, 662-663.

[14] For the evolution of US Model BIT, see Kenneth J. Vandevelde, U.S. International Investment Agreements, *Oxford University Press*, 91-112 (2009).

[15] There are 37 Articles in the 2004 US Model BIT: Article 1: Definitions; Article 2: Scope and Coverage; Article 3: National Treatment; Article 4: Most-Favored-Nation Treatment; Article 5: Minimum Standard of Treatment; Article 6: Expropriation and Compensation; Article 7: Transfers; Article 8: Performance Requirements; Article 9: Senior Management and Boards of Directors; Article 10: Publication of Laws and Decisions Respecting Investment; Article 11: Transparency; Article 12: Investment and Environment; Article 13: Investment and Labour; Article 14: Non-Conforming Measures; Article 15: Special Formalities and Information Requirements; Article 16: Non-Derogation; Article 17: Denial of Benefits; Article 18: Essential Security; Article 19: Disclosure of Information; Article 20: Financial Services; Article 21: Taxation; Article 22: Entry into force: Duration and Termination; Article 23: Consultation and Negotiation; Article 24: Submission of a Claim to Arbitration; Article 25: Consent of Each Party to Arbitration; Article 26: Conditions and Limitations on Consent of Each Party; Article 27: Selection of Arbitrators; Article 28: Conduct of the Arbitration; Article 29: Transparency of Arbitral Proceedings; Article 30: Governing Law; Article 31: Interpretation of Annexes; Article 32: Expert Reports; Article 33: Consolidation; Article 34: Awards; Article 35: Annexes and Footnotes; Article 36: Service of Documents; Article 37: State-State Dispute Settlement. The text is divided into three sections: Section A (Article 1 to Article 22), Section B (Article 23 to Article 36) and Section C (Article 37).

[16] www.legislation.gov.hk 08/07/2010.

[17] 15 out of the 16 counterparts of HK's BITs are member States of Organization for Economic Co-operation and Development (OECD), only one is developing country. The counterparts, the dates of entry into force and the texts available of the agreements are: Netherlands (1.9.1993), *Special Supplement No. 5 to the Hong Kong Government Gazette*, 134, No. 50 (1992): E25-E53; Australia (15.10.1993), Ibid, 135, No. 37 (1993): E103-E123; Denmark (4.3.1994),136, No. 6 (1994): E19-E48; Sweden (26.6.1994), 136, No. 23 (1994): E51-E78; Switzerland (22.10.1994), 136, No. 48 (1994): E85-E116; New Zealand (5.8.1995), 137, No. 34 (1995): E95-E115; France (30.5.1997), 2, No. 26 (1998): E215-E240; Japan (18.6.1997), 2, No. 26 (1998): E241-E281; Korea (30.7.1997), 2, No. 26 (1998): E283-E316; Austria (1.10.1997), 2, No. 26 (1998): E317-E351; Italy (2.2.1998), 2, No. 6 (1998): E3-E35; Germany (19.2.1998), 2, No. 10 (1998): E39-E66; UK (12.4.1999), 3, No. 15 (1999): E391-E414; Belgium and Luxembourg (18.6.2001), 5, No. 25 (2001): E175-E222; Thailand (12.4.2006), 10, No. 18 (2006): E41-E65.

practice demonstrates remarkable achievements in practice of its external autonomy[18] and indicates an important breakthrough and initiative in the history of BITs and international law.

Due to HK's status of non-sovereign entity, HK's BITs have constituted a series with its characteristics. Based on the provisions of HK's two BIT Models and relevant treaty practice, the following will discuss and analyze some key provisions of HK's BITs, such as provisions relating to authorization, scope of application, investment treatment, deprivation and compensation, dispute settlement, focusing on initiatives and implications of HK's BIT practice.

II. AUTHORIZATION

The first unique feature of HK's BIT practice is the authorization statements, which is totally new content in the preamble of BITs. It is obvious that as HK is a non-sovereign entity, the source of authorization for HK's treaty-making power should be established and indicated clearly as a prerequisite.

According to traditional international law, only sovereign States may be Contracting Parties of treaties. In the development of modern international practice, more and more non-sovereign entities have become the Contracting Parties of treaties. In addition to sovereign States, international organizations, member States of federal States, belligerent, and regional entities with high autonomy, etc., have become the newcomer for negotiating and concluding treaties. The legal grounds for these non-sovereign entities are different. The source of their treaty-making power comes from basic instruments for international organizations, from federal constitutions for member States of federal States, from customary international law for belligerent, and from authorization by sovereign States for regional entities.[19]

In the BIT practice before 1992, like other traditional treaty practice, all the Contracting Parties to BITs are sovereign States. The HK-Netherlands BIT is the first one which is concluded between a non-sovereign entity and a sovereign State in the BIT history. It is an important breakthrough in terms of Contracting Parties of BITs.

One of the common features of HK's BITs concluded in the transition period is that the treaties do not indicate the name of the authorizing government in the texts though the treaty-making power of HK has actually been duly authorized by a sovereign government. The preamble of HK-Netherlands BIT states that: "the Government of Hong Kong, having been duly authorized to conclude this agreement by the sovereign

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[18] For a general picture of HK's practice on external autonomy, see Zeng Huaqun, "Unprecedented International Status: Theoretic and Practical Aspects of HKSAR's External Autonomy", 9 (3) *The Journal of World Investment & Trade*, 275-297 (2008).

[19] See Li Haopei, On the Laws of Treaties (in Chinese), *Law Press*, 240 (1988).

government which is responsible for its foreign affairs, and the Government of the Kingdom of the Netherlands......". The HK Model BIT[20] and other HK's BITs follow the same terms. This description might be regarded as an intentional vague. Article 4 of the JD indicates that UK is in charge of HK's administration until 30 June 1997 and China resumes exercising its sovereignty from 1 July 1997. Therefore, for the counterparts to the HK in these BITs, the terms "the sovereign government which is responsible for its foreign affairs" might refer to two governments in different periods of time, namely UK before 30 June 1997 and China after 1 July 1997. In fact, the authorization of HK's BITs concluded in transition period having been transferred from UK to China after 1 July 1997 even the terms on authorization in HK's BITs remain unchanged.

HK's BITs concluded after 1 July 1997 clearly indicate the source of authorization for treaty-making power of HK. HK-UK BIT, the first HK's BIT concluded after 1 July 1997, states in the preamble that "the Government of Hong Kong Special Administrative Region of the People's Republic of China having been duly authorized to conclude this agreement by the Central People's Government of the People's Republic of China, and the Government of the United Kingdom of Great Britain and Northern Ireland......".

As for legal status of HKSAR,[21] Article 12 of the BL provides distinctly that "Hong Kong Special Administrative Region shall be a local administrative region of People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government." The provisions clarify the legal status of the HKSAR, which is a key to understand the nature of the HKSAR's external autonomy. The authorization arrangements and provisions in the preamble of HK's BITs further confirm the authorization nature of the HKSAR's external autonomy and its treaty-making power in the specified fields. Although this kind of formulation has not yet acquired popular usage in international law, its form clearly constituted HK as an entity with the capacity to enter into BITs and other treaties.[22]

III. SCOPE OF APPLICATION

The scope of application of BITs firstly is defined by definition clause.[23] The purpose of definitions in BITs is to determine the objects to which the rules of the agreement shall apply and the scope of their applicability. The typical BIT protects

[20] Preamble of HK model BIT, in Rudolf Dolzer, Margrete Stevens, supra note 12, 200.

[21] There are some comments on the HK/HKSAR's legal status before and after 1997, typically see Roda Mushkat, "Hong Kong as an International Legal Person", 6 *Emory International Law Review*, 105-170 (1992); Xiaobing Xu, George D. Wilson, "The Hong Kong Special Administrative Region as a Model of Regional External Autonomy", 32 *Case W. Res. J. Int'l L.*, 1-38 (2000).

[22] See Anthony Neoh, "Hong Kong's Future: The View of a Hong Kong Lawyer", 22 *Cal. W. Int'l L. J.* 351-352 (1992).

[23] Michael R. Reading, "The Bilateral Investment Treaty in ASEAN: a Comparative Analysis", 42 *Duke Law Journal*, 695 (1992).

investments made by investors of one Contracting Party in the territory of the other Contracting Party. The scope of the subject matter of BIT thus depends on the definitions of certain key terms, particular "investments" and "investors".[24] The clause also often defines the notion of territory of Contracting Parties, so that "investments" made in that territory of a Contracting Party by "investors" of another Contracting Party qualify as protected "foreign" investments.[25] In addition, duration and termination clause of BIT also defines the scope of their applicability in time. Following the general practice of BITs in this regard, HK has made some new and different provisions with its counterparts due to its non-sovereign status, especially the provisions on "investors" and geographical application.

1. *INVESTMENT*

BITs usually provide a definition of what constitutes an investment protected by the treaty in their definition clause. The definitions of "investment" are very broad, typically referring to "every kind of asset", and then adding a specific non-exhaustive list of examples.[26] The broad definition of "investment" is particularly drafted by US and other capital-exporting States in their Model BITs. The objective behind this is to ensure that treaty protection could be given to a wide variety of activities associated with foreign direct investment (hereinafter FDI).[27]

Following general practice of most BITs,[28] Article 1 (e) of HK Model BIT provides that:

> " 'investment' means every kind of asset, and in particular, though not exclusively, includes:
>
> (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
>
> (ii) shares in and stock and debentures of a company and any other form of participation in a company;
>
> (iii) claims to money or to any performance under contract having a financial value;
>
> (iv) intellectual property rights and goodwill;
>
> (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;
>
> A change in the form in which assets are invested does not affect their character as investments......"

The above provisions are followed by HK's BITs with minor revisions and/or

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[24] UNCTAD, supra note 3, 7.

[25] Andrew Newcombe, Lluis Paradell, supra note 1, 65.

[26] Andrew Newcombe, Lluis Paradell, supra note 1, 65-66.

[27] M. Sornarajah, The International Law on Foreign Investment, second edition, *Cambridge University Press*, 9 (2004).

[28] UNCTAD, supra note 3,8.

supplement.[29] It seems that HK adopts the broad "asset-based" definition of "investment", the scope of which goes beyond covering only FDI.[30]

It should be pointed out that the provisions that "a change in the form in which assets are invested does not affect their character as investments" have very important practical implications. According to the provisions, the character of investments is "freezed" at the time of making investment. Even the form of the investments changes afterwards, their character as investments is indisputable. The "precaution" provision might prevent or decrease the potential disputes concerning the character of investments.

2. *INVESTORS*

BITs provide in general that "investors" means physical persons who are nationals of Contracting Parties[31] and companies incorporated or constituted under the law of Contracting Parties. In HK's BITs, while provisions for defining "companies" as "investors" follow the general practice of most BITs,[32] the provisions for defining "physical persons" as "investors" are unique due to HK's non-sovereign status and specific needs for protection to certain people.

Traditionally two different approaches have been taken in the drafting of the definition of the term "physical persons". One is to set forth a single definition for applying to both parties. The other is to offer two definitions, one relating to one Contracting Party, and the other to the second Contracting Party.[33] HK Model BIT creates the third approach. According to the Model, "'investors' means: (i) in respect of either Contracting Party: physical persons who have the right of abode in the area of that Contracting Party......; (ii) in respect of [HK's counterpart] : physical persons who are its nationals".[34] It seems that the HK Model BIT adopts two standards – permanent resident standard and/or national standard[35] – for two Contracting Parties in different

[29] See Art.1(3), HK-Netherlands; Art.1(e), HK-Australia; Art.1(3), HK-Denmark; Art.1(3), HK-Sweden; Art.1(5), HK-Switzerland; Art.1.5, HK-New Zealand; Art.1(2), HK-France; Art.1.3, HK-Japan; Art. 1(4), HK-Korea; Art.1(c), HK-Austria; Art. 1(5), HK-Italy; Art. 1(2), HK-Germany; Art.1(e), HK-UK; Art. 1(4), HK-Belgium and Luxembourg; Art. 1(3), HK-Thailand. Article 1(4)(f) of HK-Korea BIT adds a category of investment, providing that "goods that, under a leasing agreement, are placed at the disposal of a lessee in the area of a Contracting Party in accordance with its laws and regulations".

[30] In addition to the broad "asset-based" definition, there are tautological or circular definition, and closed-list definition for "investment" in BIT practice. See UNCTAD, supra note 3,8-13.

[31] Most BITs protect physical persons who have the nationality of one of the Contracting Parties. Thus the typical definition of a national of a party is a physical person recognized by that party's internal law as a national or citizen. In some cases, the definition of "investor" is even broader to include not only citizens but also individuals, who qualify as permanent residents under domestic law. See UNCTAD, supra note 3, 13.

[32] BITs have essentially relied on three basic criteria to determine the nationality of a "company": (i) the concept of incorporation or constitution; (ii) the concept of the seat; and (iii) the concept of control. See Rudolf Dolzer, Margrete Stevens, supra note 12, 35-36.

[33] Rudolf Dolzer, Margrete Stevens, supra note 12, 31-32.

[34] Art. 1(f)(i), HK Model BIT.

[35] There is key difference between "national" and "citizen" in the legal implication in some countries. Under US law, the term "national" is broader than the term "citizen". For example, a native of American Samoa is a national of the US, but not a citizen. See Kenneth J. Vandevelde, supra note 14, 144.

ways: only permanent resident standard for HK; both permanent resident standard and national standard for HK's counterparts.[36]

In a more clear way, HK-Netherland BIT provides that: "'investors' means: (a) in respect of Hong Kong: (i) physical persons who have the right of abode in its area...... (b) in respect of the Kingdom of the Netherlands: (i) physical persons who are its nationals......".[37] These provisions have become general practice in most of HK's BITs.[38] The key difference between these provisions and those of the HK Model BIT is that only national standard is applied for the HK's counterparts.

It is evident that due to its non-sovereign status, HK cannot adopt the national standard for defining "physical persons" as "investors"'. The simple reason is that apart from complicated nationality issue of HK residents before 30 June 1997, even after 1 July 1997 when China resumes exercising its sovereignty on HK, the protection of HK's BITs cannot cover the Chinese nationals who have not the right of abode in HK, including Chinese nationals of Mainland, Macao and Taiwan. On the contrary, the protection of HK's BITs might cover physical persons who are nationals of foreign States and permanent residents of HK.

However, the application of different standards for defining "physical persons" as "investors" may raise a "double BIT protection" issue. As the result of the application of permanent resident standard, HK's permanent residents who seek protection from HK's BITs may cover all foreigners who have the right of abode in HK, including nationals of HK's counterparts. In this case, as qualified "investor" from both Contracting Parties, he or she may seek for BIT protection from HK and/or from HK's counterpart at will. Both of the Contracting Parties of HK's BIT therefore have to face and tackle the awkward "investor identity" issue.

For dealing with this issue, HK-UK BIT provides that "investors" means: in respect of HK, "physical persons who have the right of abode in the area of the Hong Kong Special Administrative Region but who are not British nationals"; in respect of the UK, "physical persons who are British nationals but who do not have the right of abode in the Hong Kong Special Administrative Region".[39] This is a good example for clarification and establishment of the "investor identity". However, as a result of these provisions, "physical persons who are British nationals and who have the right of abode in the Hong Kong Special Administrative Region" cannot seek for HK-UK BIT protection from either side of the Contracting Parties. A new issue of "vacuum BIT protection" occurs.

[36] In practice only two HK's BITs adopt the provisions on "both permanent resident standard and national/citizen standard for HK's counterparts". Article 1(f) of HK-Australia BIT provides that: "in respect of Australia: (A) physical persons possessing Australia citizenship or who are permanently residing in Australia in accordance with its law......" Article 1(2)(b)(i) of HK-New Zealand BIT has similar provisions.

[37] Art. 1(2), HK-Netherlands.

[38] Art. 1(2), HK-Denmark; Art. 1(2), HK-Sweden; Art. 1(2), HK-Switzerland; Art. 1(3), HK-France; Art. 1.4, HK-Japan; Art. 1(5), HK-Korea; Art.1(d), HK-Austria; Art. 1(6), HK-Italy; Art. 1(4), HK-Germany; Art.1(f), HK-UK; Art. 1(5), HK-Belgium and Luxembourg; Art. 1(4), HK-Thailand.

[39] Art.1(f)(i), HK-UK BIT.

3. *Geographical Application*

The geographical scope of application of a BIT depends on the definition of the term "territory". The purpose of defining this term is not to delimit the territory of the Contracting Parties; that is an aspect normally dealt with in national constitutions. Rather, the rationale derives from the objective of investment protection, in particular to provide that investments located in maritime areas beyond the boundaries of the territorial waters are deemed to be within the Parties' territory for the purposes of the agreement.[40]

According to Article 1 (a) (i) of HK Model BIT, "area: (i) in respect of Hong Kong includes Hong Kong Island, Kowloon and the New Territories".[41] For the HK's counterpart, the geographical scope covers the whole territory of the sovereign State including the specified maritime areas.[42]

It is noticeable that in HK's BITs the Contracting Parties firstly use the term of "area" instead of "territory" for both Parties in the BIT history. The term "territory" is usually used for description of geographical scope of sovereign States.[43] Comparing with definition of "territory", "area" is broader and may be equally used for both non-sovereign entities and sovereign States. As HK is a non-sovereign entity, the term "area" is more precise for description of HK's geographical scope than the term "territory". Moreover unlike the definition for its counterpart, the definition that in respect of HK, "area" "includes Hong Kong Island, Kowloon and the New Territories" indicates only land area, clearly excluding the maritime area, is covered by the treaty.[44]

4. *Application in Time*

Regarding the issue of application in time, two main questions have traditionally arisen in BIT negotiations: one is application to existing investments; the other is the duration and determination of the period of application.[45]

4.1. Application to existing investments

In accordance with the Vienna Convention on the Law of Treaties, a treaty does not in general have retroactive effects.[46] Therefore the rights and obligations derived

[40] UNCTAD, supra note 3, 17.
[41] Art.1(a)(i), HK Model BIT. This is general practice without exception in all HK's BITs.
[42] For example, Art. 1.1 of HK-Netherlands BIT provides that "in respect of the Kingdom of the Netherlands, is the territory of the Kingdom including the maritime areas adjacent to the coast of the territory concerned, to the extent to which the Kingdom of the Netherlands exercises sovereign rights or jurisdiction in those areas according to international law".
[43] The general definition of territory is that: "a geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a State's exclusive possession and control." Bryan A. Garner, Black's Law Dictionary, Eighth Edition, *Thomson*, 1512 (2004).
[44] Recent BITs of coastal nations generally include a reference to such maritime areas in the BIT. Rudolf Dolzer, Margrete Stevens, supra note 12, 43-44.
[45] UNCTAD, supra note 3,19.
[46] Art.28 of Vienna Convention on the Law of Treaties provides that: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

from a treaty apply only after the treaty has entered into force and with respect to acts or facts occurring thereafter. There is the issue of whether BITs should apply after their entry into force to investments already existing at that time. There are three approaches in recent BIT practice: (1) to provide protection to both future investments and existing investments, but not apply to any investment-related dispute or claim that arose or was settled before the entry into force of the BIT; (2) to provide protection only to future investments; and (3) not to address the issue.[47]

According to Article l(e) of the HK Model BIT, "the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement". This provision is followed by all HK's BITs.[48] It seems that HK's BITs take a most opening-up attitude to the issue, namely indicating "to provide protection to both future investments and existing investments", and without excluding "any investment-related dispute or claim that arose or was settled before the entry into force of the BIT".

4.2. DURATION AND TERMINATION

Unlike other international agreements, BITs usually specify that they shall remain in force for a minimum fix period. The rationale for this approach is to provide investors of the Contracting Parties with a high level of certainty and predictability regarding the international legal framework applicable to their investments. Among the BITs under UNCTAD's recent review, the prevailing trend has been to specify that the initial period for which the treaty shall be in force will be 10 years. A significant number of BITs provide for a longer initial period of application such as 15 years. Other BITs provide in principle that BIT shall remain in force indefinitely until one Contracting Party notifies the other of its intention to terminate it.[49]

According to Article 11 of HK Model BIT:

> "This Agreement shall remain in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other."

It seems that from the above provision there is no definite duration for the application of HK's BITs. The only way for termination of the treaties is by written notice of termination unilaterally.

However Article 13.1 of HK-Netherlands BIT sets up another model, providing that:

> "This Agreement shall remain in force for a period of fifteen years. Unless notice of termination has been given by either Contracting Party at least twelve months before the

[47] UNCTAD, supra note 3, 20.

[48] HK Model BIT. See Art.9, HK-Netherlands; Art.1(e), HK-Australia; Art. 12(I), HK-Denmark; Art.11, HK-Sweden; Art.9, HK-Switzerland; Art.2.2, HK-New Zealand; Art.12, HK-France; Art.10, HK-Japan; Art.12, HK-Korea; Art.11, HK-Austria; Art.9, HK-Italy; Art.9, HK-Germany; Art.1(c), HK-UK; Art.11, HK-Belgium and Luxembourg; Art. 1(3), HK-Thailand,

[49] UNCTAD, supra note 3, 20.

date of expiry of its validity, the Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least twelve months before the date of expiry of the current period of validity."[50]

The model has become general practice in HK's BITs (see Table 1).

TABLE 1: PROVISIONS ON DURATION AND TERMINATION IN HK'S BITS[51]

BITs	Dates of entry into force	Duration	Extended periods
HK-Netherlands	1.9.1993	15	10
HK-Australia	15.10.1993	15	indefinitely
HK-Denmark	4.3.1994	15	indefinitely
HK-Sweden	26.6.1994	15	indefinitely
HK-Switzerland	22.10.1994	15	10
HK-New Zealand	5.8.1995	15	indefinitely
HK-France	30.5.1997	20	10
HK-Japan	18.6.1997	15	indefinitely
HK-Korea	30.7.1997	15	indefinitely
HK-Austria	1.10.1997	15	indefinitely
HK-Italy	2.2.1998	15	10
HK-Germany	19.2.1998	15	indefinitely
HK-UK	12.4.1999	15	indefinitely
HK-Belgium and Luxembourg	18.6.2001	15	10
HK-Thailand	12.4.2006	15	indefinitely

It is worth noticing that all HK's BITs provide longer initial period (15 years) of application with flexible extended period of application. The significance of the provisions on termination of HK's BITs concluded in transition period is that these BITs shall remain in force after 1 July 1997, reflecting that the Contracting Parties of HK's BITs believe that HK's international status would remain unchanged after 1 July 1997. These provisions certainly enhance the confidence of foreign investors to HK's investment environment.

IV. INVESTMENT TREATMENT

BITs aim at decreasing the political or non-commercial risks[52] by establishing the standards of treatment relating to transnational investments with legal effect.[53] They usually include one or several general principles that, together or individually, are intended to provide overall criteria by which to judge whether the treatment given to an investment and/or investor is satisfactory, and to help interpret and clarify how more

[50] Art. 13.1, HK-Netherlands.

[51] See Art.13, HK-Netherlands; Art.14, HK-Australia; Art.14, HK-Denmark; Art.13, HK-Sweden; Art.14, HK-Switzerland; Art.13, HK-New Zealand; Art.14, HK-France; Art.15, HK-Japan; Art.14, HK-Korea; Art.13, HK-Austria; Art.13, HK-Italy; Art.13, HK-Germany; Art.15, HK-UK; Art.13, HK-Belgium and Luxembourg; Art. 12, HK-Thailand.

[52] Typical political risks include risk of expropriation, currency risk, risk of political violence and breach of contract; for detailed discussion of political risks, see Paul E. Comeaux, N. Stephan Kinsella, supra note 4, 1-22.

[53] Michael R. Reading, supra note 23, 684.

specific provisions should be applied in particular situations. These provisions are typical substantive protection for covered investment and investors of BITs.[54]

1. *CATEGORIES OF INVESTMENT TREATMENT STANDARDS*

There are a variety of standards of treatment provided for in BITs. They would usually contain one article on treatment standards but that article would identify several different treatment standards.[55]

There are two broad categories of standards in general practice of BITs.

One is absolute standards, including fair and equitable treatment, full protection and security, and the minimum standard of treatment according to customary international law.[56]

The second is relative standards, mainly referring to national treatment and most-favoured-nation (MFN) treatment. Both impose an obligation to provide "non-discriminatory" treatment.[57]

National treatment is one of the core guarantees regularly endorsed in BIT practice.[58] In a BIT context it means the obligation of Contracting Parties to grant investors of the other Contracting Party treatment no less favourable than the treatment they grant to investments of their own investors. The standard is an empty shell that obtains substantive content in relation to the treatment afforded to someone or something else. The effect of the standard is to create a level playing field between foreign and domestic investors in relevant markets.[59] The legal analysis involves a comparison between the host State's treatment of domestic and foreign investors or domestic and foreign investments.[60]

As with national treatment, MFN treatment is also a relative standard. The MFN treatment means that investments or investors of one Contracting Party are entitled to treatment by the other Contracting Party that is no less favorable than the treatment the latter grants to investments or investors of any other third country. The MFN standard ensures that investments or investors of Contracting Parties to a BIT receive the best treatment that each of them has granted to the investments or investors of any other

[54] UNCTAD, supra note 3, 28; Mary H. Mourra, supra note 3, 169-171.

[55] M. Sornarajah, supra note 27, 233. US 2004 Model BIT takes a new approach that includes four Articles on investment treatment, namely Article 3: National Treatment, Article 4: Most-Favored-Nation Treatment, Article 5: Minimum Standard of Treatment and Article 8: Performance Requirement. The prohibition on performance requirement attempts to ensure that investments are made in accordance with commercial aims, not a State's promotion of protectionist or other policy goals. See Mary H. Mourra, supra note 3, 170.

[56] There are many comments and related practice on these absolute standards, especially on fair and equitable treatment. See Alberto Alvarez-Jimenez, "Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice", 9 (1) *The Journal of World Investment & Trade*, 51-70 (2008); Mary H. Mourra, supra note 3, 170-171, 188-190.

[57] Mary H. Mourra, supra note 3, 169-170.

[58] Stephan W. Schill, "Tearing Down the Great Wall: the New Generation Investment Treaties of the People's Republic of China", 15 *Cardozo J. Int'l & Comp. L.* 94 (2007).

[59] UNCTAD, supra note 3,33.

[60] Andrew Newcombe, Lluis Paradell, supra note 1, 148-149.

third country. Thus the MFN standard establishes, at least in principle, a level playing field between all foreign investors protected by a BIT.[61] MFN treatment obligations require that State conduct does not discriminate between similarly situated persons, entities, goods, service or investments of different foreign nationalities.[62] In recent years the interpretation of MFN clauses by investment arbitration tribunals has attracted considerable attention.[63]

It is pointed out that though the BITs contemplate a two-way flow of investments between Contracting Parties to the treaties, it is usually only a one-way flow that is contemplated and feasible in reality in the context of disparities of wealth and technology between the two parties.[64] As a result of the "one-way flow", only capital-exporting States and their overseas investors gain benefit from the high level of standards on treatment of investment in BITs. As HK is a developed region and most of its counterparts are also developed States, the provisions on treatment of the "two-way flow" investment in HK's BITs might be expected to bring the mutual benefit for both Contracting Parties.

2. *MODELS OF HK'S BITS ON TREATMENT OF INVESTMENT*

There are two main models of HK's BITs on treatment of investment: HK Model BIT and HK-Netherlands BIT model.

2.1. HK MODEL BIT

Article 3 of HK Model BIT provides that:

> "(1) Neither Contracting Party shall in its area subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any other State.
>
> (2) Neither Contracting Party shall in its area subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any other State."

It seems that the provisions of HK Model BIT on treatment of investments take the form of combination of national treatment and MFN treatment in a clause. 9 of the HK's BITs follow this model with minor revisions and/or supplements.[65]

[61] UNCTAD, supra note 3, 38.

[62] Andrew Newcombe, Lluis Paradell, supra note 1, 193.

[63] For detailed comments on the issue, see Okezie Chukwumerije, "Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations", 8 (5) *The Journal of World Investment & Trade*, 597-646 (2007); Mary H. Mourra, supra note 3, 187-188.

[64] M. Sornarajah, supra note 27, 207.

[65] Art.3(1)(2), HK-Australia; Art.3, HK-Denmark; Art.3, HK-Sweden; Art.4, HK-New Zealand; Art.3, HK-Korea; Art.3, HK-Austria; Art.3 (1) (2), HK-Germany; Art.3, HK-Belgo-Luxembourg; Art.3, HK-Thailand. Minor revisions and/or supplements such as: Article 3 of HK-Australia BIT refers to "employment" issue; Article 3 of HK-Korea BIT and Article 3 of HK-Thailand BIT provide that: "fair and equitable and no less favourable than......"

Although express national treatment obligations appear in almost all BITs, there are significant variations between clauses.[66] The national treatment clauses of HK Model BIT and most of HK's BITs show that the obligation appears in the same clause with MFN clause, applies to both investors and investments and specifies the types of activities to which it applies. They contain no express comparator, such as "in like circumstances".[67] Moreover the obligation is not expressly subject to national law except for HK-New Zealand BIT.[68]

2.2. HK-NETHERLANDS BIT MODEL

Article 3 of HK-Netherlands BIT provides that:

> "(1) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party.
>
> (2) Each Contracting Party shall in its area accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any other State, whichever is more favourable to the investor concerned.
>
> (3) Each Contracting Party shall in its area accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or to investors of any other State, whichever is more favourable to the investor concerned.
>
> (4) Each Contracting Party shall accord to such investments and returns full physical protection and security in their respective areas which in any case shall not be less than that accorded either to investments and returns of their own investors or to investors of any other State, whichever is more favourable to the investor concerned.
>
> (5) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."

In HK-Netherlands BIT Model, there is a combination of absolute standards and relative standards in a same clause. First as a general principle, fair and equitable treatment has been applied to investments and returns of investors of each Contracting Party at all times. Though the meaning of fair and equitable treatment is contentious,

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[66] The variations of national treatment of BITs include whether the obligation: (1) is expressly subject to national law; (2) appears in the same clause with MFN treatment; (3) applies to establishment; (4) applies to both investors and investments; (5) specifies the types of activities to which it applies; (6) contains an express comparator, such as "in like circumstances". See Andrew Newcombe, Lluis Paradell, supra note 1, 156.

