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Case Note

CONSTRUING A TREATY AGAINST STATE PARTIES' EXPRESSED INTENTIONS?

Sanum Investments Ltd v Government of the Lao People's Democratic Republic
[2016] 5 SLR 536

The Singapore Court of Appeal's decision in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* was a landmark one in several respects. A key aspect of this decision though may appear controversial at first blush – that is, the apex court placed less weight on the express views of state parties, even though Singapore itself was not a party to the relevant bilateral investment treaty ("BIT"). While doing so was admittedly "counter-intuitive", the Court of Appeal did not set out to construe the BIT against the intentions of the contracting states. Rather, much turned on the critical date and nature of evidence adduced by, Laos to indicate the states' purported intentions. Put another way, *when* joint intentions were first expressed was significant, as were the *types* of evidence relied upon to evince subsequent joint intentions. This note will suggest that the Court of Appeal was animated by a desire to clarify important points of public international law and curial procedure; points which are instructive to future investor–state cases arising from the International Arbitration Act.

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I. Introduction

1 The Court of Appeal's seminal decision in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*[1] ("*Sanum Investments*") was the first appeal to, and curial review by, the apex court of an investor–state arbitral tribunal's ruling on jurisdiction. The appeal arose under s 10 of the International Arbitration Act[2] ("IAA"), which imports the amended version of Art 16 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration[3] ("UNCITRAL Model Law"). The Court of Appeal interpreted and applied an international investment treaty to which Singapore was not a party, namely, the Peoples' Republic of China–Laos BIT ("PRC–Laos BIT").[4]

2 At first instance, the Singapore High Court held that the award on jurisdiction be set aside, finding that the PRC–Laos BIT, and its investment protections, did not extend to the Macau Special Administrative Region where the investor was domiciled. That court preferred a narrow construction of the investor–state dispute settlement ("ISDS") provision in the PRC–Laos BIT. However, the full bench of the Court of Appeal overturned the lower court's decision and affirmed the arbitral tribunal's ruling that the tribunal had both territorial and subject-matter jurisdiction to hear the Macanese investor's claims. Some have argued that as investment arbitration cases typically involve complex questions of public international law on which courts may not have particular expertise, they should show restraint and even adopt a deferential standard of review.[5] Rejecting this view, however, the Court of Appeal found that precedent required a *de novo* review of such awards. After deciding that the interpretation and application of the PRC–Laos BIT were justiciable by a Singapore court in this case, the Court of Appeal also added that since Singapore was the seat of the

1 [2016] 5 SLR 536.

2 Cap 143A, 2002 Rev Ed.

3 UNCITRAL Model Law on International Commercial Arbitration GA Res 40/72, UN GAOR, 40th Session, Supplement No 17, Annex 1, UN Doc A/40/17, UN Sales No E.95.V.18 (1985). The curial review in this case stands in contrast to the policy of minimal curial intervention that has consistently been adopted by the Singapore courts in IAA-related cases. In fact, the Court of Appeal has held that it will not examine an award assiduously looking for fault in the arbitral process: see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

4 On 31 January 1993, the People's Republic of China and the Lao People's Democratic Republic ("Laos") concluded a bilateral investment treaty – 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 (or "PRC–Laos BIT").

5 Todd Weiler & Tai-Heng Cheng, "The Virtue of Judicial Restraint: Two Comments on *Laos v Sanum*" *Global Arbitration Review* (12 March 2015).

arbitration, the Singapore courts were "*not only competent to consider these issues, but … obliged to do so*".[6] It then proceeded to apply relevant public international law principles and canons of treaty interpretation, ultimately adopting a broad construction of the ISDS clause in the PRC–Laos BIT.

3 Consistent with its reception of public international law and in accordance with the best practices of international courts and tribunals, the Court of Appeal admitted opinions from international law experts. The Court of Appeal appointed two distinguished *amici curiae*, Mr Christopher Thomas QC and Prof Locknie Hsu, to proffer opinions on public international law. Party-appointed experts, namely, Prof Simon Chesterman, for Laos, and Sir Daniel Bethlehem QC and Prof Wenhua Shan, for Sanum, had given evidence to the court below.[7]

4 Notably, the Court of Appeal had conceded that its approach to treaty interpretation might be viewed as "counter-intuitive".[8] After all, the state parties to the BIT, Laos and PRC, had adduced two sets of *Notes Verbale*[9] in 2014[10] and 2015[11] which expressly stated that the PRC–Laos BIT does not extend to Macau. Indeed, Lawrence Boo and Earl J Rivera-Dolera have added that the Court of Appeal's conclusion has generated "wide differences of opinion":[12]

> *While some practitioners welcome the decision as being correct* to say that by selecting Singapore as seat, the IAA as well as the supervisory jurisdiction of the Singapore court is engaged and will bolster confidence in Singapore as a serious and viable seat for investor–state arbitrations involving Southeast Asian states, *others accepted the court's decision more cautiously* as being explicable on the particular facts of

6 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [38].

7 While eminent *amici* had been appointed in the past for tangential public international law issues in *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453, that case involved a private dispute on a matter of civil procedure: *ie*, service out of jurisdiction.

8 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [116].

9 A *Note Verbale* is defined in the Oxford Dictionary as "an unsigned diplomatic note written in the third person, of the nature of a memorandum": see "Note Verbale" *English Oxford Living Dictionaries*, available at https://en.oxforddictionaries.com/definition/note_verbale (accessed 13 February 2018).

10 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [10].

11 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [13].

12 Lawrence Boo & Earl J Rivera-Dolera, "Arbitration" (2016) 17 SAL Ann Rev 89 at 92; the "others" they referenced here are Gary Born, Jonathan Lim & Darshini Prasad in their article: "*Sanum v. Laos* (Part II): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC–Laos BIT" (11 November 2016).

> the case *in that it involved a BIT which, by its nature, creates rights for third parties to the treaty*. [emphasis added]

5 According to one high-level PRC official, the decision in *Sanum Investments* was "incorrect", as the PRC alone "decides whether or not the international treaties to which [she] is or becomes a party apply to the Special Administrative Regions ('SARs') based on the circumstances and their needs after seeking the views of the governments of the SARs".[13]

6 Noting that "Chinese scholars, in the main, could not accept that a Singapore court could ignore and interfere with the PRC and Laos'[s] common position on the extent of their treaty coverage", Boo and Rivera-Dolera went further to suggest that the Court of Appeal's "*readiness to displace state parties' joint expressed intentions*, could well work against Singapore's intention to poise itself as a place of choice for investor–state arbitration" [emphasis added].[14] With respect, the present authors do not agree with this assessment, in part because the *date* at which joint intentions are first expressed, and the *types of evidence* evincing subsequent joint intentions, matter. Indeed, belated jointly expressed intentions of contracting states may do little to aid a treaty's proper interpretation. The Court of Appeal's approach accords with the view that interpretation of treaties which establish rights for other states or actors may be less amenable to "authentic" *post-hoc* interpretation by treaty parties where a dispute is ongoing.[15]

7 In the course of setting out the facts and analysing the holdings of this seminal case in greater detail, this note will examine two admittedly "counter-intuitive" aspects of the Court of Appeal's decision, that is, (a) that the territorial scope of a BIT was interpreted contrary to state parties' expressions of intent, and (b) that a clause can be broadly interpreted beyond its plain and ordinary meaning. In the present authors' view, the Court of Appeal applied public international law norms when construing the contracting states' silence or inaction, as well as when construing their possibly "self-serving"[16] expressed intentions in relation to territorial and subject-matter jurisdiction. We

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13 "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on October 21, 2016" *Ministry of Foreign Affairs of the People's Republic of China* <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml> (accessed 13 February 2018).

14 Lawrence Boo & Earl J Rivera-Dolera, "Arbitration" (2016) 17 SAL Ann Rev 89 at 93.

15 See, *eg*, *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) at [386].

16 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [104].

are of the opinion that the Court of Appeal did not set out to construe a BIT against the intention of the contracting states, nor did it defer to the views of the arbitral tribunal. On the contrary, from the outset, the Court of Appeal seems to have been animated by a desire to consider the proper scope of the PRC–Laos BIT in light of all the evidence before it, examining "the question of admissibility and weight within the framework of any other applicable principles of international law, such as the critical date doctrine".[17]

8 As the present authors will analyse further in this note, the Court of Appeal held that post-critical date evidence in the form of *Note Verbales* ("*NVs*") adduced by Laos could be admitted where pre-critical date evidence was inconclusive, although "special attention" should then be given to the former's weight.[18] The court added that "greater weight" may be placed on post-critical date evidence if such evidence demonstrates "evidentiary continuity and consistency with pre-critical date evidence",[19] and ultimately held that the *NVs* were not sufficient to displace the presumption that the PRC–Laos BIT extends to Macau. Moreover, the Court of Appeal disagreed with the emphasis the High Court had placed on a literal reading of the "first-generation" BIT because it involved two communist countries, and shed light on the latitude with which an ISDS clause in such a BIT ought to be interpreted, taking account of all the circumstances of the case.

