IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Originating Summons No. 24 of 2014
Summons No. 884 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. not known)

... Defendant

AFFIDAVIT OF SIR DANIEL BETHLEHEM KCMG QC

I, Sir Daniel Bethlehem QC (British Passport No. 099082873), care of 20 Essex Street, London WC2R 3AL, United Kingdom, do solemnly and sincerely make oath / affirm and say as follows:

1. I am a barrister and Queen's Counsel in practice at the London Bar. A copy of my *curriculum vitae* is exhibited at Annex 1 to "**DB–1**".

2. I have been engaged by the Defendant to prepare an expert report for the purpose of these proceedings. A copy of my report is now shown to me and exhibited as "**DB-1**" ("**Report**")

3. I confirm that I prepared the Report exhibited as "**DB-1**" and I accept full responsibility for the Report. For the reasons explained in the Report, I believe that my opinions stated therein are correct.

4. I have read and understood the duties of an expert witness set out in Order 40A of the Rules of Court, Singapore. I understand that it is my duty to assist the Court on matters within my expertise, and that this duty overrides any obligation to the person whom I have received instructions or by whom I am paid. I understand that in giving this Report, my duty is to the Court and I confirm that I have complied with this duty.

AFFIRMED / SWORN by the above named)

DANIEL BETHLEHEM)

this 2nd day of October 2014)

in New York, NY, USA)

Before me,

MARY GRACE McEVOY
Notary Public, State of New York
No. 02MC6103841
Qualified in New York County
Commission Expires Jan. 12, 2016

A NOTARY PUBLIC

This affidavit is filed on behalf of the Defendant.

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

REFERRED TO IN THE AFFIDAVIT OF SIR DANIEL BETHLEHEM QC

AFFIRMED / SWORN THIS 2nd DAY OF OCTOBER 2014

BEFORE ME

A NOTARY PUBLIC

MARY GRACE McEVOY
Notary Public, State of New York
No. 02MC6103841
Qualified in New York County
Commission Expires Jan 12 2016

EXPERT REPORT OF SIR DANIEL BETHLEHEM KCMG QC

Introduction and Professional Experience

1. I, Daniel Bethlehem, am a barrister and Queen's Counsel in private practice at the London Bar. With a 5-year interlude, explained below, I have been in practice at the London Bar for the past 25 years. In parallel with my Bar practice, I am currently the Samuel Rubin Visiting Professor of Law at Columbia University Law School in New York where I co-teach a graduate law course on "International Lawyering for Governments".

2. My Bar practice focuses on Public International Law ("PIL"). In this role, I have advised governments, inter-governmental and non-governmental organisations, corporations and private individuals on a wide range of PIL issues, including, but not limited to, questions of treaty interpretation and application, issues of State succession, diplomatic negotiations and other matters that come within the purview of this Report. Over the years, I have advised and represented some 30 governments on various issues. I was appointed Queen's Counsel in 2003. In recent years, I have increasingly been sitting as presiding or party-appointed arbitrator on investor-State dispute settlement tribunals under the auspices of the Permanent Court of Arbitration in The Hague ("PCA") and the International Centre for the Settlement of Investment Disputes, part of the World Bank, in Washington DC ("ICSID"). At present, I am presiding arbitrator in 2 such cases and party-appointed arbitrator in a further 2 cases.

3. In parallel with my Bar practice, in the period 1992–2006, I held teaching positions at the London School of Economics (1992–1998) and the University of Cambridge (1998–2006). At the London School of Economics, I was a lecturer in international law, where I taught a general international law course and graduate courses on United Nations Law and The World Trade Organisation and International Trade Law. At Cambridge University, where I was a Fellow of Clare Hall, I was, initially, Deputy Director (1998–2003) and, thereafter, Director (2003–2006) of the Lauterpacht Centre for International Law, as well as teaching both undergraduate and graduate PIL courses on United Nations law and on WTO law. I have published widely across a range of PIL subjects.

4. From May 2006 to May 2011, I was the principal Legal Adviser of the United Kingdom Foreign & Commonwealth Office ("FCO"), being appointed to this post, following an open recruitment competition, as the first external appointee to that Office in its 170-year history. In my capacity as FCO Legal Adviser, I had responsibility for a 70-strong team that advised the FCO, and the UK Government more widely, on all issues of PIL. The Legal Adviser's Office in the FCO includes the "Treaty Section", the team that has government-wide responsibility for the provision of advice on practice and procedural matters relating to the conclusion of treaties by the United Kingdom. As FCO Legal Adviser, I led UK diplomatic and negotiating teams on various issues and was intimately engaged on the major questions of treaty interpretation and application that arose during this period. I was also ultimately responsible for the position taken by the United Kingdom on the codificatory and progressive development work of the International Law Commission. I was knighted in June 2010.

5. A summary curriculum vitae, together with a copy of my Bar Practising Certificate, are at **Annex 1**.

The issues I am asked to address

6. I have been asked by the Defendant, Sanum Investments Limited ("Sanum"), to provide an Expert Report on certain questions of PIL arising from Originating Summons OS No.24/2014 ("OS 24"), and from the Expert Report of Professor Simon Chesterman dated 7 April 2014 ("Chesterman Report"). In particular, I am asked to address the following.

   (a) The correct framework under PIL to determine whether the Agreement Between the Government of the People's Republic of China ("PRC") and the Government of the Lao People's Democratic Republic ("Laos") Concerning the Encouragement and Reciprocal Protection of Investments ("PRC/Laos BIT") extended to the Macao Special Administrative Region ("Macao") upon the handover of territory in 1999.

(b) My assessment of the Chesterman Report conclusion that the PRC/Laos BIT never applied to Macao under the "moving treaty frontiers" rule.

(c) My assessment of the Chesterman Report conclusion that the correspondence between Laos and the Embassy of the PRC in Vientiane, dated 7 and 9 January 2014, represents a "subsequent agreement" between the parties regarding the interpretation of the PRC/Laos BIT or the application of its provisions under Article 31 of the Vienna Convention on the Law of Treaties ("VCLT").

7. For purposes of this Report, I have reviewed the following case documents:

(a) PRC/Laos BIT of 31 January 1993 (exhibited as **Annex 2**).

(b) Award on Jurisdiction dated 13 December 2013 by the Arbitral Tribunal in PCA Case No.2013-13, i.e., the bilateral investment treaty ("BIT") arbitration award in the underlying dispute in this matter ("Award" or "Award on Jurisdiction"; exhibited as **Annex 3**).

(c) International Arbitration Act 1994, as amended (Cap 143A).

(d) OS 24.

(e) Summons No.884 of 2014.

(f) Note Verbale ("NV")[1] from the Ministry of Foreign Affairs of the Lao People's Democratic Republic to the Embassy of the People's Republic of

[1] In his Report, Professor Chesterman, in common with the language used in other expert reports in this case, describes this communication, and the reply from the PRC, as a "Letter". This is not accurate. It is properly described as a "Note Verbale". A Note Verbale, sometimes referred to as a "Diplomatic Note", is a standard format, unsigned diplomatic communication that is drafted in the third person. It is a commonly used form of diplomatic communication between the embassy of a foreign State and the government authorities of the State in which it is located. It is said to be more formal than an "Aide-mémoire" but less formal than a "Note". The correct description of these communications is potentially important as it may have a bearing on their legal effect.

China in Vientiane, dated 7 January 2014 ("Laotian NV"; exhibited as Annex **4**).

(g) Note Verbale from the Embassy of the People's Republic of China in Vientiane to the Ministry of Foreign Affairs of the Lao People's Democratic Republic, dated 9 January 2014 ("PRC NV"; exhibited as **Annex 5**).

(h) 1st Affidavit of Outakeo Keodouangsinh dated 10 January 2014.

(i) 1st Affidavit of John K. Baldwin dated 22 January 2014.

(j) 2nd Affidavit of Outakeo Keodouangsinh dated 10 February 2014.

(k) 1st Affidavit of Chin-Puar Yow-Hoy dated 19 February 2014.

(l) 3rd Affidavit of Outakeo Keodouangsinh dated 19 February 2014.

(m) 2nd Affidavit of John K. Baldwin dated 24 February 2014.

(n) 1st Affidavit of Chong Wan Yee Monica dated 24 February 2014.

(o) 1st Affidavit of Wenhua Shan dated 18 March 2014.

(p) 3rd Affidavit of John K. Baldwin dated 19 March 2014.

(q) 1st Affidavit of Ee Ah Choo dated 18 March 2014.

(r) 1st Affidavit of John James Maresca dated 27 March 2014.

(s) 1st Affidavit of Alounkeo Kittikhoun dated 4 April 2014.

(t) 2nd Affidavit of Chin-Puar Yow-Hoy dated 4 April 2014.

(u) 1st Affidavit of Guiguo Wang dated 7 April 2014.

(v) 1st Affidavit of Simon Chesterman dated 7 April 2014.

8. In addition to the case documents indicated above, I have also reviewed all the other documents and legal authorities cited in this Report. In the interests of economy, the exhibits accompanying this Report are limited to those which are material to the issues addressed and do not include every document to which reference is otherwise made for reasons of accuracy and completeness. Full reference information is provided for all such documents.

9. I emphasise that this Report, and my Opinion, are limited to questions of PIL. Insofar as I comment herein on any issue of PRC or Laotian law or practice, I do so solely from the perspective of PIL. I do not otherwise offer an opinion on any question of PRC or Laotian law.

Scheme of this Report

10. The remainder of this Report proceeds under the following headings.

(a) Summary of issues and conclusions.

(b) Preliminary and general observations.

(c) The PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao.

(d) The application of the "moving treaty frontiers" rule in this case.

(e) Whether the PRC/Laos Notes Verbales of January 2014 constitute a "subsequent agreement" between the parties sufficient to establish that the PRC/Laos BIT does not apply to Macao.

(f) Conclusions.

Summary of issues and conclusions

11. As emerges from the Award on Jurisdiction, Sanum commenced arbitration proceedings against Laos by a Notice of Arbitration dated 14 August 2012 (Award, paragraph 3).[2] The Arbitral Tribunal ("Tribunal") thereafter constituted was composed of Professor Bernard Hanotiau, Professor Brigitte Stern and, as Presiding Arbitrator, Dr Andrés Rigo Sureda. Pursuant to the Tribunal's Procedural Order No.1, Singapore was designated as the place of the arbitration (Award, paragraph 5). Between August and October 2013, the Parties exchanged written pleadings *inter alia* on jurisdiction (Award, paragraphs 7–8). A hearing on jurisdiction was held in Singapore on 6 November 2013, at the conclusion of which the Tribunal requested further submissions from the Parties on a number of specific questions going to the issue of jurisdiction (Award, paragraphs 13–15). The Tribunal's Award on Jurisdiction, dated 13 December 2013, concluded *inter alia* that the PRC/Laos BIT does apply to Macao and that the Tribunal has jurisdiction to arbitrate the expropriation claims of Sanum under Article 8(3) of the PRC/Laos BIT (Award, paragraphs 370(i) and (iii)). The arguments of the Parties on the issue of the application of the PRC/Laos BIT to Macao are set out in the Award at paragraphs 51–110. The Tribunal's analysis and conclusions on this aspect are addressed in the Award at paragraphs 205–300.

12. Following the 13 December 2013 Award on Jurisdiction, on 7 January 2014, the Laotian Ministry of Foreign Affairs sent a Note Verbale to the Embassy of the PRC in Vientiane. In operative part, the Laotian NV sought the views of the Government of the PRC regarding the status of the PRC/Laos BIT in relation to Macao. The NV also expressed the view of the Laotian Government that the PRC/Laos BIT does not extend to Macao.

13. By a Note Verbale dated 9 January 2014, the Embassy of the PRC in Vientiane replied to the Laotian NV expressing the view that the PRC/Laos BIT is not applicable to Macao.

[2] The Award refers to 14 August 201**3**. As will be apparent from the chronology that follows in the Award, this is an error. I am informed that the Notice of Arbitration was dated 14 August 201**2**.

14. By OS 24, dated 10 January 2014, citing section 10(3) of the International Arbitration Act (Cap 143A), Laos challenged the Award on Jurisdiction before the Singapore courts on the grounds that Tribunal "erred in ruling that it has jurisdiction to arbitrate [Sanum's] expropriation claims" under Article 8(3) of the PRC/Laos BIT. Although not stated in terms in the Originating Summons, the Laotian challenge hinges on the contention that the PRC/Laos BIT did not extend to Macao on its reversion to the PRC in 1999. Sanum is resisting the challenge *inter alia* on the ground that the Tribunal correctly concluded that the PRC/Laos BIT extended to Macao from the point of Macao's reversion to the PRC in 1999.

15. Insofar as is pertinent to the issues on which my Report is focused, there is duelling expert evidence so far submitted by the Parties on the question of whether the PRC/Laos BIT extended to Macao in 1999. The analysis and conclusions that I am asked to address are those set out in the most recent affidavit submitted by Laos, prepared by Professor Simon Chesterman in his expert report dated 7 April 2014. The Chesterman Report in turn addresses the expert report submitted by Sanum, prepared by Professor Wenhua Shan, dated 18 March 2014. Other expert evidence addresses overlapping and related issues. The present Report, however, addresses only the analysis and conclusions set out in the Chesterman Report. Insofar it touches upon any of the other expert reports submitted by the Parties, it does so only tangentially for reason of completeness.

16. Professor Chesterman reaches four key conclusions that are directly germane to the issues that I am asked to consider:

(a) The PIL framework relevant to the determination of whether the PRC/Laos BIT extends to Macao is that of Article 29 of the VCLT (exhibited as **Annex 6**)[3] and the customary international law principles reflected in Article 15 of the

[3] The PRC acceded to the VCLT on 3 September 1997. Laos acceded to the VCLT on 31 March 1998. https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (Exhibit **Annex 7**). Without prejudice to any question that may arise regarding the interpretation or application of Article 4, VCLT, it is therefore uncontroversial that the VCLT applies to, and is binding on, both the PRC and Laos *qua* treaty. [Article 4, VCLT provides: "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."] This said, it is

Vienna Convention on Succession of States in Respect of Treaties ("VCST"; exhibited as **Annex 8**)[4] (Chesterman Report, paragraph 25).

