IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Originating Summons No. 24 of 2014

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

And

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

Between

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC
(No ID exists)

...Plaintiff

And

SANUM INVESTMENTS LIMITED
(ID No Unknown)

...Defendant

AFFIDAVIT

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

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

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

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

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

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

Sworn in Singapore)
by the abovenamed)
SIMON CHESTERMAN)
on this 24th day of October 2014)

BEFORE ME,

A COMMISSIONER FOR OATHS

This affidavit is filed on behalf of the Plaintiff.

THIS IS THE EXHIBIT MARKED " SC - 2 "
REFERRED TO IN THE AFFIDAVIT
OF SIMON CHESTERMAN
SWORN/~~AFFIRMED~~ THIS 24TH DAY
OF OCTOBER 20 14

BEFORE ME

A COMMISSIONER FOR OATHS

EXPERT REPORT OF PROFESSOR SIMON CHESTERMAN

I. INTRODUCTION

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

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

3. On 7 April 2014, I provided the Government of the Lao People's Democratic Republic, the Plaintiff herein, with an expert report ("**my First Report**") concerning issues of international law arising from Originating Summons No 24 of 2014 ("**OS 24**").

4. I have now been asked to provide a second expert report in response to the expert report by Sir Daniel Bethlehem QC ("**Sir Daniel**") dated 2 October 2014 ("**Sir Daniel's Report**") and filed on behalf of Sanum Investments Limited, the Defendant in this matter.

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

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

II. PROFESSIONAL EXPERIENCE AND QUALIFICATIONS

7. My professional experience and qualifications are detailed in my First Report dated 7 April 2014 and Annexe 1 thereto.

III. ISSUES

8. The basic issues raised by Sir Daniel's Report rehearse arguments also raised in the expert report dated 18 March 2014 by Professor Wenhua Shan ("**Professor Shan's Report**"). In particular:

   (a) the applicable principles of international law;

   (b) the relevance of the letter dated 9 January 2014 and transmitted via the PRC Embassy in Vientiane ("**PRC Letter**"), referred to in Sir Daniel's Report in conjunction with the letter dated 7 January 2014 from Laos ("**Laos Letter**") as the "Notes Verbales";

(c) whether it has been "otherwise established" that the PRC-Laos BIT does not apply to the Macao SAR; and

(d) whether the PRC Letter read together with the Laos Letter constitute a subsequent agreement between the parties regarding the interpretation of the PRC-Laos Treaty, which Article 31(3)(a) of the Vienna Convention on the Law of Treaties[1] ("**VCLT**") requires to be taken into account when interpreting the treaty.

9. Sir Daniel's Report concludes that[2]:

(a) whether the PRC-Laos BIT applies to the Macao SAR requires "weighing in the balance";

(b) the evidence produced is not sufficient to "otherwise establish" that the PRC-Laos BIT does not apply to the Macao SAR;

(c) the PRC Letter and the Laos Letter are either inadmissible or of questionable quality or in any case cannot displace the legal position prior to the critical date on which the present dispute began; and

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

2 Sir Daniel's Report, paragraphs 187-192.

(d) the PRC-Laos BIT applied to the Macao SAR from its reversion to the PRC and continues to apply today.

IV. DOCUMENTS REVIEWED

10. For the purposes of preparing this report, I have reviewed the relevant legal authorities cited herein, as well as the documents cited in my expert report dated 7 April 2014. I have also, of course, carefully reviewed Sir Daniel's Report.

V. SUMMARY OF VIEWS

11. Sir Daniel agrees with my opinion on the applicable law and, though he wavers on this, on the burden of proof. My view is that it is for the Government of Laos to show, on the balance of probabilities, that it has been "otherwise established" that the PRC-Laos BIT does not apply to the Macao SAR.

12. Where our opinions diverge is in respect of the admissibility of the PRC Letter and Laos Letter. Contrary to Sir Daniel's Report, I believe that the PRC Letter and Laos Letter are plainly relevant to the issue of whether the PRC-Laos BIT applied to the Macao SAR. This is underpinned by the fact that the Arbitral Tribunal had highlighted in the Award dated 13 December 2013 that there was a "paucity of factual elements" before it.[3] This issue is now addressed by the PRC Letter and the Laos Letter. Far

[3] Award, paragraph 232.

from trying to modify the position of the parties, the PRC Letter and the Laos Letter are a valid written confirmation of a clear understanding between PRC and Laos that the PRC-Laos BIT does not apply to the Macao SAR. Accordingly, in my opinion, the PRC Letter and Laos Letter are admissible as evidence as a matter of international law.

13. I also respectfully disagree with the method applied by Sir Daniel in finding whether a different intention appears from the PRC-Laos BIT or an intention that the PRC-Laos BIT did not apply to the Macao SAR has been "otherwise established". Sir Daniel's Report proposes examining each piece of evidence on its own and asserting at each point that those individual pieces of themselves are not sufficient. However, this approach is erroneous as it fails to consider the evidence in totality.

14. In addition, contrary to Sir Daniel's opinion that each piece of evidence cited in my First Report constitutes mere "strands" of evidence of "questionable reliability",[4] it is my opinion that every piece of positive evidence supports a finding that the PRC-Laos BIT did not apply to the Macao SAR. Against that, the only evidence that is presented to the contrary is the silence of the PRC and Laos with respect to specific modification of the PRC-Laos BIT. However, the mere silence of the contracting parties to the PRC-Laos BIT does not warrant a conclusion that the parties intended the PRC-Laos BIT to apply to the Macao SAR, especially when that silence is considered in the light of the positive

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[4] Sir Daniel's Report, paragraph 190.

evidence that the treaty did *not* apply to the Macao SAR. The PRC Letter and Laos Letter also address that silence and explain it: neither party would have regarded such a modification as necessary if both parties shared a common understanding on the existing scope of the PRC-Laos BIT.

15. I am of the opinion that a finding that the PRC-Laos BIT applies to the Macao SAR would imply that all bilateral treaties to which the PRC is a party also apply to the Macao SAR and Hong Kong SAR unless this was specifically excluded in a new agreement. Such a finding would throw into confusion the international legal obligations applicable to the Macao SAR and Hong Kong SAR; would be at odds with the clear regime established in advance of the handover of both territories of "one country, two systems"; and would be inconsistent with the finding of the Singapore High Court in the case of *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 ("***Lee Hsien Loong***").[5]

16. Accordingly, I respectfully disagree with Sir Daniel's conclusion that the PRC-Laos BIT applies to the Macao SAR. I remain of the opinion that, as a matter of international law, the PRC-Laos BIT does not apply to the Macao SAR.