[67] Article 3.1 of 2004 US Model BIT provides that: "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." The inclusion of "in like circumstances" has led arbitral panels to adopt a "two-step" approach when determining whether a particular measure violates national treatment standard. The approach is that first the tribunal verified whether there were in fact differences in treatment between domestic and foreign investors or their investments; second, if a difference was found, the tribunal then addressed the issue of whether investors or investments were "in like circumstances". UNCTAD, supra note 3, 36.

[68] Article 4 of HK-New Zealand BIT provides that national treatment for investments and investors of the other Contracting Party is "subject to its laws and regulations".

the obligation of Contracting Party in HK-Netherlands BIT Model is not to "in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party".

Second the Model provides specifically the main aspects of the treatment of investments accorded to national treatment and MFN treatment with the "whichever is more favorable" rule, including: (1) investments and returns of investors; (2) the management, maintenance, use, enjoyment or disposal of investments; (3) full physical protection and security to investments and returns;[69] three of the HK's BITs adopt the HK-Netherlands model in this regard to some extent, especially the "whichever is more favorable" rule.[70]

In general practice of BITs relating to treatment of investments, each Contracting Party shall in its area accord investments and/or returns of investors of the other Contracting Party national treatment and/or MFN treatment. HK's BITs follow the general rule. Still remains the issue on the relations between these two treatments. It is noticeable that the provision on "whichever is more favourable to the investor concerned" in HK's BITs, indicates the relations between these two treatment standards, demonstrating the policy approach of "more favourable to the investor".

In general, national treatment is more favourable than that of MFN treatment. However in practice, some host countries provide more favourable treatment for foreign investors and investments than that of domestic investors and investment by treaties and/or domestic legislations. Accordingly MFN treatment is more favorable than that of national treatment. The "whichever is more favorable" rule of HK's BITs therefore gives foreign investors and investments the best option.

It is worth noticing that HK's BITs do not adopt "the right of establishment clause". Aiming at liberalizing investment flows, this approach consists in providing foreign investors with national treatment and MFN treatment not only once the investment has been established, but also with respect to the establishment. The use of this approach was traditionally limited to BITs concluded by US[71] and after the mid-1990s when the North American Free Trade Agreement had entered into force, to agreements concluded by Canada. In recent years other States, such as Japan, have also adopted this method. According to customary international law, States have the right to regulate the admission of foreign investors and investments in their territories. General practice of BIT indicates that States admit investments of investors of the other Contracting Party only if such investments conform to the host State's legislation. The so-called

[69] Art.3, HK-Netherlands.

[70] Art. 3(1)(2)(3), HK-Swiss; Art.4(1)(2), HK-France; Art.3(1)(2), HK-Italy.

[71] US BITs, unlike the BITs of other capital-exporting countries, consistently extend promises of national treatment and MFN treatment to investors at the pre-establishment stage of the investment process. Generally, this means that host States entering into BITs with US promise to allow US investors to enter the country and make an investment under the same procedures and on the same terms as domestic investors or as the investors of other States. See Jason Webb Yackee, supra note 1, 417.

"admission clause" allows the host State to apply any admission and screening mechanism for FDI that it may have in place and therefore to determine the conditions on which FDI will be allowed to enter the State.[72] Following the said customary international law and general practice of BITs, all of HK's BITs adopt the "admission clause" entitled "Promotion of Investments", "Applicability of this Agreement" or "Promotion and Protection of Investment and Returns".[73]

3. *EXCEPTIONS FOR INVESTMENT TREATMENT*

In the HK Model BIT, there is only taxation exception for treatment of investments.[74] In HK's BIT practice only HK-Korea BIT follows this provision.[75] In most of HK's BITs there are two exceptions for treatment of investments: taxation exception and regional trade agreement (RTA) exception.[76]

There are some other exceptions in HK's BIT practice, such as that "regulations to facilitate the frontier traffic between Austria and her neighbours shall not be invoked as the basis of most favored nation treatment under this Agreement";[77] and "the grant to a particular person or company of the status of 'promoted person' under the law of Thailand."[78]

V. DEPRIVATION AND COMPENSATIONS

The validity of nationalization or expropriation of FDI by host States and the standard of compensation have been the most controversial issues in theoretic and

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[72] UNCTAD, supra note 3, 21-26.

[73] Art.2, HK-Netherlands; Art.2(1), HK-Australia; Art.2(1), HK-Denmark; Art.2(1), HK-Sweden; Art.2(1), HK-Switzerland; Art.2.1, HK-New Zealand; Art.2(1), HK-France; Art.2.1, HK-Japan; Art.2(1), HK-Korea; Art.2(1), HK-Austria; Art. 2(1), HK-Italy; Art.2(1), HK-Germany; Art.2(1), HK-UK; Art.2(1), HK-Belgium and Luxembourg; Art.2(1), HK-Thailand.

[74] Article 7 of HK Model BIT provides that: "the provisions in this Agreement relative to the grant of treatment not less favorable than that accorded to the investors of either Contracting Party or to investors of any other State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation."

[75] Art.4, HK-Korea.

[76] For example, Article 7 of HK-Netherlands BIT provides that:

"Without prejudice to Article 3(1), the provisions in this Agreement relative to the grant of treatment not less favorable than that accorded to the investors of either Contracting Party or to investors of any other State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(1) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;

(2) its participation in any existing or future customs union, economic union or similar international agreement; or

(3) reciprocal arrangements with any other State."

These provisions have become general practice in HK's BITs. See Art.7, HK-Australia; Art.7, HK-Denmark; Art.7, HK-Sweden; Art.7, HK-Switzerland; Art.8.1, 8.2, HK-New Zealand; Art.4(3)(4), HK-France; Art.4(1), HK-Austria; Art.7, HK-Italy; Art.3(3)(4), HK-Germany; Art.7, HK-UK; Art.8, HK-Belgium and Luxembourg; Art.7(a)(b), HK-Thailand.

[77] Art.4(2), HK-Austria.

[78] Art.7(c), HK-Thailand.

practical aspects of international law since late 1930s.[79] Accordingly protections upon nationalization or expropriation and the standard of compensation are most important provisions in BITs. Following the traditional practice of developed States in general, the provisions of HK's BITs have some technical developments in this regard.

1. *"DEPRIVATION" AND REQUIREMENTS*

Expropriation or nationalization is one of the major political or non-commercial risks in international investments. Aiming at preventing or decreasing the risk, BITs almost uniformly establish four requirements or conditions for expropriation: (1) for a public purpose; (2) in accordance with due process of law; (3) non-discriminatory and (4) accompanied by compensation.[80] HK's BITs in general follows the traditional practice.

According to Article 5 (1) of HK Model BIT:

> "Investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except lawfully, for a public purpose related to the internal needs of that Party, and against compensation. Such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without undue delay, be effectively realizable and be freely convertible. The investor affected shall have a right, under the law of the Contracting Party making the deprivation, to prompt review by a judicial or other independent authority of that Party, of the investor's case and of the valuation of the investment in accordance with the principles set out in this paragraph."

In practice four of the HK's BITs provide three requirements or conditions for deprivation: (1) lawfully; (2) for a public purpose related to the internal needs of that Party, and (3) against compensation.[81] These provisions conform to the provisions of HK Model BIT.

In addition to the above three conditions for deprivation, Article 5 (1) of HK-Netherlands BIT adds a condition of "on a non-discriminatory basis". These "four conditions" provisions are followed by 11 of HK's BITs.[82] These provisions are consistent with the general stance of the developed States.[83]

It should be noticed that though the title of the clause still remains the term of

[79] The disagreement between capital exporting and importing States over the minimum standard of treatment came to a head in an exchange of correspondence between Mexico and the US in 1938 regarding the standard of compensation for expropriation. See Andrew Newcombe, Lluis Paradell, supra note 1, 18.

[80] Andrew Newcombe, Lluis Paradell, supra note 1, 369. For detailed analysis on expropriation of foreign property, see M. Sornarajah, supra note 27, 344-401; Paul E. Comeaux, N. Stephan Kinsella, supra note 4, 57-81.

[81] Art.6(1) HK-Austria; Art.4(2), HK-Germany; Art.5(1), HK-Belgium and Luxembourg; Art.5(1), HK-Thailand.

[82] Art.5(1), HK-Netherlands; Art.6(1), HK-Australia; Art.5(1), HK-Denmark; Art.5(1), HK-Sweden; Art.5(1), HK-Switzerland; Art.6.1, HK-New Zealand; Art.5(1), HK-France; Art.5.1, HK-Japan; Art.6(1), HK-Korea; Art.5(1), HK-Italy; Art.5(1), HK-UK.

[83] As a number of developing States denied that such conditions were part of customary international law, developed States turned to conventional international instruments – mostly BITs – to specifically provide for investment protection against expropriations. UNCTAD, supra note 3, 47.

"expropriation", Contracting Parties of HK's BITs carefully choose the term of "deprivation" instead of "expropriation" and "nationalization" in the content of the clause. It is evident that HK cannot use the concept of "nationalization" due to its non-sovereign status. Comparing with the concepts of "deprivation" and "expropriation", the meaning of the former is broader than the latter. "Deprivation of property" can probably include circumstances where title to the property has not been acquired by the government and neither has the government entered into possession of, obtained the control of or used the property concerned, but government action has resulted in a serious interference with the enjoyment of the property, a significant reduction in the value of the property, or the destruction or disappearance of existing property rights.[84] Therefore that HK's BITs adopt the concept of "deprivation", not only adapts its status of non-sovereign entity, but also provides more comprehensive legal protection for foreign investors.

2. *STANDARD OF COMPENSATION FOR DEPRIVATION*

The standard of compensation for expropriation continued to be a source of significant disagreement in the post World War II era. The most important, and historically the most contested requirement, is the standard of compensation. Hull rule, representing the stance of most developed countries, insists that "adequate, effective and prompt payment for the properties seized" are required under international law, while developing countries propose the standard of "appropriate" compensation.[85]

In practice the provisions on compensation for expropriation of BITs typically address four issues: (1) the standard of compensation and valuation methods; (2) the date for determining compensation; (3) convertibility and transferability; and (4) payment of interest. In addition, some BITs have provisions for a right to judicial review of expropriations.[86]

Following the provisions of HK Model BIT, HK's BITs provide in general that the standard of compensation for deprivation as follows:

(1) be amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier, including interest at a normal commercial rate until the date of payment;
(2) be made without undue or unreasonable delay; and
(3) be effectively realizable and be freely convertible.[87]

[84] See Albert H. Y. Chen, "The Basic Law and the Protection of Property Rights", 23 (1) *HKLJ*, 60 (1993). In this sense, the term "deprivation of property" also covers the situations of "indirect expropriation" or "creeping expropriation".

[85] For the history and the competing norms on the standards of compensation, see M. Sornarajah, supra note 27, 435-488; Paul E. Comeaux, N. Stephan Kinsella, supra note 4, 81-98; Andrew Newcombe, Lluis Paradell, supra note 1,18, 369; Mary H. Mourra, supra note 3, 23-28.

[86] Andrew Newcombe, Lluis Paradell, supra note 1, 377.

There are further provisions on interpretations on Hull rule in HK's BITs. For the term "adequate", four of the HK's BITs further deal with the valuation of the compensation, providing that: "where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors."[88]

For the term "prompt", Article 5 (1) of HK-Denmark BIT refers to the limitation of "undue delay", indicating that: "in any event, shall not extend a period of 3 months". Though using the term "against appropriate compensation" as one of the four conditions for deprivation, Article 5(1) of HK-France BIT provides that: "compensation...... shall be made without delay", which is stricter than relevant provisions in other HK's BITs.

Article 5 of HK-Thailand BIT also refers to the applicable law for the compensation.[89] In addition to the provisions of standards of compensation, the relevant provisions of HK's BITs also deal with the investors' right to judicial review of expropriations.[90]

Another character of HK's BITs in this regard is the provisions on the expropriation and compensation for the foreign shares in international joint venture corporations (IJVCs). Article 5(2) of HK Model BIT provides that:

> "Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its area, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee compensation referred to in paragraph (1) in respect of their investment to such investors of the other Contracting Party who are owners of those shares."

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[87] Art.5(1), HK Model BIT; Art.5(1), HK-Netherlands; Art.6(1), HK-Australia; Art.5(1), HK-Denmark; Art.5(1), HK-Sweden; Art.5(1), HK-Switzerland; Art.6.1, HK-New Zealand; Art.5(1), HK-France; Art.5.1, HK-Japan; Art.6(1), HK-Korea; Art.6(1) HK-Austria; Art.5(1), HK-Italy; Art.4(2), HK-Germany; Art.5(1), HK-UK; Art.5(1), HK-Belgium and Luxembourg; Art.5(1), HK-Thailand.

[88] Art.6(1), HK-Australia; Art.6.1, HK-New Zealand; Art.5(1), HK-Italy; Art.5(1), HK-Belgium and Luxembourg.

[89] According to Article 5 (1),(2) of HK-Thailand BIT, "subject to the provisions of paragraph (2) of this Article, such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge whichever is the earlier, shall include interest at the rate applicable under the law of the Contracting Party making the deprivation until the date of payment......"; "where a Contracting Party expropriates investments which consist only of immovable property, the provisions of paragraph (1) of this Article shall apply, except that the moment at which the real value of such property is determined shall be governed by the laws and policies of the Contracting Party which is expropriating that immovable property."

[90] Article 5(1) of HK Model BIT provides that: "The investor affected shall have a right, under the law of the Contracting Party making the deprivation, to prompt review by a judicial or other independent authority of that Party, of the investor's case and of the valuation of the investment in accordance with the principles set out in this paragraph." Similar provisions also in Art.5(1), HK-Netherlands; Art.6(1), HK-Australia; Art.5(1), HK-Denmark; Art.5(1), HK-Sweden; Art.5(1), HK-Switzerland; Art.6.1, HK-New Zealand; Art.5(1), HK-France; Art.5.2, HK-Japan; Art.6(2), HK-Korea; Art.6(2) HK-Austria; Art.5(2), HK-Italy; Art.4(2), HK-Germany; Art.5(1), HK-UK; Art.5(1), HK-Belgium and Luxembourg; Art.5(1), HK-Thailand.

In practice HK's BITs follow the rule for ensuring compensation to foreign shareholders in IJVCs.[91] Though some other BITs refer to share of IJVCs in "definition" clause, HK's BITs precisely deal with the protection for investors who own shares of IJVCs in the context of expropriation.

VI. DISPUTE SETTLEMENT

An efficient and comprehensive dispute resolution mechanism is considered as one of the key elements for constituting mutual confidence between Contracting Parties of the BITs.[92] Therefore dispute resolution mechanisms both for investment disputes and disputes between the Contracting Parties are main contents of the BITs.[93] International Centre for Settlement of Investment Disputes (ICSID) regime is the most popular dispute resolution mechanism provided in BITs. The major feature of provisions in this regard of HK's BITs is not to use the ICSID regime in addition to some other technical provisions.

1. *INVESTMENT DISPUTES*

In the BIT context, investment dispute refers to a dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter. Many BITs make significant progress in the area of the resolution of investment disputes by specifying arbitration in a neutral forum as the method of resolution of these disputes. There are several different types of clauses creating different obligations as to such arbitration. At the lowest level, the clauses merely direct the parties to arbitration as a way of dispute settlement. At the highest level, the clauses entitle the foreign investor to initiate proceedings by himself before an ICSID tribunal.[94]

The latter is a breakthrough in international law in terms of individuals in international tribunals. Compared to traditional means of enforcing public international law through diplomatic protection granted by the investor's home State, this empowerment of private investors has accurately been described as a "change in paradigm in international investment law." Instead of depending on the discretion of its home State to grant diplomatic protection, these BITs provide the covered investors with a unilateral right to initiate arbitral proceedings against the host State which usually

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[91] Art.5(2), HK-Netherlands; Art.6(2), HK-Australia; Art.5(2), HK-Denmark; Art.5(2), HK-Sweden; Art.5(2), HK-Switzerland; Art.6.2, HK-New Zealand; Art.5(2), HK-France; Art.5.3, HK-Japan; Art.6(3), HK-Korea; Art.6(3) HK-Austria; Art.5(3), HK-Italy; Art.4(3), HK-Germany; Art.5(2), HK-UK; Art.5(2), HK-Belgium and Luxembourg; Art.5(3), HK-Thailand.

[92] Li Shishi, "On Bilateral Investment Agreements concluded by China" (in Chinese), 1990 *The Yearbook of Chinese International Law*, 121-122.

[93] Andrew Newcombe, Lluis Paradell, supra note 1, 65.

[94] M. Sornarajah, supra note 27, 249-250. Until 1993, a majority of capital-importing States had not entered into a strong BIT—which contains dispute settlement provisions that allow foreign investors to initiate binding international arbitration against host State—with a major capital-exporting State. But by the end of the sample (2002), 117 out of the 149 developing countries—seventy-nine percent—had at least one strong BIT in force. See Jason Webb Yackee, supra note 1, 432-433.

gives general and advance consent to ICSID regime.[95] In standard international practice, investor-State arbitration is most often conducted under the rules of the ICSID.[96]

According to Article 8 of HK Model BIT, an investment dispute shall be:

(1) settled by the parties amicably;
(2) submitted to such procedures for settlement as may be agreed between the parties after a period of six months from written notification of the claim; or
(3) submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force if no procedures (2) have been agreed within that six month period. The parties may agree in writing to modify those Rules.

In general HK's BITs follow the procedures.[97] There are some revisions or supplements for the procedures, such as emphasis of investors' right to initiate arbitrations[98] and shorter timing for amicable settlement.[99] Some HK's BITs also indicate the character of arbitration and the effect of the arbitration awards.[100]

It should be pointed out that in contrast to popular provisions on investment dispute settlement in BITs,[101] the above provisions indicate that the Contracting Parties of HK's BITs have not adopted the regime of ICSID.[102] Investors covered by protection of HK's BITs therefore have not direct right to ICSID. The reason is firstly due to HK's non-sovereign status. As HK is not a Contracting Party of the Washington Convention, it cannot be a party of mediation and arbitration proceedings under ICSID without designation and approval of a Contracting Party of the Washington

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[95] ICSID established by Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereinafter the Washington Convention) has been an international institution for settlement of investment disputes and widely accepted by Contracting Parties of BITs.

[96] Stephan W. Schill, supra note 58, 87-88. For the latest development of investor-State arbitration under ICSID regime, see Mary H. Mourra, supra note 3, 163-166; Andrew Newcombe, Lluis Paradell, supra note 1, 58-59.

[97] Art. 10, HK-Netherlands; Art. 10, HK-Australia; Art.9, HK-Denmark; Art.9, HK-Sweden; Art.1 1, HK-Switzerland; Art.9, HK-New Zealand; Art.9, HK-France; Art.9.2, HK-Japan; Art.9(3), HK-Korea; Art.9, HK-Austria; Art. 10, HK-Italy; Art. 10, HK-Germany; Art.8, HK-UK; Art.9, HK-Belgium and Luxembourg; Art.8, HK-Thailand.

[98] Article 10 of HK-Netherlands BIT provides that: "... ...If no such procedures have been agreed within that six month period, the dispute shall at the request of the investor concerned be submitted to arbitration......" Article 11 of HK-Switzerland and Article 9.2 of HK-Japan have similar provisions.

[99] Article 10 of HK-Australia states that: "a dispute...... has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute." There is similar provision in Article 8 of HK-UK BIT.

[100] Article 9 (4) of HK-Korea BIT provides that: "The arbitration award shall be final and binding on the parties to the dispute. Each Contracting Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations." Article 10 of HK-Germany BIT states that: "The arbitration award shall be final and binding on the parties to the dispute and shall be enforced in accordance with relevant domestic law."

[101] These provisions have caused practical consequence. Over the past ten years, there has been a surge of investor-State arbitrations based on BITs. At least 42 new cases were registered in the first eleven months of 2005. By the end of 2006, the total number of treaty-based arbitrations has risen to 259, 161 of which were brought before the ICSID. See Mary H. Mourra, supra note 3, 17-18. China became a Contracting Party of the Washington Convention on 1 July 1992 and accepts the jurisdiction of the ICSID in an increasing number of BITs. The first claim of a Chinese investor registered on 12 February 2007, Tza Yap Shum v. Republic of Peru, will be just the beginning of ICSID disputes with Chinese participation. See Monika C. E. Heymann, "International Law and the Settlement of Investment Disputes Relating to China", 2008 *Journal of International Economic Law*, 507 (2008).

[102] It is interesting to note that the first ICSID case, Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, involves a Hong Kong corporation which invested in Sri Lanka. See Rudolf Dolzer, Margrete Stevens, supra note 12, 43, note 127.

Convention.[103] The second reason is that the investors as respect of HK in HK's BITs may include the foreigners who have the abode of right in HK. Those investors who have not nationalities of the Contracting Parties of the Washington Convention also cannot be a party of mediation and arbitration proceedings under ICSID.[104] In this case the investment dispute settlement mechanism still remains as an open issue for Contracting Parties to HK's BITs if not conforming with special requirements. This practice also indicates that the application of the provisions on "entitling the foreign investor to initiate proceedings by himself before ICSID" have some objective limitations for investment dispute settlement in certain BITs.[105]

2. *Disputes between Contracting Parties*

In BIT context, disputes between Contracting Parties refer to disputes between the Contracting Parties relating to the interpretation or application of BITs.

According to Article 9 of HK Model BIT, if any dispute between Contracting Parties arises, the Parties shall in the first place try to settle it by negotiation. If the Parties fail to settle the dispute by negotiation, it may be referred by them to such person or body as they may agree on or, at the request of either Party, shall be submitted for decision to a tribunal of three arbitrators.

The provisions on establishment, hearings and decisions of the *ad hoc* tribunal for the disputes between Contracting Parties in Article 9 of HK Model BIT consist with general practice of international arbitration, with following characteristics:

(1) emphasizing the capacity of the President of the International Court of Justice (ICJ). If within the time limits any appointment has not been made, either Party may request the President of the ICJ, in a personal and individual capacity, to make the necessary appointment within thirty days.[106] The provision on the President of the ICJ "in a personal and individual capacity" also relates to HK's non-sovereign status. According to the Statute of International Court of Justice, the qualified parties before ICJ are limited to States only.[107] In general practice of BIT, the President of ICJ acts as

[103] Article 25 of the Washington Convention provides that: "(A) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally..... (C) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required."

[104] Art.25, the Washington Convention.

[105] World Bank advice to developing countries typically emphasizes the importance of signing BITs with pre-consents to ICSID arbitration. See Jason Webb Yackee, supra note 1, 405. HK's BIT practice in this regard demonstrates that there are some alternative dispute resolutions for investment disputes.

[106] The exception for this appointment is Art. 11 (2)(b) of HK-France BIT, which provides that: "if within the time limits specified above any appointment has not been made, either Contracting Party may request the President of the International Chamber of Commerce, in a personal and individual capacity, to make the necessary appointment within thirty days."

[107] According to Article 34 (1) of Statute of International Court of Justice, "Only States may be parties in cases before the Court."

appointing authorities of arbitration in the context of disputes between States, also conforming to his capacity in ICJ. Considerately the emphasis of the President of ICJ "in a personal and individual capacity" in the context of disputes between a State and a non-sovereign entity, might prevent and avoid the controversy on the qualification of the appointing authorities.[108]

(2) providing the specific timetable for arbitration (see Table 2). These provisions are remarkable in several respects. First, it appears that no other BIT has attempted to lay down time limits for the conduct of an arbitral proceeding with such specificity. Second, this procedure would take a mere five and a half months from the constitution of the tribunal until the decision is rendered regardless of the complexity of the dispute.[109] These provisions may prevent the delay of *ad hoc* arbitration due to having no existing arbitration rules.

HK's BITs in principle follow the above main provisions of HK Model BIT.[110] However there are some important provisions different from HK Model BIT, like applicable law,[111] further provisions on successor arbitrators,[112] allocation of the costs,[113] the basis of the decision,[114] and further provisions on "a national of a State which can be regarded by both Contracting Parties as neutral in relation to the dispute".[115]

VII. SIGNIFICANCE OF HK'S BIT PRACTICE

Due to HK's non-sovereign status, HK's BITs have gradually become a series of BITs with its Characteristics. HK's successful practice of BITs has tackled the specific issues on international investment relations between HK and its counterparts since 1992 when HK-Netherlands BIT was concluded. Also it has great implications from practical and theoretic aspects.

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[108] There are not terms like "in a personal and individual capacity" in other model BITs. For example, Article 9 (4) of Germany Model Treaty 2008 states that "......either Contracting State may, in the absence of any other relevant agreement, invite the President of the International Court of Justice to make the necessary appointments."

[109] Rudolf Dolzer, Margrete Stevens, supra note 12, 127.

[110] Art.11, HK-Netherlands; Art.10, HK-Australia; Art.10, HK-Denmark; Art.10, HK-Sweden; Art.12, HK-Switzerland; Art.10, HK-New Zealand; Art.11, HK-France; Art.11, HK-Japan; Art.10, HK-Korea; Art.10, HK-Austria; Art.11, HK-Italy; Art.10, HK-Germany; Art.9, HK-UK; Art.10, HK-Belgium and Luxembourg; Art.9, HK-Thailand.

[111] Article 11 (5) of HK-Netherlands BIT states that: "The tribunal shall decide on the basis of respect for the law. Before the tribunal decides, it may, at any stage of the proceedings, propose to the Contracting Parties that the dispute be settled amicably."

[112] Art. 11 (2)(a), HK-Australia.

[113] Article 11(8) of HK-Australia BIT provides that: "The tribunal may decide, however, that a higher proportion of costs shall be borne by one of the Contracting Parties." There are similar provisions in Art.10(8), HK-Sweden; Art.10.8, HK-New Zealand; Art.10(8), HK-Belgium and Luxembourg.

[114] Article 10(7) of HK-Austria and Article 10(7) of HK-Belgium and Luxembourg provide that: "The arbitral tribunal shall reach its decision on the basis of internationally recognized rules of law."

[115] Article 1 1(2)(a) of HK-France states that: "A physical person possessing neither French nationality nor the nationality of the State which is responsible for the foreign affairs of Hong Kong nor having the right of abode in Hong Kong area shall act as President of the tribunal."

Table 2: Major Provisions on Time Limit (days) for Disputes between Contracting Parties in HK's BITs

Counterparts	Appointing Arbitrators by Parties	Appointing third Arbitrators by Arbitrators	Appointing third Arbitrators by President of ICJ/ICC	Submitting a Memo	Reply	Holding a hearing	Giving a written decision	Requests for clarification	Issuing clarification
[Model]	30	60	30	45	60	30	30	15	15
Netherlands	60	60	30	45	60	30	30	15	15
Australia	30	60	30	45	60	30	30	15	15
Denmark	30	60	30	45	60	30	/	15	15
Sweden	30	60	30	45	60	30	30	15	15
Switzerland	60	60	30	60	60	30	30	30	30
New Zealand	60	60	30	45	60	30	30	15	15
France	30	60	30	/	/	/	/	/	/
Japan	30	60	30	/	/	/	60	/	/
Korea	30	60	30	45	60	30	30	15	15
Austria	30	60	30	45	60	30	30	15	15
Italy	60	60	30	45	60	30	30	15	15
Germany	30	60	30	/	/	/	/	/	/
UK	30	60	30	45	60	30	30	15	15
Belgium and Luxembourg	30	60	30	45	60	30	30	15	15
Thailand	30	60	30	45	60	30	30	15	15

1. *PROVIDING THE MODEL FOR HKSAR, MACAO SAR AND CHINESE TAIPEI*

As for the BIT development of HK itself, HK's BITs concluded in the transition period have become the *de facto* precedents followed by HKSAR since 1 July 1997.[116] The first ground is that according to the provisions of these BITs, they maintain their effect beyond 1 July 1997. Second, basing on provisions of the JD and the BL as well as the specific situations of HK, the substantial and procedural provisions of these BITs are different from the China's BIT practice with the same counterparts to HK,[117] therefore provide unique and valuable experience for the HKSAR's BIT practice. In the procedural aspects these BITs also provide important reference for HKSAR. HK's BIT practice in transition period, as involved positively by many key capital exporting countries, sets the good examples for the international community and smoothes the way for negotiations by HKSAR with States more likely to hesitate before entering into bilateral treaties with a non-sovereign entity.[118] Following the precedents established in transition period, HKSAR has continued its BIT practice successfully since 1 July 1997.

Furthermore the HKSAR is the first special administrative region in China. One direct outcome of granting external autonomy to HKSAR is that China has to tolerate additional "Chinese" representation in certain international institutions and international activities.[119] In broad sense, HK's BIT practice can be regarded as realization of "one country two system" policy in international investment fields. It has great significance for Macao Special Administrative Region (hereinafter Macao SAR) established on 20 December 1999. Following the HK's BIT models and practice, Macao SAR concluded BITs with Portugal and Netherlands on 17 May 2000 and on 22 May 2008 respectively and became the second non-sovereign Contracting Party to BITs.[120] HK's BIT practice might also provide an important reference of legal model for so-called "international space" of Chinese Taipei before and/or after China's great reunification.[121]

[116] See Gary N. Heilbronn, "Hong Kong's First Bilateral Air Service Agreement: A Milestone in Air Law and an Exercise in Limited Sovereignty", 18 *HKLJ*, 64-65 (1988).

[117] For the characteristics and new development of China's BIT practice, see Stephan W. Schill, supra note 58, 73-118; Monika C. E. Heymann, "International Law and the Settlement of Investment Disputes Relating to China", 2008 *Journal of International Economic Law*, 507 (2008).

[118] Gary N. Heilbronn, "The Changing Face of Hong Kong's International Air Transport Relations", 20 *Case W.Res.J.Int'l L.*, 223 (1988).

[119] See Xiaobing Xu, George D. Wilson, supra note 21, 18-19.