9 As a matter of arbitral procedure, the Court of Appeal further held that regardless of the fact that investment treaty arbitration involves a foreign investor as "third party to a treaty", the standard of review in an appeal against a decision of an investment arbitration tribunal is a *de novo* one, just as it is *apropos* a commercial arbitration award. As Kelvin Elbert noted, this uniform standard is "consistent" with the fact that both international commercial arbitrations and non-ICSID[20] investment arbitrations fall within the purview of the IAA as the *lex arbitri*.[21] Even though a curial court might consider what the tribunal has said because this might well be persuasive, it is not bound to accept or take into account the arbitral tribunal's findings on the matter as it is

17 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [103].

18 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [108].

19 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [108].

20 "ICSID" refers to the International Centre for Settlement of Investment Disputes.

21 Kelvin Elbert, "Not So Different after All: *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57" *Singapore Law Blog* (15 November 2016).

the "cogency and quality of their reasoning rather than their standing and eminence that will factor in the Judge's evaluation of the matter".[22]

10 This note sets out the material facts of the case and the award of the arbitral tribunal (Part II);[23] the decision of the High Court (Part III);[24] the decision of the Court of Appeal (Part IV);[25] and the present authors' analysis of the implications of the Court of Appeal's decision, and its contribution to the corpus of investment law jurisprudence (Part V).[26] The authors' analysis pertains to whether IAA-related investment disputes are justiciable; the implications of a *de novo* standard of review of matters arising from an arbitration; the Court of Appeal's assessment of evidence with regard to the moving treaty frontier rule ("MTF Rule"); and the proper interpretation of ISDS clauses in "first-generation" BITs.

II. Facts

A. Background

11 Macau-incorporated Sanum Investments Ltd ("Sanum") had made investments in the gaming and hospitality industry in Laos through a joint venture with a Laotian entity. Sanum commenced UNCITRAL arbitration against the Government of the Lao People's Democratic Republic ("Laos") on 14 August 2012 pursuant to the PRC–Laos BIT alleging, *inter alia*, that Laos had expropriated Sanum's capital investment benefits by imposing "unfair and discriminatory" taxes.[27]

B. UNCITRAL arbitration proceedings

12 The UNCITRAL tribunal had to determine: (a) whether the PRC–Laos BIT could be invoked by investors from Macau to institute a

22 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [44].
23 See paras 11–32 below.
24 See paras 33–44 below.
25 See paras 45–70 below.
26 See para 71 below.
27 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [6]. On the same date (14 August 2012), a notice of arbitration was filed by Lao Holdings (Sanum's Aruba-registered parent company, in a parallel and ongoing International Centre for Settlement of Investment Disputes additional facility tribunal case filed pursuant to the Laos–Netherlands bilateral investment treaty. See *Lao Holdings NV v The Lao People's Democratic Republic* (ICSID Case No ARB(AF)/12/6).

treaty arbitration against Laos; and (b) whether the arbitration clause in Art 8(3) of the PRC–Laos BIT gave it jurisdiction to hear the dispute.

13 The first issue of territorial jurisdiction ("Macau question") relates to state succession and its impact on the PRC and Laos's treaty obligations. Specifically, it concerned the application of the MTF Rule; that is, a rule of customary international law that presumptively provides that a state's treaties will extend to any new territory that becomes part of the state. The MTF Rule also provides that, when a territory undergoes a change in sovereignty, it passes automatically out of the treaty regime of the predecessor sovereign and into the treaty regime of the successor sovereign. This customary rule is codified in Art 29 of the 1969 Vienna Convention on the Law of Treaties[28] ("VCLT") and Art 15 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties ("VCST").[29]

14 When determining whether the MTF Rule operated to include Macau within the scope of the PRC–Laos BIT after sovereignty over Macau was purportedly transferred from Portugal to the PRC in 1999, the tribunal had to consider if exceptions to the rule applied. Under Art 29 of the VCLT and Art 15 of the VCST, the MTF Rule can be displaced if the application of the PRC–Laos BIT to Macau: would be incompatible with the object and purpose of the BIT; would radically change the conditions of the BIT's operation; or if it is otherwise established that the BIT does not apply in respect of the entire territory of the PRC.

15 The second issue of subject-matter jurisdiction ("ISDS clause question") concerned the proper interpretation of the phrase "dispute

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28 *Vienna Convention on the Law of Treaties* (concluded on 23 May 1969) (1980) 1155 *United Nations Treaty Series* 331, Art 29 ("Territorial Scope of Treaties") states that: "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

29 *Vienna Convention on the Succession of States in Respect of Treaties* (concluded on 23 August 1978) (1996) 1946 *United Nations Treaty Series* 3, Art 15 (Succession In Respect of Part of Territory) states:

> 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.

involving the amount of compensation for expropriation" in Art 8(3) of the PRC–Laos BIT that is consistent with the canons of treaty interpretation embodied in the VCLT. Article 8(3) of the BIT reads, *inter alia*:

> *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 … [emphasis added]

16 This issue was to be assessed in the context of a "first-generation" BIT between two communist states. Many first-generation BITs concluded by communist states in the 1980s, particularly the PRC and the Soviet Union, contained narrowly defined dispute-resolution clauses providing arbitral jurisdiction only over disputes as to the quantum of compensation. This reflected a general scepticism towards foreign investment, private enterprise and international arbitration, as well as fear of the erosion of state sovereignty.[30] In light of the prevalence of indirect expropriation, some tribunals have adopted a broad interpretation so as to arbitrate disputes regarding the existence and lawfulness of an expropriation.[31] This has engendered a jurisdictional split on the ISDS clause question, with as other tribunals preferring a narrow interpretation.[32] At the heart of the divide is whether an investment tribunal may pragmatically but somewhat counter-intuitively interpret a restrictive treaty term in an expansive way, notwithstanding the language of the BIT.

17 On 13 December 2013, the UNCITRAL tribunal delivered its Award on Jurisdiction.[33] In relation to the Macau question, the tribunal held that the MTF Rule operated to include Macau within the scope of the PRC–Laos BIT given the paucity of evidence to indicate otherwise.

18 In deciding the ISDS clause question, the UNCITRAL tribunal looked at the ordinary meaning of Art 8(3) of the PRC–Laos BIT, in

30 Jane Y Willems, "The Settlement of Investor State Disputes and China: New Developments on ICSID Jurisdiction" (2012) 8(1) SC J Int'l L & Bus 1 at 3 and 21-27; Nils Eliasson, "Chinese Investment Treaties – A Procedural Perspective" in *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Vivienne Bath & Luke Nottage eds) (Routledge, 2012); Nils Eliasson, "Investor–State Arbitration and Chinese Investors – Recent Developments in Light of the Decision on Jurisdiction in the Case *Mr. Tza Yap Shum v. The Republic of Peru*" (2009) 2(2) Contemp Asia Arb J 347 at 353–354.

31 See, *eg*, *Renta 4 SVSA v The Russian Federation* (SCC Case No 024/2007, Award on Preliminary Objections) (20 March 2009).

32 See, *eg*, *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No 079/2005, Award on Jurisdiction) (October 2007).

33 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* (PCA Case No 2013-13, Award on Jurisdiction) (13 December 2013).

accordance with the VCLT rules on interpretation. It adopted a broad construction of the provision and the meaning of the phrase "involving", following the tribunal in *Tza Yap Shum v Republic of Peru*[34] ("*Tza Yap Shun*"), which analysed a BIT between the PRC and the Republic of Peru ("PRC–Peru BIT") containing an arbitration clause which was similar in all material respects to Art 8(3) of the PRC–Laos BIT. That *Tza Yap Shun* tribunal interpreted "involve" to mean that the dispute must include but was not strictly limited to the determination of the "amount of compensation". It also held that a restrictive interpretation of "involving" would mean that the investor would not actually have access to arbitration since, according to the final sentence of Art 8(3), there was a "fork in the road"– that is, turning to the courts of the host state would preclude arbitration under the ICSID Convention.[35] In sum, the ICSID tribunal in *Tza Yap Shun* interpreted this provision of the underlying PRC–Peru BIT as granting it full jurisdiction over the issue of liability as well as quantum.

19 In light of these findings, the *Sanum Investments* tribunal held that jurisdiction over Sanum's claims had been established.[36]

C. Singapore High Court proceedings

20 On 10 January 2014, Laos filed an application to refer the issue of jurisdiction to the Singapore High Court pursuant to s 10(3)(*a*) of the IAA. Before addressing the Macau and ISDS clause questions, the High Court first had to determine if it had jurisdiction to hear the matter and if so, what the applicable standard of review could be.