VI. OPINION

1. The applicable principles of international law

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5 A copy is annexed hereto as "**Annexe 30**".

17. Sir Daniel's Report agrees with my opinion in my First Report that the relevant international law provisions governing the key question of the applicability of the PRC-Laos BIT to the Macao SAR are Article 29 of the VCLT and Article 15 of the Vienna Convention on Succession of States in respect of Treaties[6] ("**VCST**").[7] In essence, these provide that a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty, or is otherwise established.

18. Sir Daniel's Report appears to elevate the Arbitral Tribunal's finding that the PRC-Laos BIT does apply to the Macao SAR based on the reputation and experience of the arbitrators[8] and the lengthy treatment of the matter in its Award on Jurisdiction.[9] As a preliminary point, I do not think that it is appropriate to suggest that the Award inherently creates support for the correctness of the Arbitral Tribunal's finding when the latter forms the very subject matter of the present application before the Court.

19. Moreover, Sir Daniel's reliance on the Arbitral Tribunal's finding is, with respect, somewhat undermined by the extract from that Award that he himself cites:

> "232. A first remark to be made by the Tribunal is the difficulty it faced in ascertaining the application or non-application of the

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

7 Sir Daniel's Report, paragraphs 17(a), 49-57.

8 Sir Daniel's Report, paragraph 19.

9 Sir Daniel's Report, paragraph 20.

> PRC/Laos BIT to the Macao SAR due to the paucity of factual elements presented by the parties: there were no affidavits from the PRC, Laos or the Macao SAR, which could probably have been obtained from the respective authorities.
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> 233. Moreover, the response to a question raised by a member of the Tribunal during the Hearing on Jurisdiction did not clarify the matter. …
>
> 236. 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. …
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> 269. In the absence of convincing elements to the contrary, the Tribunal is left with no other option but to consider that, by application of Article 15 of the VCST, the PRC/Laos BIT must be deemed to have been extended to the Macao SAR. This provisional conclusion has to be verified and confirmed by the analysis of the application to the situation of Article 29 of the VCLT which has broader exceptions than the ones included in Article 15 of the VCST."[10]

20. From the extract set out above, it is clear that what the Arbitral Tribunal conceded, and what Sir Daniel's Report would perpetuate, is that the decision on jurisdiction was made without a considered discussion of how the provisions of the VCST and the VCLT should apply to the unique circumstances of the Macao SAR. As the Arbitral Tribunal itself acknowledged, there were no affidavits submitted on this key question and the Tribunal's consideration of the specific circumstances on the Macao SAR appears to have been limited to a brief exchange in oral argument.[11] The Tribunal, which did not have the benefit of the Laos

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10 Award, quoted in Sir Daniel's Report, paragraph 21.

11 Award, paragraphs 233-235.

Letter and the PRC Letter to assist in its deliberations, conceded that it was "left with no actual information on the status of the PRC/Laos BIT".[12]

21. In the absence of detailed information on the specific case, the Tribunal proceeded to approach the topic from first principles — an approach that Sir Daniel's Report reprises. Indeed, the Tribunal acknowledged indirectly that additional information might well have led to a different conclusion:

> "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."[13]

22. As my First Report emphasized, however, there is in fact a wealth of evidence that demonstrates that both the Macao SAR and Hong Kong SAR were seen by the parties and by the vast majority of experts as representing unique cases of state succession and moving frontiers — epitomized by the idiosyncratic slogan applied to both territories by the PRC government (and accepted by the vast majority of states around the world) of "one country, two systems".

23. This is cited, for example, in the Laos Letter:

> "[T]he Lao Government is of the view that the Agreement does not extend to Macau Special Administrative Region for the reasons based on the People's Republic of China's policy of one country, two systems, its constitutional and legal framework, the Basic Law of Macau Special Administrative Region as well as the fact that the

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12 Award, paragraph 236.

13 Award, paragraph 299.

> Agreement itself is silent on its extension to Macau Special Administrative Region".[14]

24. Another fundamental issue with Sir Daniel's Report is the standard of proof which he applies. In this respect, when considering the question of whether a different intention appears from the treaty or is otherwise established that the PRC-Laos BIT should not apply to the Macao SAR, a crucial question is the threshold of proof. On this, Sir Daniel's Report is somewhat vague.

25. At times, he presents the question of the application or non-application of the PRC-Laos BIT to the Macao SAR as almost a philosophical one: it 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*".[15]

26. At other times he intimates that the barriers to a finding of non-application should be extremely high: "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."[16] Elsewhere in his report, he argues that "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

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14 Laos Letter, paragraph 2.

15 Sir Daniel's Report, paragraph 28 (emphasis added).

16 Sir Daniel's Report, paragraph 46 (emphasis added).

law that applies unless a contrary intention is *manifest*."[17] Another passage in his report asserts that evidence of a departure from the presumption must be "*compelling*".[18] In his conclusion, the threshold is raised still further: "What is presented are strands of evidence of questionable reliability and weight that do not, either individually or together, *raise sufficient doubt* to overturn the assessment that the BIT applies to Macao."[19]

27. With respect, such language is of greater rhetorical than probative value. No authority is cited for these assertions as to the variable thresholds implied.

28. Rhetoric aside, Sir Daniel's Report ultimately accepts that the crucial question of whether it has been "otherwise established" that the BIT does not apply to the Macao SAR depends on "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."[20]

29. Even so, he interprets this test in a somewhat unusual way. At various points, Sir Daniel is essentially asking that each piece of evidence should be considered individually to determine whether it and only it passes the

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17 Sir Daniel's Report, paragraph 67 (emphasis added).

18 Sir Daniel's Report, paragraph 135 (emphasis added).

19 Sir Daniel's Report, paragraph 190 (emphasis added).

20 Sir Daniel's Report, paragraph 92.

threshold, rather than considering the totality of evidence as presented — which, as I have explained in my First Report, clearly indicates the intentions of the two states parties to the PRC-Laos BIT that it should not apply to the Macao SAR.

30. In my opinion, the test for interpretation should be that consistently used in international law and reflected in Article 31 of the VCLT. That is:

> "Article 31 — General rule of interpretation
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> 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:
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> > (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> >
> > (b) any instrument which was made by one or more parties in connexion 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.
>
> Article 32 — Supplementary means of interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
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> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

31. On this basis, and consistent with the more measured passages in Sir Daniel's Report (viz "weighed in the balance"[21]), the threshold should be a balance of probabilities test — as indeed is customary in much of international arbitration.[22] As explained in further detail below, this standard of proof has clearly been met in respect of the non-application of the PRC-Laos BIT to the Macao SAR.