[120] Agreement on Mutual Encouragement and Protection of Investments between the Macao Special Administrative Region of the People's Republic of China and the Republic of Portugal (effective by exchange of notes on 2 April 2002 and 17 April 2002) and Agreement between the Macao Special Administrative Region of the People's Republic of China and the Kingdom of the Netherlands on Encouragement and Reciprocal Protection of Investments (effective by exchange of notes on 31 October 2008 and 9 March 2009) are available from http://cn.io.gov.mo/Legis/International/2/22.aspx.

[121] The economic relations across the Taiwan Strait have developed rapidly since May 2008 when Kuomintang regained its power in Taiwan. The Economic Cooperation Framework Agreement across the Taiwan Strait (ECFA) signed on 29 June 2010 is the latest development of China's RTA practice. Furthermore ECFA is considered by Taiwan authorities as first step for Chinese Taipei's RTA practice with third parties. According to Xinhua News Agency, Press Release from Taipei Representative Agency in Singapore and Singapore Commerce Office in Taipei on 5 August 2010, states that Chinese Taipei and Singapore agree to conduct a research on the feasibilities for concluding an economic cooperation agreement and will discuss the issue late this year. See "Singapore and Taiwan Will Explore the Feasibility for Concluding Economic Agreement", *Xiamen Daily*, 6 August 2010, 18. It might indicate a coming breakthrough for Chinese Taipei's bilateral economic relations with third parties.

2. *Strengthening the High Autonomy of HKSAR*

According to general international law and practice, external autonomy of autonomous entity should be recognized by the international society. Actually the HK's external autonomy could become meaningless if few States and international organizations were interested in developing and maintaining separate relations with it. According to general principle of international law, unlike States and international organizations, which are regarded as the normal types of international legal persons and can acquire their international personalities by meeting fixed conditions, the HKSAR's external autonomy and international legal status relies not only China's authorization but also on the recognition and acceptance of other existing international persons.[122] The HK's external autonomy therefore does not solely depend on the unilateral desire of HK, China or UK—it also depends on whether other countries are willing to recognize this status.[123]

As a matter of fact, China has kept its commitment on high external autonomy of HK under the provisions of the JD and the BL since 1985. The exercising of external autonomy of HK has been widely understood, received and supported by international society. Gradually HK has extended the network of bilateral agreements, including BITs, to cover relations in broad areas with many countries and will examine new multilateral treaties that may be relevant to HK. These multifarious external legal relations have helped to strengthen HKSAR's international status.[124] Since HK's BITs link to many foreign countries, especially the major capital-exporting countries, HK's external autonomy on international investment is subject to continual international oversight, which in turn will enhance its unique international status. In fact, HK's BITs, together with HK's bilateral air service treaties, HK's bilateral taxation treaties, constitute the major picture of HK's high external autonomy in international economic fields.[125] Today, the HKSAR's key international legal relations are covered and established by a number of multilateral treaties and bilateral treaties. With the further development of practice of external autonomy of HKSAR, once international network of the HKSAR constituted by its bilateral and multilateral treaties has been well set up, the HKSAR's external autonomy will be fully guaranteed by international law.

3. *Making Important Contributions to the Development of International Law*

In recent years BITs have emerged as one of the most remarkable recent developments in international law and received great attraction from international lawyers.[126] It might be pointed out that as new development of BITs, HK's BIT practice

[122] Xiaobing Xu, George D. Wilson, supra note 21, 31.
[123] Albert H. Y. Chen, "Some Reflections on Hong Kong's Autonomy", 24 *HKLJ*, 179-180 (1994).
[124] Elsie Leung, "The Rule of Law and Its Operation in Hong Kong after Reunification", 6 *Policy Bulletin* 9-10 (1995).
[125] See Zeng Huaqun, supra note 18, 283-287.
[126] Jason Webb Yackee, supra note 1, 405.

has also made important contributions to the development of international law, especially laws of treaties.

First, HK's BIT practice in transition period creates a new model of treaty practice under special historical context. It simplifies and even prevents the complicated issues of succession or renewing of treaties.[127] As in the texts of HK's BITs concluded in transition period do not indicate the sovereign State which is responsible for HK's foreign affairs, it is unnecessary for HKSAR to make any revision on authorization in these agreements after 1 July 1997. HKSAR, as a Contracting Party taking the powers, rights and obligations of HK under these BITs, maintains the identity of HK's status as a regional entity with high external autonomy and recognizes the continuing effect of these BITs.

Second, BITs traditionally are agreements between sovereign States. In the BIT history, HK-Netherlands BIT is the first BIT between a non-sovereign entity and a sovereign State. This is a big breakthrough of BIT in terms of Contracting Parties.[128] Since then the continuing HK/HKSAR's BIT practice has followed and enhanced the precedent. It is obvious that the traditional definition of BIT has to be rewritten on the Contracting Parties as the non-sovereign entity becomes the Contracting Party of BITs.

Third, some new concepts, principles and procedures established and received by the Contracting Parties of HK's BITs, constitute new international practice. For example, the special considerations and provisions on scope of application, investment treatment, deprivation and compensations, dispute settlement mechanism, authorization for a non-sovereign entity to conclude a BIT, treaty succession, etc., have gradually evolved new international practice.

Fourth, BITs typically are made between unequal partners. They are usually agreed between a capital-exporting developed State and a capital-importing developing State. There are imbalance on powers, rights and responsibilities between two partners to these treaties due to inequality of their bargaining power, economic strength and political positions.[129] Since most HK's BITs are concluded by relatively equal partners, namely developed States and developed HK, more balanced provisions on powers, rights and responsibilities of both Contracting Parties have been concluded, like clauses on investment treatment, dispute settlement, etc., in HK's BITs. In this sense, HK's BITs as a whole may offer important reference or direction for the sustainable development of BIT practice.[130]

Finally it should be pointed out that due to special status of non-sovereign entity in respect of HK, HK's BITs also have raised some relevant new issues, like the recent

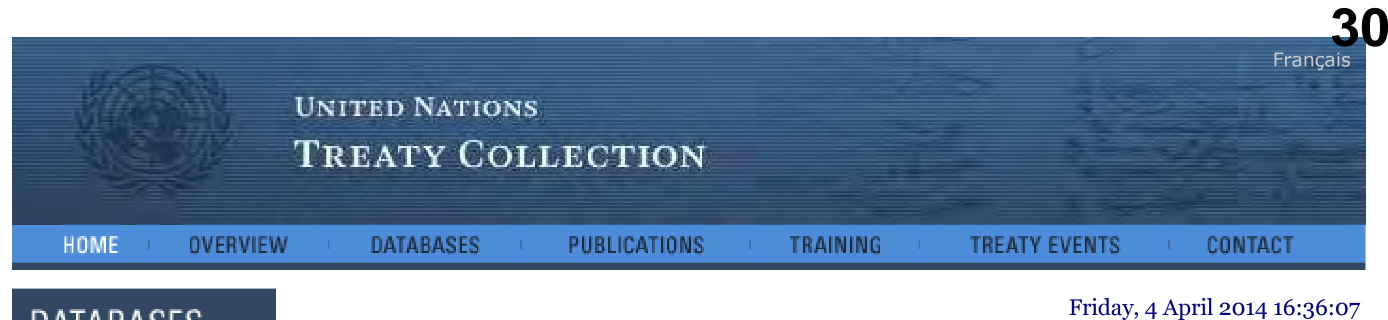
[127] For comments on succession of governments and BITs, see M. Sornarajah, supra note 27, 258-259.
[128] Gary N. Heilbronn, supra note 116, 64-65, 75.
[129] For further discussion on this issue, see M. Sornarajah, supra note 27, 204-208.
[130] Some scholars emphasize the importance of liberalization in BITs. See Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty", 92 *American Journal of International Law*, 621-641 (1998).

practical issues on application of China's BITs to HK in first Chinese ICSID case,[131] etc. Further studies on these issues might definitely enrich the content of modern international law and promote the development of international law.

[131] The application of China's BITs to HKSAR is an issue of first Chinese ICSID case Tza Yap Shum v. Republic of Peru. The development of HK's BITs has clearly indicated HK's will, position and practice for concluding its own BITs with foreign States. In general China's BITs are not applied to HK according to the relevant provisions of the JD, the BL and HK's BITs. For further comments on the issue, see An Chen: "Queries to the Recent ICSID Decision on Jurisdiction Upon the Case of Tza Yap Shum v. Republic of Peru: Should China-Peru BIT 1994 Be Applied to Hong Kong SAR under the 'One Country Two Systems' Policy", 10 (6) *The Journal of World Investment & Trade*, 829-864 (2009).

Annexe 21

to the Expert Report
of Professor Simon Chesterman



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- Uganda
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- United Kingdom of Great Britain and Northern Ireland
- United Nations (International Criminal Tribunal for the former Yugoslavia)
- United Republic of Tanzania
- Venezuela (Bolivarian Republic of)
- Viet Nam
- Yemen
- Yugoslavia
- Yugoslavia (former)

Aruba

See notes 1 and 2 under "Netherlands" .

Belarus

Note 1.

Formerly: "Byelorussian Soviet Socialist Republic" until 18 September 1991.

Benin

Note 1.

Formerly: "Dahomey" until 2 December 1975.

Bolivia (Plurinational State of)

Note 1.

As from 9 April 2009. Formerly: "Bolivia".

Bosnia and Herzegovina

Note 1.

The Government of Bosnia and Herzegovina deposited with the Secretary-General notifications of succession to the Socialist Federal Republic of Yugoslavia to various treaties with effect from 6 March 1992, the date on which Bosnia and Herzegovina assumed responsibility for its international relations.

See also note 1 under "former Yugoslavia" .

For information on the treatment of treaty actions by predecessor States and successor States in the status tables, see Part C, "Status tables" of the "Introduction" to this publication.

Burkina Faso

Note 1.

Formerly: "Upper Volta" until 4 August 1984.

Burma

See note 1 under "Myanmar" .

Cabo Verde

Note 1.

Formerly: "Cape Verde" until 24 October 2013.

Cambodia

Note 1.

As from 3 February 1990, "Cambodia". Formerly, as follows: as from 6 April 1976 to 3 February 1990 "Democratic Kampuchea"; as from 30 April 1975 to 6 April 1976 "Cambodia"; as from 28 December 1970 to 30 April 1975 "Khmer Republic".

Cameroon

Note 1.

As from 4 February 1984 Cameroon (from 10 March 1975 to 4 February 1984 known as "the United Republic of Cameroon" and prior to 10 March 1975 known as "Cameroon".

Central African Republic

Note 1.

In a communication dated 20 December 1976, the Permanent Mission of the Central African Empire to the United Nations informed the Secretary-General that, by a decision of the extraordinary Congress of the Movement for the Social Development of Black Africa (MESAN), held at Bangui from 10 November to 4 December 1976, the Central African Republic had been constituted into the Central African Empire.

In a communication dated 25 September 1979, the Permanent Representative of that country to the United Nations informed the Secretary-General that, following a change of regime which took place on 20 September 1979, the former institutions of the Empire had been dissolved and the Central African Republic had been proclaimed.

China

Note 1.

Signatures, ratifications, accessions, etc., on behalf of China.

China is an original Member of the United Nations, the Charter having been signed and ratified on its behalf, on 26 June and 28 September 1945, respectively, by the Government of the Republic of China, which continued to represent China in the United Nations until 25 October 1971.

On 25 October 1971, the General Assembly of the United Nations adopted its resolution 2758 (XXVI), reading as follows:

"The General Assembly.

" *Recalling* the principles of the Charter of the United Nations,

" *Considering* that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter,

" *Recognizing* that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

" *Decides* to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it."

The United Nations had been notified on 18 November 1949 of the formation, on l October 1949, of the Central People's Government of the People's Republic of China. Proposals to effect a change in the representation of China in the United Nations subsequent to that time were not approved until the resolution quoted above was adopted.

On 29 September 1972, a communication was received by the Secretary-General from the Minister for Foreign Affairs of the People's Republic of China stating:

"l. With regard to the multilateral treaties signed, ratified or acceded to by the defunct Chinese government before the establishment of the Government of the People's Republic of China, my Government will examine their contents before making a decision in the light of the circumstances as to whether or not they should be recognized.

"2. As from October 1, 1949, the day of the founding of the People's Republic of China, the Chiang Kai-shek clique has no right at all to represent China. Its signature and ratification of, or accession to, any multilateral treaties by usurping the name of `China' are all illegal and null and void. My Government will study these multilateral treaties before making a decision in the light of the circumstances as to whether or not they should be acceded to."

All entries recorded throughout this publication in respect of China refer to actions taken by the authorities representing China in the United Nations at the time of those actions.

Note 2.

By a notification on 20 June 1997, the Government of China informed the Secretary-General of the status of Hong Kong in relation to treaties deposited with the Secretary-General. The notification, in pertinent part, reads as follows:

"In accordance with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, signed on 19 December 1984 (hereinafter referred to as the Joint Declaration), the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China. [For the full text of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984, see United Nation *Treaty Series* volume No.1399, p. 61, (registration number I-23391)].

It is provided in Section 1 of Annex I to the Joint Declaration, "Elaboration by the Government of the

People's Republic of China of its Basic Policies Regarding Hong Kong" and in Articles 12, 13 and 14 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was adopted on 4 April 1990 by the National People's Congress of the People's Republic of China (hereinafter referred to as the Basic Law), that the Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibility of the Central People's Government of the People's Republic of China. Furthermore, it is provided both in Section XI of Annex I to the Joint Declaration and Article 153 of the Basic Law that international agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Administrative Region.

In this connection, on behalf of the Government of the People's Republic of China, I would like to inform Your Excellency as follows:

I. The treaties listed in Annex I to this Note [herein under], to w hich the People's Republic of China is a party, will be applied to the Hong Kong Special Administrative Region with effect from 1 July 1997 as they:

(i) are applied to Hong Kong before 1 July 1997; or (ii) fall within the category of foreign affairs or defence or, owing to their nature and provisions, must apply to the entire territory of a State; or

(iii) are not applied to Hong Kong before 1 July 1997 but with respect to which it has been decided to apply them to Hong Kong with effect from that date (denoted by an asterisk in Annex I). II. The treaties listed in Annex II to this Note [herein under], to which the People's Republic of China is not yet a party and which apply to Hong Kong before 1 July 1997, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997.

The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997.

III. The Government of the People's Republic of China has already carried out separately the formalities required for the application of the treaties listed in the aforesaid Annexes, including all the related amendments, protocols, reservations and declarations, to the Hong Kong Special Administrative Region with effect from 1 July 1997.

IV. With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China will carry out separately the formalities for such application. For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within in the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State."

The treaties listed in Annexes I and II, referred to in the notification, are reproduced below.

Information regarding reservations and/or declarations made by China with respect to the application of treaties to the Hong Kong Special Administrative Region can be found in the footnotes to the treaties concerned as published herein. Footnote indicators are placed against China's entry in the status list of those treaties.

Moreover, with regard to treaty actions undertaken by China after 1 July 1997, the Chinese Government confirmed that the territorial scope of each treaty action would be specified. As such, declarations concerning the territorial scope of the relevant treaties with regard to the Hong Kong Special Administrative Region can be found in the footnotes to the treaties concerned as published herein. Footnote indicators are placed against China's entry in the status list of those treaties.

Annex I

(The treaties are listed in the order that they published in these volumes.)

Charter of the United Nations and Statute of the International Court of Justice :

- Charter of the United Nations, 26 June 1945; - Statute of the International Court of Justice, 26 June 1945;

- Amendment to Article 61 of the Charter of the United Nations, adopted by the General Assembly of the United Nations in resolution 2847 (XXVI) of 20 December 1971.

Privileges and Immunities, Diplomatic and Consular Relations :

- Convention on the Privileges and Immunities of the United Nations, 13 February 1946;

- Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, 21 November 1947; - Vienna Convention on Diplomatic Relations, 18 April 1961;

- Vienna Convention on Consular Relations, 24 April 1963.

Human Rights:

- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948;

- International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966;

- Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979;

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984;

- Convention on the Rights of the Child, 20 November 1989.

Narcotic Drugs and Psychotropic Substances :

- Convention on psychotropic substances, 21 February 1971;

- Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, 8 August 1975;

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988.

Health :

- Constitution of the World Health Organization, 22 July 1946.

International Trade and Development :

- Agreement establishing the Asian Development Bank, 4 December 1965;

- Charter of the Asian and Pacific Development Centre, 1 April 1982

Transport and Communications - Customs matters:

- Customs Convention on Containers, 2 December 1972*.

Navigation :

- Convention on the International Maritime Organization, 6 March 1948;

- Convention on a Code of Conduct for Liner Conferences, 6 April 1974.

Educational and Cultural Matters:

- Convention for the Protection of Products of Phonograms Against Unauthorized Duplication of their Phonograms, 29 October 1971.

Penal Matters :

- International Convention against the taking of hostages, 17 December 1979;

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973.

Law of the Sea:

- United Nations Convention on the Law of the Sea, 10December 1982.

Commercial Arbitration:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958.

Outer Space:

- Convention on the Registration of Objects Launched into Outer Space, 12 November 1974.

Telecommunications :

- Constitution of the Asia-Pacific Telecommunity, 27 March 1976.

Disarmament :

- Convention on Prohibitions or restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with protocols I, II and III), 10 October 1980;

- Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992.

Environment :

- Vienna Convention for the Protection of the Ozone Layer, 22 March 1985;

- Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987;

- Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 29 June 1990;

- Basenvention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 22 March 1989.

Annex II (The treaties are listed in the order that they are published in these volumes.)

Refugees and Stateless Persons:

- Convention relating to the Status of Stateless Persons, 28 September 1954.

Traffic in Persons :

- International Convention for the Suppression of the Traffic in Women and Children, 30 September 1921;

- Protocol amending the International Agreement for theSuppression of the White Slave Traffic, signed at Paris on 18 May 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, 4 May 1949;

- International Agreement for the Suppression of the "White Slave Traffic", 18 May 1904;

- International Convention for the Suppression of the White Slave Traffic, 4 May 1910.

Obscene Publications:

- Protocol to amend the Convention for the suppression of the circulation of, and traffic in, obscene publications, concluded at Geneva on 12 September 1923, 12 November 1947;

- International Convention for the Suppression of the Circulation of, and Traffic in Obscene Publications, 12 September 1923;

- Protocol amending the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910, 4 May 1949;

- Agreement for the Repression of Obscene Publications, 4 May 1910.

Transport and Communications - Custom matters:

- International Convention to Facilitate the Importation of Commercial Samples and Advertising Materials, 7 November 1952;

- Convention concerning Customs Facilities for Touring, 4 June 1954;

- Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material, 4 June 1954;

- Customs Convention on the Temporary Importation of Private Road Vehicles, 4 June 1954;

- Customs Convention on the Temporary Importati of Commercial Road Vehicles, 18 May 1956;

- Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats, 18 May 1956;

- European Convention on Customs Treatment of Pallets Used in International Transport, 9 December 1960.

Transport and Communications - Road Traffic :

- Convention on Road Traffic, 19 September 1949.

Educational and Cultural Matters

- Agreement of the Importation of Educational, Scientific and Cultural materials, 22 November 1950.

Status of Women

- Convention on the Political Rights of Women, 31 March 1953;

- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10 December 1962.

Penal Matters :

- Protocol amending the Slavery Convention signed at Geneva 25 September 1926, 7 December 1953;

- Slavery Convention, 25 September 1926;

- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956.

Environment :

- Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Copenhagen, 25 November 1992.

League of Nations:

- Convention and Statute on Freedom of Transit, 20 April 1921;

- Convention and Statute on the Regime of Navigable Waterways of International Concern, 20 April 1921;

- Declaration Recognizing the Right to a Flag of States Having no Sea-coast, 20 April 1921;

- Convention and Statute on the International Regime of Maritime Ports, 9 December 1923 ;

- International Convention relating to the Simplification of Customs Formalities, 3 November 1923.

See also note 2 under "United Kingdom of Great Britain and Northern Ireland" .

Note 3.

By a notification dated 13 December 1999, the Government of the People's Republic of China informed the Secretary-General of the status of Macao in relation to treaties deposited with the Secretary-General. The notification, in pertinent part, reads as follows:

"In accordawith the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao signed on 13 April 1987 (hereinafter referred to as the Joint Declaration), the Government of the People's Republic of China will resume the exercise of sovereignty over Macao with effect from 20 December 1999. Macao will from that date, become a Special Administrative Region of the People's Republic of China. [For the full text of the Joint Declaration of the Government of the Portuguese Republic and the Government of the People's Republic of China on the Question of Macao, 13 April 1987, see United Nation *Treaty Series* volume No. 1498, p. 229 (registration number I-25805)].

It is provided in Section 1 of Elaboration by the Government of the People's Republic of China of its Basic Policies Regarding Macao, which is Annex 1 to the Joint Declaration, and in Article 12, 13 and 14 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law), which was adopted by the National People's Congress of the People's Republic of China on 31 March 1993, that the Macao Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government of the People's Republic of China. Furthermore, it is provided both in Section VIII of Annex 1 of the Joint Declaration and Article 138 of the Basic Law that international agreements to which the People's Republic of China is not yet a party but which are implemented in Macao may continue to be implemented in the Macao Special Administrative Region.

In this connection, on behalf of the Government of the People's Republic of China, I have the honour to inform your Excellency that:

I. The treaties listedin Annex I to this Note [herein below], to which the People's Republic of China is a Party, will be applied to te Macao Special Administrative Region with effect from 20 December 1999 so long as they are one of the following categories:

(i) Treaties that apply to Macao before 20 December 1999;

(ii) Treaties that must apply to the entire territory of a state as they concern foreign affairs or defence or their nature or provision so require.

II. The Treaties listed in Annex II to this Note, to which the People's Republic of China is not yet a Party and which apply to Macao before 20 December 1999, will continue to apply to the Macao Special Administrative Region with the effect from 20 December 1999.

III. The Government of the People's Republic of China has notified the treaty depositaries concerned of the application of the treaties including their amendments and protocols listed in the aforesaid Annexes as well as reservations and declarations made thereto by the Chinese Government to the Macao Special Administrative Region with effect from 20 December 1999.

IV. With respect to other treaties that are not listed in the Annexes to this Note, to which the People's Republic of China is or will become a Party, the Government of the People's Republic of China will go through separately the necessary formalities for their application to the Macao Special Administrative Region if it so decided."

The treaties listed in Annexes I and II, referred to in the notification, are reproduced below.

Information regarding reservations and/or declarations made by China with respect to the application of treaties to the Macao Special Administrative Region can be found in the footnotes to the treaties concerned as published herein. Footnote indicators are placed against China's entry in the status list of those treaties.

Moreover, with regard to treaty actions undertaken by China after 13 December 1999, the Chinese Government confirmed that the territorial scope of each treaty action would be specified. As such, declarations concerning the territorial scope of the relevant treaties with regard to the Macao Special Administrative Region can be found in the footnotes to the treaties concerned as published herein. Footnote indicators are placed against China's entry in the status list of those treaties.

Annex I

(The treaties appear in the order as they are provided in these volumes.)

Charter of the United Nations and Statute of the International Court of Justice :

- Charter of the United Nations, 26 June 1945;

- Statute of the International Court of Justice, 26 June 1945;

- Amendment to Article 61 of the Charter of the United Nations, adopted by the General Assembly of the United Nations in resolution 2847 (XXVI) of 20 December 1971.

Privileges and Immunities, Diplomatic and Consular Relations:

- Convention on the Privileges and Immunities of the United Nations, 13 February 1946;

- Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, 21 November 1947;

- Vienna Convention on Diplomatic Relations, 18 April 1961;

- Vienna Convention on Consular Relations, 24 April 1963.

Human Rights :

- International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966;

- Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979;

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984;

- Convention on the Rights of the Child, 20 November 1989.

Refugees and Stateless Persons:

- Convention relating to the Status of Refugees, 28 July 1951;

- Protocol relating to the Status of Refugees, 31 January 1967;

Narcotic Drugs and Psychotropic Substances:

- Convention on psychotropic substances, 21 February 1971;

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988.

Health :

- Constitution of the World Health Organization, 22 July 1946.

International Trade and Development :

- Charter of the Asian and Pacific Development Centre, 1 April 1982.

Navigation:

- Convention on the International Maritime Organization, 6 March 1948.

Penal Matters:

- International Convention against the taking of hostages, 17 December 1979; - Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973.

Law of the Sea:

- United Nations Convention on the Law of the Sea, 10 December 1982.

Law of Treaties :

- Vienna Convention on the Law of Treaties, 23 May 1969.

Telecommunications:

- Constitution of the Asia-Pacific Telecommunity, 27 March 1976.

Disarmament :

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), 10 October 1980;

- Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons), 13 October 1995;

- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 3 May 1996;

- Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992.

Environment:

- Vienna Convention for the Protection of the Ozone Layer, 22 March 1985;

- Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987;

- Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 29 June 1990;

- Basel Convention on thetrol of Transboundary Movement of Hazardous Wastes and their Disposal, 22 March 1989;

- United Nations Framework Convention on Climate Change, 9 May 1992;

- Convention on biological diversity, 5 June 1992.

Annex II :

(The treaties appear in the order as they are provided in these volumes.)

Human Rights :

- International Covenant on Economic, Social and Cultural Rights, 16 December 1966;

- International Covenant on Civil and Political Rights, 16 December 1966;

Narcotic Drugs and Psychotropic Substances :

- Single Convention on Narcotic Drugs, 30 March 1961

- Protocol amending the Single Convention on Narcotic Drugs and Narcotic Substances, 25 March 1972.

Traffic in Persons:

- International Convention for the Suppression of the Traffic in Women and Children, 30 September 1921;

- International Convention for the Suppression of the Traffic in Women of Full Age, 11 October 1933;

- Convention for the Suppression of the Traffic in Persons and of the Exploitation of theProstitution of Others, 21 March 1950;

Transport and Communication - customs matters :

- Convention concerning Customs Facilities for Touring, 4 June 1954;

- Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material, 4 June 1954;

Transport and Communication - road traffic :

- Convention on Road Traffic, 19 September 1949.

Penal Matters :

- Slavery Convention, 25 September 1926;

- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 1956;

League of Nations :

- Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes, 7 June1930;

- Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, 19 March 1931;

- Convention providing a Uniform Law for Bills of Exchange and Prmissory Notes, 7 June 1930;

- Convention providing a Uniform Law for Cheques, 19 March 1931;

- Convention on the Stamp Laws in connection with Bills of Exchange and Promissory Notes, 7 June 1930;

- Convention on the Stamps Laws in connection with Cheques, 19 March 1931.

See also note 1 under "Macao" and note 1 under"Portugal" .

Congo

Note 1.

In a communication dated 15 November 1971, the Permanent Mission of the People's Republic of the Congo to the United Nations informed the Secretary-General that their country would henceforth be known as the "Congo".

Cook Islands

Note 1.

Formerly administered by New Zealand, the Cook Islands and Niue currently have the status of self-governing States in free association with New Zealand.

The responsibility of the Cook Islands and Niue to conduct their own international relations and particularly to conclude treaties has evolved substantially over the years. For a period of time it was considered that, in view of the fact that the Cook Island and Niue, though self-governing, had entered into special relationships with New Zealand, which discharged the responsibilities for the external relations and defence of the Cook Islands and Niue at their request, it followed that the Cook Islands and Niue did not have their own treaty making capacity.

However, in 1984, an application by the Cook Islands for membership in the World Health Organization was approved by the World Health Assembly in accordance with its article 6, and the Cook Islands, in accordance with article 79, became a member upon deposit of an instrument of acceptance with the Secretary-General. In the circumstances, the Secretary-General felt that the question of the status, as a State, of the Cook Islands, had been duly decided in the affirmative by the World Heath Assembly, whose membership was fully respresentative of the international community.

On the basis of the Cook Islands' membership in the World Health Organization, and of its subsequent admittance to other specialized agencies (Food and Agriculture Organization in 1985, United Nations

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in the notification of succession by either the Czech Republic or Slovakia, a footnote indicating the date and type of formality effected by the former Czechoslovakia will be included in the status of the treaties concerned, the corresponding footnote indicator being inserted next to the heading "Participant".

See also note 1 under “Slovakia” .

For information on the treatment of treaty actions by predecessor States and successor States in the status tables, see Part C, “Status tables” of the “Introduction” to this publication.

Democratic Republic of the Congo

Note 1.

As from 17 May 1997. Formerly: "Zaire" until 16 May 1997 and "Democratic Republic of the Congo" until 27 October 1971.

Denmark

Note 1.

In a communication received on 22 July 2003, the Govenrment of Denmark informed the Secretary-General that "... Denmark's ratifications normally include the entire Kingdom of Denmark including the Faroe Islands and Greenland.”

Egypt

See note 1 under “United Arab Republic”.

Estonia

Note 1.

In a letter addressed to the Secretary-General on 8 October 1991, the Chairman of the Supreme Council of the Republic of Estonia informed the Secretary-General that "Estonia does not regard itself as party by virtue of the doctrine of treaty succession to any bilateral or multilateral treaties entered into by the U.S.S.R. The Republic of Estonia has begun careful review of multilateral treaties in order to determine those to which it wishes to become a party. In this regard it will act on a case-by-case basis in exercise of its own sovereign right in the name of the Republic of Estonia.”.

European Union

Note 1.

By a communication dated 8 March 2010, the Council of the European Union notified the Secretary-General, as a result of the entry into force on 1 December 2009 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, as follows:

"As a consequence, with effect from 1 December 2009, the European Union has replaced the European Community (Article 1, third paragraph, of the Treaty on European Union as it results from the amendments introduced by the Treaty of Lisbon) and has taken over all rights and obligations of the European Community.

... [T]he European Union therefore has the honour to notify the Secretariat of the United Nations that, as from 1 December 2009, the former European Community has been replaced by the European Union in respect of all Conventions/Agreements for which the Secretary-General of the United Nations is the depositary and to which the European Community is a signatory or a contracting party.

... [T]he European Union also confirms the understanding stated in the letter from the Secretary General of the United Nations of 30 December 2009 that the European Union will enjoy all the rights and maintain full responsibility for all obligations with respect to all agreements concluded and all commitments made by the European Community with the United Nations and with respect to treaties

Hong Kong

See note 2 under "China" and "United Kingdom of Great Britain and Northern Ireland".