21 Resisting the court's jurisdiction, Sanum claimed that the plaintiff's application under s 10 of the IAA "only concerns questions of pure international law because it stems from an investment treaty arbitration which operates on an international plane different from typical international commercial arbitrations",[37] and which was accordingly not justiciable by a domestic court. Significantly, the court disagreed and held that treaty interpretation is a realm that is justiciable

34 ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009.

35 "ICSID Convention" is short for Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature on 18 March 1965) (1966) 575 *United Nations Treaty Series* 159; *Tza Yap Shum v Republic of Peru* (ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) at [188].

36 *Tza Yap Shum v Republic of Peru* (ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) at [329].

37 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [21].

by a Singapore court if the court is asked to interpret the agreement in order to give effect to the rights and duties contained in the parties' agreement to arbitrate.

22 In determining whether or not Laos's application was justiciable, the court considered *Lee Hsien Loong v Review Publishing Co Ltd*,[38] ("*Review Publishing*") in which Sundaresh Menon JC (as his Honour then was) held that Singapore courts can rule on a question of international law that bears on the application of domestic law, especially since the interpretation of a treaty is not often concerned with the *making* of a treaty, but with its *effect*.[39] The court also approved of the reasoning of the English Court of Appeal in *Republic of Ecuador v Occidental Exploration and Production Co*[40] ("*Occidental*"), where the English court held that it had jurisdiction to interpret an international instrument to determine the party's rights and duties under domestic law.

23 In the present case, the court similarly held that the issue at hand was justiciable: that is, while Singapore is not a party to the PRC–Laos BIT, the dispute concerned the rights of parties who sought to invoke the court's review jurisdiction under a domestic statute, that is, the IAA.[41]

24 The High Court then held that the standard of review under s 10 of the IAA was the *de novo* standard, stating that there was no principled basis on which to apply a differentiated standard between commercial and investor–state arbitration.[42] It also held that the expertise of the UNCITRAL tribunal had no bearing on the applicable standard of review by the Singapore courts.[43]

25 In relation to the Macau question, Laos sought to adduce correspondence which had not been put before the arbitral tribunal. On 19 February 2014, Laos filed an application before the High Court requesting the admission of two *Note Verbales* ("2014 *NVs*"): (a) a 7 January 2014 letter that was sent from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Laos, which stated Laos's view

38 [2007] 2 SLR(R) 453.
39 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [100].
40 [2006] 2 WLR 70.
41 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [30].
42 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [33].
43 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [35].

that the PRC–Laos BIT did not extend to Macau and sought the views of the PRC government on the same; and (b) a 9 January 2014 letter that was the PRC Laotian Embassy's reply to the 7 January letter, stating its view that the PRC–Laos BIT did not apply to Macau "unless both China and Laos make separate arrangements in the future", highlighting that, in accordance with the Basic Law of Macau, the Government of Macau may, with the authorisation of the Central People's Government, "conclude and implement investment agreements on its own with foreign states and regions".[44]

26 The High Court held that the admission of fresh evidence under s 10 of the IAA was governed by the principles established in *Ladd v Marshall*[45] ("*Ladd v Marshall* test") and as modified in *Lassiter Ann Masters v To Keng Lam*[46] ("*Lassiter* test"). Under the *Ladd v Marshall* test, fresh evidence may be admitted in appellate cases only if the evidence: (a) could not be obtained with reasonable diligence for use at trial; (b) has an important influence on the result of the case; and (c) is apparently credible. The High Court held that it was not exercising an appellate function when reviewing a jurisdictional decision of an arbitral tribunal pursuant to s 10 of the IAA. As such, it applied the *Lassiter* test, which relaxes the first limb of the *Ladd v Marshall* test. The High Court found that the 2014 *NVs* satisfied the *Lassiter* test and thus admitted them.

27 The High Court further found that the evidence submitted by Laos established an intention that the PRC–Laos BIT did not extend to Macau. It was persuaded that the wording of the 2014 *NVs* demonstrated that China's position of the non-applicability of the PRC–Laos BIT to Macau was "not a dramatic change of position but was rather an affirmation of the common understanding between the states that the treaty from its inception did not apply to Macau".[47] Sanum had argued that the 2014 *NVs* were irrelevant as a matter of international law as they were being admitted after the arbitral proceedings had commenced. In making this argument, Sanum was invoking the critical date doctrine – an international law principle which provides that evidence generated after the dispute has arisen, that is, after the critical date, cannot be used by disputing party to improve its position in the dispute. However, the High Court concluded that the 2014 *NVs* constituted a "subsequent agreement" between the PRC and Laos permitted under Art 31(3)(*a*) of the VCLT. The High Court arrived "at

44 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [40].
45 [1954] 1 WLR 1489.
46 [2004] 2 SLR(R) 392.
47 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [77].

the conclusion that Laos has established on a balance of probabilities that the PRC–Laos BIT does not apply to Macau".[48] It added that parties seeking to use BITs ought to be on general notice that Art 31 of the VCLT contemplates the possibility of states banding together to make subsequent agreements that might cast a new light on interpretation of the relevant investment treaty.

28 Apart from the 2014 *NVs*, the High Court also relied on other pieces of evidence proffered by Laos to reach the conclusion that the PRC–Laos BIT did not extend to Macau. These were, namely, (a) the 1987 China–Portugal Joint Declaration[49] ("Joint Declaration"), (b) a 2001 World Trade Organisation Report ("WTO Report"), and (c) correspondence during the handover of Hong Kong to the PRC.

29 The High Court held that the Joint Declaration reflected the intention of the PRC that a treaty such as the PRC–Laos BIT would not apply to Macau unless some further positive steps were taken. Specifically, it relied on cl VIII of Annex 1, which states as follows:[50]

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

30 The High Court also relied upon the 2001 WTO Report as part of the basis for its conclusion that the PRC–Laos BIT did not apply to Macau, and in particular, the following statement in the report:[51]

> 27 In 1999, [Macau] signed a double taxation agreement with Portugal … [Macau] also signed a bilateral agreement on investment protection with Portugal … *[Macau] has no other bilateral investment treaties or bilateral tax treaties* … [emphasis added by the High Court of Singapore in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15]

31 The High Court also drew guidance from the common assumption in the period leading to the handover of Hong Kong that the PRC's treaties would not apply to Hong Kong after the handover. This was predicated on the work of the Joint Liaison Group for Hong Kong, which negotiated and concluded bilateral agreements on behalf of Hong

48 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [110].

49 Joint Declaration on the Question of Macao (signed on 13 April 1987) (1988) 1498 *United Nations Treaty Series* 228.

50 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [92].

51 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [109].

Kong during the period leading up to 1997. Extrajudicial statements from the outgoing Attorney-General of Hong Kong in this regard at that time, and a subsequent speech in 2005 by Hong Kong's Secretary for Justice were also relied on.[52]

32 With regard to the ISDS clause question, the High Court disagreed with the approach taken in *Tza Yap Shum*. It held that the language of Art 8(3) had a narrower meaning than that in Art 8(1) – that is, the PRC–Laos BIT permitted recourse to local courts for "any dispute" which is "in connection with an investment", whereas arbitration in investment disputes concerning expropriation under the treaty was limited to *quantum* only. The court appears to have agreed with Gallagher and Shan[53] that at the time the relevant BIT was concluded, the PRC was a closed socialist economy with a strong interest in protecting its political sovereignty. It found that the wording of the arbitration agreement should be read narrowly, and understood in the *context* of "a certain degree of distrust or ideological unconformity on the part of communist regimes regarding investment of private capital as well as a concern about the decisions of international tribunals on matters such regimes are not familiar with and over which they have no control".[54] The High Court further surmised that the PRC and Laos could have used the expansive phrase "any dispute in connection with an investment" if they had specifically intended for arbitrators to have jurisdiction over all aspects of an expropriation dispute.[55]

52 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [104].

53 *Norah Gallagher & Wenhua Shan, "China"* in *Commentaries on Selected Model Investment Treaties* (Chester Brown ed) (Oxford University Press, 2013) at p 131; T G Nelson, "Investor–State Arbitration and Investment Treaty Protection: The South-East Asian Angle" (2009) 28 *Australian Resources and Energy Law Journal* 213; Monika C E Heymann, "International Law and the Settlement of Investment Disputes relating to China" (2008) 11(3) *Journal of International Economic Law* 507 at 515.

54 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [120]; see also Jane Y Willems, "The Settlement of Investor State Disputes and China: New Developments on ICSID Jurisdiction" (2012) 8(1) SC J Int'l L & Bus 1 at 33, 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?" (2009) 10 *The Journal of World Investment & Trade* 829 and Yansheng Zhu, "Determination of the Consent to the ICSID Jurisdiction in BITs – A Review on the Errors Made by the Tribunal Concerning the Determination of the Consent in the Mr. Tza Yap Shum Case" (2010) 17(3) *Journal of International Economic Law* 106.