2. The relevance of the "Notes Verbales" and the "Critical Date"

32. Sir Daniel's Report takes issue with my reliance on the PRC Letter and Laos Letter (which he apparently terms the "Notes Verbales" on his assumption that they do not constitute "Letters"[23]) in concluding that an intention that the PRC-Laos BIT does not apply to the Macao SAR "appears from the treaty".

33. First, Sir Daniel's Report asserts that my analysis rests "almost exclusively" on the weight I give to the Laos Letter and the PRC Letter as

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21 Sir Daniel's Report, paragraph 92.

22 See, eg, Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law 2012), paragraph 7.28. A copy is annexed hereto as "**Annexe 31**".

23 Sir Daniel's Report, paragraph 165. See paragraph 46 to 48 of my report below.

a "subsequent agreement" within the scope of Article 31 of the VCLT and that there is virtually no discussion of the PRC-Laos BIT itself.[24]

34. In doing so, Sir Daniel's Report points out that the Arbitral Tribunal addressed the terms of the PRC-Laos BIT in some detail in the Award.[25] However, Sir Daniel's Report omits to mention that the conclusion drawn by the Arbitral Tribunal after carrying out that exercise was that "*no definite conclusion can be drawn* either from the silence of the Treaty on its extension to the Macao SAR, or its silence on the non-extension of the Treaty to Macao SAR."[26] Clearly, the terms of the PRC-Laos BIT did not assist the Arbitral Tribunal in determining whether an intention that the PRC-Laos BIT does not apply to the Macao SAR "appears from the treaty". In this regard, I share the Tribunal's view that the PRC/Laos BIT's silence on its extension or non-extension to the Macao SAR does not warrant a definitive conclusion either way.

35. Sir Daniel's Report also postulates that it is important for the PRC and Laos to maintain a stable legal framework for investment and be transparent about the status of the PRC-Laos BIT.[27] With respect to his assertion that a finding that the PRC-Laos BIT does not apply to the Macao SAR would disrupt a stable legal framework for investment, however, the contrary would seem to be true: given the clear statements

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24 Sir Daniel's Report, paragraph 31.

25 Sir Daniel's Report, paragraph 32.

26 Award, paragraph 277 (emphasis added).

27 Sir Daniel's Report, paragraph 41.

in the PRC Letter and the Laos Letter, as well as all the evidence produced that shows the desire to ensure legal continuity at the time of handover (see my First Report, paragraphs 47-72), it would be far more disruptive to find that the PRC-Laos BIT did apply to the Macao SAR. Where Sir Daniel asserts that there could have been better transparency and disclosure by the PRC and Laos about the status of the PRC-Laos BIT, this seems irrelevant to the ultimate finding as to whether the PRC-Laos BIT does or does not apply to the Macao SAR. It is unclear why Sir Daniel has raised these general observations in his report when he also concedes that this "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".[28]

36. Secondly, Sir Daniel's Report claims that I have omitted to test the reliability of my conclusions on the application of Article 27 of the VCLT by reference to a hypothetical situation in which a Laotian investor seeks to rely on the PRC-Laos BIT against the PRC in respect of an investment in the Macao SAR.[29] He asserts that my opinion that the PRC-Laos BIT does not apply to the Macao SAR would be "almost *per se* unsustainable"[30] in that hypothetical situation. My answer is that I did not "test" in this way because the answer was self-evident: none of the considerations I have relied on to conclude that the PRC-Laos BIT does not apply to the Macao SAR turn on whether the prospective plaintiff

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28 Sir Daniel's Report, paragraph 41.

29 Sir Daniel's Report, paragraph 44.

30 Sir Daniel's Report, paragraph 44.

seeking to rely on that treaty is a Laotian investor or a Macanese investor, or whether the prospective defendant is the PRC or Laos. My conclusion that the PRC-Laos BIT does not apply to the Macao SAR would remain the same.

37. Thirdly, Sir Daniel's Report takes issue with the timing of the PRC Letter and Laos Letter, arguing that because they were produced after the decision on jurisdiction had been made they should not be introduced as 'post-hoc "evidence"'. [31] Sir Daniel identifies the date of the commencement of the Arbitration as the "critical date", the date beyond which a party could not act to achieve an evidential advantage for its case.[32] It appears to me that it is implicit in Sir Daniel's Report that, had such a document been produced earlier, it would have been given great weight by the Tribunal.[33]

38. Such a position is hard to reconcile with his subsequent statement that it is his "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".[34]

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31 Sir Daniel's Report, paragraph 27.

32 Sir Daniel's Report, paragraph 72.

33 Sir Daniel's Report, paragraph 27. At paragraph 39 he states that "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." He adds a caveat in paragraph 46 that this would need to be achieved by the parties using formal, clear and unambiguous terms.

34 Sir Daniel's Report, paragraph 29.

39. Nonetheless, taking his position at face value, it is trite that parties to a dispute should not, in bad faith, seek to create new evidence after legal proceedings have commenced to alter their legal positions.

40. Indeed, that would be a compelling rebuttal — if there was evidence that that is what Laos were seeking to do in this case. But the idea that "post-critical date" evidence cannot be probative is rejected by the very authorities upon which Sir Daniel's Report relies.

41. Professor L.F.E. Goldie, for example, is cited as an authoritative statement that post-critical date evidence should not be allowed to modify the legal position of the parties. But Prof Goldie also states that the admissibility of events after the critical date is "dependent on whether they are in continuation of, or may effectively throw light on, the substantive events anterior to the critical date."[35] Prof Goldie discusses at length, for example, the *Flegenheimer Case*, which concerned a lawsuit that turned on a Mr Flegenheimer's nationality. Professor Goldie concludes that the critical date in that case should have allowed the Conciliation Commission to take account of the subsequent recognition by the United States of Mr Flegenheimer's US citizenship because it "decisively characterised a continuing state of affairs antecedent to that, and indeed prior to the critical date".[36] The analogy to the current case, in which post hoc

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35 L.F.E. Goldie, "The Critical Date", *International and Comparative Law Quarterly*, Volume 12(4), October 1963, pp. 1251-1284 (Annex 10 to Sir Daniel's Report), p. 1254.

36 L.F.E. Goldie, "The Critical Date", *International and Comparative Law Quarterly*, Volume 12(4), October 1963, pp. 1251-1284 (Annex 10 to Sir Daniel's Report), p. 1273-1278.

confirmation of the continuing status of the PRC-Laos BIT has been produced, is clear.