(b) The PRC NV of 9 January 2014 is relevant to the exceptions in Article 29, VCLT and Article 15, VCST, and establishes an intention that the PRC/Laos BIT does not apply to Macao (Chesterman Report, paragraphs 31, 34 and 79(b)–(c)).

(c) The Laotian and PRC Notes Verbales, read together, constitute a subsequent agreement between the PRC and Laos regarding the interpretation of the PRC/Laos BIT within the meaning of Article 31(3), VCLT (Chesterman Report, paragraphs 83, 90 and 91).

(d) By reference to Article 29, VCLT, Article 15, VCST and the Laotian and PRC Notes Verbales, the PRC/Laos BIT does not apply to Macao (Chesterman Report, paragraphs 94–98).

17. My analysis and conclusions are set out in detail in the main part of this Report that follows below. By way of summary, my assessment is as follows:

(a) I agree with Professor Chesterman that the PIL framework relevant to the determination of whether the PRC/Laos BIT extends to Macao is that of Article 29, VCLT and Article 15, VCST.

(b) I agree with the analysis and conclusions of the Tribunal, in its Award on Jurisdiction, on the issue of the application of the PRC/Laos BIT to Macao as of the date of Macao's reversion to the PRC in 1999.

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uncontroversial that Article 29, VCLT reflects customary international law, the principle stated in Article 29 being therefore binding on States irrespective of the formal application of the VCLT.

[4] Neither the PRC nor Laos are party to the VCST. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en (Exhibit **Annex 9**). As is addressed more fully in the analytical part of my Report, I am of the view that Article 15, VCST reflects customary international law, a point on which I am in agreement with Professor Chesterman. On this basis, the principle stated in Article 15 is binding on States irrespective of the formal application of the VCST.

(c) I disagree with Professor Chesterman that the PRC NV can be properly relied upon to establish that the PRC/Laos BIT does not apply to Macao.

(d) I disagree with Professor Chesterman that the Laotian and PRC Notes Verbales, read together, can properly be relied upon as a subsequent agreement between the PRC and Laos sufficient to establish that the PRC/Laos BIT does not apply to Macao.

(e) I disagree with Professor Chesterman that, having regard to Article 29, VCLT, Article 15, VCST, the Laotian and PRC Notes Verbales, and other considerations, the PRC/Laos BIT does not apply to Macao in the circumstances of this case.

(f) I am accordingly of the opinion that the PRC/Laos BIT applied to Macao as of the date of its reversion to the PRC in 1999 and that the post-Award Laotian and PRC Notes Verbales cannot properly be relied upon to displace this assessment.

Preliminary and general observations

18. It is useful to begin a more detailed analysis with a number of preliminary and general observations under two headings: (a) issues of appreciation and the Award on Jurisdiction on the question of the application of the PRC/Laos BIT to Macao, and (b) the PRC/Laos BIT. Conscious of the dispute between the Parties concerning the proper scope of the expert reports that have been submitted so far, I aver that the issues that I address below in this section are directly relevant to my overall assessment of, and response to, Professor Chesterman's Report in that they provide essential context to my views as well as a basis for the more specific assessment that follows in the subsequent sections.

Issues of appreciation and the Award on Jurisdiction on the question of the application of the PRC/Laos BIT to Macao

19. I note both that the Tribunal that rendered the Award on Jurisdiction was composed of highly experienced international arbitrators and that, in Professor Brigitte Stern, it included amongst its members an internationally recognised authority on the law on State succession. Professor Stern's 1996 Hague Academy lectures on the subject, published in book form in 2000, are acknowledged as a significant contribution on the subject.[5] The Tribunal referred to this work, to which it was cited, in its Award at paragraph 223 and following.[6]

20. I highlight this point to place in context a number of others. First, both the arguments of the Parties on the issue of the application of the PRC/Laos BIT and the Tribunal's consideration of the matter were addressed at length by the Tribunal. Its recitation of the Parties' arguments extends over some 50 paragraphs and its analysis and conclusions over 95 additional paragraphs. The issue was not treated lightly.

21. Second, although the Tribunal ultimately reached the conclusion that the PRC/Laos BIT applied to Macao, it only did so after careful deliberation, weighing all the relevant factual and legal issues. This is apparent from the following passages of the Award:

> "The Parties have invoked both Article 29 of the VCLT and Article 15 of the VCST.
>
> As the written and oral arguments 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." (Award, paragraphs 212–213)
>
> "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:

[5] Stern, *La succession d'Etats*, Hague Academy of International Law Collected Courses, Martinus Nijhoff Publishers, 2000.
[6] At footnote 392 (referring to CLA-140) and subsequently.

> there were no affidavits from the PRC, Laos or the Macao SAR, which could probably have been obtained from the respective authorities.
>
> Moreover, the response to a question raised by a member of the Tribunal during the Hearing on Jurisdiction did not clarify the matter. …
>
> …
>
> The Tribunal, being left with no actual information on the status of the PRC/Laos BIT must analyse the situation by application of the relevant rules: Article 15 of the VCST and Article 29 of the VCLT." (Award, paragraphs 232–236)
>
> "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." (Award, paragraph 269)

22. As is apparent from paragraph 279 of the Award, at the close of the Hearing on Jurisdiction, the Tribunal also asked for post-hearing submissions from the Parties to address certain questions relating to evidence that had been submitted to it on the issue of the application of the PRC/Laos BIT.

23. While the Tribunal ultimately concluded that "the PRC/Laos BIT is applicable to the Macao SAR" (Award, paragraph 300), it also felt the need to confine its conclusion to the PRC/Laos BIT with the following observation:

> "Of course, the Tribunal limits its finding to the specific PRC/Laos BIT, which it has analysed on the basis of the very 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." (Award, paragraph 299)

24. Third, in reaching the conclusions that it did reach on the issue of the application of the PRC/Laos BIT to Macao, the Tribunal did not simply adopt the position advanced by the Claimant (Sanum). On the contrary, it rejected central elements of the Claimant's submissions (Award, paragraphs 224 and 263). The analysis that informed the Tribunal's conclusions was evidently its own.

25. Fourth, subject to a number of ultimately non-material points of detail, I agree with the Tribunal's analysis and conclusions on the issue of the application of the PRC/Laos BIT to Macao from the point of Macao's reversion to the PRC in 1999. I consider the Tribunal's analysis of the issues, and its judgement in the face of the paucity of factual information before it, to be both careful and compelling. In my view, on the basis of my own analysis, largely but not wholly coincidental with that of the Tribunal, the PRC/Laos BIT applied to Macao from the point of Macao's reversion to the PRC in 1999. I address this in greater detail below.

26. Fifth, the issue that is at the heart of the Chesterman Report, as well as the expert Report of Professor Wenhua Shan and others, is the effect, if any, of the Laotian and PRC Notes Verbales of January 2014, i.e., after the Tribunal's Award on Jurisdiction. This "evidence" was, self-evidently, not before the Tribunal and did not therefore form any part of the Tribunal's analysis for purposes of its Award. The Laotian challenge to the Award on Jurisdiction is thus predicated not so much on the stated proposition that the Tribunal erred in its ruling that it has jurisdiction (i.e., that the Tribunal's analysis and conclusions, on the basis of the information before it, were wrong) but rather that, in the light of the new "evidence" that Laos now adduces, the Tribunal's ruling on jurisdiction was wrong and should be set aside. Stated in these terms, the challenge raises the question of whether the Award requires revision or must be set aside on the ground of a newly discovered fact of a decisive character.

27. It is not for me to comment on whether the views expressed in the Notes Verbales might reasonably have been procured earlier so as to enable them to be put to the Tribunal for purposes of its deliberations. I note simply that the absence of any such information was the subject of specific concern and comment by the Tribunal in its Award, reflecting issues raised with the Parties during the hearing (Award, paragraphs 232–235). Without prejudice to this aspect, quite apart from any issue going to the reliability of the Award, the reliance on post-hoc "evidence" of this kind raises important systemic questions going to what in PIL is termed the "critical date" (i.e., "the date after which the actions of the parties to a dispute can no longer affect the

issue"[7]), the finality of awards, and applications for their revision or set aside in the light of the discovery of new facts. These issues are directly germane to the matters on which my views are sought and I accordingly address them further below.

28. Sixth, and finally, under this heading, I note that the issues addressed by Professor Chesterman, and to which this Report is in response, are not questions of fact, of foreign law, or of technical abstraction. Rather, they are questions of law that are commonly addressed in argument, as opposed to evidence. I make the point not to raise any question about the exercise in which this Report is engaged, as I well appreciate the inter-linkages between the issues of PIL that this Report and that of Professor Chesterman address with the issues of fact and foreign law that are addressed in the other expert reports submitted in this case. My purpose in making this point is rather to frame my analysis and emphasise what may not otherwise be apparent from the Chesterman Report and other expert affidavits. The issue of the application or non-application of the PRC/Laos BIT to Macao after 1999 is ultimately a matter of legal appreciation in the light of all the circumstances and considerations of law. It is not a question of fact that admits of only one possible answer but rather an issue that requires weighing in the balance.

29. This point is critically important for purposes of this Report as it is not a necessary and inevitable conclusion of law that the PRC/Laos BIT applied to Macao from the point of Macao's reversion to the PRC in 1999. However, having regard to the applicable framework of PIL relevant to such matters, as well as to the available factual information, it is my clear and unequivocal judgement that the PRC/Laos BIT did indeed apply, and properly so, to Macao from the point of Macao's reversion to the PRC in 1999. This is not simply an "on balance" assessment. While the issues are not straightforward, and there is room for debate, I do not consider that the law and circumstances properly allow for any other assessment.

30. The wider point just made, i.e., that the issue of the application or non-application of the PRC/Laos BIT to Macao after 1999 is ultimately a matter of legal appreciation, will, I anticipate, be relevant to an aspect of the assessment that will be required of the

[7] Goldie, L.F.E., "The Critical Date", International and Comparative Law Quarterly, Volume 12(4), October 1963, pp. 1251-1284, at p. 1251. (Exhibit **Annex 10**)

Court in this case, namely, the appropriate level of curial intervention in arbitral proceedings. As this is a matter of Singaporean law on which I am not qualified to offer an opinion, I make no further comment on this aspect.

The PRC/Laos BIT

31. Adopting the language of Article 29, VCLT and Article 15, VCST, Professor Chesterman expresses the view that it "appears from the treaty" that the PRC/Laos BIT does not apply to Macao (Chesterman Report, paragraphs 80–91). His analysis of this matter, however, rests almost exclusively on the weight he gives to the Laotian and PRC Notes Verbales of January 2014 as a "subsequent agreement" within the scope of Article 31(3)(a), VCLT. There is virtually no discussion of the PRC/Laos BIT itself.

32. In passing, I note that the Tribunal, in its Award on Jurisdiction, addressed the terms of the PRC/Laos BIT in some detail at paragraphs 239–298, although not, of course, by reference to the Laotian and PRC Notes Verbales, which had not yet been transmitted.

33. Beyond the Tribunal's analysis of its terms, there are aspects of the PRC/Laos BIT that are material to the wider issues under analysis.

34. The PRC/Laos BIT was concluded on 31 January 1993. Pursuant to its terms, it entered into force on 1 June 1993. It was submitted to the United Nations ("UN") Office of Legal Affairs ("OLA") Treaty Section by the PRC on 9 January 1995 for purposes of registration in accordance with Article 102 of the UN Charter,[8] the BIT being published in the UN Treaty Series ("UNTS") with the registration number I-31469.[9]

35. Articles 11 and 12 of the PRC/Laos BIT provide as follows:

[8] Article 102 of the UN Charter provides as follows: "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."

[9] https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800af019 (Exhibit **Annex 11**).

"Article 11

1. The representatives of the two Contracting States shall hold meeting [sic] from time to time for the purpose of:

   (a) reviewing the implementation of this Agreement;
   (b) exchanging legal information and investment opportunities;
   (c) resolving disputes arising out of investments;
   (d) forwarding proposals on promotion of investment;
   (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 written notice to the other Contracting State to terminate this Agreement one year before the expiration 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 Articles 1 to 11 shall continue to be effective for a further period of ten years from such date of termination."

36. A number of considerations follow from these provisions. First, given the terms of Article 11(1)(a) and Article 12(1) and (2), and the initial 10 year period of the application of the BIT, it is reasonable to expect that the responsible governmental authorities in both the PRC and Laos will have undertaken a review of the application of the BIT in advance of the period indicated in Article 12(2) (i.e., 1 June 2002) for purposes of deciding whether it should continue in force. Certainly, I would expect that the relevant PRC authorities that submitted the BIT to the UN Secretariat for purposes of registration would have undertaken such an assessment. This would be

standard practice for any reasonably competent and efficient government office responsible for treaty matters, and it would appear from the PRC's assiduous Depositary Notifications to the UN Secretary-General, in his capacity as depositary in respect of multilateral treaties, that the PRC authorities responsible for treaty matters are more than just reasonably competent and efficient, particularly when it comes to issues concerning Hong Kong and Macao.[10]

37. Second, the period leading to 1 June 2002 would thus have crystallised focus, notably in the PRC, on the application of the PRC/Laos BIT to Macao, even had this not been the case previously. This period also provided an opportunity, consistent with the terms of the BIT, for the parties to have had an authoritative exchange on the application, or non-application, of the BIT to Macao, given that it was open to either party to give written notice of the termination of the BIT. From the absence of any such information before the Tribunal going to these issues, it appears that no such exchanges between the parties took place.