Indonesia

Note 1.

In a letter addressed to the Secretary-General on 20 January 1965, the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia informed the Secretary-General that "Indonesia has decided at this stage and under the present circumstances to withdraw from the United Nations". In his reply of 26 February 1965, after noting the contents of the letter from the Government of Indonesia, the Secretary-General expressed "the earnest hope that in due time [Indonesia] will resume full co-operation with the United Nations". For the text of the letter from Indonesia and the Secretary-General's reply, see document A/5857 and Corr.1 and A/5899.

In a telegram of 19 September 1966, the Government of Indonesia informed the Secretary-General that it "has decided to resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty-first session of the General Assembly". For the text of that telegram, see document A/6419.

At the 1420th plenary meeting of the General Assembly held on 28 September 1966, the President of the General Assembly, referring to the above-mentioned correspondence and to the decision of the Government of Indonesia "to resume full co-operation with the United Nations", stated, inter alia, that "it would appear, therefore, that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action so far taken by the United Nations on this matter would not appear to preclude this view. If this is also the general view of the membership, the Secretary-General would give instructions for the necessary administrative action to be taken for Indonesia to participate again in the proceedings of the Organization . . . Unless I hear any objection, I would assume that it is the will of the membership that Indonesia should resume full participation in the activities ofe United Nations and the Secretary-General may proceed in the manner I have outlined." There having been no objection, the President invited the representatives of Indonesia to take their seats in the General Assembly *(See Official Records of the General Assembly, Twenty-first Session, Plenary Meetings, 1420th meeting.)*

Iran (Islamic Republic of)

Note 1.

By a communication received on 4 November 1982, the Government of the Islamic Republic of Iran notified the Secretary-General that the designation "Iran (Islamic Republic of)" should henceforth be used.

Lao People's Democratic Republic

Note 1.

Formerly: "Laos" until 22 December 1975.

Latvia

Note 1.

In a letter addressed to the Secretary-General on 26 February 1993, the Minister of Foreign Affairs of Latvia informed the Secretary-General that "Latvia does not regard itself as party by virtue of the doctrine of treaty succession to any bilateral or multilateral treaties entered into by the former USSR."

Libya

In a letter of 14 April 1969, the Permanent Representative of the Republic of Maldives to the United Nations informed the Secretary-General that "after the change from a Sultanate to a Republican Administration, the Maldivian Government has decided that the country be known as `Maldives' instead of `Maldive Islands' and that the full title of the State be called `Republic of Maldives'".

Micronesia (Federated States of)

Note 1.

On 11 August 1992, the Secretary-General transmitted the following declaration dated 22 May 1992 emanating from the Secretary of External Affairs of the Federated States of Micronesia to the Secretary-General containing a declaration setting out the position of the Government of the Federated States of Micronesia (FSM) with regard to international agreements entered into by the United States of America and made applicable to the FSM pursuant to the United Nations Trusteeship Agreement for the former Japanese Mandated islands:

"On November 3, 1986, the application of treaties and international agreements to the Federated States of Micronesia by virtue of the application of treaties by the United States of America to the United Nations Trust Territory of the Pacific Islands, ceased. With regard to all bilateral treaties validly concluded by the United States on behalf of the Federated States of Micronesia, or validly applied or extended by the former to the latter before November 3, 1986, the Government of the Federated States of Micronesia declares that it will examine each such treaty and communicate its view to the other State Party concerned. In the meantime, the Federated States of Micronesia will continue to observe the terms of each treaty which validly so applies and is not inconsistent with the letter or the spirit of the Constitution of the Federated States of Micronesia, provisionally and on a basis of reciprocity. The period of examination will extend until November 3, 1995, except in the case of any treaty in respect of which an earlier statement of views is or has been made. At the expiration of that period, the Government of the Federated States of Micronesia will consider such of these treaties that could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

It is the earnest hope of the Government of the Federated States of Micronesia that during the aforementioned period of examination, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States Parties concerned upon the possibility of the continuance or modification of such treaties.

With regard to multilateral treaties previously applied, the Government of the Federated States of Micronesia intends to review each of them individually and to communicate to the depositary in each case what steps it wishes to take, whether by way of confirmation or termination, confirmation of succession or accession. During such period of review, any party to a multilateral treaty that has, prior to November 3, 1986, been validly applied or extended to the Federated States of Micronesia and is not inconsistent with the letter or spirit of the Constitution of the Federated States of Micronesia may, on a basis of reciprocity, rely as against the Federated States of Micronesia on the terms of such treaty."

Further, on 15 November 1995, the Secretary-General circulated a communication dated 2 November 1995 from the Government of the Federated States of Micronesia indicating that it had decided to extend the period of examination of the bilateral treaties indicated in its letter of 22 May 1992 for two additional years or until 3 November 1997.

Moldova

Montenegro

Note 1.

The National Assembly of the Republic of Montenegro adopted its Declaration of Independence on 3 June 2006, following the referendum in the Republic of Montenegro on 21 May 2006, which took place pursuant to Article 60 of the Constitutional Charter of Serbia and Montenegro. Montenegro was admitted to membership in the United Nations by General Assembly resolution A/RES/60/264 on 28 June 2006.

In a letter dated 10 October 2006, received by the Secretary-General on 23 October 2006 and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Republic of Montenegro notified that:

"[The Government of]...the Republic of Montenegro decided to succeed to the treaties to which the State Union of Serbia and Montenegro was a party or signatory.

Annexe 23

to the Expert Report
of Professor Simon Chesterman

Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments

2008-07-11 Source: Ministry of Commerce

The United Mexican States and the People' s Republic of China, hereinafter referred to as "the Contracting Parties",

INTENDING to create favorable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party;

RECOGNIZING that the reciprocal encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States;

DESIRING to intensify the cooperation of both States on the basis of equality and mutual benefits;

Have agreed as follows:

CHAPTER I: GENERAL PROVISIONS

ARTICLE 1 Definitions

For the purposes of this Agreement, the term:

“investor of a Contracting Party” means:

(a) a natural person having the nationality of a Contracting Party in accordance with its applicable laws, or

(b) an enterprise which is either constituted or otherwise organized under the law of a Contracting Party, and is engaged in substantive business operations in the territory of that Contracting Party;

having an investment in the territory of the other Contracting Party;

“enterprise” means any entity constituted or organized under the applicable law, whether or not for profit, and whether privately owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;

“investment” means the assets owned or controlled by investors of a Contracting Party and acquired in accordance with the laws and regulations of the other Contracting Party, listed below:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a Contracting Party or of a State enterprise;

(d) a loan to an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a Contracting Party or to a State enterprise;

(e) an interest in an enterprise that entitles the owner to share an income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d) above;

(g) real estate or other property, tangible or intangible, acquired or used for business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under
(i) contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,
(i) claims to money that arise solely from
(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) above, or

(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h) above;

"territory" means:
(a) in respect of the United Mexican States, the territory of the United Mexican States including the maritime areas adjacent to its coast, i.e. territorial sea, the exclusive economic zone and the continental shelf, to the extent to which the United Mexican States may exercise sovereign rights or jurisdiction in those areas according to international law;
(b) in respect of the People's Republic of China, the territory of the People's Republic of China including the territorial sea and air space above it, as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of explorations and exploitations of resources of the seabed and its subsoil and superjacent water resources in accordance with Chinese law and international law.[1]

ARTICLE 2 Admission of Investments
Each Contracting Party shall admit the entry of investments made by investors of the other Contracting Party pursuant to its applicable laws and regulations.

CHAPTER II: PROTECTION TO INVESTMENT

ARTICLE 3 National Treatment
1. Without prejudice to its laws and regulations at the time the investment is made, each Contracting Party shall accord to investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the operation, management, maintenance, use, enjoyment or disposal of investments.

2. Without prejudice to its laws and regulations at the time the investment is made, each Contracting Party shall accord to investments of investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to

investments of its own investors with respect to the operation, management, maintenance, use, enjoyment or disposal of investments.

ARTICLE 4 Most Favored Nation Treatment

1. Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to investors of any third State with respect to the operation, management, maintenance, use, enjoyment or disposal of investments.

2. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any third State with respect to the operation, management, maintenance, use, enjoyment or disposal of investments.

ARTICLE 5 Minimum Standard of Treatment

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, this Article prescribes the international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidence of State practice and opinio juris. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

ARTICLE 6

Compensation for Losses Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Contracting Party, shall be accorded by such Contracting Party, as regards any restitution, indemnification, compensation and other settlements, treatment no less favorable than that accorded to the investors of its own or any third State, whichever is more favorable to the investor concerned.

ARTICLE 7 Expropriation and Compensation

1. Neither Contracting Party may expropriate or nationalize an investment either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law; and

(d) on payment of compensation in accordance with paragraph 2 below.

2. Compensation shall:

(a) be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value because the intended expropriation had become publicly known earlier;

(b) be paid without delay;

(c) include interest at a commercially reasonable rate, from the date of expropriation until the date of actual payment; and

(d) be fully realizable and freely transferable.

3. Without prejudice to the provisions set forth in Chapter III Section One, an investor whose investment is expropriated, shall have the right to a prompt review of its case by a court or by any other competent authority, pursuant to the applicable laws of the corresponding Contracting Party, and to an assessment of such investment in accordance with the provisions set forth in this Article.

Article 8 Transfers

1. Without prejudice to any applicable formalities pursuant to its laws and regulations, each Contracting Party shall guarantee to an investor of the other Contracting Party that all payments related to an investment in its territory may be freely transferred into and out of its territory without delay. Such transfers shall include, but not be limited to:

(a) amounts necessary for establishing, maintaining or expanding the investment;

(b) profits, interests, dividends, capital gains, royalties and other fees in connection with intellectual and industrial property rights;

(c) payments made under a contract including those pursuant to a loan agreement;

(d) proceeds from the total or partial sale or liquidation of the investment;

(e) earnings and remuneration of nationals of the other Contracting Party who work in connection with an investment;

(f) any compensation owned to an investor by virtue of Article 6 and 7 ; and

(g) payments pursuant to the settlement of a dispute under Chapter III Section One.

2. Neither Contracting Party shall prevent transfers from being made without delay in freely convertible currencies as classified by the International Monetary Fund at the market exchange rate prevailing on the date of transfer unless otherwise provided in this Article.

3. A Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or administrative offenses;

(d) reports of transfers of currency or other monetary instruments; or

(e) ensuring the satisfaction of judgments in adjudicatory proceedings.

4. The formalities referred to in paragraph 1 above:

(a) shall in no case be more restrictive than those required at the time of entry into force of this Agreement;

(b) shall in no case impose new restrictions than those imposed at the time of entry into force of this Agreement; and

(c) shall not be used as a means of avoiding the Contracting Party’s commitments and obligations under this Article.

5. In case of a serious balance of payments difficulty or of a threat thereof, each Contracting Party may temporarily restrict transfers provided that such a Contracting Party implements measures or a program in accordance with international standards. These restrictions should be imposed on an equitable, non-discriminatory and in good faith basis.

ARTICLE 9 Subrogation

1. If a Contracting Party or its designated agency has granted a financial guarantee against non-commercial risks, and makes a payment under such guarantee, or acts under its rights as subrogee with respect to an investment made by one of its investors in the territory of the other Contracting Party, that other Contracting Party shall recognize the subrogation of any right, title, claim, privilege or actions existing or that might occur. The Contracting Party or its designated agency, as subrogees, may not have rights beyond those the original investor had.

2. In case a dispute arises, the Contracting Party which has been subrogated in the rights of the investor may not initiate or participate in proceedings before a national tribunal, nor submit the case to international arbitration in accordance with the provisions of Chapter III.

ARTICLE 10 Exceptions

Articles 3 and 4 shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the benefits of any treatment, preference or privilege which may be granted by such Contracting Party

by virtue of:

(a) any existing or future regional economic integration organization, free trade area, customs union, monetary union or any other similar integration arrangement, of which one of the Contracting Parties is or may become a party; or

(b) any rights and obligations of a Contracting Party resulting from an international agreement or arrangement or any domestic legislation relating wholly or mainly to taxation. In the event of any inconsistency between this Agreement and any other tax-related international agreement or arrangement, the latter shall prevail.

CHAPTER III: DISPUTE SETTLEMENT

SECTION ONE: SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

ARTICLE 11 Purpose

This Section shall apply to disputes between a Contracting Party and an investor of the other Contracting Party arising from an alleged breach of an obligation set forth in Chapter II entailing loss or damage.

ARTICLE 12 Notice of Intent and Consultation

1. The disputing parties should first attempt to settle a claim through consultation or negotiation.

2. With a view to settling the claim amicably, the disputing investor shall deliver to the disputing Contracting Party written notice of its intention to submit a claim to arbitration at least six months before the claim is submitted.[2] Such notice shall specify:

(a) the name and domicile of the disputing investor and, where a claim is made by an investor for loss or damage to an enterprise, the name and domicile of the enterprise;

(b) the provisions of Chapter II alleged to have been breached and other relevant provisions;

(c) the issues and the factual and legal basis of the claim; and

(d) the relief sought and the approximate amount of damages claimed.

ARTICLE 13 Arbitration: Scope and Standing and Time Periods

1. An investor of a Contracting Party may submit to arbitration a claim that the other Contracting Party has breached an obligation set forth in Chapter II, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.[3]

2. An investment may not make a claim under this Section.

3. A disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention;

(b) the ICSID Additional Facility Rules, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention;

(c) the UNCITRAL Arbitration Rules; or

(d) any other arbitration rules, if the disputing parties so agree.

4. A disputing investor may submit a claim to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set forth in this Section; and

(b) the investor and, where the claim is for loss or damage to an interest of an enterprise of the other Contracting Party that is a legal person that the investor owns or controls, the enterprise waive their right to initiate or continue before any administrative tribunal or court under the laws of a Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach of Chapter II, except for proceedings for injunctive, declaratory or other similar relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Contracting Party.

5. The consent and waiver referred to in this Article shall be in writing, delivered to the disputing Contracting Party and included in the submission of a claim to arbitration.[4]

6. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

7. Without prejudice to Article 12, a dispute may be submitted not later than three (3) years from the date that the investor first acquired or should have first acquired knowledge of the events which gave rise to the dispute.

8. The Contracting Parties recognize that under this Article, minority non-controlling investors have standing to submit only a claim for direct loss or damage to their own legal interest as investors.

ARTICLE 14 Contracting Party Consent

1. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Section.

2. The consent under paragraph 1 above and the submission of a claim to arbitration by the disputing investor shall satisfy the requirements of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute.

ARTICLE 15 Constitution of the Arbitral Tribunal

1. Unless the parties to the dispute agree otherwise, the arbitral tribunal shall be composed by three arbitrators. Each party to the dispute shall appoint one arbitrator and the disputing parties shall agree upon a third arbitrator who shall be the chairman of the arbitral tribunal.

2. The arbitrators referred to in paragraph 1 above shall have experience in international law and investment matters.

3. If an arbitral tribunal has not been established within ninety (90) days from the date in which the claim was submitted to arbitration, either because a disputing party failed to appoint an arbitrator or because the disputing parties failed to agree upon the chairman, the Secretary-General of ICSID, upon request of any of the disputing parties, shall be asked to appoint, at his own discretion, the arbitrator or arbitrators not yet appointed. Nevertheless, the Secretary-General of ICSID, when appointing the chairman, shall assure that he or she is a national of neither of the Contracting Parties.

ARTICLE 16 Consolidation

When a consolidation tribunal, with the Secretary General of ICSID acting as its appointing authority, is satisfied that the claims submitted before two or more tribunals under Article 15 have a question of fact or law in common, such consolidation tribunal may, in the interests of a fair and efficient resolution of the claims, consolidate the proceedings in accordance with the agreement of all disputing parties sought to be covered.

ARTICLE 17 Place of Arbitration

Any arbitration under this Section shall, upon request of any disputing party, be held in a State that is party to the New York Convention.

ARTICLE 18 Indemnification

In an arbitration under this Section, a disputing Contracting Party shall not assert as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

ARTICLE 19 Applicable Law

1. A tribunal established in accordance with this Section shall decide the submitted issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.

2. An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section.

ARTICLE 20 Awards and Enforcement of Awards

1. Unless the disputing parties agree otherwise, an award which provides that a Contracting Party has breached its obligations pursuant to this Agreement may only award, separately or in combination:

(a) monetary damages and any applicable interest; or

(b) restitution in kind, provided that the Contracting Party may pay pecuniary compensation in lieu of restitution.

2. Where a claim is submitted to arbitration for loss or damages to an enterprise:

(a) an award of restitution in kind shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. Arbitral awards shall be final and binding solely between the disputing parties and with respect to the particular case.

4. The arbitral award will be publicly accessible, unless the disputing parties agree otherwise.

5. A tribunal may not award punitive damages.

6. Each Contracting Party shall, within its territory, adopt all necessary measures for the effective enforcement of awards issued pursuant to this Article, and shall facilitate the enforcement of any award rendered within a proceeding in which it is a party.

7. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award rendered under the ICSID Convention:

(i) one hundred and twenty (120) days have elapsed from the date in which the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other arbitration rules selected by the disputing parties:

(i) three (3) months have elapsed from the date in which the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

ARTICLE 21 Interim Measures of Protection

An Arbitral Tribunal may recommend an interim measure of protection to preserve the rights of a disputing party, or to ensure that the arbitral tribunal's jurisdiction is made fully effective, including a recommendation to preserve evidence in the possession or control of a disputing party or to protect the arbitral tribunal's jurisdiction. An arbitral tribunal may not recommend attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 13.

SECTION TWO: SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

ARTICLE 22 Scope

1. This Section applies to the settlement of disputes between the Contracting Parties arising from the interpretation or application of the provisions of this Agreement.

2. A Contracting Party may not initiate proceedings in accordance with this Section with regard to a dispute concerning the violation of the rights of an investor, unless the other Contracting Party fails to abide by or comply with a final award rendered in a dispute that such investor may have submitted pursuant to Section One. In this case, an Arbitral Tribunal established in conformity with this Section may render, upon request of the Contracting Party whose investor was part in the dispute:

(a) a statement that the failure to abide by or comply with the final award is inconsistent with the obligations set forth in this Agreement; and

(b) a recommendation that the other Contracting Party abide by or comply with the final award.

ARTICLE 23 Consultations and Negotiations

1. Either Contracting Party may request consultations on the interpretation or application of this Agreement.

2. If a dispute arises between the Contracting Parties on the interpretation or application of this Agreement, it shall, to the extent possible, be settled amicably through consultations and negotiation.

3. In the event the dispute is not settled through the means mentioned above within six (6) months from the date such negotiations or consultations were requested in writing, any Contracting Party may submit the dispute to an arbitral tribunal established in accordance with the provisions of this Section or, by agreement of both Contracting Parties, to any other international tribunal.

ARTICLE 24 Constitution of the Arbitral Tribunal

1. Arbitration proceedings shall initiate upon written notice delivered by one Contracting Party (the requesting Contracting Party) to the other Contracting Party (the respondent Contracting Party) through diplomatic channels. Such notice shall contain a statement setting forth the legal and factual grounds of the claim, a summary of the development and results of the consultations and negotiations that took place pursuant to Article 23, the requesting Contracting Party's intention to initiate proceedings under this Section, and the name of the arbitrator appointed by such requesting Contracting Party.

2. Within thirty (30) days after the delivery of such notice, the respondent Contracting Party shall notify to the requesting Contracting Party the name of its appointed arbitrator.

3. Within thirty (30) days following the date in which the second arbitrator was appointed, the arbitrators appointed by the Contracting Parties shall appoint, by mutual agreement, a third arbitrator, who shall be the presiding arbitrator upon approval of the Contracting Parties. If the approval referred to in this paragraph has not been rendered within thirty (30) days following the date in which the third arbitrator was appointed, paragraph 4 below shall apply.

4. If within the time limits provided for in paragraph 2 and 3 above, the required appointments have not been made or the required approvals have not been given, either Contracting Party may invite the President of the International Court of Justice to appoint the arbitrator or arbitrators not yet appointed. If the President is a citizen or a permanent resident of either Contracting Party, or he or she is otherwise unable to act, the Vice-President shall be invited to make the referred appointment(s). If the Vice-President is a citizen or a permanent resident of either Contracting Party, or he or she is unable to act, the member of the International Court of Justice next in seniority who is not a citizen nor a permanent resident of either Contracting Party shall be invited to make the necessary appointment(s).

5. In case an arbitrator appointed as provided for in this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as that prescribed for the appointment of the original arbitrator, and he or she shall have the same powers and duties that the original arbitrator had.

ARTICLE 25 Proceedings

1. Once convened by the presiding arbitrator, the arbitral tribunal shall determine the seat of arbitration and the date of initiation of the arbitral process.

2. The arbitral tribunal shall decide all questions relating to its competence and, subject to any agreement between the Contracting Parties, determine its own procedure, taking into account the PCA Optional Rules.

3. At any stage of the proceedings and before it issues any resolution, the arbitral tribunal may propose to the Contracting Parties that the dispute be settled amicably.

4. At all times, the arbitral tribunal shall afford a fair hearing to the Contracting Parties.

ARTICLE 26 Award

1. The arbitral tribunal shall reach its decision by majority vote. The award shall be issued in writing and shall contain the applicable factual and legal findings. A signed award shall be delivered to each Contracting Party.

2. The award shall be final and binding on the Contracting Parties.

ARTICLE 27 Applicable Law

A tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and with the applicable rules and principles of international law.

ARTICLE 28 Costs

Each Contracting Party shall bear the costs of its appointed arbitrator and of any legal representation in the proceedings. The costs of the presiding arbitrator and of other expenses associated with the conduct of the arbitration shall be borne equally by the Contracting Parties, unless the arbitral tribunal decides that a higher proportion of costs be borne by one of the Contracting Parties.

CHAPTER IV: FINAL PROVISIONS

ARTICLE 29 Application of the Agreement

This Agreement shall apply to investments made after the entry into force of this Agreement by investors of one Contracting Party in the territory of the other Contracting Party, as well as to investments made in accordance with the applicable laws of the Contracting Parties and existing at the entry into force of this Agreement. However, the provisions of this Agreement shall not apply to claims arising out of events which occurred, or to claims which had been settled, prior to its entry into force.

ARTICLE 30 Consultations A Contracting Party may propose to the other Contracting Party to carry out consultations on any matter relating to this Agreement. These consultations shall be held at a place and at a time agreed by the Contracting Parties.

ARTICLE 31 Denial of Benefits

The Contracting Parties may decide jointly in consultation to deny the benefits of this Agreement to an enterprise of the other Contracting Party and to its investments, if a natural person or enterprise of a non-Contracting Party owns or controls such enterprise.

ARTICLE 32 Entry into Force, Duration and Termination

1. The Contracting Parties shall notify each other in writing the fulfilment of their domestic legal procedures in relation to the approval and entry into force of this Agreement.

2. This Agreement shall enter into force thirty (30) days after the date of the latter notification carried out through the diplomatic channels used by both Contracting Parties to notify the fulfilment of the requirements referred to in paragraph 1 above.

3. This Agreement shall remain in force for a period of ten (10) years and thereafter shall be in force for an indefinite period of time, unless either of the Contracting Parties delivers through diplomatic channels to the other Contracting Party a written notice of its decision to terminate this Agreement, with twelve (12) months in advance.

4. With respect to investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten (10) years from the date of termination.

5. This Agreement may be modified by mutual consent of the Contracting Parties, and the agreed modification shall come into effect pursuant to the procedures set forth in paragraphs 1 and 2 above.

DONE at the city of Beijing, on the eleventh day of July of two thousand and eight, in two originals in the Spanish, Chinese and English languages, all texts being equally authentic. In case of divergence of interpretation, the English text shall prevail.

FOR THE GOVERNMENT OF THE UNITED MEXICAN STATES

FOR THE GOVERNMENT OF THE PEOPLE' S REPUBLIC OF CHINA

Notes:

1. Authorized by the Central Government of the People' s Republic of China, the Governments of Hong Kong and Macao Special Administrative Regions can separately negotiate and sign the Agreement on the Promotion and Reciprocal Protection of Investments with the Government of United Mexican States by themselves.

2 .Annex A shall apply to this paragraph.

3. Annex B shall apply to this paragraph.

4. Annex C shall apply to this paragraph.

Annex A   Annex to Article 12, paragraph 2

1. The notice of intent referred to in Article 12 paragraph 2 shall be delivered:
In the case of the United Mexican States, at the Ministry of Economy; and
In the case of the People´s Republic of China, at the Ministry of Commerce.

2. The disputing investor shall submit the written notice of intent referred to in Article 12 paragraph 2 in Spanish or in Chinese, as applicable, depending on the Contracting Party against which the claim is made. The corresponding translation, made by an expert, shall be included in case such notice of intent is submitted in any language other than the aforementioned.

3. In order to facilitate the process of consultation, the investor shall provide along with the notice of intent, copy of the following documentation:
(a) passport or any other official document as evidence of nationality, where the investor is a natural person, or act of incorporation or any other document of incorporation or organization under the law of the non-disputing Contracting Party where the investor is an enterprise of such Contracting Party;
(b) where an investor of a Contracting Party intends to submit a claim to arbitration for loss or damage to an enterprise of the other Contracting Party:
(i) act of incorporation or any other document of incorporation or organization, under the applicable law of the disputing Contracting Party; and
(ii) document proving that the disputing investor owns or controls the enterprise.
(c) where applicable, power of attorney or the document proving that a person is duly authorized to act on behalf of the disputing investor.

Annex B Annex to Article 13 paragraph 1

An investor of a Contracting Party may not allege that the other Contracting Party has breached an obligation under Chapter II both in arbitration under Chapter III and in proceedings before a court or administrative tribunal of the latter Contracting Party. Where an enterprise of a Contracting Party that an investor of the other Contracting Party owns or controls alleges in proceedings before a court or administrative tribunal that the former Contracting Party has breached an obligation under this Agreement, the investor may not allege the breach in an arbitration under Chapter III.

Annex C Annex to Article 13 paragraph 5

An investor shall go through the domestic administrative review procedures as specified by the laws and regulations of the disputing Contracting Party before the submission to international arbitration in accordance with Chapter III, Section One.

If the domestic administrative review procedures are not complete within four (4) months after the date an application for the review is first filed, it shall be considered that the procedures are complete and the investor may proceed to an international arbitration. The investor may file an application for the review during the six (6) months consultation or negotiation period as provided in Article 12.

Annexe 24

to the Expert Report
of Professor Simon Chesterman

印務局

重新刊登

因第19/2000號行政長官公告刊登失誤，現重新刊登：

第19/2000號行政長官公告

公佈《中華人民共和國澳門特別行政區和葡萄牙共和國關於相互鼓勵和保護投資的協定》

行政長官根據澳門特別行政區第3/1999號法律第六條第一款及第三條第六項的規定，命令公佈《中華人民共和國澳門特別行政區和葡萄牙共和國關於相互鼓勵和保護投資的協定》。

二零零零年七月十四日發佈。

行政長官　何厚鏵

中華人民共和國澳門特別行政區和葡萄牙共和國關於相互鼓勵和保護投資的協定

經中華人民共和國中央人民政府正式授權簽訂本協定的中華人民共和國澳門特別行政區和葡萄牙共和國，以下簡稱"締約方"：

爲加強雙方經貿合作，鞏固雙方所建立之關係，

願意創造一些條件，以利某一締約方的投資者在另一締約方進行投資；

認識到按照本協定去鼓勵和保護投資會促進私人的投資意欲；

因此，達成協議如下：

第一條

（概念）

爲著本協議的效力：

1）「投資」一詞應理解爲某一締約方的投資者在另一締約方的地區內所投資的一切財產和權利，除包括未盡列舉者之外，尤其包括：

a) 動產和不動產的所有權以及其他如抵押、質權、擔保和與之相類似的權利的物權；

b) 公司的股票、股份或其他方式的股東之出資、債務或其他資金上的權利、或從事有關業務而衍生之經濟利益；

c) 債權以及其他具經濟價值之給付；

d) 知識產權，如著作權、專利權、工業設計和工業新型權、商標權、商業名稱權以及工商保密權；

IMPRENSA OFICIAL

Republicação

Por ter saído indevidamente o Aviso do Chefe do Executivo n.º 19/ /2000, novamente se publica:

Aviso do Chefe do Executivo n.º 19/2000

Publicação do *Acordo entre a República Portuguesa e a Região Administrativa Especial de Macau da República Popular da China sobre a Promoção e Protecção Recíproca de Investimentos*

O Chefe do Executivo manda publicar, nos termos do n.º 1 do artigo 6.º e da alínea 6) do artigo 3.º da Lei da Região Administrativa Especial de Macau n.º 3/1999, o *Acordo entre a República Portuguesa e a Região Administrativa Especial de Macau da República Popular da China sobre a Promoção e Protecção Recíproca de Investimentos.*

Promulgado em 14 de Julho de 2000.