42. Sir Daniel's Report also cites the more recent article by Robert Pietrowski, [37] but his two selective quotations omit the following qualification that occurs in the paragraphs skipped through the device of an ellipsis:

> "This is not to say that evidence of events occurring after the critical date is always irrelevant. The tribunal may consider facts occurring after the critical date in order to evaluate facts occurring prior to that date. As Fitzmaurice explained it:
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> > Just as the subsequent practice of parties to a treaty, in relation to it, cannot alter the meaning of the treaty, but may yet be evidence of what that meaning is, or what the parties had in mind in concluding it, so equally events occurring after the critical date in a dispute about territory cannot operate to alter the position as it stood on that date, but may nevertheless be evidence of, and throw light on, what the position was."[38]

43. It is correct that any attempt by Laos to use the PRC Letter and Laos Letter to *change* the legal position of the parties after the critical date should be rejected by both an Arbitral Tribunal and by this Court. But I do not see any basis to conclude that that was the purpose for which the PRC Letter and Laos Letter are invoked. Nothing in the PRC Letter and Laos Letter suggests that the respective governments are *changing* or *departing from* an earlier understanding regarding the application of the

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37 Sir Daniel's Report, paragraph 73.

38 Robert Pietrowski, "Evidence in International Arbitration", *Arbitration International*, Volume 22, Issue 3, 2006, pp. 373-410 (Annex 16 to Sir Daniel's Report), pp. 399-400.

PRC-Laos BIT, or that it is only those countries' position "today"[39] that the PRC-Laos BIT does not apply to the Macao SAR. On the contrary, the PRC Letter and the Laos Letter clearly seek to confirm what the position of the parties has always been. As the above authorities recognise, there is nothing objectionable about confirming or evidencing a continuing state of affairs.

44. There is, as it happens, also Singapore authority for this position (though I do not hold myself out as an expert on Singapore law). In the case of *Lee Hsien Loong*, service of a writ of summons had been effected on 4 September 2006. A key question was whether a bilateral treaty between Singapore and the PRC[40] applied to the Hong Kong SAR after its handover in 1997.

45. The respondents in that case relied upon a letter from the Singapore Ministry of Foreign Affairs ("**MFA**") dated 13 October 2006 that mentioned a confirmation given by the Department of Justice of the Hong Kong SAR to the MFA that the treaty did not extend to Hong Kong. The date of the letter shows it was obtained after the commencement of the Court proceedings or after the plaintiff served the Writ on the respondents.[41] Nevertheless, the Court found that the letter constituted relevant evidence

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39 This strange reading of the Laos Letter and the PRC Letter was previously relied on by the Plaintiff, even though no such assertion can be found in the Laos Letter and the PRC Letter. See the 1st Affidavit of Wenhua Shan filed on 19 March 2014, paragraph 49.

40 Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Singapore and the People's Republic of China (28 April 1997), GN No T2/2001, Bilateral Treaty No B459 (ratified by Singapore 29 April 1998).

41 *Lee Hsien Loong*, paragraph 71.

which it could take into consideration under Article 31(3)(a) of the VCLT,[42] though such evidence was not decisive of the matter.[43] (The Court ultimately concluded that the treaty did not extend to the territory of the Hong Kong SAR — a post discussed in paragraph 78, below.)

46. Fourthly, in the section of Sir Daniel's Report which addresses the issue of whether the PRC Letter and Laos Letter constitute a "subsequent agreement" that the PRC-Laos BIT does not apply to the Macao SAR under Article 31(3)(a) of the VCLT, Sir Daniel contests the "formalism" of these Letters.[44] He suggests that the PRC Letter and/or the Laos Letter do not constitute "Letters", on the basis that they are not "signed" and do not have a "named addressee".[45]

47. On the question of signature, however, both the PRC Letter and the Laos Letter are executed with the seals of the PRC Embassy and Laos. On the question of addressees, the first paragraph of the PRC Letter identifies the addressee as the Ministry of Foreign Affairs of Laos, whilst the first paragraph and the bottom of the Laos Letter identify the addressee as the Embassy of the PRC.

48. Considering that Sir Daniel is not an expert on the formalities used by the PRC in its official dealings with Laos (and neither am I), I am surprised that he has sought to profess a view as to whether the physical

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42 *Lee Hsien Loong*, paragraph 74.

43 *Lee Hsien Loong*, paragraph 104.

44 Sir Daniel's Report, paragraphs 166-167.

45 Sir Daniel's Report, paragraph 165.

characteristics of the PRC Letter and/or the Laos Letter are indicative of a lack of adequate "formalism". I note that the Vice-Minister of Laos for Foreign Affairs has affirmed an affidavit which states that the Laos Letter and the PRC Letter are formal correspondence and set out the respective governments' official positions on the interpretation and application of the PRC-Laos BIT.[46]

49. For the reasons set out above, I am of the view that Sir Daniel's Report does not present any meaningful objection to my reliance on the PRC Letter read with the Laos Letter.

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

50. As indicated earlier, Sir Daniel's Report accepts that it is possible that, if evidence of this intention can be adduced, it can be "otherwise established" that the PRC-Laos BIT does not apply to the Macao SAR. He then proceeds to consider the various pieces of evidence raised in my First Report in support of my conclusion that an intention that the PRC-Laos BIT does not apply to the Macao SAR has been "otherwise established." In the following section, I will order my response similarly.

3.1 The Sino-Portuguese Joint Declaration

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46 1st Affidavit of Alounkeo Kittikhoun dated 7 April 2014.

51. With regard to the Sino-Portuguese Joint Declaration, as Sir Daniel's Report concedes, "this instrument seems to be evidence in favour of the proposition that the PRC/Laos BIT did not extend to Macao from 1999".[47]

52. He then discounts that clear interpretation on the basis that Laos was not a party to the Joint Declaration, which therefore cannot create rights or duties for Laos. However, the fact that the Joint Declaration was not a binding agreement between the PRC and Laos only rebuts an argument that the Joint Declaration modified the terms of the PRC-Laos BIT. Manifestly, however, that was not the intent of the Joint Declaration and I was not relying on it for such an argument.

53. The point made in my First Report was that the Joint Declaration served to confirm the understanding between the PRC and Portugal and to put the various other stakeholders on notice that the Macao SAR's legal system — as in the case of the Hong Kong SAR — would for the most part be unchanged after handover in 1999. As Sir Daniel has conceded, the Joint Declaration therefore supports the conclusion that the PRC-Laos BIT did not extend to the Macao SAR.