55 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [121].

III. Decision of Court of Appeal

A. Justiciability and applicable standard of review on UNICITRAL arbitration proceedings

33 While the justiciability of the interpretation and application of the PRC–Laos BIT was not on appeal, the Court of Appeal, nevertheless, set out its views for the sake of completeness. Concurring with the High Court, the Court of Appeal held that the High Court was not only entitled but, indeed, obliged as the curial court at the seat of arbitration to consider these issues as the IAA and the court's supervisory jurisdiction was engaged.[56] The Court of Appeal further held that a review of jurisdiction should be undertaken *de novo*. It rejected Sanum's argument that the court should accord due deference to the UNCITRAL tribunal's finding because of the consensual nature of the arbitration, affirming its earlier holding in *PT First Media TBK v Astro Nusantara International BV*[57] that a review of jurisdiction should be undertaken *de novo*. Notably, *Astro* follows the seminal UK Supreme Court decision of *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*[58] in this regard. The Court of Appeal commented that a tribunal's reasoning may be persuasive depending on the "cogency and quality of their reasoning", but the court is not bound to agree with or accept the tribunal's findings on the matter.[59]

34 Agreeing with an observation made by Prakash J (as her Honour then was) in *AQZ v ARA*,[60] the Court of Appeal held that a *de novo* hearing does not mean that the arbitral findings should be disregarded. It simply means that the court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities. The Court of Appeal therefore embarked on a complete rehearing of the evidence heard by the tribunal, notwithstanding the High Court's consideration of key factual exhibits, scholarly writings, and expert evidence.

B. Macau question

35 The Court of Appeal noted that it was not evident from a plain reading of the text of the PRC–Laos BIT, an analysis of the BIT's object

56 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [38].
57 [2014] 1 SLR 372.
58 [2011] 1 AC 763.
59 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [44].
60 [2015] 2 SLR 972.

and the purpose, or the circumstances of its conclusion, that the treaty parties had intended for Macau to be excluded. Since the PRC–Laos BIT was silent on the issue, the Court of Appeal held that the MTF Rule presumptively applied. The Court of Appeal further noted that none of the evidence adduced by Laos was sufficient to prove that it was "otherwise established" that the PRC–Laos BIT did not apply to Macau.[61] The Court of Appeal helpfully clarified that the applicable standard of proof was on a balance of probabilities.[62]

(1) Admissibility of 2014 notes verbales

36 The 2014 *NVs* constituted the lynchpin of Laos' attempt to rebut the MTF Rule. Prior to the Court of Appeal proceedings, Laos sought to admit two further *NVs* in 2015 ("2015 *NVs*") to reaffirm the position in the 2014 *NVs*. These consisted of a *Note Verbale* sent from the Laotian Foreign Ministry on 18 November 2015 requesting that the PRC Laotian Embassy confirm that the 2014 *NVs* are authentic, and a *Note Verbale* sent from the PRC Laotian Embassy in reply confirming that the 9 January 2014 letter had been sent with the authorisation of the PRC Foreign Ministry.[63] While acknowledging the utility of the test in *Ladd v Marshall*, the Court of Appeal held that where the substantive dispute engages questions of public international law, as in the present case, a court must consider the question of admissibility and weight within the framework of applicable principles of international law.[64] The Court of Appeal held that the critical date doctrine was undoubtedly one such principle.

(2) Weight of post-critical date evidence (2014 notes verbales*) in displacing moving treaty frontier rule in relation to Macau question*

37 The general rule on the interpretation of treaties, as codified in Art 31(1) of the VCLT, instructs treaty interpreters to look, in good faith, to the text, context, and both the object and purpose of the treaty to ascertain its correct meaning, in conjunction with the other elements set out in ss 31(2), 31(3) and 31(4). Section 31(3) is relevant, and provides as follows:

61 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [121].

62 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [62].

63 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [13].

64 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [103].

> 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; [and]
>
> (*c*) Any relevant rules of international law applicable in the relations between the parties.

38 Applying this rule, the Court of Appeal placed far less evidentiary weight on the 2014 *NVs* than the High Court which found that the 2014 *NVs* "signify an agreement under Art 31(3)(*a*) of the VCLT between [the] PRC and Laos that the PRC–Laos BIT does not apply to Macau".[65] Since the Lao government has the burden of proving that which it asserts,[66] its failure to prove that the displacement of the MTF Rule prior to the critical date would mean that its attempt to introduce the 2014 *NVs* was designed to "*contradict* the position which prevailed at the time arbitration proceedings were commenced".[67] Therefore, giving effect to 2014 *NVs* as a subsequent agreement in relation to the interpretation of the PRC–Laos BIT would "amount to effecting a retroactive amendment".[68] Moreover, it would essentially allow Laos to use the PRC's domestic laws in order to justify its position that it is not bound to arbitrate the claim brought by Sanum.[69] The Court of Appeal thus concluded that the PRC's treaties applied to Macau automatically upon Macau's reversion to the PRC in 1999, and that the arbitral tribunal appointed under the PRC–Laos BIT's arbitration agreement has jurisdiction to hear the investment dispute. The Court of Appeal added, for the sake of completeness, that in the circumstances, the 2015 *NVs* ultimately did not have any bearing on the dispute since its decision did not turn at all on the authenticity of the 2014 *NVs*.[70]

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65 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [70].

66 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [112], citing *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Reports 2010 (20 April 2010) at [162] and *The Mavrommatis Jerusalem Concessions* [1925] PCIJ (ser A) No 5 at 29–30.

67 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [112].

68 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [116].

69 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [115].

70 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [121].

39 The Court of Appeal also noted that the High Court judge had been under the mistaken impression that the critical date doctrine would preclude reliance on any material that came into being after the handover of Macau to the PRC had taken place. In fact, Laos could still rely on evidence which came into being after the conclusion of the PRC–Laos BIT or even *after handover but before the dispute had commenced* in trying to prove that there was a subsequent agreement.

40 The Court of Appeal also examined the other pieces of evidence beyond the 2014 *NVs* that had been relied upon by the High Court. On the whole, it found that the evidence was not relevant, persuasive or sufficient to "otherwise establish" that contrary to the operation of the MTF Rule, the PRC–Laos BIT was not intended to apply to Macau.[71] In relation to the Joint Declaration, the Court of Appeal agreed with *amicus* Sir Daniel Bethlehem QC that it establishes "an internal PRC constitutional basis on which the PRC might subsequently have engaged with its bilateral treaty-partners to address the application, or non-application, of PRC treaties to Macau" and cannot substitute bilateral engagement between the PRC and Laos.[72] The Court of Appeal opined that the correspondence in relation to Hong Kong's handover was not a "true analogue" to the situation with Hong Kong.[73] The former was observed to relate to the retention of protections afforded under treaties signed by the UK in the past and did not squarely address the question of whether BITs concluded by the PRC would apply to Hong Kong after the handover. Without further evidence, the above correspondence was found to be irrelevant.[74]

41 The Court of Appeal also observed that the High Court's reliance on the WTO Report was wrong in law as WTO case law has held that statements made in such reports should not be relied upon in dispute settlement procedures.[75] It noted that the question of whether concluded PRC treaties extend to Macau is a complex legal question and

71 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [99].

72 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [78].

73 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [87].

74 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [90].

75 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [98], citing Report of the Panel, *Canada – Measures Affecting the Export of Civilian Aircraft* (WTO Document WT/DS70/R) (14 April 1999) at paras 9.274–9.275 and Report of the Panel, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (WTO Document WT/DS207/R) (3 May 2002) at para 7.95, fn 664.

would involve significant analysis of the issue that is unlikely to have been undertaken in the context of this report.[76]

C. Investor–state dispute settlement clause question

42 The issue before the Court of Appeal was whether the phrase "involving the amount of compensation for expropriation" in Art 8(3) of the PRC–Laos BIT should be interpreted narrowly to include Sanum's expropriation claim, as the UNCITRAL tribunal had done, or to exclude it as the High Court had. This claim raised both issues of liability and compensation. In reversing the High Court decision, the Court of Appeal focused on the context as well as the object and purpose of the PRC–Laos BIT.

43 The Court of Appeal echoed the concerns of both Michael Hwang,[77] an experienced jurist and arbitrator, and the *Tza Yap Shum* tribunal[78] that a narrow interpretation which permitted arbitration only in cases of direct expropriation would denude the arbitration clause of any force. After all, a host state could conceivably avoid arbitration over the amount and modalities of compensation for indirect expropriation simply by not submitting the dispute on liability to its municipal courts, or by denying that it had engaged in expropriatory acts in the first place.[79]

44 The Court of Appeal also took the opportunity to examine and distinguish jurisprudence in relation to the interpretation of ISDS clauses in first-generation Soviet BITs (raised by Laos) that appeared to lend credence to a narrow interpretation in the present case.[80] The distinction was made on two grounds. First, the Court of Appeal held that it was inappropriate to transpose the Soviet context onto the PRC–Laos BIT, thereby heeding the tribunal's cautionary note in *AES Corp v*

76 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [98].