O Chefe do Executivo, *Ho Hau Wah.*

ACORDO ENTRE A REPÚBLICA PORTUGUESA E A REGIÃO ADMINISTRATIVA ESPECIAL DE MACAU DA REPÚBLICA POPULAR DA CHINA SOBRE A PROMOÇÃO E PROTECÇÃO RECÍPROCA DE INVESTIMENTOS

A República Portuguesa e a Região Administrativa Especial de Macau da República Popular da China devidamente autorizada pelo Governo Popular Central da República Popular da China, adiante designadas como Partes Contratantes,

Animadas do desejo de intensificar a cooperação económica e reforçar os laços existentes entre as duas Partes;

Desejando criar condições favoráveis para a realização de investimentos pelos investidores de uma Parte Contratante na outra Parte Contratante;

Reconhecendo que a promoção e protecção de investimentos nos termos deste Acordo contribuirá para estimular a iniciativa privada;

Acordam o seguinte:

Artigo 1º

Definições

Para efeitos do presente Acordo:

1. O termo "investimento" compreenderá toda a espécie de bens e direitos investidos na área de uma Parte Contratante por investidores da outra Parte Contratante, incluindo em particular, mas não exclusivamente:

a) O direito de propriedade sobre móveis e imóveis, bem como outros direitos reais, tais como hipotecas, penhores, cauções e direitos similares;

b) Acções, quotas, ou outro tipo de participações sociais, obrigações ou outros direitos no capital de sociedades e/ou interesses económicos resultantes da respectiva actividade;

c) Direitos de crédito e quaisquer outras prestações com valor económico;

d) Direitos de propriedade intelectual, tais como direitos de autor, patentes, desenhos ou modelos industriais, marcas, denominações comerciais e segredos comerciais e industriais;

e) 法律賦予之特許權，有權限之公共當局的合同或行政行爲，包括勘探、研究及開採自然資源的特許權；

在投資方面，開展方式上的任何變動，只要是依據投資所在地之締約方的法律及規章爲之，就不會影響其"投資"的資格。

2) 「地區」一詞理解爲：

a) 葡萄牙共和國這一締約方的領土範圍一如其相關法例所訂定的，並包括共和國根據法律及適用之國際法對之行使主權之海域或及專屬經濟區域；

b) 中華人民共和國澳門特別行政區的區域包括澳門半島以及氹仔和路環島。

3) 「投資者」一詞

在葡萄牙共和國方面，係指：

a) 按照該協約方的法律而具有葡萄牙國籍之自然人；及

b) 法人，包括總部設於這一締約方及係依據這一締約方的法律而設立和運作的企業、商業公司、其他公司或社團。

中華人民共和國澳門特別行政區方面：

a) 根據實施予澳門特別行政區的法律，持有澳門居民身份證而不具有葡萄牙國籍之自然人，及

b) 法人，包括總部設於這一締約方及係依據這一締約方的法律而設立和運作的商業公司、其他公司或社團。

4) 根據上一款的規定，如自然人同時爲協議雙方之投資者，則按下列規定解決:

a) 如在協議一方有永久性住所，則僅視其爲該協議一方之投資者。如在協議雙方同時有永久性住所，則僅視其爲與其個人及經濟關係較密切之協議一方(重要利益中心)之投資者：

b) 如無法確定其重要利益中心在協議何方，或其在協議任一方均無永久性住所，則僅視其爲有習慣性居處之協議一方之投資者；

c) 如其在協議雙方均有或均無習慣性居處，而其爲葡萄牙國民者，則僅視其爲葡萄牙居民；

d) 如非葡萄牙國民，則協議雙方之有權限當局應透過共同協商解決。

e) Concessões conferidas por lei, contrato ou acto administrativo da autoridade pública competente, incluindo concessões para prospecção, pesquisa e exploração de recursos naturais.

Qualquer alteração na forma de realização dos investimentos não afectará a sua qualificação como investimentos, desde que essa alteração seja feita de acordo com as leis e regulamentos da Parte Contratante em cuja área os investimentos tenham sido realizados.

2. O termo "área" compreende:

a) Relativamente à República Portuguesa, o território desta Parte Contratante, tal como se encontra definido na respectiva legislação, incluindo o mar territorial e a zona económica exclusiva, e onde, de acordo com a lei e o direito internacional aplicável, a República exerce poder de soberania;

b) Relativamente à Região Administrativa Especial de Macau da República Popular da China, o território compreendido pela península de Macau e pelas ilhas de Taipa e Coloane.

3. O termo "investidor" designa:

Relativamente à República Portuguesa,

a) As pessoas singulares com a nacionalidade desta Parte Contratante de acordo com a respectiva lei, e

b) As pessoas colectivas, incluindo empresas, sociedades comerciais ou outras sociedades ou associações, que tenham sede na área desta Parte Contratante e estejam constituídas e funcionem de acordo com a lei desta Parte Contratante.

Relativamente à Região Administrativa Especial de Macau da República Popular da China,

a) As pessoas singulares que sejam titulares de Bilhete de Identidade de Residente a Região Administrativa Especial de Macau sem nacionalidade portuguesa de acordo com as leis aplicadas na Região Administrativa Especial de Macau, e

b) As pessoas colectivas, incluindo sociedades comerciais ou outras sociedades ou associações, que tenham sede na área desta Parte Contratante e estejam constituídas e funcionem de acordo com a lei desta Parte Contratante.

4. Quando, por virtude do disposto no número anterior, uma pessoa singular for investidor de ambas as Partes Contratantes, a situação será resolvida como segue:

a) Será considerada investidor apenas na Parte Contratante em que tenha uma habitação permanente à sua disposição. Se tiver uma habitação permanente à sua disposição em ambas as Partes Contratantes, será considerada investidor apenas da Parte Contratante com a qual sejam mais estreitas as suas relações pessoais e económicas (centro de interesses vitais);

b) Se a Parte Contratante em que tem o centro de interesses vitais não puder ser determinada ou se não tiver uma habitação permanente à sua disposição em nenhuma das Partes Contratantes, será considerada investidor apenas da Parte Contratante em que permanece habitualmente;

c) Se permanecer habitualmente em ambas as Partes Contratantes ou se não permanecer habitualmente em nenhuma delas, será considerada investidor apenas de Portugal, se for seu nacional;

d) Se não for nacional de Portugal, as autoridades competentes das Partes Contratantes resolverão o caso de comum acordo.

5) 「收益」一詞表示在一定時期內從投資中所得的款項，除包括未盡列舉者之外，尤其包括利潤、股息、利息、知識產權使用方面應收之支付及/或其他與投資有關的收益，尤其有關因提供技術或管理援助而得的報酬。

6) 倘將投資中的收益再投資在同一締約方的地區內，所得之收益將會以處理起始投資收益的方式同樣處理之。

第二條

鼓勵和保護投資

1) 締約雙方應盡其所能相互促進和鼓勵締約另一方的投資者在其境內投資，依照其法律和規章的規定接受此等投資，並在任何情況下給予公平、合理的待遇。

2) 締約一方應保護締約另一方投資者按其現行法律規定在其地區內進行的投資，並保障其安全。

3) 締約雙方應使締約另一方投資者對在其地區內投資的管理、維持、使用、享有或支配不受任何不合理、任意或歧視性措施所約束。

第三條

投資待遇及保護

1) 締約任何一方的投資者在締約另一方地區內的投資和收益所享受的待遇，不應低於締約另一方給予其本身投資者或其他國家投資者的投資和收益的待遇。

2) 締約雙方應相互對投資於其地區內之締約另一方的投資者在管理、維持、使用、享有或支配他們的投資方面給予公平合理的待遇，而此等待遇不應低於其給予本身的投資者或其他國家投資者的待遇。

3) 本條規定不會引致締約任何一方將因下述情況所產生的待遇、優惠或特權給予締約另一方的投資者：

a) 參加締約任何一方已經或可能加入的任何現存或將來的自由貿易區、關稅同盟或共同市場，又或類似的國際協定，包括其他任何形式的區域性經濟合作組織；及

b) 任何全部或部分與稅務有關的區域性或非區域性的雙邊或多邊協議。

4) 締約雙方視本協議第三條之規定爲不會影響任一締約方實施

5. O termo "rendimentos" designará as quantias geradas por investimentos, num determinado período, incluindo em particular, mas não exclusivamente, lucros, dividendos, juros, pagamentos devidos pela utilização de propriedade intelectual e/ou outros rendimentos relacionados com os investimentos, nomeadamente pagamentos por assistência técnica ou de gestão.

Caso os rendimentos dos investimentos sejam reinvestidos na área da mesma Parte Contratante, os rendimentos resultantes desse reinvestimento serão tratados da mesma forma que os rendimentos do investimento inicial.

Artigo 2°

Promoção e protecção dos investimentos

1. Ambas as Partes Contratantes promoverão e encorajarão, na medida do possível, a realização de investimentos na sua área por investidores da outra Parte Contratante, admitindo tais investimentos de acordo com as suas leis e regulamentos e concedendo-lhes, em qualquer caso, tratamento justo e equitativo.

2. Os investimentos realizados por investidores de uma das Partes Contratantes na área da outra Parte Contratante, em conformidade com as disposições legais aí vigentes, gozarão nessa Parte Contratante de plena protecção e segurança.

3. As Partes Contratantes não sujeitarão a gestão, manutenção, uso, fruição ou disposição dos investimentos realizados na sua área por investidores da outra Parte Contratante a medidas injustificadas, arbitrárias ou discriminatórias.

Artigo 3°

Tratamento e protecção dos Investimentos

1. Os investimentos realizados por investidores de uma Parte Contratante na área da outra Parte Contratante, bem como os respectivos rendimentos, não serão objecto de um tratamento menos favorável do que o concedido por esta última aos investimentos e rendimentos dos seus próprios investidores ou de investidores de qualquer outro Estado.

2. Ambas as Partes Contratantes concederão aos investidores da outra Parte Contratante, no que respeita à gestão, manutenção, uso, fruição ou disposição dos investimentos realizados na sua área, um tratamento justo e equitativo e não menos favorável do que o concedido aos seus próprios investidores ou aos investidores de outro Estado.

3. As disposições do presente artigo não implicam a concessão por qualquer das Partes Contratantes aos investidores da outra Parte Contratante de qualquer tratamento, preferência ou privilégio que possa ser outorgado em virtude de:

a) Participação em zonas de comércio livre, uniões aduaneiras ou mercados comuns, existentes ou a criar, ou em outros acordos internacionais semelhantes, incluindo outras formas de cooperação económica regional, aos quais uma das Partes Contratantes tenha aderido ou venha a aderir; e

b) Acordos bilaterais ou multilaterais, com carácter regional ou não, de natureza total ou parcialmente fiscal.

4. As Partes Contratantes consideram que as disposições do artigo 3° do presente Acordo não prejudicam o direito de qualquer das Partes Contratantes

因行使徵稅權而對各納稅人居住地或資本投資地而訂定之不同待遇的權利的規定。

de aplicar as disposições pertinentes do seu direito fiscal que estabeleçam, nos termos da respectiva legislação, uma distinção entre contribuintes que não se encontrem em idêntica situação no que se refere ao seu lugar de residência ou ao lugar em que o seu capital é investido.

第四條

轉移

1) 締約任何一方應根據其相關法例保證締約另一方投資者自由轉移下列與投資有關的款項，除包括未盡列舉者之外，尤其包括：

a) 資本和實現、維持或擴大投資所用的追加款項；

b) 本協定第一條第四款所指之收益；

c) 締約雙方認可爲投資之貸款的服務費用以及有關之歷償還及攤還之款項；

d) 投資的全部或部分轉讓或清算價值；

e) 本協定第五條及第六條所指之償還或其他的支付；

f) 任何按本協定第七條規定以投資者名義作出之初期支付；

g) 締約一方自然人獲准在締約另一方地區內進行與投資有關的工作的收入。

2) 本條所述之轉移應在不受限制或不被拖延的情況下，以可自由兌換的貨幣，按照轉移之日所適用之匯率進行。

3) 爲著本條的效力，轉移倘是在履行所需手續之正常期限，即由申請轉移之日起計不超過三十日的期限內進行，有關的轉移則被理解爲已獲迅速辦妥。

Artigo 4°

Transferências

1. Ambas as Partes Contratantes, em conformidade com a respectiva legislação, garantirão aos investidores da outra Parte Contratante a livre transferência das importâncias relacionadas com os investimentos, em particular, mas não exclusivamente:

a) Do capital e das importâncias adicionais necessárias à efectivação, manutenção ou ampliação dos investimentos;

b) Dos rendimentos definidos no n° 5 do artigo 1° deste Acordo;

c) Das importâncias necessárias para o serviço, reembolso e amortização de empréstimos reconhecidos por ambas as Partes Contratantes como investimentos;

d) Do produto resultante da alienação ou da liquidação total ou parcial dos investimentos;

e) Das indemnizações ou outros pagamentos previstos nos artigos 5° e 6° deste Acordo;

f) De quaisquer pagamentos preliminares que possam ter sido efectuados em nome do investidor de acordo com o artigo 7° do presente Acordo;

g) Dos salários das pessoas singulares autorizadas a trabalhar, em conexão com o investimento, na área da outra Parte Contratante.

2. As transferências referidas neste artigo serão efectuadas sem restrições ou demora, em moeda convertível, à taxa de câmbio prevalecente aplicável na data da transferência.

3. Para os efeitos do presente artigo entender-se-á que uma transferência foi realizada sem demora quando a mesma for efectuada dentro do prazo normalmente necessário para o cumprimento das formalidades indispensáveis, o qual não poderá exceder trinta (30) dias a contar da data da apresentação do pedido de transferência.

第五條

徵收

1) 締約任何一方不應對締約另一方的投資者所進行的投資採取徵收或采取與此種徵收效果相同的措施（以下稱爲徵收），除非這種措施是法律所規定的，是以公共利益爲由，在非歧視並伴有補償的基礎下方可爲之。

2) 補償款額應按情相當於投資被徵收前一日或即將進行徵收已爲公眾所知的前一日的市場價值。

3) 補償款額的支付不應無故被遲延，應包括自徵收日起至付款日止按銀行平常利率計算之利息，並應是有效、恰當及自由轉移的。

4) 投資被徵收的投資者有權依照採取徵收的締約一方的法律，

Artigo 5°

Expropriação

1. Os investimentos efectuados por investidores de qualquer das Partes Contratantes no território da outra Parte Contratante não poderão ser expropriados, ou sujeitos a outras medidas com efeitos equivalentes à expropriação (adiante designadas como "expropriação"), excepto por força da lei, no interesse público, sem carácter discriminatório e mediante pronta indemnização.

2. A indemnização deverá corresponder ao valor de mercado dos investimentos expropriados na data imediatamente anterior ao, consoante os casos, momento em que a expropriação ocorrer ou ao momento em que a futura expropriação se torne do conhecimento público.

3. A indemnização deverá ser paga sem demora, vencerá juros à taxa bancária normal desde a data da expropriação até à data da sua liquidação e deverá ser efectiva, adequada e livremente transferível.

4. O investidor cujos investimentos tenham sido expropriados terá o direito, de acordo com a legislação da Parte Contratante em cuja área os bens tenham

要求以司法程序或其他程序覆核有關徵收的事宜，亦有權依照本條規定原則要求審核其投資。

第六條

補償損失

1) 締約一方的投資者在締約另一方地區內的投資因締約另一方境內發生戰爭或其他武裝沖突、革命、國民緊急狀態或其他被國際公法視爲相類似的情況而遭受損失時，應獲得締約另一方按情以恢復、補償或其他合宜方式予以之其認爲最有利的援助，而有關的待遇不應低於締約另一方給予其投資者或其他國家投資者的待遇。

2) 上款所述的補償得以可兌換的貨幣自由及無遲誤地予以轉移。

第七條

代位

若締約一方或其委派實體對其投資者在締約另一方地區內的投資提供擔保，並爲此向投資者支付了款項，就成爲該投資者的權利和訴訟權的代位，且得根據原投資者訂定之規定和條件行使之。

第八條

締約一方與締約另一方投資者之間的爭端

1) 締約一方的投資者與締約另一方就有關其在該締約另一方的投資所發生的爭端應以友好方式協商解決。

2) 倘有關的爭端由任一締約爭議方提出書面日起計六個月內仍未能按上款之規定解決時，投資者得選擇將爭端提交予下列任一機構處理：

a) 有關投資所在地之締約方的有權限法院；

b) 根據聯合國商貿及發展法委員會所訂且在當時仍然生效之仲裁規則而設立之臨時仲裁庭。

3) 將爭端以上款所指之任一機構處理的決定不得有變。

4) 根據有關投資所在地之締約方的域內法的規定，判決或仲裁裁判對締約雙方均有約束力，而雙方亦不得就此判決或仲裁裁判提起上訴，但第二款 a)項所指情況之域內法例或有關仲裁規則另有訂明者則除外。

第九條

締約雙方間的爭端

1) 締約雙方就本協定的解釋或適用發生的爭端應盡量以友好方式協商解決。

sido expropriados, à revisão do seu caso, em processo judicial ou outro, e à avaliação dos seus investimentos de acordo com os princípios definidos neste artigo.

Artigo 6.º

Compensação por perdas

1. Os investidores de uma das Partes Contratantes que venham a sofrer perdas nos investimentos realizados na área da outra Parte Contratante em virtude de guerra ou outros conflitos armados, revolução, estado de emergência nacional ou outros eventos considerados equivalentes pelo direito internacional receberão dessa Parte Contratante um tratamento não menos favorável do que o concedido aos seus próprios investidores ou aos investidores de outro Estado, consoante o que for mais favorável, no que diz respeito à restituição, indemnização ou outros factores pertinentes.

2. As compensações previstas no número anterior serão transferíveis, em moeda convertível, livremente e sem demora.

Artigo 7.º

Subrogação

No caso de uma das Partes Contratantes, ou uma entidade por ela designada, efectuar pagamentos a um dos seus investidores em virtude de uma garantia prestada a um investimento realizado na área da outra Parte Contratante, ficará a primeira por esse facto sub-rogada nos direitos e acções desse investidor, podendo exercê-los nos mesmos termos e condições que o titular originário.

Artigo 8.º

Diferendos entre uma Parte Contratante e um investidor da outra Parte Contratante

1. Os diferendos entre um investidor de uma das Partes Contratantes e a outra Parte Contratante relacionados com um investimento do primeiro na área da segunda serão resolvidos de forma amigável através de negociações.

2. Se o diferendo não puder ser resolvido de acordo com o disposto no número anterior no prazo do seis (6) meses contados da data em que uma das partes litigantes o tiver suscitado por escrito, o investidor poderá optar por submeter o diferendo a uma das seguintes instâncias:

a) Aos tribunais competentes da Parte Contratante em cuja área se situe o investimento; ou

b) A um tribunal arbitral *ad hoc*, estabelecido de acordo com as regras de arbitragem da Comissão das Nações Unidas para o Comércio e Desenvolvimento (CNUCED) que então estejam em vigor.

3. A decisão de submeter o diferendo a um dos procedimentos referidos no número anterior é irreversível.

4. A sentença será vinculativa para ambas as partes, de acordo com a lei interna da Parte Contratante na área da qual se situa o investimento em causa, e não será objecto de qualquer tipo de recurso, para além dos previstos na legislação interna, no caso da alínea a) do número 2, ou nas referidas regras de arbitragem.

Artigo 9.º

Diferendos entre as Partes Contratantes

1. Os diferendos que surjam entre as Partes Contratantes sobre a interpretação ou aplicação do presente Acordo serão, na medida do possível, resolvidos amigavelmente através de negociações.

2) 如締約雙方未能自協商開始後六個月內達成協議，有關爭端得提交予雙方同意之實體或應締約任何一方的要求，提交予由三名仲裁員組成且根據下列各款規定臨時成立的仲裁庭。

3) 締約雙方各委派一名仲裁員，該兩名仲裁員協議推舉一名可在有關爭端事項上保持中立地位的其他國家國民，由締約雙方共同委任爲仲裁庭長。

4) 仲裁庭長不得具有葡籍或中國籍，更不得擁有澳門居民的身份。

5) 首兩名仲裁員應自締約任何一方書面通知另一方要將爭端提交仲裁庭之日起二個月內委派，仲裁庭長在三個月內委派。

6) 如在上款規定的期限內未能作出委派，且無任何其他協議時，締約任何一方可請求國際法院院長以私人名義作出必要的委派。

7) 如國際法院院長爲一位被視爲在有關爭端事項上未能保持中立地位的某國公民，則應請求副院長作出必要的委派。倘副院長又因同樣理由不能履行此項職責時，則應按照等級由法院法官作出任命。

8) 仲裁庭以多數票作出裁決，並爲終局裁決。該裁決對締約雙方均有約束力。

9) 締約各方各自負擔其仲裁員及代表其參與仲裁程序之人士的費用，其餘費用，包括仲裁庭長的費用則應由雙方平均擔負。如需由國際法院院長或副院長作出委派時，有關的費用亦由雙方平均分擔。

10) 仲裁庭可決定另一種有別於上款所訂之費用攤分的方式。

11) 本協定未有規範者，則由仲裁庭自行訂定其審判權以及制定其程序規則。

第十條

其他規則的適用

1) 締約各方域內法的任何規定、對締約雙方間生效的國際公約的任何規定，倘對締約另一方的投資者的投資訂有一套較本協定更爲有利的一般或特別制度，則應從優適用。

2. Se as Partes Contratantes não chegarem a acordo no prazo de seis (6) meses após o início das negociações, o diferendo poderá ser submetido a qualquer entidade acordada por ambas ou, a pedido de qualquer delas, a um tribunal arbitral *ad hoc* constituído por três árbitros e estabelecido nos termos dos números seguintes.

3. Cada Parte Contratante designará um árbitro e estes proporão por acordo um terceiro como presidente, o qual deverá ser nacional de um Estado que possa ser considerado neutro em relação à disputa e que será nomeado conjuntamente por ambas as Partes Contratantes.

4. O presidente do tribunal não pode ter nacionalidade portuguesa ou chinesa nem o estatuto de residente de Macau.

5. Os primeiros dois árbitros serão nomeados no prazo de dois (2) meses e o presidente no prazo de três (3) meses contados da data em que qualquer das Partes Contratantes tiver comunicado à outra, por escrito, a intenção de submeter o diferendo a um tribunal arbitral.

6. Se os prazos fixados no número anterior não forem observados, qualquer uma das Partes Contratantes poderá, na falta de qualquer outro acordo, solicitar ao presidente do Tribunal Internacional de Justiça que proceda, a título pessoal, às necessárias nomeações.

7. Se o presidente do Tribunal Internacional de Justiça for nacional de um Estado que não possa ser considerado neutro em relação à disputa, as nomeações caberão ao vice-presidente, e se este também estiver impedido pela mesma razão, as nomeações caberão ao membro do Tribunal que se siga na hierarquia.

8. 0 tribunal arbitral decidirá por maioria de votos e as suas decisões serão definitivas e vinculativas para ambas as Partes Contratantes.

9. Caberá a cada Parte Contratante suportar as despesas do respectivo árbitro, bem como da respectiva representação no processo perante o tribunal, suportando ambas em partes iguais as demais despesas, incluindo as do presidente do tribunal arbitral e, se for o caso, as do presidente ou vice-presidente do Tribunal Internacional de Justiça.

10. 0 tribunal arbitral poderá, no entanto, decidir uma distribuição das despesas diferente da estabelecido no número anterior.

11. Caberá ao tribunal arbitral definir os limites da sua jurisdição e as suas próprias regras processuais em todos casos não regulados no presente acordo.

Artigo 10°

Aplicação de outras regras

1. Prevalecem sobre o presente Acordo quaisquer disposições da lei interna das Partes Contratantes e das convenções internacionais em vigor entre as duas Partes Contratantes que estabeleçam um regime, geral ou especial, mais favorável aos investimentos efectuados pelos investidores da outra Parte Contratante.

2) 本協定的規定並無豁免締約雙方須就締約另一方投資者在其地區內進行的投資而肩負或將肩負，但未列明協定內的其他義務。

第十一條

協定的適用

1) 本協定適用於締約一方的投資者在本協定生效前或生效後在締約另一方地區內按其法律規定進行的全部投資。

2) 在本協定生效前所進行的投資，倘發生爭端，則不在上款適用之列。

第十二條

諮詢

1) 締約雙方代表在必要時應就各種與本協定的解釋和適用有關的問題舉行會議。

2) 締約任何一方得向締約另一方建議召開上款所述之會議及諮詢活動，而被要求之締約方應重視此等建議，並爲有關會議及活動的舉行提供適當的協助。

第十三條

生效及期限

1) 本協定自締約雙方相互書面通知各自已完成使本協定生效所必需的法律程序之日起三十天後生效。

2) 本協定有效期爲十年。在十年期限屆滿前至少十二個月內，除非締約任何一方宣佈終止本協定，否則本協定將會以相同時段自動續期。

3) 締約任何一方宣告終止本協定時，對於之前已進行的投資，本協定第一至第十二條的的規定自宣告日起十年內仍然有效。

本協定於二零零零年五月十七日在里斯本簽訂，一式兩份，每份用中文及葡文寫成，兩種文本均具有同等效力。

中華人民共和國 澳門特別行政區 代表	葡萄牙共和國 代表
行政長官 何厚鏵	國家及外交部長 伽馬

二零零零年七月二十五日於印務局

局長 馬丁士

2. O disposto no presente acordo não exime as Partes Contratantes do cumprimento de outras obrigações nele não incluídas e que tenham sido, ou venham a ser, assumidas em relação a investimentos realizados na respectiva área por investidores da outra Parte Contratante.

Artigo 11.º

Aplicação do acordo

1. O presente Acordo aplicar-se-á a todos os investimentos realizados antes ou após a sua entrada em vigor, por investidores de uma das Partes Contratantes na área da outra Parte Contratante, em conformidade com as respectivas disposições legais.

2. Exceptuam-se do disposto no número anterior os diferendos relativos a investimentos efectuados antes da entrada em vigor do presente acordo.

Artigo 12.º

Consultas

1. Os representantes das Partes Contratantes deverão, sempre que necessário, realizar reuniões sobre qualquer matéria relacionada com a interpretação e aplicação deste Acordo.

2. Qualquer das Partes Contratantes pode propor à outra a realização das reuniões e consultas previstas no número anterior, devendo a Parte Contratante solicitada tomar em boa conta a proposta e providenciar a oportunidade adequada para o efeito.

Artigo 13.º

Entrada em vigor e duração

1. Este Acordo entrará em vigor trinta (30) dias após a data em que ambas as Partes tiverem notificado uma à outra, por escrito, o cumprimento dos procedimentos legais requeridos para o efeito.

2. O Acordo permanecerá em vigor por um período de dez (10) anos, renovando-se automaticamente por iguais períodos excepto se denunciado, por escrito, por qualquer das Partes Contratantes com a antecedência mínima de doze (12) meses em relação à data do termo do período de dez (10) anos em curso.

3. Ocorrendo a cessação do presente Acordo por denúncia de uma das Partes Contratantes, as disposições dos artigos 1.º a 12.º continuarão em vigor, relativamente aos investimentos já realizados, por um período de dez (10) anos a contar da data da denúncia.

Feito em duplicado, em Lisboa, no dia 17 do mês de Maio do ano 2000, em língua portuguesa e chinesa, ambos os textos fazendo igualmente fé.

Pela Região Administrativa Especial de Macau da República Popular da China	Pela República Portuguesa
Dr. Hó Hau Wah Chefe do Executivo	Dr. Jaime José Matos da Gama Ministro de Estado e dos Negócios Estrangeiros

Imprensa Oficial, aos 25 de Julho de 2000.

O Administrador, *António Gomes Martins*.

Annexe 25

to the Expert Report
of Professor Simon Chesterman

Agreement on Encouragement and Reciprocal Protection of Investments between the Macao Special Administrative Region of the People's Republic of China and the Kingdom of the Netherlands

The Macao Special Administrative Region of the People's Republic of China
and
the Kingdom of the Netherlands,

hereinafter referred to as the Contracting Parties,

Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the investors of one Contracting Party in the area of the other Contracting Party,

Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,

Have agreed as follows:

Article 1

For the purposes of this Agreement:

(a) the term "investments" means every kind of asset and more particularly, though not exclusively:

(i) movable and immovable property as well as any other rights in rem in respect of every kind of asset;

(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;

(iii) claims to money, to other assets or to any performance having an economic value;

(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;

(v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

(b) the term "investors" shall comprise:

(i) with regard to the Kingdom of Netherlands, natural persons having the nationality of the Kingdom of the Netherlands and legal persons constituted under the laws applicable in the Kingdom;

(ii) with regard to the Macao Special Administrative Region, natural persons entitled to the Resident Identity Card and legal persons constituted under the law of the Macao Special Administrative Region;

(iii) with regard to either Contracting Party legal persons not constituted under the law of the other Contracting Party but controlled by natural persons or by legal persons as defined in (i) or (ii) above.

For greater clarity as to whether a legal person not constituted under the law of a Contracting Party is controlled by natural or legal persons of that Contracting Party as referred to in 1 b) (i) or (ii), control means de facto control, determined after an examination of the actual circumstances. In any such examination, all relevant factors should be considered, including

-1- financial interest, including equity interest, in the controlled investor;

-2- ability to exercise substantial influence over the management and operation of the controlled investor; and

-3- ability to exercise decisive influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether direct or indirect control exists, an investor claiming such control has to provide the evidence.

With respect to physical persons: an individual who possesses both the nationality of the Kingdom of the Netherlands and is entitled to the Resident Identity Card of the Macao Special Administrative Region at the time of the investment, who invests in the Macao Special Administrative Region, shall not be considered an investor of the Kingdom of the Netherlands, for the purposes of this Agreement.

(c) the term "area":
in respect of the Kingdom of the Netherlands, is the territory of the Kingdom of the Netherlands and includes any area adjacent to the territorial sea which, under

the laws applicable in the Kingdom of Netherlands, and in accordance with international law, is the exclusive economic zone or continental shelf of the Kingdom, in which it exercises jurisdiction or sovereign rights;
in respect of the Macao Special Administrative Region of the People's Republic of China, is the peninsula of Macao and the islands of Taipa and Coloane.

Article 2

Either Contracting Party shall, within the framework of its laws and regulations, promote economic co-operation through the protection in its area of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

Article 3

1) Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments, full physical security and protection.

2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

3) If a Contracting Party has accorded special advantages to investors of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

4) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

5) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

6) The provisions of this Article shall be without prejudice to the provisions of article 4 of this Agreement.

Article 4

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its area, treatment not less favourable than that accorded to its own investors or to those of any third State who are in the same circumstances, whichever is more favourable to the investors concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party:

a) under an agreement for the avoidance of double taxation; or

b) by virtue of its participation in a customs union, economic union or similar institution; or

c) on the basis of reciprocity with a third State.

Article 5

The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay. Such transfers include in particular though not exclusively:

a) profits, interests, dividends and other current income;

b) funds necessary

(i) for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or

(ii) to replace capital assets in order to safeguard the continuity of an investment;

c) additional funds necessary for the development of an investment;

d) funds in repayment of loans;

e) royalties or fees;

f) earnings of natural persons;

g) the proceeds of sale or liquidation of the investment;

h) payments arising under Article 7.