3.2 The PRC UN depositary notification

54. With regard to the PRC UN depository notification, again, Sir Daniel's Report accepts that this "appears to be compelling evidence that the

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47 Sir Daniel's Report, paragraph 95.

PRC/Laos BIT did not extend to Macao from 1999."[48] He then argues, however, that the depositary function is limited to multilateral treaties. That is correct, but the manner in which the PRC approached multilateral and bilateral treaties with respect to both the Hong Kong SAR and Macao SAR was identical: in each case, great pains were taken to make clear that the international legal position of both SARs would remain largely unchanged. The PRC's approach would have been undermined if either multilateral or bilateral treaties that the PRC had entered into had suddenly applied to the Macao SAR from 1999.

55. In my opinion, the non-application of the PRC-Laos BIT to the Macao SAR is far more consistent with the PRC's overall approach to multilateral and bilateral treaties with respect to both the Hong Kong SAR and the Macao SAR.

3.3 The PRC Letter of 9 January 2014

56. Sir Daniel's Report treats the significance of the PRC Letter as being extremely limited. Given the frustration expressed by the Tribunal on the lack of factual evidence cited earlier (see paragraphs 17-21 above), this is curious position to take. In addition to the many statements in the course of the lead up to handover of Macao in 1999, the PRC Letter appears to confirm the general understanding that international law applicable to the Macao SAR would not be appreciably different from that which had applied before 1999.

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48 Sir Daniel's Report, paragraph 103.

57. Sir Daniel's Report also expresses a concern that the process for considering extension of the PRC-Laos BIT and other treaties to the Macao SAR might depend on PRC internal law.[49] That concern would be valid with respect to the use of internal law to justify the failure to perform a treaty obligation, but not with respect to internal law *extending* the application of a treaty to new territory. It is noteworthy, moreover, that he acknowledges that such internal legal processes of the PRC can function to extend *multilateral* treaties to the Macao SAR. It is unclear why he adopts an inconsistent position by asserting that the same cannot apply when the issue is the extension of *bilateral* treaties, notwithstanding that all parties are put on notice of the PRC's internal laws. In my view, the PRC's internal laws are relevant considerations under the "otherwise established" limb of the VCLT in considering whether the PRC's bilateral treaties were intended to apply to the Macao SAR from 1999.

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

58. Sir Daniel's Report accepts the characterisation of the international legal context of Hong Kong and Macao's handover to China in my First Report.[50] He also appears to accept that the status of PRC bilateral treaties in the Hong Kong SAR will be persuasive in considering the status of such treaties in the Macao SAR.

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49 Sir Daniel's Report, paragraph 117.

50 Sir Daniel's Report, paragraph 118.

59. However, he is somewhat selective in his reading of the evidence put forward, concluding that:

> "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."[51]

60. With respect, this assertion is undermined by his earlier acceptance — at least with regard to multilateral treaties — that the Joint Declaration covered precisely such matters with respect to the Macao SAR (and, *mutatis mutandis*, the Hong Kong SAR).[52]

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

61. Sir Daniel's Report accepts that the Arbitral Tribunal was too sanguine in its dismissal of the relevance of other BITs in interpreting the PRC-Laos BIT and finds that there is at least some "confusion" as to the territorial scope of application of BITs concluded by the PRC to the Macao SAR (and the Hong Kong SAR).[53]

62. He also makes passing mention of United Kingdom practice with regard to territorial application:

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51 Sir Daniel's Report, paragraph 123.

52 See above, paragraph 57.

53 Sir Daniel's Report, paragraph 131.

> '136. ... 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.[54]
>
> 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.'[55]

63. What Sir Daniel's Report fails to observe, however, is that the extract also makes clear that an intention can be "otherwise established" *unilaterally*. That is, for countries like the United Kingdom that comprise distinct units for whom international obligations are not always identical — comparable, therefore, to the PRC with respect to the Macao SAR and Hong Kong SAR — it is open to them at the time of ratification to make a unilateral statement as to the territorial application of a given treaty.

64. This is not presented as a rule of customary law, but would clearly support a practice whereby a state made a declaration that *all treaties* would not extend to particular territories without further action being taken — precisely the position articulated in the Joint Declaration and consistent with the views of both the PRC and Laos as made clear in the PRC Letter and Laos Letter.

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54 Sir Daniel's Report, paragraph 136.

55 Sir Daniel's Report, paragraphs 136-137.

3.6 WTO Trade Policy Review report concerning Macao

65. When considering the WTO report, Sir Daniel's Report engages in some questionable parsing of text that is, on the face of it, fairly clear. The report outlined the legal framework for foreign investment 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."

66. The obvious reading of this statement, which is intended to provide information and certainty to potential investors, is that no other BITs apply to the Macao SAR except for the BIT with Portugal. Strangely, Sir Daniel's Report suggests that this statement by the WTO should instead be interpreted to mean that the Macao SAR has "concluded" no other BITs.[56] Sir Daniel's interpretation would effectively mean that instead of providing investors with certainty and guidance about the Macao SAR's existing bilateral treaties, the WTO report was actually implicitly informing potential investors that on top of the BITs listed in the WTO report the Macao SAR also had other BITs not listed or identified in the WTO report. It is not clear why such an idiosyncratic interpretation should be preferred to the more obvious and natural one, which is also consistent with the WTO report's purpose of guiding investors: that the BITs applicable to the Macao SAR are limited to the single treaty listed — and thereby indicating that the PRC-Laos BIT was not seen as applying to the Macao SAR.

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[56] Sir Daniel's Report, paragraph 139.

3.7 Scholarly comment

67. Sir Daniel's Report makes only brief mention of reference to scholarly comment, focusing on the work of Professors Gallagher and Shan, who conclude that "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."[57]

68. It is telling, however, that in a relatively long expert report he does not refer at all to one of the leading authorities on treaty law, Anthony Aust, who has expressed an opinion directly on point. The relevant text (quoted in my First Report at paragraph 59) bears repeating:

> 'Anthony Aust observes that it was agreed that none of the bilateral agreements then applicable to Hong Kong would survive handover. There is no suggestion that the bilateral treaties entered into by the PRC would suddenly apply to the Hong Kong SAR. In fact, Aust states that Hong Kong's lapsing bilateral treaties were replaced **even if the PRC had existing bilateral treaties with the same parties**:
>
> > "Thus, before handover a substantial number of states concluded treaties with Hong Kong on such matters as air services, ***investment promotion and protection***, surrender of fugitive offenders, mutual legal assistance in criminal matters and transfer of prisoners, ***even though sometimes the third state already had a treaty on the same subject with China***."'[58]

69. Nor does Sir Daniel's Report address the clear statements by Professor Zeng Huaqun, also worth repeating:

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57 Sir Daniel's Report, paragraph 143.