77 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [131], citing Michael Hwang & Aloysius Chang, "*Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters" (2015) 30(3) *ICSID Review* 506 at 522.

78 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [131], citing *Tza Yap Shum v Republic of Peru* (ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence) (19 June 2009) at [188].

79 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [133], citing August Reinisch, "How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?" (2011) 2(1) *Journal of International Dispute Settlement* 115 at 173.

80 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [135]–[145].

The Argentine Republic[81] that each BIT has its own identity and "striking similarities in the wording of many BITs often dissimulate real differences in the definition of certain key concepts".[82] The *amici* too shared this opinion.[83] Second, the Court of Appeal held that unlike the Soviet BITs, the ISDS clause in the PRC–Laos BIT contained a "fork-in-the-road" provision that would limit the investor's access to arbitration if the investor had recourse first to the national courts to determine whether an expropriation had taken place.

IV. Analysis of Court of Appeal's decision

A. Whether investor–state disputes are justiciable under International Arbitration Act

45 Some have queried whether the IAA can be used as a basis for Singapore courts to assume supervisory jurisdiction over investor–state arbitrations arising from BITs. Notably, no judicial consideration was given to whether a Singapore court could be seized of the jurisdiction given that the IAA is meant to give effect to the UNCITRAL Model Law on international commercial arbitration. In fact, Boo and Rivera-Dolera have observed that while "some may see the court's decision as another manifestation of the Singapore's courts strong support for arbitration, it should be borne in mind that BITs are entered into by state parties and not by investors".[84] They go on to conclude that the court's readiness to displace the state parties' "joint express intentions" could serve to be inimical to Singapore's wish to be an investment arbitration hub.[85] Most recently, when clarifying that the Singapore International Commercial Court's jurisdiction as a supervisory court extended to international commercial arbitration, lawmakers alluded to the possibility that further amendments to the Rules Of Court[86] will make clear whether or not the SICC can therefore also be the curial court for IAA-related investment arbitration cases such as *Sanum Investments*.

46 While the present authors agree that it would be helpful to have a legislative amendment which makes clear that the scope of s 10(3) of

81 ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005).

82 *AES Corp v The Argentine Republic* (ICSID Case No ARB/02/17, Decision on Jurisdiction) (26 April 2005) at [24]–[25].

83 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [146].

84 Lawrence Boo & Earl J Rivera-Dolera, "Arbitration" (2016) 17 SAL Ann Rev 89 at 93.

85 Lawrence Boo & Earl J Rivera-Dolera, "Arbitration" (2016) 17 SAL Ann Rev 89 at 93.

86 Cap 332, R 5, 2014 Rev Ed.

the IAA includes investment arbitration, in the authors' view, the Court of Appeal rightly construed the effect of the state parties' silence and inaction prior to the critical date and their purported express intentions thereafter. Put differently, it is not for state parties to a BIT to subjectively proffer the meaning and effect of clauses in a BIT without due regard to international law principles. *Sanum Investments* could also have an impact on investors if they are electing between ICSID and non-ICSID arbitrations. This choice was not available to Sanum in this case as Laos is not a party to the ICSID Convention. Such a choice will be predicated on the investors' appetite for curial oversight of the arbitral process.

47 The Singapore courts would not have jurisdiction to hear an application such as the one filed by Laos if it involved a jurisdictional decision made by an ICSID tribunal. This is because the ICSID system is a delocalised and "self-contained" one, which is independent of any other legal framework[87], and with the benefit of Art 53 of the ICSID Convention unequivocally providing for the finality of ICSID awards.[88]

B. Implications of de novo *standard of review*

48 By opting for a *de novo* standard of review, the decision in *Sanum Investments* provides much needed clarity, and is consistent with the approach of other jurisdictions which appear to apply a *de novo* standard of review for jurisdictional awards.[89]

49 There are cogent reasons for the courts to hear the matter afresh rather than to assume the position of an appellate body. The following passage of Judith Prakash J's (as her Honour then was) ruling in *Insigma Technology Co Ltd v Alstom Technology Ltd*[90] is apposite:[91]

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87 See R Doak Bishop & Silvia M Marchili, *Annulment under the ICSID Convention* (Oxford University Press, 2012) at para 2.28.

88 Article 53 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature on 18 March 1965) (1966) 575 *United Nations Treaty Series* 159 provides:

> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
>
> (2) For the purposes of this Section, 'award' shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

89 See, *eg*, *The Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm.) and *BG Group plc v The Republic of Argentina* 134 S Ct 1198 (2014).

90 [2009] 1 SLR(R) 23.

91 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR(R) 23 at [22].

> First, if the court was limited to a process of review, it might be reviewing the decision of a tribunal that itself had no jurisdiction to make such a finding. Second, the procedure to determine jurisdiction is available to a party that took no part in the arbitral proceedings; if the court was confined to a review of the tribunal's decision this would greatly undermine the ability of the challenging party to make its case. Third, if there is to be a challenge on an issue of fact, the court should not be in a worse position to make an assessment than the tribunal, and should therefore be able to examine witnesses in the usual way. *Accordingly, therefore, a party is entitled to raise an objection to jurisdiction before the judge that it had not raised and argued before the arbitrator* … [emphasis added]

50 Some commentators have noted that investors, by opting for an *ad hoc* arbitration instead of an ICSID one, have consented to anchor the arbitral procedure in the national legislation applicable at the seat of the arbitration.[92] In that regard, it is not inconceivable that municipal courts might review an investment treaty award, and in so doing, adjudicate upon public international law issues where necessary, just as the Court of Appeal chose to do in *Sanum Investments*.

51 While the *de novo* standard of review has its merits, it remains unclear if it would in fact encourage high-profile arbitrations to be seated in Singapore, as it can be argued, with equal force, that the finality of arbitral awards could be compromised if the Singapore courts were to function as a *de facto* appeal mechanism.[93] In this regard, a Canadian court in *The United Mexican States v Metalclad Corp*[94] partially vacated an early North American Free Trade Agreement ("NAFTA") tribunal award in *Mexico v Metalclad* when it intervened in support of Mexico and held that NAFTA tribunals were not entitled to extensive judicial deference by Canadian courts. Troubled by this Canadian court decision, the parties in *UPS v Canada* and *ADF v United States* opted for arbitration seated in Washington DC, rather than Ottawa and Quebec respectively.[95]

92 Kaj Hobér & Nils Eliasson, "Review of Investment Treaty Awards by Municipal Courts" in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small ed) (Oxford University Press, 2010) at pp 662-664.

93 See Lawrence Boo & Earl J Rivera-Dolera, "Arbitration" (2016) 17 SAL Ann Rev 89 at 93.

94 [2001] BSCS 664.

95 See Todd Weiler & Tai-Heng Cheng, "The Virtue of Judicial Restraint: Two Comments on *Laos v Sanum*" *Global Arbitration Review* (12 March 2015).

C. Assessment of evidence in relation to moving treaty frontier rule

52 The Court of Appeal decision provides clear guidance on the application of the MTF Rule and the critical date doctrine particularly where purported subsequent agreements are concerned. Adopting the MTF Rule, the Court of Appeal held that the PRC's treaties apply to Macau unless the BIT says otherwise. Indeed, it may often be politically problematic for the courts to allow extraneous (and informal) sources to create new obligations not articulated within the BIT itself. The Court of Appeal's decision comports with the accepted principle of international law that absent treaty provisions to the contrary, the "critical date" is the date of the institution of proceedings, with all measures and events taking place after that date being irrelevant to the question of jurisdiction.[96] In other words, an arbitral tribunal's jurisdiction is vested at the point that consent is perfected, even if the contracting states have amended or retroactively terminated the investment treaty after that point. As such, the Court of Appeal rightly gave little weight to the 2014 *NVs* created and adduced by Laos and the PRC after the critical date.

53 Although it has been said that treaty interpretation is not necessarily determined by a "fixed 'original intent', but must rather be determined by taking into account a broader range of considerations, including certain later developments",[97] the Court of Appeal is entitled under Art 31(1) of the VCLT to "take into account" subsequent practice but, in the final analysis, place little weight on it. On a practical level, *Sanum Investments* forestalls the practical consequences of the High Court decision – that is, if the MTF Rule was inapplicable in all cases involving Hong Kong and Macau, the PRC would have to renegotiate its agreements to show that they apply to both special administrative regions.