Article 6

1) Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

a) the measures are taken in the public interest and under the due process of law;
b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party, which takes such measures, may have given;
c) the measures are taken against just compensation. Such compensation:

(i) shall represent the genuine value of the investments affected and shall be at least equal to the value of the expropriated investment on the date immediately prior to that in which expropriation, or any other proceeding of similar force, has taken place or became public knowledge;

(ii) shall include interest at a normal commercial rate until the date of payment; and

(iii) shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country or region designated by the claimants concerned in any freely convertible currency accepted by the claimants.

2) Without prejudice to the right to seek international arbitration, the investor shall be entitled to have the legality of the expropriation reviewed by the competent authorities of the Contracting Parties having induced the expropriation.

Article 7

Investors of the one Contracting Party who suffer losses in respect of their investments in the area of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own investors or to investors of any third State, whichever is more favourable to the investors concerned.

Article 8

If the investments of an investor of the one Contracting Party are insured against non-commercial risks or otherwise give rise to payment of indemnification in respect of such investments under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer or Agency designated by the one Contracting Party to the rights of the said investor pursuant to the terms of such insurance or under any other indemnity given shall be recognised by the other Contracting Party.

Article 9

(1) Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the area of the former Contracting Party shall, whenever possible, be settled amicably between the parties concerned.

(2) If the dispute cannot be settled amicably within a reasonable lapse of time, the dispute shall at the request of the investor concerned be submitted to:

a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965;

b) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility of Rules);

c) an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade law (UNCITRAL) .

(3) With respect to a legal person of one Contracting Party, which before such a dispute arises is controlled by an investor of the other Contracting Party, Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States is applicable.

(4) The decision to submit the dispute to one of the preceding procedures is irreversible. The arbitral awards shall be final and binding on both parties to the dispute.

(5) An investor may also decide to submit a dispute to a competent domestic court.

(6) Each Contracting Party hereby gives its unconditional consent to submit investment disputes for resolution to the alternative disputes settlement fora mentioned in the preceding paragraphs.

Article 10

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments, which have been made before that date, but not to investment disputes which arose before its entry into force.

Article 11

Either Contracting Party may propose to the other Party that consultations be held on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

Article 12

1) Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a reasonable lapse of time by means of diplomatic negotiations, shall, unless the Parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members. Each Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of the Kingdom of the Netherlands and not a resident of the Macao Administrative Region.

2) If one of the Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Party to make

such appointment, the latter Party may invite the President of the International Court of Justice to make the necessary appointment.

3) If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator, either Party may invite the President of the International Court of Justice to make the necessary appointment.

4) If, in the cases provided for in the paragraphs (2) and (3) of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of the Kingdom of the Netherlands or a resident of the Macao Administrative Region, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of the Kingdom of the Netherlands or a resident of the Macao Administrative Region, the most senior member of the Court available who is not a national of the Kingdom of the Netherlands and not a resident of the Macao Administrative Region, shall be invited to make the necessary appointments.

5) The tribunal shall decide on the basis of respect for the law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice settlement of the dispute ex aequo et bono if the Parties so agree.

6) Unless the Parties decide otherwise, the tribunal shall determine its own procedure.

7) The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties.

Article 13

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, to the Netherlands Antilles and to Aruba, unless the notification provided for in Article 14, paragraph (l) provides otherwise.

Article 14

l) The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their required legal procedures have been complied with, and shall remain in force for a period of fifteen years.

2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

3) In respect of investments made before the date of the termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from that date.
In case the present agreement has been terminated for any of the parts of the Kingdom of the Netherlands separately, the period of fifteen years shall apply

to those parts of the Kingdom for which the present Agreement has been terminated.

4) Subject to the period mentioned in paragraph (2) of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.

IN WITNESS WHEREOF, the undersigned representatives, duly authorised thereto, have signed the present Agreement.

DONE in two originals at ...., on ...., in the Chinese, Portuguese, Netherlands and English languages, all texts being authentic. In case of difference of interpretation the English text will prevail.

For The Macao Special Administrative Region of the People's Republic of China:

For the Kingdom of the Netherlands:

Annexe 26

to the Expert Report
of Professor Simon Chesterman

AGREEMENT BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE PORTUGUESE REPUBLIC ON THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

文章来源： Department of Treaty and Law 2010-02-04 09:38 文章类型： 原创内容分类： 政策

The Portuguese Republic and the People's Republic of China (hereinafter referred to as the "Parties"),

Intending to create favorable conditions for investment by investors of one Party in the territory of the other Party,

Recognizing that the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States,

Desiring to intensify the economic cooperation of both States,

Have agreed as follows:

Article 1

Definitions

For the purpose of this Agreement:

1. The term "investment" means every kind of asset invested directly or indirectly by investors of one Party in the territory of the other Party, and in particular, though not exclusively, includes:

(a) movable and immovable property and other rights in rem such as mortgages and pledges;

(b) shares, debentures, stock and any other kind of interest in companies;

(c) claims to money or to any other performance having an economic value associated with an investment;

(d) intellectual property rights, in particular copyrights, patents and industrial de-signs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will;

(e) business concessions conferred by law, under contract permitted by law or by an administrative act of a competent state authority, including concessions to search for, cultivate, extract or exploit natural resources;

(f) goods that, under a leasing agreement, are placed at the disposal of a lessee in the territory of a Party in conformity with its laws and regulations.

Any change in the form in which assets are invested does not affect their character as investments, provided that such change is made in accordance with the laws and regulations of the Party in whose territory the investment has been made.

2. The term "investor" means

(a) in respect of the Portuguese Republic:

- natural persons having the nationality of Portugal, in accordance with its laws and regulations;

- legal entities, including companies , associations, partnerships and other organizations, incorporated or constituted under its laws and regulations and have their seats in Portugal;

(b) in respect of the People's Republic of China:

- natural persons who have nationality of the People's Republic of China in accordance with its laws,

- economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of and with their seats in the People's Republic of China, irrespective of whether or not for profit and whether their liabilities are limited or not;

3. The term "return" means the amounts yielded from investments, including in particular, though not exclusively, profits, dividends, interests, capital gains, royalties, fees and other legitimate income.

In cases where the returns of investments, as defined above, are reinvested, the income resulting from the reinvestment shall also be considered as income related to the first investments.

4. The term “territory” means the territory in which the Parties have, in accordance with international law and their national laws, sovereign rights or jurisdiction, including land territory, territorial sea and air space above them, as well as those maritime areas adjacent to the outer limit of the territorial sea, including seabed and subsoil thereof.

Article 2

Promotion and Protection of Investment

1. Each Party shall encourage investors of the other Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

2. Investments of the investors of either Party shall enjoy constant pro¬tection and security in the territory of the other Party.

3. Neither Party shall take any arbitrary or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party.

4. Subject to its laws and regulations, either Party shall give sympathetic consideration to applications for obtaining visas and working permits to nationals of the other Party engaging in activities associated with investments made in the territory of that Party.

Article 3

Treatment of Investment

1. Investments of investors of each Party shall all the time be accorded fair and equitable treatment in the territory of the other Party.

2. Each Party shall accord to investments and activities associated with such investments by the investors of the other Party treatment no less favourable than that which it accords to the investments and associated activities by its own investors.

3. Neither Party shall subject investments and activities associated with such investments by investors of the other Party to treatment less favourable than that accorded to the investments and associated activities by the investors of any third State.

4 The provisions of Paragraphs 2 and 3 of this Article shall not be construed so as to oblige one Party to extend to the investors of the other Party and their investments the benefit of any treatment, preference or privilege by virtue of:

a) any membership of or association with any existing or future customs union, free trade zone, economic union, monetary union and any international agreement resulting in such unions or similar institutions;

(b) any double taxation agreement or other agreement regarding matters of taxation.

c) Any arrangements for facilitating small scale frontier trade in border areas.

Article 4

Expropriation and Compensation

1. Neither Party shall expropriate, nationalize or take other similar measures having equivalent effect to nationalization or expropriation (hereinafter referred to as "expropriation") against the investments of the investors of the other Party in its territory, unless the following conditions are met:

a) for the public interest,

b) under domestic legal procedure,

c) without discrimination and

d) and against compensation.

2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the market value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier. The market value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall be paid without delay, be effectively realizable and freely transferable.

3. The investor affected shall have the right, under the law of the Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case, including the valuation of its investment and the payment of compensation, in accordance with the principles set out in this Article.

Article 5

Compensation for Damages and Losses

Investors of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, a state of national emergency or revolt, shall be accorded treatment by such other Party not less favourable than that which the latter Party accords to its own investors or to investors of any third State as regards restitu¬tion, indemnification, compensation or other valuable consideration.

Article 6

Repatriation of Investments and Returns

1. Each Party shall guarantee to the investors of the other Party the transfer of their investments and returns held in its territory, including:

(a) the initial capital and additional amounts to maintain or increase the investment;

(b) returns;

(c) proceeds obtained from the total or partial sale or liquidation of investments or amounts obtained from the reduction of investment capital;

(d) payments pursuant to a loan agreement in connection with investments;

(e) payments in connection with contracting projects;

(f) the compensation or other payments referred to in articles 4 and 5 of this Agreement;

(g) earnings of nationals of the other Party who work in connection with an investment in the territory of the other Party.

2. The transfer mentioned above shall be made without delay in a freely convertible currency and at the prevailing market rate of exchange applicable within the Party accepting the investments and on the date of transfer. In the event that the market rate of exchange does not exist, the rate of exchange shall correspond to the cross rate obtained from those rates, which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

Article 7

Subrogation

If one Party or its designated agency makes a payment to its investor under a guarantee given in respect of an investment made in the territory of the other Party, the latter Party shall recognize the assignment of all the rights and claims of the indemnified investor to the former Party or its designated agency, by law or by legal transactions, and the right of the former Party or its designated agency to exercise by virtue of subrogation any such right to same extent as the investor. As regards the transfer of payments made by virtue of such assigned claims, Article 6 shall apply mutatis mutandis.

Article 8

Settlement of Disputes between Parties

1. Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled, as far as possible, with consultation through diplomatic channel.

2. If a dispute cannot thus be settled within six months, it shall, upon the request of either Party, be submitted to an ad hoc arbitral tribunal.

3. Such tribunal comprises of three arbitrators. Within two months of the receipt of the written notice requesting arbitration, each Party shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a national of a third State having diplomatic relations with both Parties to be appointed as Chairman of the arbitral tribunal by both Parties.

4. If the arbitral tribunal has not been constituted within four months from the receipt of the written notice requesting arbitration, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the said functions, the Member of the International Court of Justice next in seniority who is not a national of either Party or is not otherwise prevented from discharging the said functions shall be invited to make such necessary appointments.

5. The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its award in accordance with the provisions of this Agreement and the applicable principles of international law.

6. The arbitral tribunal shall reach its award by a majority of votes. Such award shall be final and binding upon both Parties. The arbitral tribunal, upon the request of either Party, shall explain the reasons of its award.

7. Each Party shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Parties.

Article 9

Settlement of Disputes between Investors and one Party

1. Any dispute concerning investments between a Party and an investor of the other Party should as far as possible be settled amicably between the parties in dispute.

2. If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other State, be submitted at the choice of the investor to:

a) the competent court of the Party that is a party to the dispute;

b) arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID);

c) an ad-hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or other arbitration rules.

3. The decision to submit the dispute to one of the above mentioned procedures shall be final.

4. Any award by an ad-hoc tribunal shall be final and binding. Any award under the procedures of the Convention mentioned in 2. b) above shall be binding and subject only to those appeals or remedies provided for in this Convention. The awards shall be enforced in accordance with domestic law.

Article 10

Other Obligations

1. If the legislation of either Parties or obligations under international law existing at present or established hereafter between the Parties in addition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over this Agreement.

2. Each Party shall observe any other obligation it has entered into with regard to investments in its territory by investors of the other Party.

Article 11

Application

This Agreement shall apply to investment, which are made prior to or after its entry into force by investors of either Party in accordance with the laws and regulations of the other Party in the territory of the latter, but shall not apply to any dispute concerning investments which has arisen before its entry into force.

Article 12

Relations between Parties

The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Parties.

Article 13

Consultations

Either Party may propose to the other Party that consultations be held on any matter concerning interpretation, application and implementation of the Agreement. The other Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

Article 14

Protocol

The attached protocol shall form an integral part of this Agreement.

Article 15

Entry into Force

1. The present Agreement shall enter into force on the thirtieth day following the receipt of the last notification in writing and through diplomatic channels, stating that all the internal procedures of both Parties have been fulfilled.

2. Upon the entry into force of the present Agreement, the Agreement between the Portuguese Republic and the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed in Lisbon, on February 3rd, 1992 shall be terminated.

Article 16

Duration and Termination

1. The present Agreement shall remain in force for a period of ten years.

2. Unless either Party notifies the other, in writing and through diplomatic channels, of its intention to terminate the present Agreement at least one year before the end of the initial period of ten years, the present Agreement shall remain in force for indeterminate periods of five years.

3. After the initial period of ten years, either Party may terminate at any time the present Agreement by giving at least one year's written notice to the other Party. The notice shall be sent through diplomatic channels.

4. In respect of investments made prior to the date of termination of present Agreement, the provisions of Articles 1 to 13 shall remain in force for a further period of ten years from the date of termination.

Done at Lisbon on Dec, 9th, 2005 in duplicate in the Portuguese, Chinese and English languages, all texts being authentic. In case of divergent interpretation of texts, the English text shall prevail.

For the People's Republic of China	For the Portuguese Republic
Yu Guangzhou	Manuel Pinho

PROTOCOL TO THE AGREEMENT

BETWEEN

THE PORTUGUESE REPUBLIC

AND

THE PEOPLE'S REPUBLIC OF CHINA

ON THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

On signing the Agreement between the Portuguese Republic and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments, the plenipotentiaries, being duly authorized, have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Agreement:

Ad Article 1

Returns from the investment and from reinvestments shall enjoy the same protection as the investment.

Ad Article 2 and 3

With regard to the People's Republic of China, paragraph 3 of Article 2 and paragraph 2 of Article 3 do not apply to:

(a) any existing non-conforming measures maintained within its territory;

(b) the continuation of any such non-conforming measure;

(c) any amendment to any such non-conforming measure to the extent that the amendment does not increase the non-conformity of these measures.

The People's Republic of China will take all appropriate steps in order to progressively remove the non-conforming measures.

Ad Article 3

1. The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3.2 the management, maintenance, use, enjoyment and disposal of an investment. The following shall, in particular, though not exclusively, be deemed "treatment less favourable" within the meaning of Article 3 unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.

2. The provisions of Article 3 do not oblige a Party to extend to investors resident in the territory of the other Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in its territory.

Ad Article 6

With regard to the People's Republic of China:

1. Article 6, paragraph 1. (c) will apply provided that the transfer shall comply with the relevant formalities stipulated by the present Chinese laws and regulations relating to exchange control.

2. A transfer shall be deemed to have been made "without delay" within the meaning of Article 6. 3 if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted to the relevant foreign exchange administration with full and authentic documentation and information and may on no account exceed two months.

3. In this respect, the People's Republic of China shall accord to investors of the Portuguese Republic treatment not less favourable than that accorded to the investors of any third State.

4. These formalities shall not be construed as a means of avoiding the Party's commitments or obligations under this Agreement.

5. The provisions of Article 6 of this Agreement shall not affect the rights and obligations with respect to exchange restrictions that either Party has or may have as a member to the International Monetary Fund.

6. Paragraph 1 (d) will apply provided that a loan-agreement has been registered with the relevant foreign exchange administration authority.

7. To the extent that the formalities mentioned above are no longer required according to the relevant provisions of Chinese law, Article 6 shall apply without restrictions.

Ad Article 9

With respect to investments in the People's Republic of China an investor of Portuguese Republic may submit a dispute for arbitration under the following conditions only:

(a) the investor has referred the issue to an administrative review procedure according to Chinese law,

(b) the dispute still exists three months after he has brought the issue to the review procedure.

For the People's Republic of China	For the Portuguese Republic
Yu Guangzhou	Manuel Pinho

Annexe 27

to the Expert Report
of Professor Simon Chesterman

Agreement on encouragement and reciprocal protection of investments between
the Government of the People's Republic of China
and the Government of the Kingdom of the Netherlands.

The Government of the People's Republic of China
and
the Government of the Kingdom of the Netherlands,

hereinafter referred to as the Contracting Parties,

Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party,

Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,

Have agreed as follows,

ARTICLE 1

DEFINITIONS

For the purpose of this Agreement,

1. The term "investment" means every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, and in particularly, though not exclusively, includes:

(a) movable and immovable property and other property rights such as mortgages and pledges;
(b) shares, debentures, stock and any other kind of participation in companies;
(c) claims to money or to any other performance having an economic value associated with an investment;
(d) intellectual property rights, in particularly copyrights, patents, trade-marks, trade-names, technological process, know-how and goodwill;
(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.

Any change in the form in which assets are invested does not affect their character as investments.

2. The term "investor" means,

(a) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;

(b) economic entities, including companies, corporations, associations, partnerships and other organizations, incorporated and constituted under the laws and regulations of either Contracting Party and have their seats in that Contracting Party, irrespective of whether or not for profit and whether their liabilities are limited or not.

3. The term “returns” means the amounts yielded from investments, including profits, dividends, interests, capital gains, royalties and other legitimate income.

4. For the purposes of this Agreement, the term “territory” means respectively:

- for the People’s Republic of China, the territory of the People’s Republic of China (including the territorial sea and air space above it) as well as any area beyond its territorial sea within which the People’s Republic of China has sovereign rights of exploration for and exploitation of resources of the seabed and its sub-soil and superjacent water resources in accordance with Chinese law and international law;

- for the Kingdom of the Netherlands, the territory of the Kingdom of the Netherlands and any area adjacent to the territorial sea which, under the laws applicable in the Kingdom of the Netherlands, and in accordance with international law, is the exclusive economic zone or continental shelf of the Kingdom of the Netherlands, in which the Kingdom of the Netherlands exercises jurisdiction or sovereign rights.

ARTICLE 2
PROMOTION AND ADMISSION OF INVESTMENTS

Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

ARTICLE 3

TREATMENT OF INVESTMENT

1) Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.

2) Neither Contracting Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

3) Each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded to investments and activities by its own investors or investors of any third State.

4) Each Contracting Party shall observe any commitments it may have entered into with the investors of the other Contracting Party with regard to their investments.

5) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

6) The provisions of Paragraphs 1 to 5 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of:

(a) agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions;

(b) any international agreement or international arrangement relating wholly or mainly to taxation;

(c) any international agreement or arrangement for facilitating small scale investments in border areas.

ARTICLE 4

ENTRY AND SOJOURN OF PERSONNEL

Each Contracting Party shall, within the framework of its legislation, give sympathetic consideration to application for visas and working permits to investors of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

ARTICLE 5

EXPROPRIATION

1. Neither Contracting Party shall expropriate, nationalise or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:

a) the expropriation is done in the public interest and under domestic legal procedures;

b) the expropriation is not discriminatory or contrary to any undertaking which the Contracting Party, which takes such measures, may have given;

c) the expropriation is done against compensation. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation measures were taken. The fair market value shall not reflect any change in value because the expropriation had become publicly known earlier. It shall include interest at the prevailing commercial rate from the date the expropriation was done until the date of payment and shall, in order to be effective for the affected investors, be paid and made transferable, without delay to the country designated by the investor concerned and in the currency of the country of the affected investor, or in any freely convertible currency accepted by the affected investor.

ARTICLE 6

COMPENSATION FOR DAMAGES AND LOSSES

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation and other settlements no less favourable than that accorded to the investors of its own or any third State, whichever is more favourable to the investor concerned.

ARTICLE 7

REPATRIATION OF INVESTMENTS AND RETURNS

1) Each Contracting Party shall, guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including, though not exclusively:

(a) profits, dividends, interests and other legitimate income;

(b) proceeds obtained from the total or partial sale or liquidation of investments;

(c) payments pursuant to a loan agreement in connection with investments;

(d) royalties in relation to the matters in Paragraph 1 (d) of Article 1;

(e) payments of technical assistance or technical service fee, management fee;

(f) payments in connection with contracting projects;

(g) earnings of investors of the other Contracting Party who work in connection with an investment in its territory.

2) Nothing in Paragraph 1 of this Article shall affect the free transfer of compensation paid under Articles 5 and 6 of this Agreement.

3) The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments on the date of transfer.

ARTICLE 8

SUBROGATION

If one Contracting Party or its designated agency makes a payment to its investor under an indemnity given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of all the rights and claims of the indemnified investor to the former Contracting Party or its designated agency, by law or by legal transactions, and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right to the same extent as the investor.

ARTICLE 9

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1) Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled with consultation through diplomatic channel.

2) If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting Party, be submitted to an ad hoc arbitral tribunal.

3) Such tribunal comprises of three arbitrators. Within two months of the receipt of the written notice requesting arbitration, each Contracting Party shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a national of a third State having diplomatic relations with both Contracting Parties as Chairman of the arbitral tribunal.

4) If the arbitral tribunal has not been constituted within four months from the receipt of the written notice requesting arbitration, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or is otherwise prevented from discharging the said functions, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party, or is not prevented from discharging the said functions, shall be invited to make such necessary appointments.

5) The arbitral tribunal shall determine its own procedure. The arbitral tribunal shall reach its award in accordance with the provisions of this Agreement and the applicable principles of international law.

6) The arbitral tribunal shall reach its award by a majority of votes. Such award shall be final and binding upon both Contracting Parties. The arbitral tribunal shall, upon the request of either Contracting Party, explain the reasons of its award.

7) Each Contracting Party shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the Contracting Parties.

ARTICLE 10

SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

1) Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, whenever possible, be settled amicably between the Parties concerned.

2) An investor may decide to submit a dispute to a competent domestic court. In case a legal dispute concerning an investment in the territory of the People's Republic of China has been submitted to a competent domestic court, this dispute may be submitted to international dispute settlement, on the condition that the investor concerned has withdrawn its case from the domestic court. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands an investor may choose to submit a dispute to international dispute settlement at any time.

3) If the dispute has not been settled amicably within a period of six months, from the date either party to the dispute requested amicable settlement, each Contracting Party gives its unconditional consent to submit the dispute at the request of the investor concerned to:

a) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965; or

b) an ad hoc arbitral tribunal, unless otherwise agreed upon by the parties to the dispute, to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

4) The ad hoc tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In absence of such agreement the tribunal shall apply the law of the Contracting Party to the dispute (including its rules on the conflict of laws), the provisions of this Agreement and such rules of international law as may be applicable.

5) The arbitral awards shall be final and binding on both parties to the dispute.

ARTICLE 11
CONSULTATIONS

Either Contracting Party may propose to the other Party that consultations be held on any matter concerning interpretation, application and implementation of the Agreement. The other Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

ARTICLE 12

APPLICATION

This present Agreement shall also apply to investments which have been made prior to its entry into force by investors of the one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the Contracting Party concerned, which were in force at the time the investment was made. The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties.

ARTICLE 13

TRANSITION

1) This Agreement substitutes and replaces the Agreement on reciprocal encouragement and protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, signed June 17th, 1985 in the Hague.

2) The present Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force. Such disputes and claims shall continue to be settled according to the provisions of the Agreement of 1985 mentioned in paragraph 1 of this Article.

ARTICLE 14

APPLICATION AND TERMINATION OF THE AGREEMENT CONCERNING THE KINGDOM OF THE NETHERLANDS

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom of the Netherlands in Europe and shall also apply to the Netherlands Antilles and to Aruba, unless the notification provided for in Article 15, paragraph (1) states otherwise.

Subject to the provisions of Article 15, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of the Kingdom of the Netherlands in Europe, of the Netherlands Antilles and of Aruba.

ARTICLE 15

ENTRY INTO FORCE, DURATION AND TERMINATION

1) This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefore have been fulfilled and remain in force for a period of fifteen years.

2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of five years.

3) With respect to investments made prior to the date of termination of this Agreement, the preceding provisions of Article 1 to 14 shall continue to be effective for a further period of fifteen years from such date of termination.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by respective Governments, have signed this Agreement.

Done in two originals at --------------on ------------,200. in the Chinese, Netherlands and English languages, all texts being equally authoritative. In case of difference of interpretation the English text will prevail.

For the Government of the People's Republic of China	For the Government of the Kingdom of the Netherlands

PROTOCOL

Protocol to the Agreement on encouragement and reciprocal protection of investments between the People's Republic of China and the Kingdom of the Netherlands.

On the signing of the Agreement on encouragement and reciprocal protection of investments between the People's Republic of China and the Kingdom of the Netherlands, the undersigned representatives have agreed on the following provisions which constitute an integral part of the Agreement:

Ad Article 1

The term "investments" mentioned in Article 1 (1) includes investments of legal persons of a third State which are owned or controlled by investors of one Contracting Party and which have been made in the territory of the other Contracting Party in accordance with the laws and regulations of the latter. The relevant provisions of this Agreement shall apply to such investments only when such third State has no right or abandons the right to claim compensation after the investments have been expropriated by the other Contracting Party.

The Agreement shall also apply to reinvestments made by investors of one Contracting Party in the territory of the other Contracting Party and in accordance with the laws and regulations of that Party.

Ad Article 3, paragraph 2 and 3

In respect of the People's Republic of China, Paragraphs 2 and 3 of Article 3 do not apply to:

a) any existing non-conforming measures maintained within its territory;

b) the continuation of any non-conforming measure referred to in subparagraph a);

c) an amendment to any non-conforming measure referred to in subparagraph a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.

It will be endeavoured to progressively remove the non-conforming measures.

Ad Article 7

1. With regard to the People's Republic of China, the transfer referred to in Article 7 of this Agreement shall comply with relevant formalities stipulated by the present Chinese laws and regulations relating to exchange control.

2. In this respect the People's Republic of China shall accord to the investors of the Kingdom of the Netherlands treatment not less favourable than that accorded to the investors of any third State.

3. These formalities shall not be used as a means of avoiding the Contracting Party's commitments or obligations under this Agreement.

4. The provisions of Article 7 of this Agreement shall not affect the rights and obligations with respect to exchange restrictions that either Contracting Party has or may have as a member to the International Monetary Fund.

Ad Article 10

The Kingdom of the Netherlands takes note of the statement that the People's Republic of China requires that the investor concerned exhausts the domestic administrative review procedure specified by the laws and regulations of the People's Republic of China, before submission of the dispute to international

arbitration under Article 10, paragraph 3. The People's Republic of China declares that such a procedure will take a maximum period of three months.

For the Government of the People's Republic of China	For the Government of the Kingdom of the Netherlands

Annexe 28

to the Expert Report
of Professor Simon Chesterman

II. TRADE POLICY REGIME: FRAMEWORK AND OBJECTIVES

(1) INTRODUCTION

1. On 20 December 1999, in accordance with the 1987 Joint Declaration on the Question of Macau and with the Constitution of the People's Republic of China (PRC), Macau, previously a territory under Portuguese administration, became the Macau Special Administrative Region (MSAR) of the PRC. The Basic Law, which was adopted by China's National People's Congress in 1993, is the constitutional instrument governing the MSAR. The Basic Law grants the MSAR a high degree of autonomy except in foreign affairs and defence, and stipulates the principle of "one country, two systems". Under this principle, the previous market-based economic system and way of life are to be maintained for at least 50 years after 1999, and the MSAR's courts are endowed with independent judicial power, including that of final adjudication. Within certain limits, the MSAR is authorized to conduct, on its own, some external affairs; in particular, the MSAR can, using the name "Macau, China", maintain and develop relations and conclude international agreements in fields such as economic, trade, financial, and monetary matters.

(2) GENERAL CONSTITUTIONAL AND LEGAL FRAMEWORK

2. Macau, China's political status and institutional structure are embodied in the Basic Law. It appears that the reversion to China did not affect Macau's legislation concerning trade and trade-related policies, except for the changes made to laws and regulations to comply with the requirements stipulated in the Basic Law.

3. Chart II.1 depicts the structure of the Government.[1] The Government of the MSAR, which is the executive authority of the Region, is headed by the Chief Executive. The Chief Executive is selected by election or through consultations held locally, and appointed by the Central People's Government.[2] The term of office of the Chief Executive is five years, with a maximum of two terms.[3] The Chief Executive is formally empowered to conduct, on behalf of the Government of the MSAR, external and other affairs as authorized by the Central People's Government; the Chief Executive has the power to represent the MSAR and to conclude in the name of the MSAR multilateral, regional, and bilateral trade agreements with foreign countries and regions and relevant international organizations.[4] The Chief Executive is accountable to the Central People's Government and the MSAR in accordance with the provisions of the Basic Law.[5] The authorities confirm that there is no specific provision empowering the Central People's Government to instruct the Chief Executive; there are several provisions specifying the relationship between China's central authorities and the MSAR.

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[1] The Government must abide by the law and is accountable to the Legislative Assembly. The Government implements laws, presents regular policy addresses to the Assembly, and answers questions raised by members of the Assembly (Article 65).