58 See Chesterman First Report, paragraph 59.

'As Professor Zeng Huaqun of Xiamen University, Executive Vice President of the Chinese Society of International Economic Law, wrote in 2010:

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

As Professor Zeng subsequently observed in the same article:

> "In general China's BITs are not applied to [Hong Kong] according to the relevant provisions of the [1984 Sino-British Joint Declaration], the [Basic Law] and [Hong Kong's] BITs."'[59]

70. With respect, Sir Daniel's failure to address these direct and authoritative opinions cited in my First Report undermines the contrary conclusions which he has expressed in his own report.

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

71. Sir Daniel's Report goes on to cite other matters that, he argues, lend weight to his view that the PRC-Laos BIT does not apply to the Macao SAR.

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59 Chesterman First Report, paras 63-64.

72. One point raised is the non-lodgement of a notification under the ICSID Convention. Here, Sir Daniel may have answered his own question when observing that "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."[60] In any case, though such a declaration may well have been dispositive if it existed, its absence is not proof of anything.

73. Similarly, Sir Daniel's discussion of the failure of the PRC and Laos to engage in subsequent practice to make clear their intentions with regard to the territorial application of the PRC-Laos BIT[61] does not prove anything. On the contrary, if it was understood by both parties that the PRC-Laos BIT did not apply to the Macao SAR there would have been no particular need for both parties to take any further action for their intention to be realised.

74. Such an analysis also applies to the account in Sir Daniel's report of the PRC-Russia BIT.[62] The fact that the territorial application of that treaty was provided for in the treaty itself is irrelevant to whether it could be "otherwise established" that other treaties were limited in their territorial application.

3.9 Summary

60 Sir Daniel's Report, paragraph 149.

61 Sir Daniel's Report, paragraphs 151-152.

62 Sir Daniel's Report, paragraphs 153-158.

75. In his review of this evidence, Sir Daniel's Report attempts to pick at each piece of evidence individually — the Sino-Portuguese Declaration is not "dispositive",[63] the PRC UN depositary notification is not "controlling";[64] the PRC Letter is not "dispositive";[65] the Hong Kong experience does not "provide guidance on the specific question";[66] the practice with regard to other BITs is not "dispositive";[67] the WTO report does not "authoritatively [answer] the question";[68] scholarly comment does not go "directly to the question in issue".[69] Against this evidence, he balances the silence of the PRC and Laos on the specific question of whether the PRC-Laos BIT applied to the Macao SAR.

76. Sir Daniel's Report finds that silence persuasive, but it is a far more reasonable conclusion that the parties were silent on the matter because they saw no need to address it. The preponderance of evidence shows a clear intention that both multilateral and bilateral treaties entered into by the PRC do not automatically apply to the Hong Kong SAR and Macao SAR without more. That intention was "otherwise established" within the meaning of the VCST and VCLT and it was clearly understood by Laos and the PRC, as confirmed in the Laos Letter and the PRC Letter.

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63 Sir Daniel's Report, paragraph 101.

64 Sir Daniel's Report, paragraph 114.

65 Sir Daniel's Report, paragraph 116.

66 Sir Daniel's Report, paragraph 124.

67 Sir Daniel's Report, paragraphs 132-133.

68 Sir Daniel's Report, paragraph 141.

69 Sir Daniel's Report, paragraph 142.

77. When that understanding of the parties was called into question in the arbitration proceedings before by the Tribunal, the PRC and Laos proceeded to confirm their understanding in the form of the Letters. I note that the Laotian Vice-Minister for Foreign Affairs has personally affirmed an affidavit that explains that during the arbitration the Government of Laos had reached out to the PRC through diplomatic channels, and that following a normal process of diplomatic communications the respective governments had issued formal correspondence to set out their official positions on the interpretation and application of the PRC-Laos BIT in the form of the Laos Letter and the PRC Letter.[70]

78. There is also Singapore authority on point (though I do not hold myself out as an expert on Singapore law). In the case of *Lee Hsien Loong* (cited above at paragraphs 44-45 concerning the admission of post-hoc evidence under Article 31(3)(a) of the VCLT), Menon JC, as he then was, went on to conclude that the Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Singapore and the People's Republic of China (28 April 1997), GN No T2/2001, Bilateral Treaty No B459 (ratified by Singapore 29 April 1998) should not be interpreted as extending to the Hong Kong SAR after handover. He reached this

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70 1st Affidavit of Alounkeo Kittikhoun dated 7 April 2014, paragraphs 14 to 18.

conclusion after considering two expert opinions that had been provided on the matter.[71]

79. Menon JC's finding on this point is worth quoting in extenso:

> "114 If, as I have found, it is the time at which a treaty is signed that is critical in the present case, this was before the handover of Hong Kong to the PRC. It then stands to reason that the Treaty would not apply to Hong Kong, notwithstanding the general presumption in Art 29 of the VCLT. This was the starting point of Prof Lowe's opinion, which I found cogent.
>
> 115 However, even if I am wrong in this conclusion, I am persuaded that there is sufficient evidence of an intention not to extend the Treaty to Hong Kong. The starting point is, of course, Hong Kong's own Basic Law which, by Art 153, states expressly that international agreements or treaties to which the PRC is or becomes a party will only be extended to Hong Kong if it is so decided by the Central People's Government after taking into account the circumstances and the needs of Hong Kong and after seeking the views of the Government of Hong Kong. To similar effect is Section XI of Annex I of the Joint Declaration. In addition, para 3(3) of the Joint Declaration makes it known that the default position is that:
>
> > The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.
>
> 116 Further, the Chinese and UK Governments issued notes on 20 June 1997 [the PRC UN depositary notification] listing the treaties that would be applicable to Hong Kong. Apart from excluding the Treaty from those listed, the Chinese Note went on to say:
>
> > With respect to any other treaty not listed in the Annexes to this Note, to which the People's Republic of China is or will become a party, in the event that it is decided to apply such treaty to the Hong Kong Special Administrative Region, the Government of the People's Republic of China

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71 The respondents provided an opinion from Professor Vaughan Lowe, who argued that the treaty did not apply to Hong Kong SAR; the appellants provided an opinion from Prof Gillian Triggs, who reached the opposite conclusion.