38. Third, the apparent absence of any internal PRC review of the application of the BIT, or of any exchanges between the parties at this point over the application of the BIT to Macao, is not itself dispositive of a view one way or the other on the question of the application of the BIT to Macao after 1999. The relevant PRC and Laotian authorities might have taken the view that the position was clear that the PRC/Laos BIT did or did not apply to Macao and therefore that no further action was necessary. What is material, for present purposes, however, is that the parties to the BIT had a framework within which to consider the question of the territorial scope of application of the BIT as regards Macao, after Macao's reversion to the PRC, and an opportunity to undertake such a consideration, and appear not to have done so. That they did not do so leads at the very least to the conclusion that there is nothing in the parties' "subsequent practice in the application of the treaty" (Article 31(3)(b), VCLT) that can be relied upon to displace the operation of the general rules in Article 29, VCLT and Article 15, VCST to the effect that the PRC/Laos BIT applied to Macao from 1999.

[10] A selection of PRC Depositary Notifications to the UN Secretary-General, in his capacity as depositary of multilateral treaties, is exhibited as **Annex 12**. A full list, and accompany texts, of all such Depositary Notifications are available on the UN Treaty Collection website at https://treaties.un.org/pages/CNs.aspx

39. Fourth, it is material that the PRC/Laos BIT included explicit language on the BIT's period of application and on termination. It would therefore be open to the parties, consistently with the terms of the BIT, to clarify by authoritative agreement between them the application or the non-application of the BIT to Macao going forward, subject to the requirements of Article 12(3) and (4), addressed further below.

40. Fifth, without prejudice to an assessment of this provision in circumstances other than the termination of the PRC/Laos BIT, I note the terms of paragraphs 3 and 4 of Article 12 of the BIT, which together provide, in the case of a termination of the BIT, that Articles 1 to 11 of the BIT shall continue to be effective for a period of 10 years from the date of termination. This has some importance as it underscores an imperative of the BIT to establish and maintain a stable legal framework applicable to investment in the Contracting States by investors of the other Contracting State. It is in the nature of a legitimate expectations or legal framework stability clause. Investors of one Contracting State who invest in the other Contracting State are provided with a grace period of 10 years after any notice of termination of the BIT during which they can continue to rely on the terms of the BIT. In more concrete terms, it means that the parties to the BIT, the PRC and Laos, cannot presumptively and without notice remove from investors the protections of the BIT.

41. The preceding does not, of course, go to the issue of whether the PRC/Laos BIT applied to Macao as of its point of reversion to the PRC in 1999. But, it does go to the importance of (a) maintaining a stable legal framework for investment, and (b) transparency and disclosure by the PRC and Laos about the status of the BIT.

42. These elements of the PRC/Laos BIT are material to another important aspect of the BIT. While it is a treaty between the PRC and Laos, binding on the two States as parties, it also establishes a legal framework that is expressly intended for the benefit of private persons who qualify as "investors", both natural persons and economic entities (PRC/Laos BIT, Article 1(2)). More specifically, Articles 2–6 of the BIT create rights for qualified investors that are actionable in their own name under the dispute settlement provisions of Article 8 of the BIT. So, although the BIT is an instrument concluded by the PRC and Laos, and binding upon them, it also creates

actionable rights for natural and legal persons having the nationality, or which are established under the laws, of the Contracting States. As the Article 12(4) legal framework stability clause makes clear, such persons have acquired rights and legitimate expectations in the arrangements established by the BIT.

43. It also warrants comment that the PRC/Laos BIT affords rights, and establishes procedures to safeguard those rights, that avail Laos, Laotian natural persons and legal entities who invest in the PRC, the PRC, and PRC natural persons and legal entities who invest in Laos. In the (for present purposes) hypothetical scenario that a Laotian natural person or legal entity had invested in Macao after 1999, and subsequently sought to bring a claim in reliance on the PRC/Laos BIT, it would not be open to the PRC, or to Macao, to sustain an argument that the BIT did not apply to Macao. This follows from the uncontroversial terms of Article 27 of the VCLT, which provides in material part that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." It would not be open to the PRC or Macao to sustain a contention that some or other aspect of the PRC's internal constitutional arrangements vis-à-vis Macao precluded reliance on the PRC/Laos BIT by a Laotian investor in Macao.

44. Professor Chesterman challenges Professor Wenhua Shan's expert report on the issue of the application of Article 27, VCLT by reference to various scenarios (Chesterman Report, paragraphs 35–42). Professor Chesterman does not, however, test the reliability of his conclusions by reference to a situation in which a Laotian investor seeks to rely on the BIT against the PRC in respect of an investment in Macao. In such circumstances, the contention that the PRC/Laos BIT did not apply would be almost *per se* unsustainable. It fails presumptively by operation of Article 27, VCLT. Given the avowedly reciprocal nature of the BIT, the reverse position must also apply. If a Laotian investor in Macao after 1999 would be able to rely on the PRC/Laos BIT, so too must it be the case that a Macanese investor in Laos after 1999 would be able to rely on the BIT.

45. I note, by way of concluding observation to this section, that Laos, in the context of the present case, is seeking to rely on unpublished, post-hoc Note Verbale exchanges with the PRC Embassy in Vientiane that would exclude any and all reliance on the

PRC/Laos BIT as regards Macao. It would exclude Laos's reliance on the BIT vis-à-vis the PRC in respect of any Laotian Government interests in Macao, including in connection with the interests of Laotian investors that it may wish to espouse. It would exclude reliance on the BIT by Laotian investors in Macao. It would exclude the PRC's reliance on the BIT vis-à-vis Laos in the interests of Macao or of Macanese investors. It would exclude, as in the present case, reliance on the BIT by Macanese investors in Laos.

46. I do not – and I emphasise this point – I do not take the view that such a result could not be lawfully achieved. In my view, it would be open to the PRC and Laos to exclude the application of the PRC/Laos BIT to Macao with the significant consequences just outlined. In my view, however, given the terms and the objects and purpose of the BIT, such a result could only properly be achieved by the parties to the BIT acting together, in formal, clear and unambiguous terms, and with appropriate advance public notice. I do not consider that the strands of evidence pulled together by Professor Chesterman are even nearly sufficient to achieve the very swingeing outcome that his analysis would sustain.

47. I appreciate, of course, that the simple response to all this would be that this assumes that the PRC/Laos BIT applied to Macao from 1999 in the first place and that the circumstances in issue thus concern the removal of rights already granted. If the BIT did not extend to Macao in 1999, however, there would be no issue of removal of rights. The analysis set out above – so would go the response – thus rests on a false premise.

48. Such a response would be accurate. However, as I address further below, given the PIL framework applicable in such circumstances, the paucity and questionable weight of evidence and information to the contrary, and the swingeing consequences that follow from the Chesterman Report, the balance of legal appreciation weighs heavily in favour of an assessment that the PRC/Laos BIT applied to Macao from 1999. As discussed in paragraphs 28–30 above, while there is room for debate on these issues, it is my clear and unequivocal judgement that a conclusion that the PRC/Laos BIT applied to Macao from 1999 is warranted by reference to the law and the circumstances, and is compelling.

The PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao

49. I turn now to the issue of the PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao after 1999. On this issue, I am largely in agreement with Professor Chesterman, even if we differ on the weight that we attach to various ancillary documents and in our analysis and conclusions that follow from the applicable PIL framework.

50. The applicable principles of PIL that apply to a determination of the application of the PRC/Laos BIT to Macao from the date of Macao's reversion to the PRC in 1999 are to be found in Article 29, VCLT – which applies to the PRC and Laos *qua* treaty, as both States are party to the VCLT[11] – and the principle of customary international law reflected in Article 15, VCST.[12] I note these provisions in this order as the VCLT was concluded in 1969 and the VCST was concluded in 1978. The VCLT thus contains the antecedent principle of PIL on which the principle embodied in Article 15, VCST is based. That the principle embodied in Article 15, VCST is indeed based on that in Article 29, VCLT is addressed more fully below.

51. Article 29, VCLT provides as follows:

> "*Article 29*
> *Territorial scope of treaties*
>
> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

52. Quite apart from the binding character of this provision, *qua* treaty rule, on the PRC and Laos, it is uncontroversial that the principle stated in Article 29, VCLT is a principle of customary international law binding on all States and applicable notwithstanding the formal non-application of the VCLT *inter alia* to treaties concluded before the entry into force of the VCLT for the parties thereto – in the case of the PRC, on 3 September 1997; in the case of Laos, on 31 March 1998.[13] As I

[11] See footnote 3 above.
[12] See footnote 4 above.
[13] See footnote 3 above.

understand it, there is no dispute between the Parties in the present case, and no suggestion to the contrary in the experts reports so far submitted, that Article 29, VCLT reflects customary international law. If State practice and scholarly support for the proposition is required, I note the following observations in *The Vienna Conventions on the Law of Treaties: A Commentary* by Corten and Klein ("Corten & Klein"), one of the leading treatises on the subject:

> "[Article 29] looks rather easy to understand and seems not to have caused much debate in the course of its preparation. Its conditions of adoption at the Vienna Conference in 1969, where 97 delegations voted in favour of it with no votes against or any abstentions, were also rather unusual. It did not give rise to any reservations or interpretative statements, another fact that simply adds to its singularity. …
>
> Even though it has not always been easy to define the expression 'territorial application' of treaties with precision, the rule stated in Article 29 of the Vienna Convention on the Law of Treaties is nonetheless usually considered to reflect general international law."[14]

53. The same appreciation is to be found in another leading treatise, *Vienna Convention on the Law of Treaties: A Commentary* by Dörr and Schmalenbach ("Dörr & Schmalenbach"), in the following terms:

> "Art 29 is regarded as setting out a **rule of customary international law**. Both State practice and scholarly literature agree on this fact. The discussions of the Final Draft in the General Assembly mirror the same consensus. The congruity went so far that some members of the ILC and delegations of States even proposed to delete the provision since it was deemed to be unnecessary."[15]

54. Without prejudice to the customary international law quality of the rule in Article 29, VCLT, a small point of some importance warrants comment. By its terms, the VCLT is not controlling in cases of State succession. Thus, Article 73, VCLT provides as follows:

[14] Corten, O., and Klein, P., *The Vienna Conventions on the Laws of Treaties: A Commentary*, Oxford University Press, 2011, at Volume I, p.732, paragraphs 1–3. Extracts exhibited at **Annex 13**.
[15] Dörr, O., and Schmalenbach, K., *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2012, at p.490, paragraph 3 (footnotes omitted; emphasis in the original). Extracts exhibited at **Annex 14**.

"*Article 73*
Cases of state succession, state responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

55. The terms of Article 73, VCLT notwithstanding, the relevance and importance of Article 29, VCLT in the present context is clear and, as I understand it, uncontroversial as between the Parties to the present case. The relevance and importance of Article 29, VCLT follows from the generality of the principle stated therein, from its antecedent quality as regards Article 15, VCST, and from the uncontroversial appreciation that Article 15, VCST takes as its foundation the principle stated in Article 29, VCLT. Dörr & Schmalenbach address the issue in the following terms:

> "Even though questions of State succession are not covered by Art 29 but by Art 73, State succession may be one of many possible reasons for territorial changes. Each **alteration of State boundaries** influences treaty borders. Therefore, insofar as State succession, like other forms of addition or loss of territory, leads to territorial changes, the 'moving treaty frontiers' rule (→ MN 26), implicitly embodied in Art 29, applies. All other aspects of State succession, especially those affecting the identity of a State, are not governed by the law of treaties but by special rules (→ Art 73)."[16]
>
> "The 'moving treaty frontiers' rule constitutes a **generally recognized principle of international customary law**. Aspects of the rule are to be found both implicitly in Art 29 and explicitly in the Vienna Convention on State Succession in Treaties (Art 15, Art 31 para 2, Art 35). Although the rule has been explicitly included in the convention on State succession, it is not a rule of State succession. As [Special Rapporteur] *Waldock* clearly stated in his second report on succession in respect of treaties in 1969:
>
> > 'the rule provides that, on a territory's undergoing a change in sovereignty, it passes automatically out of the treaty regime of the predecessor sovereign into the treaty regime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of the territory.

[16] Dörr, O., and Schmalenbach, K., *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2012, at p.489, paragraph 2 (footnotes omitted; emphasis in the original). Extracts exhibited at **Annex 14**.

> The rule thus assumes a simple substitution of one treaty regime for another, and denies altogether any succession in respect of treaties.'
>
> The reason for nevertheless **including the 'moving treaty frontiers' rule in the Vienna Convention on State Succession in Treaties** was the fact that the law of State succession is mainly concerned with the exceptions to the rule. Therefore, it was considered necessary to include the 'moving treaty frontiers' rule as a basic provision of the law of State succession in the special convention."[17]

56. Against this background, the issues for discussion in the context of the present case as regards the application of Article 29, VCLT concern the interpretation and application of the exceptions to the rule of the territorial application of treaties stated in Article 29, namely, that treaties apply in respect of the entire territory of the State party thereto unless a different intention (a) appears from the treaty, or (b) is otherwise established.

57. As I read Professor Chesterman's Report, he and I are in agreement on this aspect.

58. The second limb of the applicable PIL framework relevant for present purposes is the "moving treaty frontiers" rule stated in Article 15, VCST. This provides 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 responsibility 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."

[17] Dörr, O., and Schmalenbach, K., *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2012, at pp.498–99, paragraphs, 26–27 (footnotes omitted; emphasis in the original). Extracts exhibited at **Annex 14**.

59. As noted in the Dörr & Schmalenbach extract set out in paragraph 55 above, it is also broadly uncontroversial that the rule stated in Article 15, VCST reflects a principle of customary international law and, as such, that it is a rule that is binding on States regardless of whether they are party to the VCST. I note in passing that the Tribunal in the instant case accepted that both the general rule and the exceptions stated in Article 15, VCST reflected customary international law (Award, paragraphs 221–230), in so doing rejecting the Claimant's (Sanum's) contention that only the general rule in Article 15 had customary international law status, but not the exceptions (Award, paragraph 224). I agree with the Tribunal's conclusions.