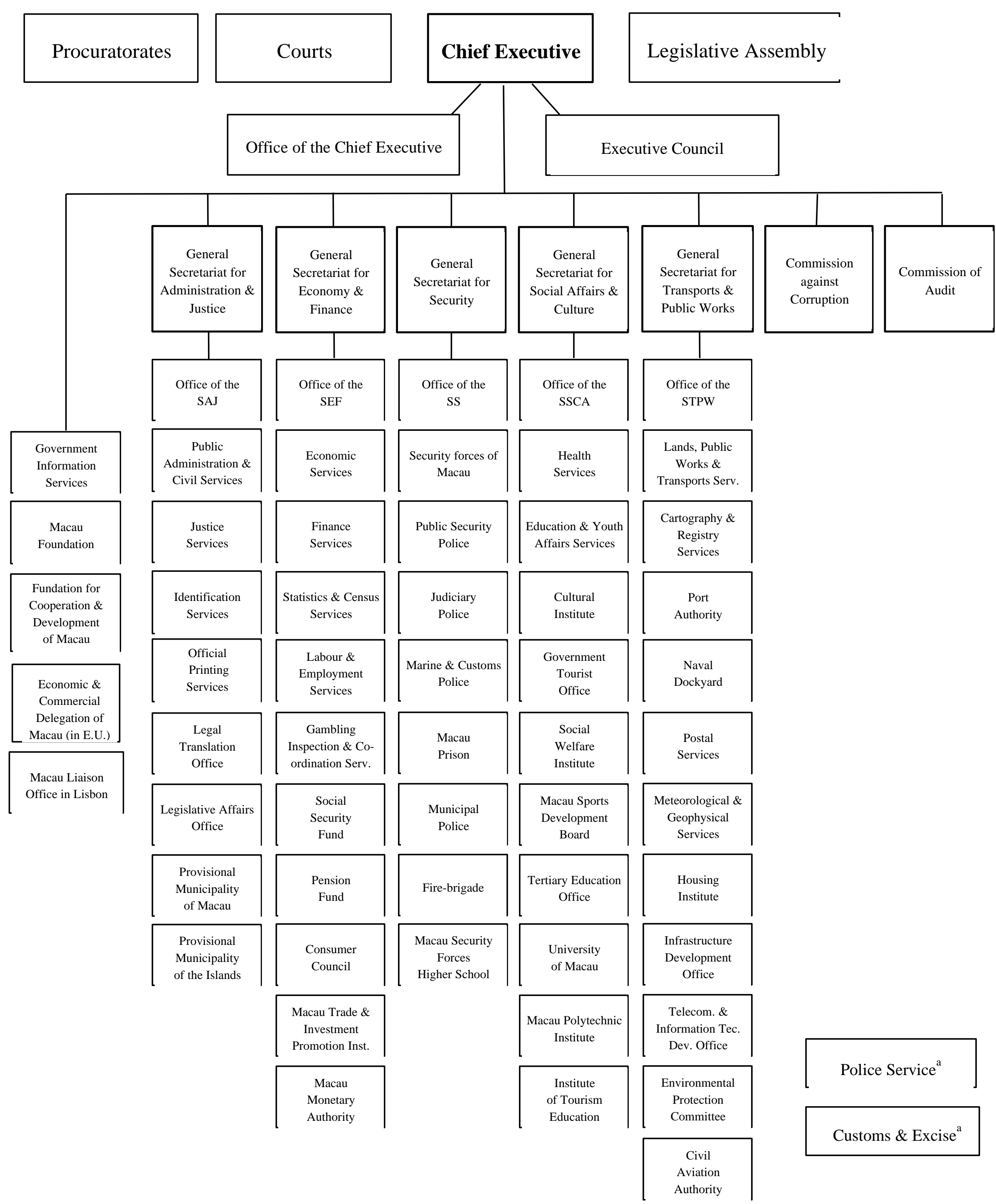
[2] The specific method for selecting the Chief Executive is described in the Annex I of the Basic Law (Article 47).

[3] Article 48 of the Basic Law.

[4] Article 50 of the Basic Law stipulates the powers and functions of the Chief Executive, such as: to sign bills passed by the legislature and to promulgate laws; to decide on government policies and to issue executive orders; to nominate, and report to the Central People's Government for appointment, certain principal officials; to appoint and remove judges of the courts at all levels, and holders of public office, in accordance with legal procedures; to implement the directives issued by the Central People's Government in respect of the relevant matters provided for in the Basic Law; to conduct external and other affairs as authorized by the Central Authorities; and to approve the introduction of motions regarding revenue or expenditure to the legislature.

[5] Article 45 (2) of the Basic Law.

Chart II.1
Structural Diagram of the Government of Macau SAR



a Administrative subordination is under consideration.

Note: This diagram does not cover all entities under supervision and guardianship of the Government.

Source: Information provided by the authorities of Macau, China.

4. In formulating policy, the Chief Executive is assisted by the Executive Council.[6] The latter consists of seven to eleven (currently ten) members, who are appointed from among principal officials of the executive authorities, Legislative Assembly members and public figures[7]; their appointment or removal is decided by the Chief Executive, who chairs meetings of the Executive Council.

5. The Legislative Assembly is the MSAR's legislature.[8] It currently consists of 23 members, i.e. eight returned through direct elections, eight indirect elections, and seven appointed by the Chief Executive.[9] The term of office of the first (current) Legislative Assembly lasts until 15 October 2001; the term of subsequent Legislative Assembly will be four years. The President of the Legislative Assembly is elected by, and from among, its members.

6. The Legislative Assembly is empowered, *inter alia*, to enact laws, approve budgets, and decide on taxation.[10] The Chief Executive is not vested with legislative power. Members of the Legislative Assembly may introduce, individually or jointly, bills that do not relate to public expenditure, the political structure, or the operation of the Government. All bills relating to government policy need the written consent of the Chief Executive before being introduced into the Legislative Assembly.

7. Macau, China's trade-related legislation consists of laws and decree-laws[11]; the Chief Executive may issue administrative regulations, executive orders, and decisions in accordance with laws or decree-laws (Table II.1). Bills passed by the Legislative Assembly become law only after being signed and promulgated by the Chief Executive.[12] If the Chief Executive considers that a bill passed by the Legislative Assembly is not compatible with the overall interests of the MSAR, it may be returned to the Legislative Assembly within 90 days for reconsideration.[13] If the Legislative Assembly passes the original bill again, by not less than a two-thirds majority of all members (i.e. 16 of the total of 23 members), the Chief Executive must sign and promulgate it within 30 days.[14] If the Chief Executive refuses to do so, or if the Legislative Assembly refuses to pass a budget or any other bills that may concern the overall interests of the MSAR, and if consensus cannot be reached after consultation, the Chief Executive may dissolve the Legislative Assembly.[15] Laws enacted by the

[6] The Executive Council effectively replaced a previous Consultative Council.

[7] As provided in Article 58, the Chief Executive must consult the Executive Council before making important policy decisions, introducing bills to the Legislative Assembly, formulating administrative regulations, or dissolving the Legislative Assembly. Members of the Executive Council must be Chinese citizens who are permanent residents of the MSAR.

[8] Article 67 of the Basic Law.

[9] Indirect elections involve a system of electoral colleges, where certain associations or organizations representing social interests recognized by law are endowed with active voting capacity.

[10] Article 71 of the Basic Law.

[11] The decree-law was the format for the legislative power of Governor before the transfer of sovereignty. Decree-laws that were in force at the time of the transfer and did not contravene the Basic Law have been maintained in force in the MSAR. The effectiveness of the laws and of the decree-laws in the legal order is the same.

[12] Article 78 of the Basic Law.

[13] Article 51 of the Basic Law.

[14] Article 51 of the Basic Law.

[15] Article 52 of the Basic Law. The Chief Executive is allowed to dissolve the Legislative Assembly only once during each term of his or her period of office. The Chief Executive must resign if the new Legislative Assembly again passes the original bill by a two-thirds majority of all members and if he/she still refuses to sign it within 30 days. The same applies to a situation where the new Legislative Assembly refuses to pass the original bill in dispute.

Legislative Assembly must be reported to the Standing Committee of the National People's Congress for the record; the reporting does not affect the entry into force of such laws.[16]

Table II.1
Basic trade-related legislation in Macau, China

Subject	Date	Legislation	Content
Commercial Code	03.08.99	Decree-Law 40/99/M	Legal system regulating trade activities
Foreign trade	18.12.95	Decree-Law 66/95/M (as amended by Decree-Law 59/98/M)	Framework legislation governing all foreign trade operations.
	29.01.96	Decree-Law 7/96/M	Regulations for freight forwarders.
	25.06.96	Decree-Law 158/96/M	Regulations for registration of foreign trade operators.
	12.02.96	Government Decision 28/96/M	Issuance procedures of certificate of origin and licences under Decree-Law 66/95/M.
	28.12.98	Government Decision 128/GM/98	Goods subject to import and export licensing.
Export quotas	19.09.94	Government Decision 59/GM/94	Allocation and utilization of export quotas.
Trade controls	08.11.99	Decree-Law 77/99/M	Regulations for arms and ammunitions.
	04.12.95	Decree-Law 62/95/M	Regulation for trade in substances depleting the ozone layer.
	29.09.86	Decree-Law 45/86/M	Regulation for imports of CITES species.
	19.10.98	Government Decision 219/98/M	Prohibition of import of used vehicles and engines.
	09.10.96	Notice on Gazette	Allocation of import quotas for trichloroethane under Montreal Protocol.
Optical media	27.09.99	Decree-Law 51/99/M	Regulation for production and trade of optical media products.
Government procurement	15.12.84	Decree-Law 122/84/M (as amended by Decree-Law30/89/M)	Financial regime governing procurement of public works, acquisition of goods and services.
	06.07.85	Decree-Law 63/85/M	Guidelines for tenders for acquisition of goods and services.
Labelling	17.08.92	Decree-Law 50/92/M (as amended by Decree-Law 56/94/M)	Labelling regulations for prepared foods.
Industrial policy	22.03.99	Decree-Law 11/99/M	Industrial licensing requirements.
Investment incentives	08.02.86	Decree-Law 1/86/M (as amended by Decree-Law 35/93/M)	Fiscal incentives for industrial investors.
	01.06.98	Decree-Law 23/98/M	Extension of interest-rate subsidies to all private enterprises.
	27.03.95	Decree-Law 14/95/M (as amended by Decree-Law 22/96/M and Decree-Law 22/97/M)	Investors and professionals residency application.
Consumption taxes	13.12.99	Law 4/99/M	Basic framework regulation.
Intellectual property protection	16.08.99	Decree-Law 43/99/M	Copyright and related rights law in compliance with TRIPS.
	13.12.99	Decree-Law 97/99/M	Industrial property law in compliance with TRIPS.
	05.12.95	Government Decision 313/95/M	Classification of goods and services for purposes of trade mark registration.
	05.06.00	Executive Decision 87/2000	Administrative fees for IP registration.
Pharmaceuticals	19.09.90	Decree-Law 58/90/M (amended by Decree-Law 20/91/M, Government Decision 43/SASAS/91 and Decree-Law 30/95/M)	Regulation for import, export, wholesale, and retail sale of medicines and pharmaceuticals.
	19.09.90	Decree-Law 59/90/M	Registration of pharmaceutical products.

Source: Information provided by the Macau, China authorities.

[16] Article 17 of the Basic Law.

8. International treaties ratified or approved by the PRC or, as may be the case in certain appropriate fields, by the Chief Executive, immediately and automatically become part of the MSAR's legal order once published in the *Official Gazette*. International law generally takes precedence over domestic law.

9. The Basic Law vests the MSAR with independent judicial power, including that of final adjudication; it also establishes the independence of the courts, their submission only to the law, and their jurisdiction over all cases in the Region. There are exceptions to their jurisdiction, imposed by the legal system and by the principles previously in force, which the Basic Law maintained. The courts of the MSAR also have no jurisdiction over acts of State such as defence and foreign affairs. With the transfer of sovereignty, the Court of Second Instance and the Court of Final Appeal were established; the latter replaced the Justice Superior Court.[17]

(3) TRADE POLICY FORMULATION AND IMPLEMENTATION

10. Since the previous Trade Policy Review of Macau in 1994, the Territory has continued to rely largely on free market forces to allocated domestic resources and thus trade and investment flows. Government activities focus on establishing a basic regulatory framework and improving the business environment for private operators, through such measures as investment incentives, training programmes and trade promotion initiatives.

11. Under the Basic Law, the MSAR remains a separate customs territory; it may use the name "Macau, China" and participate in international organizations and international trade agreements, such as WTO Agreements. The MSAR may, on its own, maintain and develop relations and conclude and implement agreements with foreign States and regions and relevant international organizations in the appropriate fields, including in economic, trade, financial and monetary, shipping, communications, tourism, cultural, science and technology, and sports matters.[18] The Basic Law also stipulates that the MSAR "shall maintain the status of a free port" (Article 110) and "pursue a policy of free trade and safeguard the free movement of goods, intangible assets, and capital" (Article 111). The authorities maintain that Article 111 includes free movement of services, but excludes labour. In addition, the MSAR "may issue its own certificates of origin for products in accordance with prevailing rules of origin" (Article 113).

(i) Agencies involved in trade policy implementation

12. The Secretaries[19], the Commissioner against Corruption, the Director of Audit, and the heads of the Police Services and the Customs Services are principal officials in the Government.

13. Macau Economic Services is the main agency advising and assisting the Chief Executive and principal officials in formulating, coordinating and implementing policy initiatives in areas related to

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[17] Macau, China's courts consist of primary courts, intermediate courts and a Court of Final Appeal. The primary courts have general jurisdiction at first instance, including the Criminal Instruction Tribunal. The Administrative Court has jurisdiction at first instance in administrative disputes. The Court of Second Instance is a court of appeal and the Court of Final Appeal is vested with final adjudication power. The judges of the courts at all levels are appointed by the Chief Executive, on the recommendation of an independent commission composed of local judges, lawyers, and eminent persons from other sectors. The judges are chosen on the basis of merit. The independence of the courts is safeguarded by the irremovability of the judges and their non-subjection to any orders or guidance other than the duty to respect decisions made following appeal to higher courts.

[18] Article 136 of the Basic Law.

[19] Currently, there are five Secretaries, i.e. for Administration and Justice, Economy and Finance, Security, Social Affairs and Culture, and Transport and Public Works.

trade, fisheries, and industry. The Organization of Macau Economic Services (Chart II.2), is mandated to:

- cooperate in the formulation and implementation of economic policies and the overall planning of economic activities;

- support economic development, industrial diversification, investment and product quality enhancement in Macau, China;

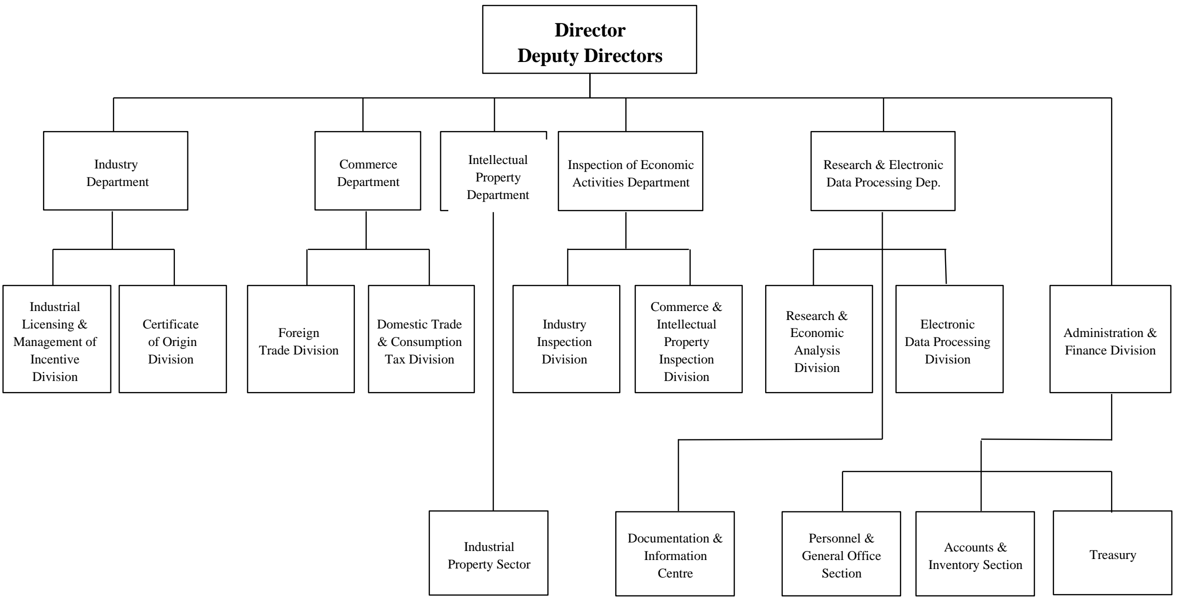
- administer foreign trade regulations and ensure the normal operation of commercial flows;

- foster export growth and diversification, and promote Macau, China's economy abroad; and

- ensure fair competition, protect intellectual property rights and defend consumer interests.

14. Other governmental bodies that participate in advising and assisting the Chief Executive and principal officials in the formulation and implementation of trade policies include the Macau Finance Services, the Macau Monetary Authority, the Macau Statistics and Census Services, the Macau Marine Police and Customs, the Macau Health Services, the Office for Development of Telecommunications and Information Technology, the Macau Trade and Investment Promotion Institute, and the Economic Council.[20]

Chart II.2
Organization of Macau Economic Services



Source: Information provided by the authorities of Macau, China.

[20] The Macau Trade and Investment Promotion Institute was established in July 1994, and the Office for Development of Telecommunication and Information Technology in June 2000.

(ii) Advisory and review bodies

15. Two of the main advisory and review bodies are the Economic Council and the Consumer Council. The Economic Council gives advice on matters relating to Macau, China's economic and trade strategies, development, and policies.[21] The Consumer Council, a public institute established since 1988, promotes the task of consumer protection in the MSAR and provides comments on the implementation of policy pertaining to consumer protection.

(4) TRADE POLICY OBJECTIVES

16. The MSAR's trade policy objectives AREgeared to maintaining a structurally diverse, market-driven, *laissez-faire*, and rules-based Macau economy. With regard to the new round of trade negotiations, Macau, China attaches great importance to liberalization of certain sectors, such as air transport, tourism, telecommunications, and e-commerce.

(5) TRADE AGREEMENTS AND ARRANGEMENTS

(i) Multilateral agreements

17. Macau, China signed the Marrakesh Declaration to become a founding member of the WTO; it had been a GATT contracting party in its own right since January 1991. The WTO Agreements were published in the *Government Gazette* on 27 December 1994 and entered into force on the same date.[22] At the WTO Singapore Ministerial Conference in 1996, Macau was party to the Ministerial Declaration on Trade in Information Technology Products (the Information Technology Agreement). In the context of implementing its Uruguay Round commitments and in support of multilateral disciplines, the MSAR has made notifications under a number of WTO Agreements (Table II.2)

Table II.2
Principal notifications by Macau, China under WTO Agreements, as at October 2000

Agreement	Document reference	Requirement/Contents
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	IP/N/1/MAC/1, 1/Rev.1 and 1/Rev.1/Add.1, 4 February 1998, 7 March 2000, and 23 June 2000	Article 63.2: Notification of the legislation that applies in Macau, China in the field of intellectual property
	IP/N/1/MAC/C/1 and 1/Rev.1, 30 March 2000 and 9 May 2000	Article 63.2: Notification of the legislation that applies in Macau, China in the field of intellectual property
	IP/N/1/MAC/I/1 and 2, 16 February 1998 and 17 May 2000	Article 63.2: Notification of the legislation that applies in Macau, China in the field of intellectual property
	IP/N/1/MAC/T/1 and 2, 16 February 1998	Article 63.2: Notification of the legislation that applies in Macau, China in the field of intellectual property
	IP/N/6/MAC/1, 1 May 2000	Checklist of issues on enforcement
	IP/Q/MAC/1 (IP/Q2/MAC/1, IP/Q3/MAC/1, IP/Q4/MAC/1), 18 August 2000	Review of legislation

Table II.2 (cont'd)

[21] The Council is chaired by the Chief Executive, comprising council members from senior officials, traders and businessmen, professionals, economists, academics, and representatives of enterprises.

[22] Articles 112 and 138 of the Basic Law safeguard Macau, China's continued participation in the WTO.

Agreement	Document reference	Requirement/Contents
Agreement on Agriculture	G/AG/N/MAC/1, 2, 3, 4, 5, 6 and 7, 25 July 1996, 16 April 1998, 16 April 1998, 17 December 1999, 17 December 1999, 17 March 2000, 17 March 2000	Article 6: Notification concerning domestic support; Article 9.1: Notification concerning export subsidies
Agreement on Textiles and Clothing	G/TMB/N/108, 5 July 1995	Article 2.2: Macau, China's observation in relation to the U.S. notification under Article 2.1
	G/TMB/N/96, 24 May 1995	Article 3.1: Notification concerning restrictions on textile and clothing products
	G/TMB/N/97, 24 May 1995	Article 6.1: Notification concerning transitional safeguard
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Agreement on Anti-Dumping Practices)	G/ADP/N/1/MAC/1, 22 November 1995	Article 18.5: Notification concerning laws or regulations relevant to the Agreement.
Agreement on the Implementation of Article VII of the GATT 1994 (Agreement on Customs Valuation)	G/VAL/N/1/MAC/1, 9 May 1996	Article 22.2: Notification concerning national legislation relevant to the Agreement
Agreement on Subsidies and Countervailing Measures	G/SCM/N/1/MAC/1, 1 July 1998	Article 32.6: Notification concerning laws or regulations relevant to the Agreement
	G/SCM/N/3/MAC (16/MAC, 25/MAC), 38/MAC, 48/MAC, 60/MAC and 60/MAC/Corr.1, 2 July 1998, 20 September 1999, 21 September 1999, 16 March 2000, 1 May 2000	Article 25: Notification concerning subsidies
Agreement on Safeguards	G/SG/N/1/MAC/1 and 2, 14 August 1995 and 30 November 1995	Article 12.6: Notifications concerning laws and regulations relevant to the Agreement
Agreement on Import Licensing Procedures	G/LIC/N/3/MAC/1 and 2, 22 December 1998 and 3 January 2000	Article 7.3: Notifications concerning import licensing procedures
Agreement on Technical Barriers to Trade	G/TBT/Notif.96.449, 450, 451, 452, 19 December 1996. G/TBT/Notif.00.481, 2 October 2000	Notification under Article 10.6
Agreement on the Application of Sanitary and Phytosanitary Measures	G/SPS/N/MAC/1, 2 and 3, 19 July 1999, 13 August 1999 and 26 August 1999	Notification of emergency measures
Understanding on the Interpretation of Article XVII of the GATT 1994	G/STR/N/1/MAC, G/STR/N/2/MAC, G/STR/N/3/MAC, G/STR/N/4 (5)/MAC and G/STR/N/6/MAC, 18 September 1995, 21 September 1999, 16 April 1998, 21 September 1999 and 15 March 2000	Notification of state trading enterprises

Source: WTO Secretariat.

(ii) Regional agreements

18. Macau, China does not participate in any regional trade arrangements involving preferences, and all trading partners are treated on an MFN basis.

19. Although Macau, China filed its application to join the Asia Pacific Economic Cooperation (APEC) in 1993, it is not an APEC member.

(iii) Bilateral agreements

20. Macau, China has no bilateral trade-related agreements or arrangements with any other parties; no bilateral negotiations or initiatives have taken place since its previous Review.

21. Certain exports from Macau, China enjoy preferential treatment in Australia, Canada, the European Union, Japan, New Zealand, Norway, Switzerland, and the United States, under GSP

schemes, although such treatment has been diminishing.[23] While Macau, China exported GSP-eligible goods worth US$4.5 million in 1999; the authorities indicate that only 0.2% of its total exports of such goods to these countries actually benefited from preferential access, according to the data provided by the authorities.

22. While Macau, China accords no preferential treatment to the Mainland in terms of trade, the Governments of the MSAR and Mainland China have cooperated in various fields such as customs and infrastructure.

(6) TRADE DISPUTES AND CONSULTATIONS

23. Macau, China has never had any trade disputes with Members of the WTO; nor have there been any trade disputes outside the WTO framework, according to the authorities.

(7) MEASURES RELATED TO FOREIGN DIRECT INVESTMENT

24. Macau, China does not maintain any restrictions or controls on inward or outward foreign direct investment or the use of foreign capital in existing or newly established companies; nor are there any restrictions on the repatriation of profits or exchange controls. Moreover, the same procedures are applied for the establishment of a local or foreign company; each company doing business in Macau must have a registered office there.

25. Since the establishment of the MSAR, the Macau Trade and Investment Promotion Institute (IPIM) has assumed additional authority and responsibilities; its scope of activities has been expanded and an Investment Committee coordinating relevant government offices, and a Private Notary to assist the setting up and registration of companies were established within the IPIM to assist investors with the necessary procedures required to start a business in Macau.

26. The Government grants interest-rate subsidies on Pataca-denominated bank loans for the purchase or leasing of new equipment, as well as for purchase, construction or leasing of industrial buildings, used exclusively by the beneficiary; the subsidies may be granted for up to four years. In addition, refundable and non-refundable subsidies may be granted to investment projects if certain requirements are met (Chapter III(4)(ii)). According to the authorities, the granting of these subsidies is non-discriminatory, benefiting local and foreign investors alike.[24]

27. In 1999, Macau, China signed a double taxation agreement with Portugal (published in Decree-Law No. 106/99/M of 13 December 1999). Macau, China also signed a bilateral agreement on investment protection with Portugal (published in the *Government Gazette* No. 31, on 31 July 2000). Macau, China has no other bilateral investment treaties or bilateral tax treaties.

[23] In 1998, Macau products ceased to benefit from the U.S. GSP scheme; benefits under the Japanese GSP scheme were terminated on 1 April 2000.

[24] According to Decree-Law No. 22/96/M of 22 April 1996, entrepreneurs investing at least US$125,000 are granted the right of abode in the MSAR. According to Decree-Law No. 22/97/M of 11 June 1997, this amount is further reduced to US$62,500 for applicants who are retirees or pensioners from Hong Kong, China and have proof of their financial status. The authorities indicate that the provision of the right to abode aims to attract foreigners wishing to investing in housing and reside in the MSAR.

Annexe 29

to the Expert Report
of Professor Simon Chesterman

Case Name:

Edwards v. Canada

Between

Kelly Brian Edwards, appellant, and

Her Majesty the Queen, respondent

[2003] F.C.J. No. 1508

[2003] A.C.F. no 1508

2003 FCA 378

2003 CAF 378

312 N.R. 220

[2004] 1 C.T.C. 129

2003 D.T.C. 5667

126 A.C.W.S. (3d) 359

Docket A-534-02

Federal Court of Appeal

Ottawa, Ontario

Desjardins, Noël and Malone JJ.A.

Heard: September 24, 2003.

Judgment: October 14, 2003.

(30 paras.)

Income tax — Treaties — China - Canada — Interpretation — Double taxation avoidance agreements.

Appeal by Edwards from a decision by the Tax Court dismissing his appeal from an income tax assessment. Edwards was a Canadian resident who was employed as an airline pilot by a company registered in Hong Kong. The employer paid its taxes to Hong Kong prior to July 1, 1997, at which time it began paying taxes to the Hong Kong Special Administrative Region of the People's Republic of China. Canada and China were parties to a treaty providing that remuneration from employment exercised aboard an aircraft operating in international traffic by an enterprise of a contracting state was to be taxable only in the contracting state. The Tax Court judge found that although the Hong Kong Special Administrative Region had formed an inalienable part of the People's Republic of China since 1997, the treaty did not apply to it.

HELD: Appeal dismissed. Even after sovereignty of Hong Kong reverted to China in 1997, the Special Administrative Region preserved an independent taxation system and did not consider itself bound by any international tax treaties to which China was a party. China did not extend any of its double taxation avoidance agreements to the Region, and the Region did not enter into any of its own double taxation avoidance agreements. The treaty defined the People's Republic of China in geographic rather than political terms, thereby including only the mainland and excluding Hong Kong.

Statutes, Regulations and Rules Cited:

Income Tax Act, s. 110(1)(f)(i).

Counsel:

Roger Taylor and Edward Rowe, for the appellant.

Donald Gibson, for the respondent.

The judgment of the Court was delivered by

1 **NOËL J.A.**:— This is an appeal from a decision of Rip J. of the Tax Court of Canada (2002 D.T.C. 1856), in which he dismissed the appeal filed by the appellant with respect to the assessment made by the Minister of National Revenue (the Minister) for the 1997 taxation year.

2 The issue is whether the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between Canada and the People's Republic of China (enacted by S.C. 1986, c. 48, Part III) (Canada-China Tax Treaty, Agreement, Treaty, or Convention) applies to the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC). If the Treaty applies, the appellant's 1997 employment income, which he earned from employment as an airline pilot with a commercial airline company based in the HKSAR, would be exempt from taxation in Canada pursuant to Article 15(3) of the Treaty, and the appellant would be entitled to a corresponding deduction under subparagraph 110(1)(f)(i) of the Income Tax Act (the Act).

3 Article 15(3) of the Tax Agreement provides in its relevant part that "remuneration in respect of an employment exercised aboard a[n] aircraft operated in international traffic by an enterprise of a Contracting State, shall be taxable only in that Contracting State". The term "enterprise of a Contracting State" is defined as an enterprise carried on by "a resident of a Contracting State" (Article 3(1)(g)) which term is defined in turn as "a person ... liable to tax therein", i.e., in that state (Article 4).

4 Subparagraph 110(1)(f)(i) in its relevant part provides:

- 110(1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such of the following amounts as are applicable:
- ...

(f)

- ...
    - (i)

      an amount exempt from income tax in Canada because of a provision contained in a tax convention or agreement with another country that has the force of law in Canada,

* * *

- 110.

  (1) Pour le calcul du revenu imposable d'un contribuable pour une année d'imposition, il peut être déduit celles des sommes suivantes qui sont appropriées:

[...]

(f)

- [...]
    - (i)

      une somme exonérée de l'impôt sur le revenu au Canada par l'effet d'une disposition de quelque convention ou accord fiscal avec un autre pays qui

a force de loi au Canada,

5 In dismissing the appeal, Rip J. found that, although, since July 1, 1997, the HKSAR has formed an inalienable part of the People's Republic of China (PRC), the Treaty was not intended by the parties to apply to the HKSAR. It followed that the appellant's employer was not a "resident of a Contracting State" nor an "enterprise of a contracting state" within the meaning of Article 4 and Article 3(1)(g) respectively and, consequently, that the appellant could not rely on Article 15(3) of the Treaty in the computation of his 1997 income.

Facts

6 The matter proceeded before the Tax Court on the basis of a Partial Statement of Agreed Facts and Documents, segments of which have been reproduced in Annex I to these reasons as background. The essential facts are outlined in the following paragraphs.