> will carry out separately the formalities for such application. For the avoidance of doubt, no separate formalities will need to be carried out by the Government of the People's Republic of China with respect to treaties which fall within the category of foreign affairs or defence or which, owing to their nature and provisions, must apply to the entire territory of a State.
>
> 117 Such language is unequivocal. It means that in the absence of formalities undertaken to extend a treaty to Hong Kong, such a treaty will simply not apply. There was no real dispute before me that no formalities had been taken to extend the Treaty to Hong Kong, and this seems to point irresistibly to the conclusion that the Treaty does not extend to Hong Kong. The only exception contemplated in these constitutional documents is if the Treaty was to be regarded as involving foreign affairs or defence matters, in which case it would extend to Hong Kong without the need for any consultations or formalities."

80. Such analysis would apply equally to the question of whether PRC bilateral treaties apply to the Macao SAR.

81. For the above reasons, I respectfully disagree with Sir Daniel's Report and maintain that an intention that the PRC-Laos BIT does not apply to the Macao SAR has been "otherwise established."

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

82. Sir Daniel's Report attempts to refute my opinion that an intention that the PRC-Laos BIT does not apply to the Macao SAR "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.

83. Besides Sir Daniel's objections regarding my reliance on the PRC Letter and Laos Letter, Sir Daniel's Report asserts that the analysis in my First Report is "argumentative rather than evaluative"[72] (though the same might equally be said of his own report). In any case, he accepts 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."[73]

84. While Sir Daniel had earlier stated in his report that he is "unequivocally of the view that the Notes Verbales of January 2014 cannot be relied upon as a subsequent agreement",[74] his own analysis in fact leads to the more cautious position 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".[75]

85. Sir Daniel's Report then asserts that the Laos Letter and the PRC Letter lack "formalism"[76] (a point discussed in paragraphs 46-48 above). He also cites with approval an authority that concludes that "the question [of

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72 Sir Daniel's Report, paragraph 162.

73 Sir Daniel's Report, paragraph 164.

74 Sir Daniel's Report, paragraph 162.

75 Sir Daniel's Report, paragraph 165.

76 Sir Daniel's Report, paragraphs 166-167.

whether such documents can express an intention to be bound] must be settled on the basis of the practice of States themselves."[77] It is perplexing, therefore, that he does not consider, among other evidence, the affidavit produced by the Government of Laos that explains the very practice of Laos and the PRC. As noted above, the Laotian Vice-Minister for Foreign Affairs has affirmed an affidavit filed in these proceedings that confirms that "both parties to the PRC-Laos BIT share the common view, and are in agreement that the BIT has not been extended to the Macao SAR and does not apply to the Macao SAR."[78]

86. The rest of the section in Sir Daniel's Report on the "appears from the treaty" limb largely engages in the circular argument that because, as he asserts, the PRC-Laos BIT did apply to the Macao SAR before the date of the PRC Letter and the Laos Letter, they should not be admitted as evidence if the effect were to *alter* that application. As I was at pains to highlight in my First Report, and as Sir Daniel's Report occasionally acknowledges, I have not argued and am not arguing that the Laos Letter and the PRC Letter serve to alter a pre-existing state of affairs. On the contrary, my point was that the Letters confirm the understanding of both the PRC and Laos concerning the non-application of the PRC-Laos BIT to the Macao SAR. There is nothing in the Letters that purports to change any prior position or understanding between the countries where the

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77 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, cited in Sir Daniel's Report, paragraph 166.

78 1st Affidavit of Alounkeo Kittikhoun dated 7 April 2014, paragraph 6.

PRC-Laos BIT applied to the Macao SAR. Sir Daniel has not cited any evidence or reasons for his underlying assumption that the Letters should be construed as *altering* a prior position.

87. I respectfully disagree with Sir Daniel's reasoning and maintain my opinion that an intention that the PRC-Laos BIT does not apply to the Macao SAR "appears from the treaty" when it is interpreted in accordance with Article 31 of the VCLT.

VII. CONCLUSION

88. As Sir Daniel's Report acknowledges, the determination of whether the PRC-Laos BIT applies to the Macao SAR requires weighing evidence in the balance. He seeks to weigh each individual piece on its own, asserting at each point that those individual pieces of themselves are not sufficient. Far from constituting mere "strands" of evidence of "questionable reliability",[79] every piece of positive evidence supports a finding that the PRC-Laos BIT did not apply to the Macao SAR. Against that, the only evidence that is presented to the contrary is the silence of the PRC and Laos with respect to specific modification of this treaty. The PRC Letter read with the Laos Letter address that silence and explain it: neither party regarded such a modification as necessary.

89. A finding that the PRC-Laos BIT applies to the Macao SAR would imply that all bilateral treaties to which the PRC is a party also apply to the

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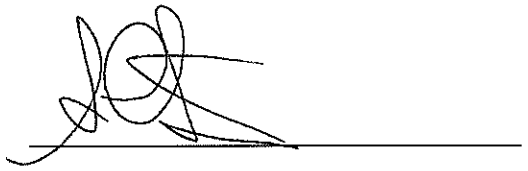
79 Sir Daniel's Report, paragraph 190.

Macao SAR and Hong Kong SAR. Such a finding would throw into confusion the international legal obligations applicable to the Macao SAR and Hong Kong SAR, it would be at odds with the clear regime established in advance of handover of both territories of "one country, two systems", and it would also be inconsistent with the Singapore Court's finding in the earlier case of *Lee Hsien Loong*.

90. For these reasons, I am unpersuaded by Sir Daniel's Report and reiterate my conclusion that the PRC-Laos BIT does not apply to the Macao SAR.



PROFESSOR SIMON CHESTERMAN

Dated 24 October 2014

Annexe 30

to the Expert Report
of Professor Simon Chesterman

Lee Hsien Loong
v
Review Publishing Co Ltd and another and another suit

[2007] SGHC 24

High Court — Suits Nos 539 and 540 of 2006
(Registrar's Appeals Nos 328 and 329 of 2006)
Sundaresh Menon JC
3, 4 January; 21 February 2007

Civil Procedure *— Service — Leave to serve writs out of jurisdiction granted — Whether invoking jurisdiction of court — Burden of proving service of process effected in appropriate manner lying on respondents as plaintiffs — Whether burden remaining on respondents when challenge to jurisdiction brought — Section 16(1) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)*

Civil Procedure *— Service — Leave to serve writs out of jurisdiction granted — Whether order granting leave should be set aside as abuse of process of court — Whether claims for damages and injunctive relief contained in writs confined to damages sustained or actions taken within Singapore — Order 11 r 1 Rules of Court (Cap 322, R 5, 2006 Rev Ed)*

Civil Procedure *— Service — Whether civil procedure convention subsisting between Singapore and Hong Kong — Whether treaty concluded between People's Republic of China and Singapore applying to Hong Kong — Order 11 r 4(1), O 11 r 4(2) Rules of Court (Cap 322, R 5, 2006 Rev Ed)*

Facts

The respondents were, respectively, the Prime Minister and the Minister Mentor of Singapore. The first appellant was the publisher of the *Far Eastern Economic Review* ("the *Review*"), a current affairs magazine that has an international circulation. The second appellant was the author of an article published in an issue of the *Review*, the contents of which the respondents took offence at. They each commenced separate actions against the first and second appellants.