54 The departure of the Court of Appeal from the *Ladd v Marshall* test in assessing admissibility of evidence in favour of the critical date doctrine is a welcome one. By applying the test, albeit in the less stringent *Lassiter* formulation, to a review of an arbitral tribunal's decision on jurisdiction, the High Court essentially exercised an appellate function and did not carry out a complete rehearing; a position that would be incompatible with a *de novo* standard of review. Moreover, it has been observed that the *Lassiter* test applies specifically to decisions

96 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [65].

97 See, *eg*, United Nations, General Assembly, *Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, A/CN.4/671 (26 March 2014) at pp 50–51 and *Yearbook of the International Law Commission* 1966 vol II (United Nations, 1966) at p 221, para 15.

of the Registrar that do not involve the conducting of proceedings akin to a trial,[98] whereas arbitral proceedings are akin to a full trial. It has also been argued that the application of the *Lassiter* test could create a perverse incentive for parties to withhold evidence from the arbitral tribunal so they can introduce them at court where a less stringent standard is applied. Indeed, the present authors believe that the eleventh-hour introduction of the two 2014 *NVs* at the High Court by Laos could be said to be a case in point.[99]

(1) Assessing subsequent agreements in relation to moving treaty frontier rule

55 The Court of Appeal's clarification of the applicability of subsequent agreements or evidence that materialised after the critical date[100] is an important one. It is consistent with international law jurisprudence that the interpretation of treaties is not necessarily determined by a "fixed 'original intent', but must rather be determined by taking into account a broader range of considerations, including certain later developments", and in this context the parties' subsequent agreement or practice can be an authentic means of interpreting a treaty.[101]

56 Ultimately, the Court of Appeal appeared to have considered the 2014 *NVs* a thinly veiled attempt to make *ex post facto* changes to the intent of the parties at the time the BIT was entered into. The dubious quality of the 2014 *NVs* is notable; in particular the unsigned letter of the PRC to Laos from an anonymous Chinese official with no reference to the author's department or designation or any indication that a PRC governmental entity was involved in its preparation. This fell short of the diplomatic correspondence one would expect to see from an

98 *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR(R) 392 at [26]; see also *Ang Leng Hock v Leo Ee Ah* [2004] 2 SLR(R) 361 at [15], *Tan Sia Boo v Ong Chiang Kwong* [2007] 4 SLR(R) 298 and *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR(R) 1133 at [14].

99 Yvette Anthony & Nish Shetty, "The *Sanum* Case: A Comparison between ICSID and *Ad Hoc* Investment Treaty Arbitration: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322" (2015) 11(2) Asian International Arbitration Journal 181 at 184.

100 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [100]–[122].

101 See *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) at [386] and Gary Born, Jonathan Lim & Darshini Prasad "*Sanum v. Laos* (Part II): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC–Laos BIT" (11 November 2016), citing United Nations, General Assembly, *Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, A/CN.4/671 (26 March 2014) at pp 50–51 and *Yearbook of the International Law Commission* 1966 vol II (United Nations, 1966) at p 221, para 15.

authorised official of the PRC's Ministry of Foreign Affairs in Beijing. This might be contrasted with the detailed correspondence of the Singapore's Ministry of Foreign Affairs with a department of the Taiwanese Ministry of Transport and Communications which was closely examined by the Court of Appeal in *Civil Aeronautics Administration v Singapore Airlines Ltd*[102] albeit in the context of determining whether state immunity could be invoked in that case. Specifically, the correspondence in this case involved a request for a certificate confirming Taiwan's status as a state for the purposes of s 18 of the State Immunity Act.[103] Therefore, parties should ensure that the evidence they seek to rely on passes muster, particularly if it pertains to interstate communications; they should expect close judicial scrutiny of the evidence presented.

57 The Court of Appeal also distinguished the High Court decision of *Review Publishing*, which held that a letter from the Singapore Ministry of Foreign Affairs, which post-dated the commencement of the dispute, "might potentially be material … as evidence of subsequent state practice" in the application of a treaty concluded between Singapore and the PRC to Hong Kong.[104] The Court of Appeal held this case, relied on by Laos, was not analogous to the present facts as it involved the applicability of domestic rules on the manner of service outside jurisdiction notwithstanding the availability of recourse to treaty analysis. Even in that analysis, the central question was whether courts should not depart from the views of the executive branch of government on the question of the applicability of a treaty rather than the application of the MTF Rule. This is in contrast to the present issue, which involved a jurisdictional question governed almost entirely by public international law principles.[105]

58 The Court of Appeal in *Sanum Investments* distinguished the use of an interpretive note in the ICSID case of *ADF Group, Inc v United States of America*[106] ("*ADF Group*") from the present facts. In the former, a tribunal constituted under the NAFTA gave effect to an interpretive statement by the contracting states issued after the notice of arbitration, on the basis that Art 1105 of the NAFTA expressly permits the NAFTA Free Trade Commission (that is, the contracting states) to issue binding interpretative statements, unlike the PRC–Laos BIT. It was its nature as a *binding interpretation* rendered pursuant to an express provision that explained why significant weight was placed on that note of

102 [2004] 1 SLR(R) 570.
103 Cap 313, 1985 Rev Ed.
104 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [74].
105 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [120].
106 ICSID Case No ARB(AF)/00/1, Award (9 January 2003).

interpretation, notwithstanding that it was only issued after the dispute had arisen, in contrast to the 2014 *NVs*.[107] Some scholars have noted that some interpretative statements are tantamount to retroactive amendments, which may undermine the rule of law. For instance, it has been observed that the conduct of the host state of the investment must be measured on the basis of norms in effect when the conduct occurred and not of newly created norms; which may happen if the purported interpretation is issued after the conduct and is in reality an amendment.[108] In practice, it will be difficult to draw a line between a true interpretation and a retroactive amendment.

59 That is not to say that diplomatic notes can never be accorded weight. As a general principle, it appears that the Singapore courts will likely consider exchanges of diplomatic notes with an "interpretative declaration" which limit the operation of an investment provision as evidence of state practice. The exchange of such notes can be instructive if made before the critical date. An example of a successful invocation of such an exchange of diplomatic notes would be Argentina and Panama's shared understanding of the most-favoured-nation provision in their BIT.[109]

(2) Impact of unilateral declarations on moving treaty frontier rule

60 The Court of Appeal has also analysed the legal nature of the Joint Declaration which preceded the PRC–Laos BIT; important analysis which was omitted in the High Court decision as it took the Joint Declaration at face value. The High Court gave the impression that unilateral declarations may contribute to establishing a party's intention as to territorial scope by expressing that the governments in question should "have been fully aware of the implications" of a declaration "worded in general terms".[110] Whilst affirming the principle that such declarations would not ordinarily bind third parties such as Laos, the Court of Appeal held that given the status of the MTF Rule as an established norm of customary international law, Laos cannot unilaterally contract out of it. Thus, save for express intention by both

107 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [118].

108 Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law" in *Fifteen Years of NAFTA Chapter 11 Arbitration* (Emmanuel Gaillard & Frédéric Bachand eds) (Juris Publishing, 2011) at pp 190-192.

109 See Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority" (2014) 55 Harv Int'l LJ 1 at 58; "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104 *American Journal of International Law* 179 at 217–221.

110 *Government of the Laos People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 at [76].

parties at the critical date to displace the MTF Rule, it was presumptively applicable to Laos.

(3) Need for clarity on how moving treaty frontier rule can be displaced

61 While the Court of Appeal has provided commendable clarity on what would not displace the MTF Rule, it has not shed light on the standard of proof required to displace the MTF Rule. With respect, little attention was devoted to the form in which, or the time at which, such an intention must be expressed. In the present case, one might argue that Laos could have been directed to produce evidence from its own files evidencing internal and intergovernmental thinking of treaty negotiation and implementation at or around the critical date. The PRC could likewise have been asked for relevant correspondence at the time of Macau's handover to it in 1999. Further, reference could also have made to the burgeoning parallelism existent among Chinese international investment agreements ("IIAs"), as well as between PRC IIAs and IIAs concluded by Hong Kong and Macau. For example, the PRC's FTAs that include investment chapters, such as the PRC–Peru free trade agreement ("FTA"), which refers to the PRC's "customs territory", could potentially impact the territorial scope of the PRC–Peru BIT.[111] Such evidence would not have been conclusive of the treaty parties' intent regarding the scope of the PRC–Laos BIT, but it might have lent weight to some of the arguments advanced by the parties before the Court of Appeal.