7 The Canada-China Income Tax Agreement Act, 1986 implements the Treaty, which was signed on May 12, 1986.

8 The appellant, Kelly Brian Edwards, was a commercial airline pilot employed by Veta Ltd. (Veta), a wholly-owned subsidiary of Cathay Pacific Ltd. (Cathay Pacific). During the relevant time, the appellant was a resident of Canada.

9 Under the terms of subsection 8(1) of the Inland Revenue Ordinance, Ordinance 112, the appellant was required to pay salaries tax to Hong Kong prior to July 1, 1997, and to the HKSAR of the PRC from July 1, 1997 on his income from employment with Veta.

10 Cathay Pacific is incorporated, registered and resident in Hong Kong. During the relevant time, Cathay Pacific was liable to pay profits tax to Hong Kong in accordance with the Inland Revenue Ordinance before July 1, 1997 and to the HKSAR in accordance with the Inland Revenue Ordinance, Ordinance 112 from July 1, 1997.

11 On July 1, 1997, sovereignty over Hong Kong reverted to the PRC, at which time it became the HKSAR of the PRC. Since then, all the laws of the HKSAR derive their authority from the PRC.

12 Up to the time of devolution, Hong Kong was a source based low tax jurisdiction recognized as an international financial centre which did not tax its residents on their universal income. As such, Hong Kong had no interest in entering into comprehensive double taxation avoidance agreements and was not a party to any such agreement with any country

13 In conformity with the Sino-British Joint Declaration concluded in 1984, the Basic Law of the HKSAR of the PRC promulgated on April 4, 1990, with effect July 1, 1997 (the Basic Law), had the effect of preserving Hong Kong's legal system including its taxation system and its vocation as an international financial centre.

14 Specifically, Article 8 of the Basic Law provided for the continuation of the laws previously in force in Hong Kong and Article 108 provided for the preservation of its tax system as an independent taxation system.

15 The HKSAR has been governed accordingly since 1997. It has not entered into any double taxation avoidance agreement since devolution (except with the Mainland of the PRC), and does not consider itself bound by any of the international tax treaties to which the PRC is a party (there were 54 such treaties as of 1997).

16 Similarly, the PRC has not extended any of the double taxation avoidance agreements to which it is a party to the HKSAR although Article 153 of the Basic Law empowers it to do so.

17 In an exchange of correspondence taking place in March 2001, the governments of Canada, PRC and HKSAR each took the position that the Treaty did not apply to the HKSAR.

18 In November 2001, a representative of the Canadian Department of Foreign Affairs sent a third person diplomatic note to the Chinese Ministry of Foreign Affaires stating the Canadian government's position that the Treaty did not apply to the HKSAR and requesting that the PRC confirm its agreement in this respect. A similar note was sent to the Hong Kong Department of Justice.

19 The Chinese government replied stating its agreement in the following terms:

- [TRANSLATION]
- Article No. 108 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China governs that HKSAR implements an independent taxation system. Therefore, the aforementioned agreement does not apply to the Hong Kong Special Administrative Region, and a company incorporated and resident in, and with its place of head office and place of management in, the Hong Kong Special Administrative Region, is neither a "resident of a Contracting State" nor an "enterprise of a Contracting State" within the meaning of Article 4 and Article 3, paragraph 1(g), respectively of the Agreement.

20 The reply from the Hong Kong Department of Justice also confirmed the Canadian government's position.

Analysis

21 The interpretation of international taxation treaties requires an approach which differs from that employed in the interpretation of ordinary statutes as regard must be had to the intention of the parties to the Treaty. In Crown Forest Industries Ltd. v. Canada [1995] 2 S.C.R. 802, the Supreme Court of Canada held that courts must use a purposive approach. Writing for the Court in that case Iacobucci J. stated:

- In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intention of the parties.

22 Looking first at the language used in the Treaty (the relevant provisions can be found in Annex I), it does not appear that it was intended to apply to Hong Kong or to the HKSAR. While the Treaty contains no explicit statement to this effect, articles 2(1)(b) and 3(1)(b) when read together make this relatively clear: Article 3(1)(b) of the Treaty defines the PRC in terms of where the laws relating to Chinese tax apply, while article 2(1)(b) lists the four Mainland taxes (i.e., taxes not having application in Hong Kong or elsewhere outside of the Chinese Mainland) to which the Treaty shall apply. Indeed, this was the opinion expressed by Professor Baker with respect to the corresponding provisions in the China-United Kingdom taxation treaty:

- Similarly, the convention with China defines "China" as "all the territory...in which the laws relating to Chinese tax are in force...";

Chinese tax is defined to cover only those taxes in force in the Mainland (so as to exclude Hong Kong, Macao and Taiwan -- thus avoiding a difficult diplomatic issue in making it relatively clear that China's treaties will not apply to Hong Kong after June 30, 1997). (PP. Baker, Double Taxation Convention and International Tax Law, 2nd edition, (London: Street and Maxwell, 1994) paragraph E-03).

23 The appellant accepts the opinion of Professor Baker insofar as the China-UK Agreement is concerned but points out that while the definition in the UK Treaty does not use the words "when used in a geographical sense", the Canadian Treaty does. According to the appellant, this qualification restricts the definition of the PRC in the Canadian Treaty to one that is strictly geographical. As the PRC is otherwise undefined, the appellant argues that it must be understood in its juridical or political sense which, since July 1, 1997, includes Hong Kong.

24 In making this argument, the appellant loses sight of the fact that both the Canada and UK Treaties define the PRC in a geographical sense, that is by reference to where, within the territory over which the PRC asserts its sovereignty, Chinese taxes apply. The fact that the Canadian Treaty says so explicitly and that the UK Treaty does not is in my view immaterial. Both delineate the scope of the respective treaties by reference to the same geographic definition of the PRC.

25 In this respect, reference may usefully be made to the technical interpretation of the comparable provisions in the USA-China Tax Convention which was signed at approximately the same time as the Canadian Treaty. This Treaty bears the same language as the Canada Treaty including the geographical qualification which the UK Treaty omits. Despite this, the US competent authorities have expressed the view that Hong Kong is excluded from the definition of the PRC based on the same reasoning as that advanced by Professor Baker in relation to the UK Convention:

- The geographical territory of the two Contracting States is defined to include their continental shelf areas to the extent consistent with international law and their respective domestic laws. ... The "People's Republic of China" does not include Hong Kong, as Chinese tax laws are not in effect there. Moreover, in accordance with the Agreement between the United Kingdom and China on the future of Hong Kong, the taxes imposed by the Hong Kong Special Administrative Region will continue to be independent of the tax laws of the Central People's Government, and therefore the Agreement will not apply to Hong Kong even after 1997 (Treasury Department technical explanation - U.S.-China Treaty for the avoidance of double taxation).

26 The appellant has been unable to demonstrate why this reasoning, which flows from the language of the Convention, should not apply to the Canada-China Tax Treaty.

27 With respect to the intention of the parties, this case is straight forward in that the contracting states have expressed their agreement, by exchange of diplomatic notes, that the Treaty was not intended to apply to the HKSAR. The appellant argues that little weight should be given to this expression of intent. This argument, which was vigorously pursued during the hearing, is best stated by reproducing paragraph 97 of the appellant's memorandum of fact and law:

- ...such [diplomatic] notes should not be given such weight in the interpretation of the Tax Agreement as to effectively override retroactively the natural meaning of the text of the Tax Agreement which is, by reason of the Canada-China Tax Agreement Act, 1986,

> a Canadian law. It would be an unusual (and undesirable) result if the rights of a Canadian resident under a law of Canada could be affected by agreements between Canada and another country which are not enacted into Canadian law, not published and occur after the time at which the such rights have arisen.

28 I reject this argument without hesitation. First of all, I do not accept that the construction advocated by the parties goes against the natural meaning of the Tax Agreement. As indicated, the definition of the PRC in terms of where "Chinese Tax" apply, lends itself to the common view expressed by the parties. Second, the evidence reveals that the Canadian government has consistently maintained that the Treaty does not apply to Hong Kong or to the HKSAR and this position has been known in tax circles and accessible to anyone interested since at least 1997. To the extent that the appellant claims to have been surprised by the Canadian position, it can only be because he did not see fit to inform himself.

29 As was stated by Laforest J. in a passage quoted by Iacobucci J. in Crown Forest (supra) at paragraph 63:

- It would be odd if in construing an international treaty to which the legislature had attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended.

In my view, the commonly expressed intention of the parties is entitled to great weight and should not be ignored unless a contrary intent can be shown in either the words of the Treaty or in some other expression by the parties. No such contrary intent has been shown.

30 I would dismiss the appeal with costs.

NOËL J.A.
DESJARDINS J.A.:-- I concur.
MALONE J.A.:-- I concur.

* * * * *

Annex 1
Partial Statement of Agreed Facts and Documents

A. Facts about the Canada-China Income Tax Agreement

- 1.

  The Canada-China Income Tax Agreement Act, 1986 being Part III of S.C. 1986 c. 48 promulgates in Canada the Agreement between the Government of Canada and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (the "Canada-China Income Tax Agreement").

- 2.

  The Canada-China Income Tax Agreement was signed on May 12, 1986 by the Prime Ministers of Canada and the People's Republic of China ("PRC") on behalf of their respective governments. The Canada-China Income Tax Agreement is generally patterned on the 1977 Model Double Taxation Convention prepared by the Organization for Economic Co-operation and Development ("OECD") (the "OECD Model Convention") and the Model Double Taxation Convention between Developed and Developing Countries adopted by the United Nations Ad Hoc Group of Experts in 1979 (the "UN Model Convention").

- 3.

  The Appellant relies upon Articles 1, 2, 3, 4(1) and 15(3) of the Canada-China Income Tax Agreement as being relevant to the determination of this appeal. Those Articles provide:

  - The Government of Canada and the Government of the People's Republic of China, desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, have agreed as follows:
    - ARTICLE 1: Personal Scope
    - This Agreement shall apply to persons who are residents of one or both of the Contracting States.
    - ARTICLE 2: Taxes Covered
    - 1.

      The existing taxes to which this Agreement shall apply are, in particular:

      - (a)

        in the case of Canada:
    - the income taxes imposed by the Government of Canada, (hereinafter referred to as "Canadian tax");
      - (b)

        in the case of the People's Republic of China:
        - (i)

          the individual income tax:
        - (ii)

          the income tax concerning joint ventures with Chinese and foreign investment:
        - (iii)

          the income tax concerning foreign enterprises; and
        - (iv)

          the local income tax;
    - (hereinafter referred to as "Chinese tax").
    - 2.

      This Agreement shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, those referred to in paragraph 1. The relevant authorities of the Contracting States shall notify each other of any substantial changes which have been made in their respective taxation laws within a reasonable period of time after such changes.
    - ARTICLE 3: General Definitions
    - 1.

      For the purposes of this Agreement, unless the context otherwise requires:

- (a)

  the term "Canada" used in a geographical sense, means the territory of Canada, including any area beyond the territorial seas of Canada which, in accordance with international law and under the laws of Canada, is an area within which Canada may exercise rights with respect to the seabed and subsoil and their natural resources;
- (b)

  the term "the People's Republic of China", when used in a geographical sense, means all the territory of the People's Republic of China, including its territorial sea, in which the laws relating to Chinese tax apply, and all the area beyond its territorial sea, including the seabed and subsoil thereof, over which the People's Republic of China has jurisdiction in accordance with international law and in which the laws relating to Chinese tax apply;
- (c)

  the terms "a Contracting State" and "the other Contracting State" mean Canada or the People's Republic of China, as the context requires;
- (d)

  the term "tax" means Canadian tax or Chinese tax, as the context requires;
- (e)

  the term "person" includes an individual, a company and any other body of persons;
- (f)

  the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
- (g)

  the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
- (h)

  the term "nationals" means all individuals having the nationality of a Contracting State and all legal persons, partnerships and other bodies of persons deriving their status as such from the law in force in a Contracting State;
- (i)

  the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when

the ship or aircraft is operated solely between places in the other Contracting State;

- (j)

  the term "competent authority" means, in the case of Canada, the Minister of National Revenue or his authorized representative, and in the case of the People's Republic of China, the Ministry of Finance or its authorized representative.

- 2.

  As regards the application of this Agreement by a Contracting State any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the law of that Contracting State concerning the taxes to which this Agreement applies.

- ARTICLE 4: Resident
- 1.

  For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of head office, place of management or any other criterion of a similar nature.

...

ARTICLE 15: Dependent Personal Services

...

- 3.

  Notwithstanding the provisions of paragraphs 1 and 2, remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State, shall be taxable only in that Contracting State.

...

D. Facts about the HKSAR of the PRC

- 16.

  The Sino-British Joint Declaration on the Question of Hong Kong (the "Joint Declaration") was signed at Beijing on December 19, 1984 by the Prime Ministers of the United Kingdom and the PRC.

- 17.

  In the Joint Declaration, the Government of the PRC declared that it had decided to resume the exercise of sovereignty over Hong Kong with effect from July 1, 1997, and the Government of the United Kingdom declared that it would restore Hong Kong to the PRC effective July 1, 1997.

- 18.

  On July 1, 1997 sovereignty over Hong Kong reverted to the PRC, at

which time Hong Kong became the Hong Kong Special Administrative Region of the People's Republic of China. The Hong Kong Special Administrative Region has formed part of the PRC since July 1, 1997.

- 19.

  Article 31 of the Constitution of the People's Republic of China authorizes the establishment of Special Administrative Regions on the terms prescribed by law enacted by the National People's Congress, as follows:

  - The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions.

- 20.

  The constitutional structure of the HKSAR of the PRC is prescribed by the law adopted by the 7th National People's Congress on April 4, 1990 and promulgated by decree of the President of the PRC on that date and effective July 1, 1997, which law is known as the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the "Basic Law").

- 21.

  Article 8 of the Basic Law provides for the maintenance of the laws of Hong Kong after the resumption of sovereignty by the PRC, and for the power of the legislature of the HKSAR to continue to amend such laws, provided that such laws are not in conflict with the Basic Law. Article 8 stipulates:

  - The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

- 22.

  The mechanism for the adoption of the laws of Hong Kong as laws of the HKSAR of the PRC is provided in Article 160 of the Basic Law, which stipulates:

  - Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law.

- 23.

  On February 23, 1997, the twenty-fourth session of the Eighth National People's Congress adopted the Decision of the Standing Committee of the National People's Congress on the Treatment of Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, (the "Standing Committee Decision") which provided that, with the exception of 24 Ordinances set out in Annex 1 and Annex 2 of the Standing Committee Decision, the laws previously in force in Hong Kong are adopted as laws of the HKSAR. Section 1 of the Standing Committee Decision provides:

  - The laws previously in force in Hong Kong, which include the

common law, rules of equity, ordinances, subordinate legislation and customary law, except those which are in contravention of the Basic Law, are adopted as laws of the Hong Kong Special Administrative Region.

- 24.

  The legislature of the HKSAR enacted the Hong Kong Reunification Ordinance, Gazette No. 110 of 1997, effective July 1, 1997, which declares in section 7(1) that:

  - The laws previously in force in Hong Kong, that is the common law, rules of equity, Ordinances, subsidiary legislation and customary law, which have been adopted as laws of the Hong Kong Special Administrative Region, shall continue to apply.

- 25.

  Article 151 of the Basic Law provides:

  - The Hong Kong Special Administrative Region may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping communications, tourism, cultural and sports fields.

- 26.

  Article 153 of the Basic Law provides:

  - The application to the Hong Kong Special Administrative Region of the international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.
  - International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.

- 27.

  The HKSAR of the PRC and the Mainland of the PRC have an agreement for the avoidance of double taxation between the two Sides entitled "Memorandum for the Arrangement between the Mainland of China and the Hong Kong Special Administrative Region for the Avoidance of Double Taxation on Income". This agreement was signed by representatives of the two governments of the HKSAR of the PRC and the Mainland of the PRC on February 11, 1998.

E. Facts about the Tax Law of the Mainland of the PRC

- 28.

  Tax is imposed by the Mainland of the PRC in accordance with two basic principles. Residents of the Mainland of the PRC are generally subject to tax on world-wide income. Non-residents of the Mainland of the PRC are generally subject to tax only on income sourced to the Mainland of the PRC. Taxes in the Mainland of the PRC are

administered by the State Administration of Taxation.

- 29.

  The taxes described in this Section E apply to the Mainland of the PRC. None of the taxes referred to in this Section E apply to the HKSAR of the PRC, nor is the Central People's Government entitled to levy taxes in the HKSAR of the PRC under Article 106 of the Basic Law.

- 30.

  The "individual income tax" is referenced at Article 2(1)(b)(i) of the Canada-China Income Tax Agreement and was a tax imposed under the Individual Income Tax Law of the People's Republic of China (Adopted at the Third Session of the Fifth National People's Congress on September 10, 1980 and revised in accordance with the Decision on the Revision of the Individual Income Tax Law of the People's Republic of China adopted at the Fourth Meeting of the Standing Committee of the Eighth National People's Congress on October 31, 1993 and effective as of January 1, 1994).

- 31.

  Pursuant to the provisions of the Individual Income Tax Law of the People's Republic of China, as amended (the "Individual Income Tax Law") and the Regulations thereto (the "Implementing Regulations"):

  - (a)

    Individuals not domiciled but who reside in the Mainland of the PRC for not more than 90 days in any one tax year and whose income is not borne by a permanent establishment in the Mainland of the PRC are not subject to tax in the Mainland of the PRC (Implementing Regulations, Article 7);

  - (b)

    Individuals residing in the Mainland of the PRC for less than one year are subject to tax only on income derived from sources inside the Mainland of the PRC (Individual Income Tax Law, Article 1);

  - (c)

    Individuals not domiciled but resident in the Mainland of the PRC for more than one year and less than five years are subject to tax on income derived from sources inside the Mainland of the PRC and from sources outside the Mainland of the PRC but only to the extent that the payor is inside the Mainland of the PRC (Implementing Regulations, Article 6); and

  - (d)

    Individuals who reside in the Mainland of the PRC for more than five years are subject to tax on income from sources inside the Mainland of the PRC and from sources outside the Mainland of the PRC (i.e. on world-wide income) (Individual Income Tax Law, Article 1).

Tax under the Individual Income Tax Law is imposed at graduated rates from 5% to 45% on income from wages and salaries and at graduated rates from 5% to 35% on business income (Individual Income Tax Law, Article 3)

- 32.

  The "income tax concerning joint ventures with Chinese and foreign

investment" is referenced at Article 2(1)(b)(ii) of the Canada-China Income Tax Agreement and was a tax imposed prior to July 1, 1991 under the Income Tax Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures adopted by the National People's Congress on September 10, 1980 and amended by the National People's Congress on September 2, 1983. In accordance with Article 3 of this law, the income tax was generally levied at a rate of 30% (subject to the reductions specified at Article 5 thereof) on world-wide income.

- 33.

The "income tax concerning foreign enterprises" is referenced at Article 2(1)(b)(iii) of the Canada-China Income Tax Agreement and was a tax imposed prior to July 1, 1991 under the Income Tax Law of the People's Republic of China on Foreign Enterprises adopted by the National People's Congress on December 13, 1981 and effective January 1, 1982. Income tax under this law was generally levied at graduated rates from 20% to 40% on income derived from sources in the Mainland of the PRC.

- 34.

The "income tax concerning joint ventures with Chinese and foreign investment" and the "income tax concerning foreign enterprises" were replaced, effective July 1, 1991 with the income tax on enterprises with foreign investment ("FIE"s) and on foreign enterprises ("FE"s) imposed under the Income Tax Law of the People's Republic of China on Enterprises with Foreign Investment and Foreign Enterprises adopted at the Fourth Meeting of the Seventh National People's Congress on April 9, 1991 and effective from July 1, 1991.

- 35.

The tax imposed under the Income Tax Law of the People's Republic of China on Enterprises with Foreign Investment and Foreign Enterprises ("Income Tax Law on FIEs and FEs") and the Detailed Implementing Rules thereto applies to the world-wide income of FIEs and to the income of FEs to the extent that such income is derived from sources in the Mainland of the PRC. This tax is levied at a maximum rate 30% of taxable income (Article 5).

- 36.

The tax rate under the Income Tax Laws on FIEs and FEs is reduced to 15% for FIEs with production activities in "special economic zones", and to 24% for FIEs in "coastal economic open zones" and certain other areas (Detailed Implementing Rules, Article 7 & Chapter 6 "Preferential Tax Treatment"). Subject to certain exceptions, FIEs with a term of operation of at least ten years engaged in production are exempt from tax for the first two profit-making years and granted a 50% reduction in tax in the third to fifth years (Detailed Implementing Rules, Article 8 & Chapter 6 "Preferential Tax Treatment"). Where a foreign investor in a FIE directly reinvests profits derived therefrom in the establishment or expansion of export-oriented or technologically advanced enterprises in the PRC, the investor may obtain a full refund of the enterprise income tax already paid on the reinvested amount in accordance with the relevant regulations of the State Council. (Detailed Implementing Rules, Article 81). Similarly, where a foreign investor in a FIE directly reinvests in profits derived therefrom in order to increase the registered capital in the FIE, or uses the same as capital

investment for the establishment of another FIE, the investor shall obtain a refund of 40 percent of the income tax already paid on the reinvested amount, provided that the term of operation is not shorter than five years. If the reinvestment is withdrawn within five years, the refunded tax shall be paid back. (Income Tax Law on FIEs and FEs, Article 10). The after-tax profits derived from an FIE are not subject to withholding tax upon remittance to the shareholders thereof (Income Tax Law on FIEs and FEs, Article 19 and Implementing Regulations, Article 63).

- 37.

The "local income tax" is referenced at Article 2(1)(b)(iv) of the Canada-China Income Tax Agreement. Prior to July 1, 1991, a "local income tax" of 10% of the income tax otherwise payable was imposed under Article 3 of the Income Tax Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures and Article 4 of Income Tax Law of the People's Republic of China on Foreign Enterprises. Effective July 1, 1991, a "local income tax" is imposed on FIEs and FEs under the Income Tax Law of the People's Republic of China on Enterprises with Foreign Investment and Foreign Enterprises at a rate of 3% of taxable income (Article 5), subject to reduction by the local authorities (Article 9).

- 38.

Effective January 1, 1994, an "enterprise income tax" is imposed on all enterprises other than foreign investment enterprises and foreign enterprises under the Provisional Regulations on Enterprise Income Tax (adopted at the 12th Executive Meeting of the State Council on November 26, 1993, promulgated by Decree No. 137 of the State Council of the PRC on December 13, 1993). This tax applies specifically to state-owned enterprises, collective enterprises, private enterprises, joint venture enterprises and joint stock enterprises. The enterprise income tax is imposed at a rate of 33% of taxable income, which is world-wide income (Article 1). No "local income tax" is imposed under the Provisional Regulations on Enterprise Income Tax.

- 39.

The Provisional Regulations on Enterprise Income Tax replaced as of January 1, 1994 the "state enterprise income tax", "state enterprise income regulatory tax", "collective enterprise income tax", "private enterprise income tax" and "household income tax" which had been imposed under the Draft Regulations of the People's Republic of China on State-Owned Enterprise Income Tax and Measures of Collection of State Owned Enterprise Adjustment Tax published by the State Council on September 1, 1984, the Provisional Regulations of the PRC on Collective Enterprise Income Tax published April 11, 1985 and the Provisional Regulations of the People's Republic of China on Private Enterprise Income Tax published on June 25, 1988.

- 40.

In addition to the individual income tax, the income tax for FIEs and FEs, the local income tax and the enterprise income tax, there are several other taxes imposed in the Mainland of the PRC, including a "value added tax" on the sale or import of goods or taxable services, a "consumption tax" on luxury items, a "business tax" on the provision of certain services and the transfer of immovable and intangible property, a "land value added tax", a "deed tax", a "stamp tax", a "vehicle and

vessel license tax" and a "resource tax".

F. Facts about the Tax Law of the HKSAR of the PRC

- 41.

  In the HKSAR of the PRC, there is no general system of taxing income or capital by reference to the residence of the taxpayer. For the purpose of determining taxable income, residents and non-residents are treated alike. Source of income, rather than residence status, is the single most important factor in determining a person's liability for taxation. A taxable person includes any person who has derived income in or from the HKSAR of the PRC. The following are chargeable income or profits: income from an office or employment, assessable profits from a trade, business or profession, and the assessable value of land and buildings. Income derived in or from the HKSAR of the PRC which falls under one of these three heads of taxation in the Inland Revenue Ordinance, Ordinance 112 is generally subject to tax in the HKSAR of the PRC.

- 42.

  Taxes in the HKSAR of the PRC are administered by the Department of Inland Revenue. None of the taxes described in this Section F apply to the Mainland of the PRC.

- 43.

  Article 73 of the Basic Law provides:

  - The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions: ...
  - (3)

    To approve taxation and public expenditure.

- 44.

  Article 106 of the Basic Law provides:

  - The Hong Kong Special Administrative Region shall have independent finances.
  - The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes, and they shall not be handed over to the Central People's Government.
  - The Central People's Government shall not levy taxes in the Hong Kong Special Administrative Region.

- 45.

  Article 108 of the Basic Law provides:

  - The Hong Kong Special Administrative Region shall practice an independent taxation system.
  - The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as a reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.

- 46.

  The Hong Kong Tax Law that was the Inland Revenue Ordinance of May 3, 1947 was adopted as Inland Revenue Ordinance, Ordinance 112 of the HKSAR of the PRC effective July 1, 1997, according to the process

described in paragraphs 20-24 hereof. The text of the Inland Revenue Ordinance, Ordinance 112 of the HKSAR of the PRC on July 1, 1997 was identical to the text of the Inland Revenue Ordinance of May 3, 1947 on June 30, 1997.

- 47.

The Inland Revenue Ordinance, Ordinance 112 of the HKSAR of the PRC imposes a "salaries tax" in Part III thereof. The salaries tax is imposed upon individuals in respect of income arising in or derived from the HKSAR of the PRC from any office or employment or profit or any pension, pursuant to section 8(1). Section 8(1) will apply where an individual's employment is sourced in the HKSAR of the PRC and in such a case, all his income from that employment will be subject to the salaries tax even if only part of the services are performed in the HKSAR of the PRC. Section 8(1A) applies the salaries tax to employment which is not sourced in the HKSAR of the PRC but where the services are performed in the HKSAR of the PRC (CIR v. Geopfert (1987) HKTC 2, 210). The salaries tax is imposed at graduated rates from 2% to 17%.

- 48.

The Inland Revenue department of the HKSAR of the PRC has indicated that an employment will be sourced in the HKSAR of the PRC where the contract of employment is negotiated or entered into in the HKSAR of the PRC, the employer is resident in the HKSAR of the PRC, or the employee's remuneration is paid to the employee in the HKSAR of the PRC.

- 49.

The Inland Revenue Ordinance, Ordinance 112 of the HKSAR of the PRC imposes a "profits tax" in Part IV thereof. Persons, (including corporations, partnerships, trustees and bodies of persons), both resident and non-resident, carrying on or deemed to be carrying on a trade, business or profession in the HKSAR of the PRC are liable to the profits tax on chargeable profits sourced to the HKSAR of the PRC. Certain income from sources outside the HKSAR of the PRC is deemed to arise from a source in the HKSAR of the PRC. Both actual receipts and amounts credited but not paid (i.e. accruals) are considered to be income liable to profits tax. The rate of profits tax is 15% for individuals and 16% for corporate entities.

- 50.

Specific rules for the application of the profits tax to an aircraft owner resident in the HKSAR of the PRC are set out in section 23C of the Inland Revenue Ordinance, Ordinance 112 of the HKSAR of the PRC. Section 23C deems a corporation resident in the HKSAR of the PRC that carries on a business as an owner of an aircraft to be carrying on that business in the HKSAR of the PRC. Section 23C of the Inland Revenue Ordinance, Ordinance 112 prescribes what proportion of the aircraft owner's worldwide income from carrying on business as an owner of an aircraft is to be apportioned to the HKSAR of the PRC for tax purposes.

- 51.

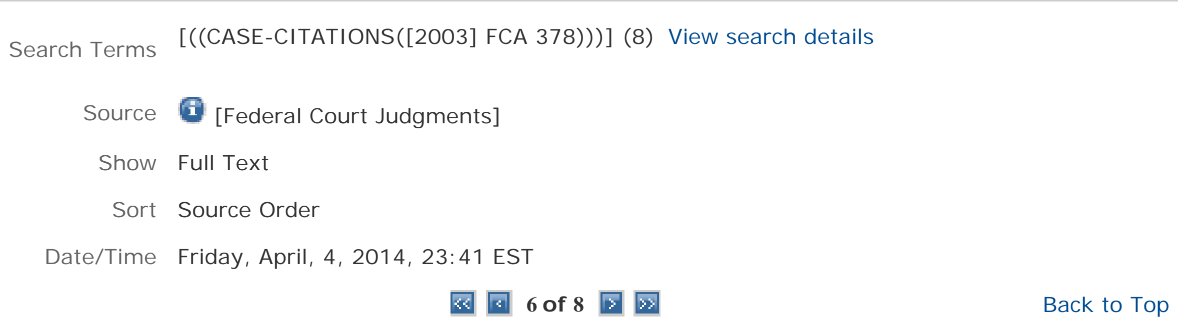
Part VII of the Inland Revenue Ordinance, Ordinance 112 of the HKSAR of the PRC provides for the charging of tax under personal assessment. This Part provides for an effective merging of the heads of taxation under the Inland Revenue Ordinance, Ordinance 112 of the HKSAR of the PRC into a single assessment for an individual who is a permanent

or temporary resident of the HKSAR of the PRC and who elects for personal assessment. The total income of the individual for the purposes of personal assessment consists of the net assessable value of land and buildings owned by the individual, the net assessable income from an office or employment of profit of the individual and assessable profits. Total income is reduced by approved charitable donations, business losses and certain interest in order to arrive at the individual's taxable amount.

- 52.

The parties hereto agree, for the purpose of this appeal, to the facts as set out herein. Each party reserves the right to object to the relevance of any of the facts set out herein.

cp/e/qw/qlhbb



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