60. In further support of the proposition that Article 15, VCST reflects customary international law, I note that there was little controversy over this rule during the International Law Commission ("ILC") process that produced the draft convention and its accompanying commentaries or during the international conference that subsequently led to the adoption of the text of the convention. Although the final text of what is now Article 15, VCST went through some revision during the ILC and UN conference process, from its original introduction as draft Article 2 in the second report of the Special Rapporteur, Sir Humphrey Waldock in 1969,[18] to its migration to become draft Article 10 in the first report of the (new) Special Rapporteur, Sir Francis Vallat in 1974,[19] to its discussion as draft Article 14 during the 1977–1978 UN Conference on Succession of States in Respect of Treaties,[20] no doubt was expressed about the customary international law status of the rule. The commentary to the draft text as finally adopted by the UN Conference in 1978 reflected this in the following terms:

> "Moreover, the rule is well established in State practice and is commonly included by writers among the cases of succession of States. As to the rationale of the rule, it is sufficient to refer to the principle embodied in article

[18] Sir Humphrey Waldock, Special Rapporteur, *Second Report on succession in respect of treaties*, Document A/CN.4/214 and Add.1* and 2, Yearbook of the International Law Commission 1969, Volume II, p.45 et seq., at pp.52–54.
[19] Sir Francis Vallat, Special Rapporteur, *First Report on succession of States in respect of treaties*, Document A/CN.4/278 and Add.1–6*, Yearbook of the International Law Commission 1974, Volume II, p.1 *et seq.*, at pp.37–39.
[20] United Nations Conference on Succession of States in Respect of Treaties, Official Records, Volume I, Summary records of the plenary meetings and of meetings of the Committee of the Whole, A/CONF.80/16, at pp.153–160 and Volume III, Documents of the Conference, A/CONF.80/16/Add.2, at pp.38–40 and 98 *et seq.* Extracts exhibited as **Annex 15**.

> 29 of the Vienna Convention 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."[21]

61. The preponderant weight of authoritative opinion is accordingly that Article 15, VCST reflects customary international law. I am not aware of any serious dispute about this.

62. Looking beyond Article 29, VCLT and Article 15, VCST, there are other texts and instruments to which one might also properly have regard as part of the PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao. So, for example, as part of the evidential dossier relevant to the interpretation and application of the BIT, it would be relevant to consider the following:

- any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty (Article 31(2)(a), VCLT);
- 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 (Article 31(2)(b), VCLT);
- any subsequent agreement between the parties regarding the interpretation or application of its provisions (Article 31(3)(a), VCLT);
- any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31(3)(b), VCLT); and
- any relevant rules of international law applicable in the relations between the parties (Article 31(3)(c), VCLT).

63. As this implies, I am in agreement with Professor Chesterman that, as an abstract matter, a subsequent agreement between the parties to the PRC/Laos BIT regarding the interpretation or application of its provisions would be potentially relevant as part

[21] United Nations Conference on Succession of States in Respect of Treaties, Official Records, Volume III, Documents of the Conference, A/CONF.80/16/Add.2, at p.38, paragraph (3). (Exhibit **Annex 15**)

of the applicable PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao.

64. I note in passing that Professor Chesterman does not anywhere consider the existence, or the absence, of other evidential indicia on the list noted in paragraph 62 above that may have a bearing on the issue. For example, given the express terms of Article 11(1)(a) and Article 12(1)–(3) of the PRC/Laos BIT (addressed in paragraphs 35–41 above), the absence of any subsequent practice of the parties in the application of the BIT in the period 1999–2013, indicating agreement that the BIT did not apply to Macao post 1999 (i.e., practice coming within the scope of Article 31(3)(b), VCLT), supports the proposition that the BIT was applicable to Macao from 1999. Professor Chesterman thus relies on what is in my view questionable conduct in support of the proposition for which he contends but ignores the evidential weight of the absence of any practice that might otherwise have been expected had the position for which he contends been accurate. I return to this issue below.

65. Also relevant to the PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao may be other rules of PIL concerning, potentially, the application of successive treaties relating to the same subject-matter (as addressed *inter alia* in Article 30, VCLT), as well as, perhaps, others instruments and principles. I highlight in particular Article 30, VCLT as potentially relevant to the enquiry given the Portugal/Macao BIT, the PRC/Portugal BIT, the Netherlands/Macao BIT and the Netherlands/PRC BIT addressed by Professor Chesterman (Chesterman Report, paragraphs 69–76). The fact of these treaties, and possibly their terms as well, are quite properly part of the PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao.

66. In summary, the PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao from the point of its reversion to the PRC in 1999 rests, in the first instance, on the principles set out in Article 29, VCLT and Article 15, VCST. Beyond this, and in addition thereto, other texts and evidence will also properly warrant assessment. This includes agreements, practice and rules of law within the scope of Article 31(2) and (3), VCLT, other treaties on the same subject-matter (engaging Article 30, VCLT), as well as other relevant material.

67. By way of conclusion to this section, it warrants emphasis that the general rule that a treaty is binding upon a party in respect of its entire territory is the default and presumptively applicable rule of international law that applies unless a contrary intention is manifest. This follows from both Article 29, VCLT and from the moving treaty frontiers rule in Article 15, VCST. The importance of the general rule is that it establishes a predictable, stable and transparent framework of treaty application. While the presumption that arises by operation of the general rule can be displaced by evidence of intention to the contrary, such evidence will only be relevant within narrow limits and would have to be clear, unambiguous and compelling if it is to displace the operation of the general rule. This follows from normal cannons of interpretation that exceptions to a general rule must be construed narrowly.

The application of the "moving treaty frontiers" rule in this case

68. I turn from this general review of the PIL framework appropriate to a determination of the application of the PRC/Laos BIT to Macao to a consideration of the application of the rules in the specific circumstances of this case. In doing so, it is useful to begin with a brief discussion of the methodology appropriate to the enquiry.

Methodology of enquiry

69. The application of the PRC/Laos BIT to Macao is contested. The Parties have adduced contrasting evidence and have advanced competing submissions. Agreement on the abstract application of Article 29, VCLT and Article 15, VCST aside, there is no apparent common ground.

70. In such circumstances, the starting point for the analysis must be the applicable PIL framework, which will operate to establish a rebuttable conclusion on application. This is not an exercise hinged on burdens or standards of proof. It is, however, the foundation of the legal analysis that, absent contrasting legal and factual considerations, will be controlling.

71. As noted above, the Tribunal in this case considered that it was faced with what it described as a "paucity of factual elements" from the Parties relevant to the application or non-application of the PRC/Laos BIT (Award, paragraph 232). Some limited additional information has been adduced by the Parties in the challenge proceedings but, insofar as I am aware, the evidential record relevant to the application or non-application of the BIT remains broadly the same as it was before the Tribunal.

72. The arbitration proceedings commenced on 14 August 2012. This date is of some significance as it marks an uncontroversial point beyond which a Party could not act to achieve an evidential advantage for its case. This threshold is known to PIL as the "critical date". It is described in a 1963 article in the International & Comparative Law Quarterly by L.F.E. Goldie as "the date after which the actions of the parties can no longer affect the issue. It is exclusionary, and it is terminal."[22] Following discussion of the concept in the context of territorial disputes, Goldie goes on to describe the contours of the "critical date" concept in the following terms:

> "It is a legal doctrine used to designate that point of time after which no acts of the parties can validly affect the legal situation in an international dispute. It may be invoked to exclude 'colourable' and 'window-dressing' acts on the one hand, and on the other hand, to indicate and condemn laches. For the critical date doctrine is applicable, without doing violence to its traditional connotations, to all issues in public international law which arise from changes in legal relations which exhibit the following qualities: (1) when they may be regarded as arising from claims and rights which exhibit close analogies with claims or rights *in rem* in municipal law; (2) when they relate to changes which occur over, or arise from, the lapse of time when the lapse of time is itself a determining factor in the case; and (3) when their outcome is dependent upon the decisions of an appropriate court as to the selection of one, or perhaps several, points of time as operative in the case."[23]

73. In a more recent discussion of the subject, addressing the issue of evidence in international arbitration, Robert Pietrowski describes the "critical date" concept in the following terms:

[22] Goldie, L.F.E., "The Critical Date", International and Comparative Law Quarterly, Volume 12(4), October 1963, pp. 1251-1284, at p. 1251. (Exhibit **Annex 10**)
[23] Goldie, L.F.E., "The Critical Date", International and Comparative Law Quarterly, Volume 12(4), October 1963, pp. 1251-1284, at p. 1267 (footnotes omitted). (Exhibit **Annex 10**)

> "A different kind of time constraint which involves the relevance rather than the admissibility of evidence is the so-called 'critical date'. In all cases, there is a point in time in the factual chronology of the dispute beyond which the conduct of the parties and other events can no longer affect the decision in the case. This time is called 'the critical date'.
>
> …
>
> The critical date forecloses the use of evidence of self-serving conduct intended by the party concerned to improve its position in the arbitration after the dispute has arisen."[24]

74. My purpose in drawing attention to the concept of the critical date is to emphasise that PIL will generally look to pre-dispute facts and evidence for purposes of determining the availability and sustainability of rights. Post-critical date evidence may be admissible and reliable when it supports pre-critical date evidence as in such circumstances it will demonstrate evidential continuity and consistency. As a general proposition, however, post-critical date evidence is unlikely to be relevant, weighty and reliable in circumstances in which the pre-critical date evidence is insufficient to sustain the proposition for which the post-critical date evidence is advanced. In such circumstances, employing Goldie's language, the critical date concept "may be invoked to exclude 'colourable' and 'window-dressing' acts".

75. From the perspective of the matters that I am asked to address, the concept of the critical date, and the post-hoc evidence adduced in this case, operate to emphasise the importance in assessing the issue of the application or otherwise of the PRC/Laos BIT to Macao from the position as it was on the date of Macao's reversion to the PRC in 1999 looking forward, not from the vantage point of post-hoc evidence looking backwards. In this forward-looking analysis, weight must properly be given to facts and evidence that are independent of the dispute.

76. It follows from the preceding that the proper methodology for assessing the application, or the non-application, of the PRC/Laos BIT to Macao from 1999 is to start from an analysis of the general rules of PIL applicable to the issue. Thereafter, having established a baseline from which to address the issue, the question will be

[24] Pietrowski, R., "Evidence in International Arbitration", Arbitration International, 2006, Volume 22, Issue 3, pp.373–410, at section IX, text following footnotes 102 and 106. (Exhibit **Annex 16**)

whether there is any evidence of sufficient clarity, reliability and weight to displace the initial assessment. As noted above, this is not an exercise of burdens and standards of proof, in which the burden shifts from the claimant to the respondent. Rather, it is an exercise of moving from a general rule to its exceptions.

The general rule of the territorial scope of application of treaties and the "moving treaty frontiers" rule in this case

77. Article 29, VCLT is the starting point of the analysis. Pursuant to this rule, a treaty entered into by the PRC will, absent anything dispositive to the contrary, presumptively apply to the entire territory of the PRC. This will include Macao, Hong Kong and any other part of the territory of the PRC. The only exceptions to the general rule are the exceptions indicated in the rule itself, i.e., in circumstances in which a different intention appears from the treaty in question or a different intention is otherwise established. I return to these exceptions below.

78. Pursuant to Article 27, VCLT, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The proposition that follows from this is that the PRC would not be in a position to invoke its internal constitutional arrangements vis-à-vis Macao as a justification for a failure to extend the PRC/Laos BIT to Macao.

79. Importantly, the issue in the present case is not one in which the PRC is seeking to invoke its internal constitutional arrangements vis-à-vis Macao as a justification for its failure to extend the PRC/Laos BIT to Macao. Rather, the issue is whether Laos can invoke the internal constitutional arrangements of the PRC vis-à-vis Macao as a justification for Laos's failure to extend the PRC/Laos BIT to a Macanese investor. These issues are not the same and they cannot be readily equated.

80. This being said, as I have already addressed above, the PRC/Laos BIT establishes a symmetry of reciprocal rights and obligations, including rights accruing to Laotian investors in Macao and Macanese investors in Laos. It is in this context that Article 27, VCLT is material to a wider appreciation of the issues. Insofar as the PRC could not properly sustain an argument that a Laotian investor in Macao could not avail

itself of the PRC/Laos BIT on grounds of its internal constitutional arrangements vis-à-vis Macao, I consider that the same must properly hold true for Laos seeking to deny a Macanese investor the benefits of the PRC/Laos BIT on the same grounds. This is especially the case in circumstances in which the Laotian argument rests on a PRC assertion of its own internal constitutional arrangements vis-à-vis Macao, an assertion that would, in modified factual circumstances, be flatly at odds with Article 27, VCLT. In my view, therefore, although a formal reading of Article 27, VCLT does not catch the circumstances in issue in this case, an object and purpose reading of the provision weighs in favour of a conclusion that Laos cannot properly rely on a PRC statement that rests entirely on its own internal constitutional arrangements vis-à-vis Macao, without any regard to international law, for purposes of denying the application to Macao of the PRC/Laos BIT.

81. Article 15, VCST is the *lex specialis* that addresses the circumstances applicable in the case of the reversion of Macao from Portugal to the PRC in 1999. As discussed above, it is commonly accepted that Article 15, VCST is a special rule that embodies the general rule in Article 29, VCLT. The part of Article 15, VCST that is material for present purposes is paragraph (b), the effect of which is to provide that treaties of the PRC apply to Macao from the date of its reversion to the PRC "unless it appears from the [PRC/Laos BIT] or is otherwise established that the application of the [PRC/Laos BIT] to [Macao] would be incompatible with the object and purpose of the [PRC/Laos BIT] or would radically change the conditions of its operation."