D. Proper scope of narrow investor–state dispute settlement clauses in first-generation bilateral investment treaties

62 While later generations of BITs, particularly in China and Russia (or the former Soviet Union), have adopted a more liberal view on investment protection to attract global capital, in particular, by providing for arbitration of all investor–state disputes under the treaty, many investments still remain covered only by the "first-generation" BITs which adopt dispute resolution clauses restricted to determining only the "amount of compensation" for expropriation. The settled view of such clauses was once "that they constituted a bar to international

111 Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (signed on 9 June 1994); see also Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru (28 April 2009) Art 5 and Odysseas G Repousis, "On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao" (2015) 37(1) Mich J Int'l 113 at 189.

arbitration in respect of substantive issues, so that arbitration was available only if an investor was fortunate enough to have first obtained a finding by a host State organ that its property had been [directly] expropriated".[112] Today, there is a growing divide in the case law on the interpretation of "amount of compensation" arbitration clauses, with some tribunals employing a broad interpretation so as to arbitrate disputes regarding the existence and/or lawfulness of an expropriation including those related to the quantum of compensation,[113] and other tribunals adopting a narrow interpretation so as to restrict their jurisdiction to disputes on the quantum of compensation for expropriation.[114] Despite the reference to Art 31 of the VCLT to aid interpretation in all of those cases cited above, varied outcomes have emerged due to the different ways of deploying Art 31, to either place importance on the ordinary meaning of the treaty text or to give a dominant role to the object and purpose of the BIT.[115]

63 *Sanum Investments*, together with *Tza Yap Shum*, is part of a larger shift in jurisprudence away from the narrow interpretation of the arbitration clauses in "first-generation" communist BITs to a broader one. Up to 2006, the orthodox position at international law was that investors covered by such "first-generation" BITs concluded by communist states in the 1980s, particularly the PRC and the former Soviet Union, could only refer quantum of expropriation to arbitration, with the question of whether expropriation actually occurred left to be

112 Michael Hwang & Aloysius Chang, "*Government of the Lao People's Democratic Republic v Sanum Investments Ltd*: A Tale of Two Letters" (2015) 30(3) *ICSID Review* 506 at 523.

113 See, *eg*, *Mr Franz Sedelmayer v The Russian Federation* (SCC Case No 106/1998, 7 July 1998), *Telenor Mobile Communications AS v The Republic of Hungary* (ICSID Case No ARB/04/15, Award) (13 September 2006), *Saipem SpA v The People's Republic of Bangladesh* (ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures) (21 March 2007), *The Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm) and *Renta 4 SVSA v Russian Federation* (SCC Case No ArbitrationV 024/2007, Award on Preliminary Objections) (20 March 2009).

114 See, *eg*, *Plama Consortium Ltd v Republic of Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction) (8 February 2005), *Vladimir Berschader and Moïse Berschader v The Russian Federation* (SCC Case No 080/2004, Award) (21 April 2006), *RosInvestCo UK v The Russian Federation* (SCC Case No 079/2005, Award on Jurisdiction) (October 2007), *Austrian Airlines AG v The Slovak Republic* (UNCITRAL, Final Award) (9 October 2009) and *ST-AD GmbH v The Republic of Bulgaria* (UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction) (18 July 2013).

115 See Romesh J Weeramantry & Claire Wilson, "The Scope of 'Amount Of Compensation' Dispute Resolution Clauses in Investment Treaties" in *Evolution in Investment Treaty Law and Arbitration* (Chester Brown & Kate Miles eds) (Cambridge University Press, 2011) at p 425 and August Reinisch, "How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?" (2011) 2(1) *Journal of International Dispute Settlement* 115 at 152–172.

decided by national courts. Support for the restricted scope of these provisions stem from the decisions of the investor–state tribunals in relation to similarly worded arbitration clauses in Soviet BITs, namely, *Vladimir Berschader and Moïse Berschader v The Russian Federation*[116] ("*Berschader*"), which involved a claim by Belgian nationals under the Belgium–Luxembourg Economic Union–Soviet Union BIT,[117] and *RosInvestCo UK Ltd v The Russian Federation*[118] ("*RosInvestCo*"), which involved a claim by UK nationals under the UK–Soviet Union BIT. Both cases concerned the interpretation of a provision which gave investors the right to arbitrate disputes only "concerning the amount or mode of compensation". In both cases, the tribunals adopted a purely textual interpretation based on the wording of the provisions. In *Berschader*, the tribunal stated that "the ordinary meaning of Article 10.1 is quite clear", emphatically stating that the "wording expressly limits the type of dispute, which may be subjected to arbitration under the Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act occurring under the terms of Article 5".[119] In *RosInvestCo*, the tribunal similarly stated that "[i]n order to give an ordinary meaning to that qualification [in the arbitration clause], it can only be understood as a limitation of the jurisdiction conferred by that clause".[120]

64 This narrow interpretation effectively precluded international arbitration as a forum for potential dispute resolution between foreign investors and the PRC/USSR under such "first-generation" BITs.[121] Indeed, this was a legacy of how communist states in the 1980s viewed foreign investment and international arbitration with caution and suspicion due to the ideological differences between the communist and capitalist systems, and the communist states' perception that capitalist ideals had the potential to erode their states' sovereignty.[122]

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116 SCC Case No 080/2004, Award (21 April 2006).

117 Belgium, Luxembourg and Union of Soviet Socialist Republics Agreement Concerning the Reciprocal Promotion and Protection of Investments (signed on 9 February 1989).

118 *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No 079/2005, Award on Jurisdiction) (October 2007).

119 *Vladimir Berschader and Moïse Berschader v The Russian Federation* (SCC Case No 080/2004, Award) (21 April 2006) at [152].

120 *RosInvestCo UK v The Russian Federation* (SCC Case No 079/2005, Award on Jurisdiction) (October 2007) at [110].

121 See, *eg*, Stephan W Schill, "Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China" (2007) 15 Cardozo J Int'l & Comp L 73 and Kathryn Sanger, "Basic Principles of Investment Treaties" in *Investor–State Arbitration – Lessons for Asia* (Michael J Moser ed) (Juris Publishing 2008).

122 See, *eg*, Jane Y Willems, "The Settlement of Investor State Disputes and China: New Developments on ICSID Jurisdiction" (2012) 8(1) SC J Int'l L & Bus 1 at 3 and 21–27 and Nils Eliasson, "Chinese Investment Treaties – A Procedural

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65 However, the narrow view which was preferred by the High Court in *Sanum Investments* could allow host states to conveniently circumvent an investor's jurisdiction by denying the existence of any regulatory expropriation.[123] This has been observed to be antithetical to the object and purpose of a BIT in *Renta 4 v Russia*[124] ("*Renta 4*"), which involved the interpretation of a similarly worded expropriation clause in a Soviet BIT. The *Renta 4* tribunal dismissed the analysis of the *Berschader* tribunal, which had ruled in favour of the Russian Federation. In the *Renta 4* tribunal's view, the position advanced by the Federation was erroneous as it meant that "the predicate of obtaining *any* amount of compensation according to *any* method would be hostage to the host State's self-determination as to whether it is due at all" [emphasis in original].[125] The *Renta 4* tribunal's decision to adopt a broad interpretation of the dispute resolution provision is consistent with the importance Court of Appeal in *Sanum Investments* attached to the object and purpose of the BIT. The following passage of the *Renta 4* award is thus instructive:[126]

> *It must be accepted that investment is not promoted by purely formal or illusory standards of protection*. It must more specifically be accepted that a fundamental advantage perceived by investors in many if not most BITs is that of the internationalisation of the host state's commitments. It follows that it is impermissible to read Article 10 of the BIT *as a vanishingly narrow internationalisation* of either Russia's or Spain's commitment … *The dispute would not be internationalised if the respondent State could simply declare whether there is an obligation to compensate*. Either signatory State could thus by its fiat ensure there would never be an arbitration under Article 10. *This would be an illusion which the Tribunal cannot accept as consonant with Article 31 of the Vienna Convention* if ever that Article is to be given its full weight. [emphasis added]

66 In arriving at its decision, the tribunal in *Renta 4 v Russia* referred to UK High Court judge's analysis of a similar limitation of dispute resolution in *Czech Republic v European Media Ventures SA*

Perspective" in *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Vivienne Bath & Luke Nottage eds) (Routledge, 2012); "Investor–State Arbitration and Chinese Investors – Recent Developments in Light of the Decision on Jurisdiction in the Case *Mr. Tza Yap Shum v. The Republic of Peru*" (2009) 2(2) Contemp Asia Arb J 347 at 353–354.

123 August Reinisch, "How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?" (2011) 2(1) *Journal of International Dispute Settlement* 115 at 117 and 173.

124 *Renta 4 SVSA v The Russian Federation* (SCC Case No 024/2007, Award on Preliminary Objections) (20 March 2009).

125 *Renta 4 SVSA v The Russian Federation* (SCC Case No 024/2007, Award on Preliminary Objections) (20 March 2009) at [58].

126 *Renta 4 SVSA v The Russian Federation* (SCC Case No 024/2007, Award on Preliminary Objections) (20 March 2009) at [56].

("*European Media Ventures*") with approval,[127] and which the tribunal hailed as "the most thorough and detailed" decision of all previous judgments rendered regarding such restrictive expropriation clauses.[128] In *European Media Ventures*, Simon J concluded that a broad interpretation of Art 8(1) of the Czech Republic–Belgian Luxembourg Economic Union BIT[129] was to be preferred:[130]

> 47. In my view the ordinary meaning of the words of Article 8, with its specific cross-reference to the terms of Article 3(3) suggests strongly that the jurisdiction is not confined to a single issue arising under Art 3(1). The cross-reference to Article 3(3) reinforces the impression that the jurisdiction relates to issues of entitlement and not simply to issues of quantification.
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> 48 *Such an interpretation both gives effect to all the words of Art.8, and 'creates conditions favourable to the making of investments by Investors'* (see the preamble to the BIT). [emphasis added]

67 The Court of Appeal in *Sanum Investments* appears to share this view. Similar to Simon J's *dicta* in *European Media Ventures*, the Court of Appeal interpreted the relevant BIT's dispute resolution provision "consistent with the object and purpose of the BIT".[131] More specifically, the Court of Appeal favoured a broad, holistic interpretation of Art 8(3) of the PRC–Laos BIT:[132] "in addition to the ordinary meaning of the words used in Art 8(3) and the context surrounding the provision, *the Broad Interpretation is also consistent with the BIT's objective of protecting investments*" [emphasis added].

68 While a broad reading of the ISDS clause is to be preferred over a narrow one, some ask whether the proper role of investment tribunals is to correct the meaning of dispute-resolution clauses they deem senseless or whether such remedial action is the sole prerogative of the

127 *The Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm).

128 *Renta 4 SVSA v The Russian Federation* (SCC Case No 024/2007, Award on Preliminary Objections) (20 March 2009) at [53].

129 Accord entre l'Union Économique Belgo-Luxembourgeoise et la République Socialiste Tchécoslovaque Concernant la Promotion et la Protection Réciproque des Investissements ("Agreement between the Belgium–Luxembourg Economic Union and the Czechoslovak Socialist Republic Concerning the Promotion and the Reciprocal Protection of Investments") (signed on 24 April 1989).

130 *Renta 4 SVSA v The Russian Federation* (SCC Case No 024/2007, Award on Preliminary Objections) (20 March 2009) at [47]–[48].

131 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [147].

132 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [150].

state parties entering into the BITs.[133] A difference of opinion between the treaty-maker and treaty-interpreter is evident in this case in light of the PRC's public statements in the aftermath of the Court of Appeal decision. A PRC spokesperson has said that the court's ruling was "incorrect", since the "geographical scope of application of the PRC–Laos investment agreement is a question of fact concerning acts of State, which is up to the contracting parties to decide".[134] In the PRC's view, it seems that it alone should "decide whether or not the international treaties to which the PRC is or becomes a party apply to the Special Administrative Regions ('SAR's) based on the circumstances and their needs after seeking the views of the governments of the SAR".[135] One might argue that as *Sanum Investments* was based on the "specific context surrounding Art 8(3) of the PRC–Laos BIT", it likely remains an open question as to how other courts and tribunals will interpret the PRC's other BITs.[136]

69 It bears mention that the question of whether to prefer a broad or narrow construction of dispute resolution clauses is far from settled. Recently, the Svea Court of Appeal in *Juan Ignacio v Russia*[137] appeared to adopt a narrow approach in setting aside the award in the *Renta 4* case. In *Juan Ignacio*, the Svea Court of Appeal seemed to focus on the wording of the Russia–Spain BIT, concluding that "the wording of the reference to Article 6 set forth in Article 10 does not support the interpretation that the jurisdiction would cover also whether an expropriation actually occurred".[138] Notably, the Svea Court of Appeal also recognised that the object and purpose of a treaty were part of the interpretation to be carried out under Article 31 of the VCLT.[139] However, the Svea Court of Appeal ultimately held that even if the Russia–Spain BIT aimed to attract foreign investments by having "issues relating to expropriation resolved by an international arbitral tribunal than by a national court", such an interpretation did not find support in the plain wording of the Treaty.[140] This approach is reminiscent of the

133 August Reinisch, "How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?" (2011) 2(1) *Journal of International Dispute Settlement* 115 at 174.

134 Kelsey Wilhelm, "MFA Rejects Singapore Ruling" *Macau Business.com* (24 October 2016) http://macaubusiness.com/mfa-rejects-singapore-ruling (accessed 14 February 2018).

135 Kelsey Wilhelm, "MFA Rejects Singapore Ruling" *Macau Business.com* (24 October 2016) http://macaubusiness.com/mfa-rejects-singapore-ruling (accessed 14 February 2018).

136 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [147].

137 *Juan Ignacio v The Russian Federation* (Case No T 9128-14) (18 January 2016).

138 *Juan Ignacio v The Russian Federation* (Case No T 9128-14) (18 January 2016) at 6.

139 *Juan Ignacio v The Russian Federation* (Case No T 9128-14) (18 January 2016) at 4.

140 *Juan Ignacio v The Russian Federation* (Case No T 9128-14) (18 January 2016) at 7.

caution in the *RosInvestCo* award that care must be taken to achieve a "balanced interpretation" of a BIT's clauses, and not to use general aspirational treaty preambles that do not contain any right to international arbitration, and divert the interpretive exercise or "lead to re-write of a narrow jurisdictional clause" in favour of an investor.[141]

70 Conversely, and more recently, the arbitral tribunal in *Beijing Urban Construction Group Co Ltd v Republic of Yemen*[142] ("*Beijing Urban*") closely followed and applied the reasoning of the Court of Appeal in *Sanum Investments*. While acknowledging the need for a "balanced approach", it held that a narrow interpretation would defeat the treaty's object and purpose, which was to promote investments. In the tribunal's view, without "investor protection", the BIT "would be seen as a trap for unwary investors instead of an incentive for them to invest in the [host state]".[143] Moreover, the *Beijing Urban* tribunal opined that the "five judge panel of the Court of Appeal in *Sanum Investments* had dealt persuasively" with the issue when it concluded that the "fork in the road" provision would, if narrowly interpreted, effectively deprive the investor of both choice and protection.[144] This ICSID tribunal drew significantly from the reasoning of the Court of Appeal in *Sanum Investments*, which it quoted with approval.

V. Conclusion

71 The Court of Appeal's decision in *Sanum Investments* cements Singapore's position as a choice forum for the adjudication of investor–state disputes. Its affirmative finding on the justiciability of treaty interpretation and its willingness to apply a *de novo* standard of review in assessing jurisdictional objections to investment arbitral awards whilst invoking principles of public international law paves the way for careful examination of such awards by the Singapore municipal courts to the benefit of jurisprudence in this area, including the recent High Court decision in *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd*,[145] which is the first case in Singapore in which a party sought to set aside an investor–state arbitral award on the merits, and is currently pending appeal. Such a curial inquiry has not come at the expense of Singapore's pro-arbitration stance; and, if anything, has

141 *RosInvestCo UK v The Russian Federation* (SCC Case No 079/2005, Award on Jurisdiction) (October 2007) at [83].

142 ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017).

143 *Beijing Urban Construction Group Co Ltd v Republic of Yemen* (ICSID Case No ARB/14/30, Decision on Jurisdiction) (31 May 2017) at 29–30.

144 *Beijing Urban Construction Group Co Ltd v Republic of Yemen* (ICSID Case No ARB/14/30, Decision on Jurisdiction) (31 May 2017) at 24–28.

145 [2017] SGHC 195.

strengthened it in light of the court's affirmation of the UNCITRAL tribunal's decision to broadly construe the ISDS clause in the PRC–Laos BIT.

72 As discussed above,[146] the Court of Appeal's decision was not embraced by the BIT's contracting States Laos and the PRC. However, their response should not, one hopes, minimise the significance of BITs or ISDS. It would be unfortunate if *Sanum Investments* (and related cases) taint Laotian policy makers' lenses in a way that obscures the benefits' of IIAs.[147] Notably, the decision also has been relied on by outbound Chinese investors. In *Beijing Urban*, the state-owned Beijing Urban Construction Group successfully echoed *Sanum Investments* by advocating for a broad interpretation of a ISDS clause to extend the ICSID tribunal's jurisdiction to matters of liability of a claim for expropriation as well as an assessment of compensation; in contrast to the Republic of Yemen's argument for a narrow position akin to the PRC in *Sanum Investments*. In embarking upon a *de novo* review, the Court of Appeal in *Sanum Investments* has provided much needed clarity regarding the principles that the Singapore courts will adhere to when interpreting treaties; particularly where there is little extrinsic evidence to aid interpretation. Any evidence provided will be closely scrutinised by the Singapore courts, regardless of whether it is presented by a sovereign treaty party to the underlying BIT.

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146 See paras 5, 6 and 68 above.

147 See Romesh Weeramantry & Mahdev Mohan, "International Investment Arbitration in Laos: Large Issues for a Small State" (2017) 18(5-6) *The Journal of World Investment & Trade*.