82. The exceptions in Article 15, VCST are narrower than those in Article 29, VCLT, although there is some overlap between them. Taking the exceptions together, the PRC/Laos BIT will by operation of law apply to Macao unless one or more of the following exceptions can be shown:

(a) it appears from the PRC/Laos BIT that its application to Macao would be incompatible with its object and purpose; or
(b) it is otherwise established that the application of the PRC/Laos BIT to Macao would be incompatible with the BIT's object and purpose; or
(c) it appears from the PRC/Laos BIT that its application to Macao would radically change the conditions of its operation; or

(d) it is otherwise established that the application of the PRC/Laos BIT to Macao would radically change the conditions of its operation; or

(e) an intention appears from the PRC/Laos BIT that it does not apply in respect of the entre territory of the PRC; or

(f) an intention is otherwise established that the PRC/Laos BIT does not apply in respect of the entre territory of the PRC.

83. Of these possible exceptions, Professor Chesterman's conclusions that the PRC/Laos BIT does not apply to Macao rests on two propositions: first, that an intention that the PRC/Laos BIT does not apply to Macao can be and has been "otherwise established" (Chesterman Report, paragraphs 32–79); second, that an intention that the PRC/Laos BIT does not apply to Macao "appears from the treaty" (Chesterman Report, paragraphs 80–91). These are the exceptions expressed in Article 29, VCLT, not those in Article 15, VCST. Although his discussion comingles the issues, it appears that Professor Chesterman accepts that the more narrowly formulated exceptions in Article 15, VCST do not apply in the circumstances of this case, i.e., that the application of the PRC/Laos BIT to Macao would be incompatible with the BIT's object and purpose or would radically change the conditions of its operation. I agree that there is no reasonable basis on which to sustain a claim of the non-application of the PRC/Laos BIT to Macao by reference to these exceptions. I note also that the Tribunal explicitly considered, and rejected, the possibility that the PRC/Laos BIT did not apply to Macao on the grounds that such application would be incompatible with the BIT's object and purpose (Award, paragraphs 239–242) or would radically change the conditions for its operation (Award, paragraphs 243–269). I agree with the conclusion that neither of these exceptions operate in the circumstances in issue.

84. Against this background, I turn now to consider whether an intention that the PRC/Laos BIT does not apply to Macao appears either from the BIT itself or is otherwise established.

Whether an intention that the PRC/Laos BIT does not apply to Macao appears from the BIT itself

85. It is convenient to begin with a discussion of whether an intention that the PRC/Laos BIT does not apply to Macao appears from the PRC/Laos BIT itself. Professor Chesterman addresses this issue by reference to the Laotian and PRC Notes Verbales of January 2014 (Chesterman Report, paragraphs 80–91), rather than by reference to the text of the PRC/Laos BIT itself. He does so on the basis that the Notes Verbales constitute a subsequent agreement between the parties regarding the application of the BIT within the meaning of Article 31(3)(a), VCLT and therefore, implicitly, that regard to the subsequent agreement is akin to regard to the PRC/Laos BIT itself.[25]

86. I accept entirely that it is appropriate to have regard to a subsequent agreement, within the meaning of Article 31(3)(a), VCLT, for purposes of addressing the interpretation and application of a treaty. As I disagree, however, on the admissibility, relevance and weight of the Notes Verbales, it is useful to begin with an assessment of whether an intention that the PRC/Laos BIT does not apply to Macao appears from the PRC/Laos BIT itself.

87. The question of whether it appears from the PRC/Laos BIT itself that it does not apply to Macao was expressly addressed by the Tribunal (Award, paragraphs 270–277). It notes that, while the PRC/Laos BIT does not contain an express provision

[25] Article 31, VCLT reads as follows:

"*Article 31*
General rule of interpretation

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."

that it applies to Macao, "this is not necessary as the principle of territorial extension of a State's legal order embodied in Article 29 applies, unless otherwise indicated" (Award, paragraph 270). I agree with this analysis.

88. This notwithstanding, the Tribunal goes on to conclude that "[the] factual situation means that no definite conclusion can be drawn from the silence of the Treaty on its extension of the Macao SAR, or its silence on the non-extension of the Treaty to the Macao SAR" (Award, paragraph 277). The reason for this is that the conclusion of the PRC/Laos BIT in 1993 predated the reversion of Macao to the PRC in 1999 and it could not therefore be expected that the PRC/Laos BIT should contain a clause addressing its application or otherwise to Macao from 1999, even though the reversion of Macao to the PRC was anticipated in 1993 (Award, paragraphs 271–276). I agree also with this aspect of the Tribunal's analysis and conclusions.

89. I would nonetheless add the following to the Tribunal's assessment just noted. In keeping with the appropriate methodology for the enquiry, the starting proposition, by application of both the general rule on territorial application (Article 29, VCLT) and the rule on succession in respect of part of territory (Article 15, VCST), is that the PRC/Laos BIT properly applied to Macao from its reversion to the PRC in 1999. The question that follows is whether an exception to the general rules operates to displace the initial assessment. For purposes of this element of the enquiry, review of the PRC/Laos BIT itself gives no indication that the general rule of application is in any way unsound and should be displaced. I agree with the Tribunal's analysis and conclusions on the narrow point of whether any definite conclusion can be drawn from the PRC/Laos BIT itself. I consider, however, that a more robust conclusion is warranted on the wider issue of whether there is anything in the PRC/Laos BIT that suggests that the operation of the rules in Article 29, VCLT and Article 15, VCST are displaced by the PRC/Laos BIT itself. In my view, there is nothing in the PRC/Laos BIT itself that calls into question or displaces the starting proposition that the PRC/Laos BIT applied to Macao from its reversion to the PRC in 1999.

Whether an intention that the PRC/Laos BIT does not apply to Macao is otherwise established

90. The more important enquiry is whether an intention that the PRC/Laos BIT does not apply to Macao "is otherwise established".

91. Professor Chesterman draws on a number of strands of evidence in support of his conclusion that such an intention is established, including:

- the 1987 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 Sino–Portuguese Joint Declaration" or "Joint Declaration") (Exhibit **Annex 17**);

- the 13 December 1999 notification submitted by the PRC to the UN Secretary-General in relation to treaties deposited with the Secretary-General ("the PRC UN depositary notification" or "Depositary Notification") (Exhibit **Annex 18**);

- the PRC Note Verbale of 9 January 2014 as "confirmation that the process for extending the PRC-Laos BIT to the Macao SAR has not taken place" (Chesterman Report, paragraph 34);

- analogies between the situation applicable to Hong Kong and that applicable to Macao;

- a series of 3 BITs concluded between the PRC, on the one hand, and Mexico, the Netherlands and Portugal, on the other hand, as well as 2 BITs concluded between Macao, on the one hand, and the Netherlands and Portugal, on the other hand;

- a World Trade Organisation ("WTO") Trade Policy Review report of February 2001 concerning Macao; and

- scholarly comment.

92. As a preliminary observation, the issue in each case is the relevance and weight of each element of evidence in support of the point for which it is prayed in aid and whether, when weighed in the balance, the evidence is sufficient to displace the proposition that the PRC/Laos BIT applied to Macao by operation of uncontroverted principles of law. Weighed in the balance, my assessment is that the evidence cited by Professor Chesterman is not sufficient by some margin to displace the proposition of the application of the PRC/Laos BIT to Macao by reference to the general rules in Article 29, VCLT and Article 15, VCST. I address the various evidential elements cited by Professor Chesterman in turn below.

The Sino-Portuguese Joint Declaration

93. The Sino–Portuguese Joint Declaration is a bilateral treaty between the PRC and Portugal. It was submitted by both the PRC and by Portugal to the UN OLA Treaty Section for registration in accordance with Article 102 of the UN Charter and was registered as such on 22 March 1988 with the registration number I-25805.

94. Annex I of the Joint Declaration elaborates the PRC's basic policies as regards Macao. As Professor Chesterman notes, Clause VIII of Annex I of the Joint Declaration addresses Macanese responsibility in the field of foreign affairs *inter alia* in the following terms:

> "Subject to the principle that foreign affairs are the responsibility of the Central People's Government, the Macao Special Administrative Region may, on its own, using the name 'Macao, China', maintain and develop relations and conclude and implement agreements with States, regions and relevant international organisations in appropriate fields, including the economic, trade, financial, shipping, communications, tourism, cultural, scientific, technological and sporting fields. …
>
> … The application to the Macao Special Administrative Region of international agreements to which the People's Republic of China is a party shall be decided by the Central People's Government in accordance with the circumstances of each case and the needs of the Macao Special Administrative Region and after seeking the views of the Macao Special Administrative Region Government. International agreements to which the Government of

> the People's Republic of China is not a party but which are implemented in Macao may continue to be implemented. The Central People's Government shall, as necessary, authorize or assist the Macao Special Administrative Region Government to make appropriate arrangements for the application to the Macao Special Administrative Region of other relevant international treaties."[26]

95. On first review, this instrument seems to be evidence in favour of the proposition that the PRC/Laos BIT did not extend to Macao from 1999. To this end, it indicates both that Macao will have a measure of international personality of its own, to enable it to enter into treaties (including in the investment sphere) in its own right, and that the application of treaties to which the PRC is party to Macao shall be decided upon by an internal PRC constitutional process.

96. On closer consideration, however, this initial assessment is unreliable, for a number of reasons. First, the Joint Declaration is a treaty between the PRC and Portugal alone, binding only upon these States. As a matter of uncontroversial principles of PIL, it does not create either rights or duties for other States. It is not therefore opposable to Laos, i.e., it creates neither rights nor duties for Laos.

97. Second, Annex I of the Joint Declaration is an "Elaboration by the Government of the People's Republic of China of its basic Policies Regarding Macau". It is therefore in the nature of a statement regarding the PRC's internal constitutional arrangements vis-à-vis Macao. As such, it calls to mind the terms of Article 27, VCLT, already discussed above, viz.: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. …"

98. Third, while the Joint Declaration, which preceded the PRC/Laos BIT by 6 years, 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 Macao, it cannot operate as a substitute for such bilateral engagement. This is particularly important not simply because the Joint Declaration is not itself opposable to third States but also because a general declaration of this kind cannot be assumed to override the specific terms of individual

[26] Exhibit **Annex 17**.

treaties. The PRC's bilateral treaty partners are entitled to rely on the presumptive application of law, including the general rules in Article 29, VCLT and Article 15, VCST, as regards the application of such treaties to the entirety of PRC territory. Further, it cannot properly be presumed that persons who would be afforded direct rights and remedies under such treaties – as in the case of investors under BITs concluded between the PRC and other States – could have such rights and remedies denied by operation of a declaration of this kind.

99. Fourth, it is apparent from the Joint Declaration itself that elements of it will manifestly not apply in the case of certain bilateral treaties. For example, the extract set out above contains the following statement: "International agreements to which the Government of the People's Republic of China is not a party but which are implemented in Macau may continue to be implemented."

100. A plain reading of this sentence would suggest that bilateral treaties that applied to Macao that had been concluded by Portugal with third States other than the PRC in the pre-1999 period would (or could) continue to be implemented in Macao in the period following Macao's reversion to the PRC in 1999. This would, however, be contrary to the unqualified rule in paragraph (a) of Article 15, VCST that "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". I am not aware of any suggestion that Portuguese-concluded bilateral treaties continued to be implemented in Macao after 1999.

101. It is clear from this that it is not appropriate to take the Joint Declaration as a dispositive statement of the position under international law of the application or non-application to Macao of either PRC or Portuguese bilateral treaties from the point of Macao's reversion to the PRC in 1999. It is the applicable rules in Article 29, VCLT and Article 15, VCST that are controlling.

The PRC UN depositary notification

102. In correspondence to the UN Secretary-General dated 13 December 1999, the PRC "informed the Secretary-General of the status of Macao in relation to treaties

deposited with the Secretary-General." That Depositary Notification indicated, in paragraphs I and II, that certain enumerated treaties listed in Annexes I and II to the depositary notification would apply or continue to apply to Macao with effect from 20 December 1999. The PRC/Laos BIT is not listed amongst these treaties. Paragraph IV of the Depositary Notification goes on to state as follows:

> "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."[27]

103. As with the Joint Declaration, on first review, the Depositary Notification appears to be compelling evidence that the PRC/Laos BIT did not extend to Macao from 1999. It provides that treaties that are not listed in the Depositary Notification – as is the case with the PRC/ Laos BIT – will only apply to Macao if and when the PRC so decides and undertakes the necessary formalities to achieve such application.

104. A considered assessment of the Depositary Notification, however, challenges this reading of the position, for a number of reasons. Before setting these out, I note that the effect of the Depositary Notification was addressed by the Tribunal in paragraphs 206–211 of its Award. For the reasons set out below, I agree with the Tribunal's analysis and conclusions on this point. I note that Professor Chesterman describes the Tribunal's analysis and conclusions on this matter as "debatable" (Chesterman Report, paragraph 68). For the reasons that follow, I disagree with Professor Chesterman on this issue.

105. The questionable relevance and weight of the Depositary Notification for present purposes flow from the following considerations. First, as is clear both from the terms of the Depositary Notification and from the UN's appreciation of it, evidenced by the form of its publication thereof, the Depositary Notification addressed the issue of multilateral treaties deposited with the UN Secretary-General in his role as depositary. The official UN publication of the Depositary Notification makes this clear in a way in which the print out of the online version annexed to the Chesterman

[27] Exhibit **Annex 18**.

Report does not. Thus, UN document ST/LEG/SER.E/26, exhibited as **Annex 18** hereto, is entitled "Multilateral Treaties Deposited with the Secretary-General", and gives the status of such treaties as at 1 April 2009.

106. The PRC Depositary Notification is recorded in the chapter headed "Historical Information", at **Note 3** under the sub-heading **China**. The UN Secretariat introduction to the PRC's Depositary Notification reads as follows: "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." As is clear from this description, the Depositary Notification was not understood as applying to all PRC treaties, including bilateral treaties to which the PRC is or would become a party. It was limited to multilateral treaties deposited with the UN Secretary General. This reading of the scope of the Depositary Notification is also readily apparent from the treaties that are enumerated in Annexes I and II of the notification, all of which are framework multilateral conventions.

107. Second, as a tangential point following from the preceding, the Tribunal's observation that there is a "fundamental difference between the role of the UN as depositary and its role as an instance of registration" (Award, paragraph 209) is correct and in my view incontestable on any sustainable ground. I agree, therefore, with the Tribunal's conclusion that "the 1999 Notification has no relevance as far as bilateral treaties are concerned" (Award, paragraph 210).

108. Third, there is a straightforward practical reason why a different approach is properly adopted to the handling of issues concerning the application of multilateral treaties, on the one hand, and bilateral treaties, on the other hand. Bilateral treaties engage the legal rights and duties of a State vis-à-vis one other State only. Any issues of interpretation and application, including as regards the territorial reach of a treaty, are thus readily and properly amenable to a process of bilateral engagement between the two States concerned. For reasons of legal obligation and legal certainty, a State must be able to rely on the rights and duties agreed with another State in a bilateral treaty between them. A State cannot be presumed to have been given notice of another

State's position or intention as regards a bilateral treaty simply by way of a generic notification addressed to a third party.

109. In contrast, multilateral treaties pose special challenges in circumstances of succession or other questions of application. Chaos would follow if a successor State was required to enter into bilateral exchanges with each and every other State that was a party to a multilateral treaty in circumstances in which an issue of application arose. The negotiating process that would follow would be endless, unmanageable and of uncertain legal effect multilaterally, as each bilateral engagement under the multilateral umbrella could lead to a potentially different outcome. A fragmentation of the multilateral rights and duties under the original treaty would be the inevitable result.

110. In the case of multilateral treaties, a mechanism is established for the multilateral notification of issues. As a formal matter, each multilateral treaty has a depositary – most frequently, but not necessarily, the UN Secretary-General. Any State wishing to draw a matter concerning a multilateral treaty to the attention of other States writes formally to the depositary in what is termed a "depositary notification". On receipt of such a note, the depositary notifies all the parties to the treaty.

111. Because many multilateral treaties have a systemic, as well as a contractual, quality, rules and practices have developed over time for addressing issues that arise as regards their application in consequences of the succession of States. These vary depending on the circumstances, as, for example, in cases of the independence of formerly colonial territories, in cases of the division, dissolution or unification of States, etc. In contrast, bilateral treaties do not give rise to the same difficulties. There are 2 parties. It is readily open to those parties to engage directly to address any issues that may arise.

112. Against this background, the terms of Article 11(1)(a) of the PRC/Laos BIT are material. As discussed above, this provides as a formal matter that the representatives of the PRC and the representatives of Laos will hold meetings from time to time "for purposes of (a) reviewing the implementation of this Agreement". There is therefore a formal mechanism under the BIT for addressing any issue regarding its application.

It cannot therefore be properly presumed that the application of the PRC/Laos BIT to Macao fell to be dealt with by implication by way of a depositary notification concerning multilateral treaties deposited with the UN Secretary-General. Issues concerning the application of the PRC/Laos BIT, including as regards its territorial scope, properly fall to be addressed either by way of operation of law or by way of the direct bilateral engagement of the States concerned.

113. For completeness, I should make it clear that I do not consider that the Laotian and PRC Notes Verbales of January 2014, being post-hoc instruments exchanged by the parties to the PRC/Laos BIT after the Tribunal's Award on Jurisdiction was rendered, can properly be taken as retroactively determining the non-application, *ab initio*, of the BIT to Macao. Through such an engagement, the parties would have been in a position to terminate the BIT going forward, either by agreement or by the unilateral notification of either party pursuant to Article 12(3) of the BIT, subject to the notification and legal framework stability requirements of Article 12(3) and (4). An engagement of this kind cannot, however, properly have retroactive effect.

114. In my view, it follows from the preceding that the PRC UN depositary notification cannot be relied upon, whether by the PRC or by Laos, as a sound basis under international law in support of the contention that the PRC/Laos BIT did not apply to Macao from the date of its reversion to the PRC in 1999. The Depositary Notification was limited to multilateral treaties deposited with the UN Secretary-General. It is not controlling of the issue of the application to Macao of bilateral treaties to which the PRC is a party. The applicable rules in Article 29, VCLT and Article 15, VCST remain the proper touchstone on the issue.

The PRC Note Verbale of 9 January 2014

115. Professor Chesterman asserts that the PRC Note Verbale of 9 January 2014 provides "confirmation" that the PRC-Laos BIT does not apply to Macao. This assertion is separate from Professor Chesterman's subsequent contention that the Laotian and PRC Notes Verbales of 7 and 9 January 2014 together constitute a subsequent agreement concerning the application of the PRC/Laos BIT (this latter point being addressed in the Chesterman Report at paragraphs 80–91).

116. Professor Chesterman does not here take the view that the PRC Note Verbale is itself controlling of the issue of the application of the PRC/Laos BIT. Rather, he asserts that "[f]ar 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" (Chesterman Report, paragraph 34). Described in these terms, the question of whether the PRC/Laos BIT applied to Macao from 1999 falls to be determined by reference to pre-Note Verbale considerations. The PRC Note Verbale does not "alter the legal position". It is simply "confirmation" of an assessment that rests on some other basis. On this analysis, only very limited evidential relevance and weight is claimed for the PRC Note Verbale. It is not said to be dispositive of anything.

117. A further difficulty with Professor Chesterman's analysis on this point is that it ultimately rests on the assessment that the controlling mechanism for applying the PRC/Laos BIT to Macao is "the process for extending the PRC–Laos BIT to the Macao SAR" that is set out in the Joint Declaration and/or the Depositary Notification. It is in these instruments, reflective of PRC internal law, that the processes for extending the PRC–Laos BIT to Macao are to be found. But, as addressed above, neither the Joint Declaration nor the Depositary Notification are controlling of the matter as regards the application of the PRC/Laos BIT to Macao. Absent compelling evidence of intention to the contrary, the application of the PRC/Laos BIT to Macao falls to be determined by reference to the general rule in Article 29, VCLT and Article 15, VCST, i.e., that a treaty is binding upon a State in respect of its entire territory, including in the case of succession in respect of part of territory, in which circumstance the moving treaty frontiers rule operates to ensure that the treaties of the successor State are in force in respect of the territory to which the succession relates. The PRC Note Verbale does not alter the general analysis.

Analogies between the situation applicable to Hong Kong and that applicable to Macao

118. Professor Chesterman contends that "the example of the Hong Kong SAR is a particularly illuminating aid to the interpretation of the PRC–Laos BIT" (Chesterman

Report, paragraph 46) and that "the Hong Kong experience may provide valuable guidance when examining the situation in the Macao SAR" (Chesterman Report, paragraph 51). In paragraphs 47–50, he describes the international law context of Hong Kong and Macao's handover to China. There is nothing with which I would disagree in these paragraphs.

119. Professor Chesterman addresses the Hong Kong SAR and the application of treaties in paragraphs 51–64 of his Report. There is nothing with which I disagree in paragraphs 51–54, which simply describe the work of the Sino–British Joint Liaison Group addressing Hong Kong treaty issues. Citing to a 1997 article by the Attorney-General of Hong Kong and a 2005 speech by the Hong Kong Secretary of Justice, however, Professor Chesterman goes on to assert that the "clear assumption" is that bilateral treaties applicable to the PRC would not "suddenly apply" to Hong Kong on its reversion to the PRC in 1997.

120. The texts to which Professor Chesterman cites do not, however, sustain the broader conclusion that he advances. The relevant extracts of the article and speech to which he refers are as follows:

> *1997 Article by J.F. Matthews, Attorney General of Hong Kong*
>
> "*International Rights and Obligations*
>
> Another important area of the work in preparing 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 word'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 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."[28]

2005 Speech by Wong Yan Lung SC, Justice Secretary of Hong Kong

"International rights and obligations

The international rights and obligations that applied to Hong Kong also called for action. Before reunification, over 200 multilateral treaties, 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

[28] 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.1–12, at pp.6–7. Attached as Annexe 14 to the Chesterman Report. Extracts at Chesterman Report, pp.219–220.

> 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 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 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."[29]

121. These extracts, which are consistent, make a number of uncontroversial points:

(a) a different approach was adopted in respect of multilateral treaties and bilateral treaties concluded by Britain in respect of Hong Kong;

(b) agreement was reached that certain expressly identified multilateral treaties concluded by Britain in respect of Hong Kong would continue to apply to Hong Kong after its reversion to the PRC;

(c) Britain and the PRC agreed on a mechanism to address the continuation in respect of multilateral agreements, including parallel notifications to the United Nations and other international organisations;

(d) in contrast to the position in respect of multilateral treaties, it was clear that bilateral treaties concluded by Britain in respect of Hong Kong would lapse automatically at the point of Hong Kong's reversion to the PRC;

[29] Wong Yan Lung, "Speech by Secretary of Justice", 18 November 2005. Attached as Annexe 15 to the Chesterman Report. Extracts at Chesterman Report, pp.228–229.

(e) Hong Kong was given an independent treaty-making competence in respect of certain types of treaties;

(f) pursuant to this independent treaty-making competence, in order to ensure that there was no vacuum as regards international rights and obligations following Hong Kong's reversion to the PRC, Hong Kong entered into a range of bilateral agreements with other States both prior and subsequent to its reversion to the PRC.

122. As regards bilateral treaties, the point set out in sub-paragraph (d) above reflects exactly the position that would apply by operation of the rule in paragraph (a) of Article 15, VCST, i.e., "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".

123. What is nowhere addressed in these comments is the position as regards the application to Hong Kong, on its reversion to the PRC, of treaties to which the PRC was or would become a party. And it does not in any way inevitably follow that the fact of Hong Kong's independent treaty-making competence implies that treaties to which the PRC is a party, whether bilateral or multilateral, do not or would not apply to Hong Kong. Indeed, any such implication would be directly at odds with the general rules contained in Article 29, VCLT and Article, 15 VCST. While it would have been perfectly possible for the PRC, through direct bilateral engagements with third States with which it had concluded, or would conclude, bilateral treaties, to exclude the application of such bilateral treaties to Hong Kong (or Macao), there is nothing in the Sino–British arrangements as regards the application of treaties to Hong Kong that provides any useful guidance on the issue in question as regards Macao. The issue in question is not addressed in the Hong Kong practice that is cited and nothing can properly be implied from the arrangements that were adopted.

124. The point made in the preceding paragraph about PRC direct bilateral engagement with its treaty partners warrants emphasis. The Sino–British arrangements as regards Hong Kong treaties, just as with the Sino–Portuguese arrangements as regards Macao

treaties, were not opposable to third States. The PRC could not displace the application of the general rule on territorial application in Article 29, VCLT as regards its bilateral treaties with third States by reaching an agreement with Britain or with Portugal. Absent explicit indication to this effect in any given treaty, the only way for the PRC to have properly and effectively achieved such a result would have been through direct bilateral engagement with each State with which it had a bilateral treaty. Absent clear and compelling evidence to the contrary, PIL provides that treaties will apply to the entire territory of a State and, in cases of succession in respect of part of territory, that the treaties of the successor State will apply to the territory in question from the date of succession. There is nothing in the Hong Kong experience cited by Professor Chesterman that provides guidance on the specific question that is before the Court as regards the application of the PRC/Laos BIT to Macao.

Implications to be drawn from other BITs concluded by the PRC and by Macao

125. In support of his analysis, Professor Chesterman refers to a series of 3 BITs concluded between the PRC, on the one hand, and Mexico, the Netherlands and Portugal, on the other hand, as well as to 2 BITs concluded between Macao, on the one hand, and the Netherlands and Portugal, on the other hand. The conclusion that he draws from these treaties is that "the clear understanding – consistent with the PRC [Note Verbale] – 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" (Chesterman Report, paragraph 72). He states further as follows:

> "In my opinion, the conclusion of the 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 VCLT and Article 15 of the VCST, that the PRC–Portugal BIT and the PRC–Netherlands BIT were not to apply to the Macao SAR." (Chesterman Report, paragraph 74)

126. I note at the outset that the Tribunal addressed the questions posed by these BITs – with the exception of that between the PRC and Mexico (which was not apparently draw to its attention by the Parties) – at paragraphs 278–297 of its Award. It addressed in particular the argument that parallel BITs between the PRC and the

Netherlands (of 2001) and Macao and the Netherlands (of 2008), and also between the PRC and Portugal (of 2005) and Macao and Portugal (of 2000), are evidence of an appreciation by the parties to those instruments that the BITs concluded with the PRC did not apply to Macao. The Tribunal rejected this argument, concluding as follows:

> "In the Tribunal's view, the existence of two treaties facilitates rather than hinders the fulfilment 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.'" (Award, paragraph 296)

127. The case of *Tza Yap Shum v. The Republic of Peru*, to which the Tribunal referred, was an award on jurisdiction of 19 June 2009 by an ICSID tribunal constituted under the 2006 PRC–Peru BIT. The claimant in this case was a Chinese national resident in Hong Kong.

128. As well as the BITs with the Netherlands and with Portugal, Professor Chesterman also draws attention to the 2008 PRC/Mexico BIT which includes an endnote which provides: "Authorized by the Central Government of the People's Republic of China, the Governments of Hong Kong and Macau 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."[30] The conclusion that Professor Chesterman draws from this endnote (referred to in his Report as a footnote) is as follows:

> "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." (Chesterman Report, paragraph 71)

129. As an initial comment, it is not quite so clear that the effect of the endnote to the PRC/Mexico BIT is as Professor Chesterman suggests. The reason for this is that the

[30] 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 of 2008. Attached as Annexe 23 to the Chesterman Report. Extract at Chesterman Report, p.333.

note in question is attached to the Article 1 definition of "territory" in the BIT which, in paragraph (b), reads as follows:

> "[For the purpose of this Agreement, the term: … 'territory' means:] 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]"

130. Given that the BIT itself defined what was meant by the term "territory" for the narrow purposes of the BIT, the simplest and clearest way of excluding the application of the BIT to Hong Kong or Macao would have been to define the term "territory" in explicit terms to do so. Were this not to have been appropriate for any reason, the endnote could itself have been explicit on the point, using language along the following lines: "For the avoidance of doubt, for purposes of this Agreement, the territory of the People's Republic of China does not include the territory of the Hong Kong and Macao Special Administrative Regions." The language of the current endnote could then have been added on the end of this sentence, the effect of which would have been to make absolutely clear that the BIT did not apply to Hong Kong and Macao. As it now stands, however, the endnote must reasonably be read as a simple statement of the competence of Hong Kong and Macao to negotiate and sign BITs with Mexico.[31] It is not a necessary implication of the endnote that the PRC/Mexico BIT does not extend to Hong Kong and Macao.

131. The point is a small one but it is important as it highlights what in my view is an over claiming by Professor Chesterman of the relevance and weight of the evidence on which he relies. On this issue, I am less sanguine than the Tribunal that the implication to be drawn from the parallel BITs with the Netherlands and Portugal can be quite so readily rejected. I would agree, therefore, with an assessment of this practice that concluded that it introduces a measure of confusion into the issue of the territorial scope of application of BITs concluded by the PRC to Macao (and Hong

[31] The use of the definite article "the" in reference to Hong Kong and Macao's competence may be read as a narrow reference to the PRC/Mexico BIT in issue. However, the reference to Hong Kong and Macao's competence to "negotiate" suggests that the endnote addresses their competence to negotiate BITs more generally, subject to PRC authorisation.

Kong). However, to go beyond this to conclude that this practice is evidence in support of a conclusion that the PRC/Laos BIT does not apply to Macao goes much too far.

132. The reasons for this are as follows. First, the only clear conclusion for present purposes to be drawn from parallel BITs concluded by the PRC and by Macao with the same third State is that Macao was authorised by the "Central People's Government" to conclude such a treaty. It does not say anything dispositive one way or another about the territorial scope of application of the BIT concluded by the PRC.

133. Second, PIL has established rules for addressing, and reconciling, conflicts that may arise between successive treaties on the same subject matter. These are set out in Article 30, VCLT, addressed in passing in paragraph 65 above.[32] The detail of this provision is not material for present purposes. The relevant point is simply that it is well-known to PIL that States may conclude successive treaties on the same subject-matter. The conclusion of parallel BITs by the PRC and by Macao with the Netherlands and with Portugal is not therefore dispositive evidence of the intended limited territorial scope of application of the PRC BITs.

134. Third, whatever may be the implication to be drawn from the parallel BITs concluded with the Netherlands and with Portugal, this practice is not opposable to Laos. A State (the PRC) cannot define, restrict or amend its treaty relations with another State (Laos) by concluding a treaty with a third State (the Netherlands). BITs create

[32] Article 30, VCLT, under the heading "Application of successive treaties relating to the same subject matter" provides as follows:
"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
(a) as between States Parties to both treaties the same rule applies as in paragraph 3;
(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

binding bilateral treaty relations. The territorial scope of the PRC/Laos BIT can only be authoritatively addressed by an engagement between the PRC and Laos.

135. Fourth, in all this it is important to keep in focus the starting proposition, i.e., that, absent compelling evidence to the contrary, the territorial scope of PRC treaties will, by operation of law, extend to the whole of the territory of the PRC. This includes Macao. As noted in paragraph 67 above, for there to be evidence of intention of sufficient weight to displace the application of the general rule, such evidence must be relevant, clear and unambiguous. This is especially so as the effect of such evidence will be to deny rights and remedies to persons who are otherwise intended to benefit from the treaty. The parallel treaty evidence relied upon by Professor Chesterman is not of such quality.

136. In this regard, it is useful to draw attention to a "Memorandum on Application" prepared by the Treaty Section of the UK FCO which addresses the interpretation and application of Article 29, VCLT (Exhibit **Annex 19**).[33] For present purposes, I draw attention only to the discussion of the phrase "unless a different intention … is otherwise established" in Article 29, VCLT, which reads as follows:

> "7. Even if a particular treaty does not contain a territorial application clause, it is still open to a State such as the United Kingdom to specify at the time of signature, ratification or accession the territorial extent of the application of that treaty and, subsequently, to increase that extent. This is done by means of wording contained in the instrument of ratification or accession, or by means of a Note addressed to the Depositary."

137. As this extract makes clear, at least as regards UK practice, any qualification of the territorial scope of application of a treaty, as an exception to the general rule in Article 29, VCLT, must be clearly and explicitly stated. This is not the case with the parallel treaty evidence cited by Professor Chesterman.

[33] http://webarchive.nationalarchives.gov.uk/20130104161243/http://www.fco.gov.uk/en/publications-and-documents/treaties/uk-overseas-territories/memorandum-application

WTO Trade Policy Review report concerning Macao

138. In his Report, Professor Chesterman refers to a 2001 WTO Trade Policy Review report on Macao, a paragraph of which he says "is consistent" with the understanding that "BITs entered into by the PRC do not automatically apply to the Macao SAR" (Chesterman Report, paragraphs 76–77). The extract in question is as follows:

> "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."[34]

139. As with the issue of the PRC/Mexico BIT, addressed in paragraphs 128–131 above, my view is that Professor Chesterman is over claiming on this issue. While the point he makes is arguable, the relevance and weight of this "evidence" becomes much more questionable the more closely it is scrutinised. For example, the Trade Policy Review report statement would have been clearer and weightier had its last sentence read "No other bilateral investment treaties or bilateral tax treaties apply to Macau, China". As it stands, however, the sentence in question can quite properly be read as saying that "Macau, China has **concluded** no other bilateral investment treaties or bilateral tax treaties", which is an uncontroversial statement of the position as it then stood.

140. The evidential weight of this statement is also unclear as it is not apparent whether, even on Professor Chesterman's reading of it, it indicates a considered appreciation of the Macanese authorities, an independent and considered assessment by the WTO Secretariat team that compiled the report, or an appreciation derived from some other source.

141. Given this, while I am perfectly content to accept that the sentence in issue raises the question of whether BITs concluded by the PRC apply to Macao, I am much less sanguine about the contention that it must also be read as authoritatively answering

[34] Trade Policy Review: Macau, China, at p.20, paragraph 27. Attached as Annexe 28 to the Chesterman Report. Extract at Chesterman Report, p.398.

that question, and in the negative. Displacing the operation of an applicable rule of PIL on the territorial scope of application of treaties requires, in my view, more than simply an ambiguous sentence in a wide-ranging trade policy review report undertaken by the WTO Secretariat.

Scholarly comment

142. Lastly, in this review of the evidential indicia advanced by Professor Chesterman, is scholarly comment. The only such reference under this heading that goes directly to the question in issue (as opposed more general descriptive commentary on the law of treaties or the Hong Kong and Macanese handover negotiations) is to a statement in Gallagher and Shan's 2009 book on *Chinese Investment Treaties: Policies and Practice* to the effect 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" (Chesterman Report, paragraph 42).[35]

143. As Professor Chesterman himself notes, however, this statement simply acknowledges that there is potential for uncertainty about whether PRC BITs will apply to Hong Kong and Macao (Chesterman Report, paragraph 42). Professors Gallagher and Shan's view on the issue, however, read in its entirety, reaches a conclusion that is directly at odds with that advanced by Professor Chesterman. The following excerpts of their discussion of the "territorial application" of PRC BITs, drawn from the extract annexed to Professor Chesterman's Report, makes this plain.

> "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. …
>
> There are also some Chinese BITs that include a separate definition of territory for each contracting state. …
>
> With the one exception of the Russian BIT 2006, no Chinese BIT has excluded from its scope of application Hong Kong, Macau, and Taiwan, which

[35] Citing to Gallagher, N., and Shan, W., *Chinese Investment Treaties: Policies and Practice*, Oxford University Press, 2009, at p.96, paragraph 2.90. Attached as Annexe 9 to the Chesterman Report. Extract at Chesterman Report, p.190.

are legally part of Chinese territory. The Russia BIT expressly excludes its application to Chinese SARs including Hong Kong and Macau. …

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. Indeed, it has entered into a few investment treaties with other states. 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. Also, the two SARs can enter into international agreements in a number of economic areas including investment and trade. In practice, Hong Kong SAR has already signed a dozen BITs in its own name (Hong Kong, China). 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. …

… 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.

However, all the aforementioned concepts and rules are those of Chinese domestic law, which cannot be invoked to justify failure to perform treaty obligations. 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 government). 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.

Nevertheless, it would be advisable for the Chinese Government to complete the required domestic law procedures, to avoid any doubt about 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. 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. 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."[36]

[36] Gallagher, N., and Shan, W., *Chinese Investment Treaties: Policies and Practice*, Oxford University Press, 2009, at pp.93–96, paragraphs 2.81–2.90. Attached as Annexe 9 to the Chesterman Report. Extract at Chesterman Report, pp.187–190.

144. I agree with this analysis by Professors Gallagher and Shan.

Evidence supporting an assessment that the PRC/Laos BIT applied to Macao from 1999

145. The preceding discussion addresses the strands of evidence cited by Professor Chesterman in support of his assessment that the PRC/Laos BIT does not apply to Macao. As will have been clear from the discussion, I do not consider that this evidence is sufficiently reliable and weighty to displace the starting proposition that the PRC/Laos BIT applied to Macao from the date of its reversion to the PRC in 1999 by straightforward operation of law.

146. Tipping the balance further in support of the application of the PRC/Laos BIT to Macao are a number of other considerations that warrant brief comment. These are:

(a) the absence of any PRC notification in respect of Macao under Article 70 of the ICSID Convention;

(b) the absence of any apparent subsequent practice by the PRC and Laos in the period 1999–2013 establishing the agreement of the Parties that the BIT did not apply to Macao; and

(c) the implications to be drawn from the Protocol to the PRC–Russian Federation agreement on the promotion and reciprocal protection of investments of 2006.

The absence of any PRC notification in respect of Macao under Article 70 of the ICSID Convention

147. The PRC became a party to the International Convention for the Settlement of Investment Disputes ("ICSID Convention") on 6 February 1993. Article 70 of the ICSID Convention provides:

> "This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently."

148. ICSID periodically publishes details of *Contracting States and Measures Taken by Them for the Purpose of the Convention*. The most recent such publication is dated February 2014. Document ICSID/8-B of this publication contains details of "Exclusions of Territories by Contracting States". It opens with the following explanation: "Pursuant to Article 70 of the Convention, the following Contracting States have excluded from the application of the Convention the following territories for whose international relations they are responsible: …" There is no notification by the PRC on the list of States that follows.[37]

149. The absence of any notification by the PRC that Macao (and Hong Kong) are excluded from the application of the Convention is not ultimately dispositive of the question here in issue. The arbitration award in respect of which the present challenge is brought was rendered by a tribunal constituted under the auspices of the Permanent Court of Arbitration. There may also be other explanations as to why a notification by the PRC under Article 70 of the ICSID Convention was not made or was considered to be unnecessary. I am not in a position to speculate about such matters.

150. This being said, the absence of such a notification weighs in favour of an assessment that the PRC/Laos BIT applied to Macao. It constitutes evidence, as recent as February 2014, of an absence of an intention on the part of the PRC to exclude from ICSID investment protection procedures Macanese investors in, and foreign investors in Macao from, States with which the PRC has concluded BITs that enable resort to ICSID dispute settlement. At the very least, the PRC's silence on this front is at odds with the claim that PRC BITs generally, and the PRC/Laos BIT in particular, do not apply to Macao.

[37] *Contracting States and Measures Taken by them for the Purpose of the Convention*, ICSID/8, February 2014, at ICSID/8-B, at Exhibit **Annex 20**. (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&Measures=True&language=English. PRC designations and notifications under the ICSID Convention are exhibited at **Annex 21**.

The absence of any apparent subsequent practice by the PRC and Laos in the period 1999–2013 establishing the agreement of the Parties that the BIT did not apply to Macao

151. In similar vein to the preceding, as noted in paragraph 64 above, given the express terms of Article 11(1)(a) and Article 12(1)–(3) of the BIT, the absence of any subsequent practice in the application of the BIT by the PRC and Laos in the period 1999–2013 indicating agreement that the BIT did not apply to Macao also supports the proposition that the BIT was applicable to Macao from 1999. In this regard, the wider issue of the application of PRC BITs to its Special Administrative Regions cannot have escaped attention by the parties (or, at the very least, by the PRC) in the period prior to the commencement of arbitration proceedings in this case as there was a growing body of jurisprudential and scholarly opinion that addressed this issue. The ICSID tribunal award on jurisdiction in *Tza Yap Shum v. The Republic of Peru* was rendered on 19 June 2009. The analysis by Professors Gallagher and Shan referred to above was published the same year. The *Tza Yap Shum* award, and the application of PRC BITs more generally, has received growing scholarly attention, including by Chinese scholars of international law.[38]

152. As with the absence of any PRC notification under Article 70 of the ICSID Convention, the absence of any apparent subsequent practice by the PRC and Laos in the application of the treaty in the period 1999–2013 indicating that the PRC/Laos BIT did not apply to Macao is not dispositive. It does, however, weigh in favour of an assessment that the PRC/Laos BIT applies to Macao.

[38] See, for example, Wei Shen, "The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in *Tza Yap Shum v. The Republic of Peru*", *Chinese Journal of International Law* (2011) 10 (1): 55-95 (http://chinesejil.oxfordjournals.org/content/10/1/55.full.pdf+html?sid=0c6e3e06-392a-43b1-9f4b-e01b12e6e9c9); Tong Qi, "How Exactly Does China Consent to Investor-State Arbitration: On the First ICSID Case against China", (2012) *Contemporary Asia Arbitration Journal, Volume 5, Issue 2, pp. 265-291* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181451) Also, Shan, W., and Gallagher, at chapter 4, "China", in Brown, C., Commentaries on Selected Model Investment Treaties, Oxford University Press, 2013 (in particular at pp.154–155).

The implications to be drawn from the Protocol to the PRC–Russian Federation agreement on the promotion and reciprocal protection of investments of 2006

153. The PRC and the Russian Federation concluded an agreement on the promotion and reciprocal protection of investments in 2006 ("PRC/Russia BIT"). By a Protocol to the BIT of the same date, the PRC and Russia stipulated, in paragraph 1, as follows:

> "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."[39]

154. The implication to be drawn from this express exclusion of the application to Macao of the PRC/Russia BIT was addressed by the Tribunal at paragraphs 270–274 of its Award. The Tribunal's assessment was as follows:

> "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 at that time it would not have made sense to exclude the Macao SAR which was not then a part of 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" (Award, paragraph 274).

155. This conclusion is sound. Without detracting from it, however, there is another consideration that can also be drawn from this practice. It is that this practice constitutes evidence that, in 2006, the PRC was seised of the issue of the territorial scope of application of its BITs to Macao and Hong Kong. Also material is the way in which the PRC decided to address the issue, i.e., by agreeing with Russia to add an explicit statement on the non-application of the BIT to Hong Kong and Macao.

156. Had, however, the PRC's appreciation in 2006 been that its BITs did not apply *per se* to Hong Kong and Macao, it might have been expected that the PRC would have chosen to address the issue differently in the PRC/Russian BIT. For example, the definition of "territory" in Article 1(5) of the BIT might have been stated differently.

[39] Exhibit **Annex 22**.

Alternatively, the statement made in the Protocol to the BIT might have been more sensibly framed along something like the following lines:

> "For the avoidance of doubt, 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."

157. The point is small but important, and has two consequences beyond the conclusions expressed by the Tribunal. The first consequence is to cast doubt over the PRC's historic appreciation of the theory now advanced concerning the territorial scope of application of the PRC's BITs to Macao and Hong Kong. The second consequence is that the PRC, seised of the issue of the territorial scope of application of its BITs to Macao and Hong Kong by 2006 at the latest, had ample opportunity to engage bilaterally with its other BIT partners to clarify its understanding of the scope of application of its BITs or to otherwise rectify the position. It appears, though, that nothing was done until the Notes Verbales with Laos in January 2014.

158. Once again, while this evidence is not ultimately dispositive of the issue of the territorial scope of application of the PRC/Laos BIT, it raises questions about the reliability of the theory that Laos is advancing in these proceedings.

Conclusions on the question of whether an intention that the PRC/Laos BIT does not apply to Macao is otherwise established

159. As I observed at the outset of this Report, my assessment is that the application of the PRC/Laos BIT to Macao is not a necessary and inevitable conclusion of law. It would have been, and would (for prospective purposes) still be, open to the PRC and Laos to exclude the application of the PRC/Laos BIT to Macao. However, such an outcome could only have been (or could only now be) properly achieved by the parties to the BIT acting together, in formal, clear and unambiguous terms, and with appropriate public notice. The applicable PIL framework governing such matters is the general rules on the application of treaties in Article 29, VCLT and Article 15, VCST. Methodologically, this must be the starting point of any analysis. If the proposition that emerges from this analysis is that the PRC/Laos BIT does apply to Macao, the question that follows is whether there is any evidence that comes within the narrowly

tailored exceptions to these general rules that is both relevant and sufficiently weighty to displace the presumptive appreciation of law in favour of the application of the BIT.

160. In my view, for the reasons given above, the evidential strands on which Professor Chesterman rests his conclusions of non-application are by some margin neither sufficiently reliable nor sufficiently weighty, even taken together, to displace the normal operation of law. When one takes into account other available evidence, the balance is tipped more heavily still in favour of an assessment that the PRC/Laos BIT applied to Macao from the date of Macao's reversion to the PRC in 1999, and continues now to apply to Macao, pursuant to the rule of international law expressed in Article 29, VCLT that a treaty is binding in respect of the entire territory of its parties and the "moving treaty frontiers" rule expressed in Article 15, VCST.

Whether the PRC/Laos Notes Verbales of January 2014 constitute a "subsequent agreement" between the Parties sufficient to establish that the PRC/Laos BIT does not apply to Macao

161. The issue that remains for consideration is whether the PRC/Laos Notes Verbales of January 2014 constitute a "subsequent agreement" between the parties for purposes of the interpretation or application of the PRC/Laos BIT and, if so, whether this evidence is sufficient to displace the assessment, by reference to the general rules in Article 29, VCLT and Article 15, VCST, that the PRC/Laos BIT applies to Macao. Professor Chesterman addresses this issue in paragraphs 80–91 of his Report, reaching the conclusion that:

> "… 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.
>
> 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." (Chesterman Report, paragraphs 90–91)

162. For the reasons given below, I am unequivocally of the view that the Laotian and PRC Notes Verbales of January 2014 cannot be relied upon as a subsequent agreement between the parties that displaces the assessment that the PRC/Laos BIT applies to Macao by operation of law. The analysis advanced to the contrary is argumentative rather than evaluative. Quite apart from any issue going to the authenticity and authority of the PRC Note Verbale – issues which I understand from other evidence submitted in this case are in dispute – the Notes Verbales cannot, in my view, as a matter of law, be relied upon to sustain the contention for which they are advanced.

Preliminary observations

163. Two preliminary observations are warranted. The first goes to the proper description of the correspondence in question. Professor Chesterman, in common with the description used in other expert reports submitted in this case, refers to each correspondence as a "Letter". This is not accurate. As addressed in footnote 1 above, each document is properly described as a "Note Verbale". A Note Verbale, sometimes also referred to as a "Diplomatic Note", is a standard format, unsigned diplomatic communication that is drafted in the third person. It is a commonly used form of diplomatic communication between an embassy of a foreign State and the government authorities of the State in which it is located. An illustrative example of an exchange of Notes Verbales, taken from the internet, is provided at Exhibit **Annex 23**. As will be seen, the format of this exchange, between the Embassy of the United States of America in Madrid and the Spanish Ministry of Foreign Affairs, is the same as that of the Laotian–PRC exchanges here in issue. The correct description of these communications is potentially important as it may have a bearing on their legal effect.

164. Second, for the avoidance of any doubt, I emphasise that I agree that a subsequent agreement between the parties to a treaty can properly be taken into account for purposes of assessing the interpretation or application of a treaty. Further, I agree that a subsequent agreement between Laos and the PRC concerning the interpretation or application of the PRC/Laos BIT could be both relevant to and, depending on its

terms, potentially controlling of any issue regarding the interpretation or application of the BIT. Additionally, subject to a caveat that follows, I agree that it is in principle possible for such a subsequent agreement to take the form of an exchange of Notes Verbales between the Laotian Ministry of Foreign Affairs and the Embassy of the PRC in Vientiane. This is all straightforward stuff of law that is uncontroversial. What is contestable is what has been erected on top of this edifice.

165. The caveat to the point made above is that, while it is possible for a treaty / agreement between States to take the form of an exchange of Notes Verbales, this practice is not free from debate. It is in this context that the description of the communication is of potential importance as a "Note Verbale" is not the same as a "Letter" (which will have a named addressee and be signed), with the result that an exchange of Notes Verbales is not the same as an Exchange of Letters. Treaties / agreements constituted by an Exchange of Letters are common, the communications in question both being signed by persons who have "full powers" for these purposes, as required by Article 7, VCLT.[40]

166. In contrast, there is debate about the absence of formalism of Notes Verbales. The issue is addressed in Corten & Klein as follows:

> "On the one hand, do the instruments necessarily have to be signed or can they, for example, take the form of a *note verbale*? The question divides the literature. Some authors admit that the exchange of instruments constituting a treaty can be carried out by an exchange of *notes verbales*. Other authors deem that the instruments must necessarily be signed. Others still are of the opinion that the exchange of *notes verbales* is not governed by Article 13, but can nevertheless constitute a means of expressing consent to be bound by a

[40] Article 7, VCLT, under the heading "Full powers", provides:
"1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
(*a*) he produces appropriate full powers; or
(*b*) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

> treaty aimed at by Article 11 *in fine* of the Vienna Convention which admits 'any other means, if so agreed'. In our opinion, the question must be settled on the basis of the practice of States themselves. Diplomatic practice is acquainted with cases where the exchange of instruments constituting a treaty takes the form of an exchange of *notes verbales*."[41]

167. I agree with this assessment, and the U.S.–Spain exchange of Notes Verbales addressed in paragraph 163 above stands in support of this view. Without prejudice to this conclusion, a claim that an agreement between States is affected through an exchange of Notes Verbales will properly require evaluation to establish that the exchange does indeed formally and authoritatively reflect the views of the parties.

The legal effect of the Laotian–PRC exchange of Notes Verbales

168. Assuming, for present purposes, the authenticity and authority of the Laotian and PRC Notes Verbales, the range of their effect that might conceivably be claimed is as follows:

(a) it might be said that their effect is to *determine* that the PRC/Laos BIT does not apply to Macao, whether prospectively or retrospectively;

(b) it might be said that their effect is to *clarify* that the PRC/Laos BIT does not apply to Macao, whether prospectively or retrospectively;

(c) it might be said that their effect is to *confirm* that the PRC/Laos BIT does not apply to Macao, whether prospectively or retrospectively.

169. Each of these potential claims could seek to rely on the Laotian–PRC Notes Verbales as a subsequent agreement between the parties to the PRC/Laos BIT within the meaning of Article 31(3)(a), VCLT.

170. Professor Chesterman does not suggest that the effect of the Notes Verbales is to *determine* that the PRC/Laos BIT does not apply to Macao. To do so would be to

[41] Corten, O., and Klein, P., *The Vienna Conventions on the Laws of Treaties: A Commentary*, Oxford University Press, 2011, at Volume I, at pp.260–261, paragraph 35. Extracts exhibited at **Annex 13**.

identify the crystallising date of the *determination* as the date of the PRC Note Verbale, i.e., 9 January 2014. And, in my view, it would not be possible to sustain a claim that such a determination could have retrospective effect, reaching back *ab initio* to the date of Macao's reversion to the PRC in 1999. Professor Chesterman, in any event, does not suggest that the PRC Note Verbale has retrospective effect (Chesterman Report, paragraph 34).

171. Professor Chesterman also does not suggest that the effect of the Notes Verbales is to *clarify* that the PRC/Laos BIT does not apply to Macao. To do so would be to acknowledge that there was uncertainty over this matter until the clarification provided by the Notes Verbales, something that Professor Chesterman does not accept. It would also identify the crystallising date of the *clarification* as the date of the PRC Note Verbale, with the consequential implications regarding retrospectivity addressed above. It would also engage critical date questions, and whether the Notes Verbales evidence is relevant and admissible for the purpose for which it is claimed.

172. This leaves the contention that the effect of the Notes Verbales is to *confirm* that the PRC/Laos BIT does not apply to Macao. This is the position taken by Professor Chesterman, viz.: "… the parties are not seeking to manipulate proceedings but rather to confirm their understanding as to the application of the PRC–Laos BIT" (Chesterman Report, paragraph 88; also at paragraph 34).

173. The proposition that an exchange of Notes Verbales can properly set out the views of the parties to a treaty about its interpretation or application is perfectly acceptable. Issues of authenticity and authority apart, there could be nothing objectionable in law about the PRC and Laos – for example, in the context of a periodic review of the implementation of the BIT pursuant to its Article 11(1)(a) – setting out their views on the interpretation or application of the PRC/Laos BIT, including its territorial scope of application as regards Macao. What is questionable, however, is the weight and effect that is given to such an expression of views in the context of the present proceedings, for a number of reasons.

174. First, as discussed in paragraphs 115–117 above, a view that the January 2014 Notes Verbales are *confirmatory* of the position that prevailed prior to the exchanges of

Notes Verbales is properly deferential to an assessment of what the position actually was prior to January 2014. The Notes Verbales do not "alter the legal position" (Chesterman Report, paragraph 34) but are only prayed in aid to confirm it. Viewed in these terms, the Notes Verbales are of questionable evidential relevance and weight in the face of an assessment that the PRC/Laos BIT applied to Macao from the date of its reversion to the PRC in 1999 by straightforward operation of law. As discussed above, the balance of evidence supports an assessment that the PRC/Laos BIT applied to Macao from 1999, there being no evidence to the contrary of sufficient relevance and weight to displace the operation of the general rules in Article 29, VCLT and Article 15, VCST.

175. Second, the view that the January 2014 Notes Verbales are admissible and relevant as *confirmation* of the position that prevailed prior to the exchanges of Notes Verbales engages critical date considerations. Questions of authenticity and authority are beside the point. If the claim is simply, as it seems to be, that the Notes Verbales constitute further evidence to confirm a position that had previously been advanced by reference to evidence adduced during the arbitration, and is now advanced to the Court, this raises questions of admissibility. From the perspective of PIL, it is not necessary to resolve the issues of authenticity and authority. A prior issue is whether the evidence should now be cognisable by the Court. In my view, from a PIL perspective, the admissibility of this evidence is highly questionable, for critical date reasons.

176. Third, as a tangential point, for reasons of completeness, insofar as the Notes Verbales may fall to be considered as a new element or fact that warrants the revision or the setting aside of the Award, I note that those international tribunals and dispute settlement mechanisms that address the possibility of applications for revision of a judgment or award on the ground of new facts do so subject to tight constraints. So, for example, the Statute of the International Court of Justice ("ICJ"), in Article 61(1), provides:

> "An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also