The respondents applied for leave to serve the writs out of the jurisdiction and their applications were granted. Service was effected by a process server by personally serving the second appellant and by leaving copies of the writs of summons, statements of claim and relevant court orders at the registered address of the *Review*.

The appellants challenged the jurisdiction of the court on two main grounds, both in the court below and on appeal: (a) the order granting leave to serve the writs out of the jurisdiction ought to be set aside as an abuse of the process of the court because the claims for damages and for injunctive relief contained in the writs were not confined to damages sustained or actions taken within Singapore; and (b) even if leave to serve the writs out of the jurisdiction had been properly granted, the writs had not been served in an appropriate manner because service had not been effected in accordance with the Treaty on Judicial Assistance in

Civil and Commercial Matters between the Republic of Singapore and the People's Republic of China ("the PRC") (28 April 1997), GN No T2/2001, Bilateral Treaty No B459 (ratified by Singapore 29 April 1998) ("the Treaty").

Before the assistant registrar, the appellants' challenge was dismissed. Dissatisfied, the appellants filed these appeals against the whole of the assistant registrar's decision.

Held, dismissing the appeals:

(1) The burden of proving all the elements necessary to found jurisdiction, including proper service, lay with the respondents, as plaintiffs, when they applied for leave to serve the writs out of the jurisdiction. It remained on them when a challenge was subsequently brought to dispute the jurisdiction of the court: at [20] and [21].

(2) There were a number of interests that the abuse of process doctrine was meant to protect: (a) to guard against the unjustified extension of jurisdiction beyond the home jurisdiction's territorial limits; (b) to ensure that litigants did not unjustly draw foreign defendants into a jurisdiction thereby causing inconvenience to them; and (c) to prevent the wastage of judicial resources in adjudicating a claim which had nothing to do with the home jurisdiction but was merely an attempt to vindicate one's global reputation: at [25], [26] and [29].

(3) The statements of claim ("the SOC") clearly demarcated the boundaries of the respondents' claim. The affidavits filed in support of the respondents' applications for leave to serve out were also wholly unambiguous as to the scope of the remedies sought. The undertaking given by counsel for the respondents in the court below was more than sufficient to quash any uncertainty in respect of the real scope of the respondents' claim against the appellants: at [31].

(4) In analysing the SOC, the inquiry was directed at whether, in fact, the respondents were seeking to include a claim to relief founded on matters occurring outside the jurisdiction having regard to the fact that each publication gave rise to a separate tort. There was no basis upon which the SOC as pleaded and taken as a whole could sustain a finding of publication to someone outside Singapore: at [35] and [48].

(5) When a challenge was brought against the jurisdiction of the court, the court could look at the affidavit filed in support of the application for leave to serve out to assess whether the claim fell within O 11 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"). The respondents could not have been trying to preserve a claim for relief outside Singapore when their affidavits clearly disavowed any such intent: at [53] and [55].

(6) The court would not assume a highly rigid and categorical approach to deciding which cases were not justiciable. The following principles bore noting: (a) justiciability depended not on the source of the decision-making power, but on the subject matter that was in question; (b) where the decision involved matters of government policy and required the intricate balancing of various competing policy considerations that judges were ill-equipped to adjudicate because of their limited training, experience and access to material, the courts should shy away from reviewing its merits; (c) where a judicial pronouncement could embarrass some other branch of government or tie its hands in the conduct of affairs traditionally regarded as falling within its purview, the courts

should abstain; and (d) in all cases of judicial review, the court should exercise restraint and take cognisance of the fact that our system of government operated within the framework of three co-equal branches: at [98].

(7) To the extent that the court was required to construe a bilateral treaty in the light of international law principles and certain international instruments, it was only to determine the domestic legal obligations applicable to litigants seeking to invoke the court's jurisdiction pursuant to the Rules and the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the SCJA"). Such an inquiry comfortably fell within the proper sphere of judicial inquiry: at [103].

(8) It was the time at which the parties signed and concluded a treaty that was critical in the assessment of the parties' intentions. At that time, Hong Kong had not yet been handed over to the PRC. Moreover, the Treaty did not involve matters touching on the conduct of foreign affairs. It was a civil procedure convention between two countries and more specifically, an agreement between two countries to render mutual judicial assistance: at [112] and [118].

[Observation: While a court had the power to set aside an order granting leave to serve out for breach of the rule that there be full and frank disclosure during the leave application (even if that breach was committed innocently), this was ultimately a discretionary power and a court was entitled to examine all the circumstances of the case to determine whether in any given case that was to be exercised: at [60].

The court was not deciding on the PRC's or Hong Kong's behalf what laws were in fact in operation there. The court was only concerned with what laws were likely to be in operation in the foreign jurisdiction for the purposes of determining whether Singapore writs had been served out of the jurisdiction in compliance with the requirements of s 16 of the SCJA read with O 11 r 4 of the Rules and hence whether our court was properly seized of jurisdiction: at [123].]

Case(s) referred to

Aaron Anne Joseph v Cheong Yip Seng [1996] 1 SLR(R) 258; [1996] 1 SLR 623 (refd)

Aksionairnoye Obschestvo AM Luther v Sagor & Co [1921] 3 KB 532 (refd)

Al Amoudi v Brisard [2007] 1 WLR 113; [2006] 3 All ER 294 (refd)

Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd [2006] 1 SLR(R) 901; [2006] 1 SLR 901 (refd)

Badische Anilin und Soda Fabrik v Chemische Fabrik vormals Sandoz (1903) 88 LT 490 (refd)

Berezovsky v Michaels [2000] 1 WLR 1004 (folld)

Chadha v Dow Jones & Co Inc [1999] EMLR 724 (refd)

Civil Aeronautics Administration v Singapore Airlines Ltd [2004] 1 SLR(R) 570; [2004] 1 SLR 570 (distd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)

Diamond v Sutton (1865–66) LR 1 Ex 130 (refd)

Dow Jones & Co Inc v Gutnick (2002) 194 ALR 433 (folld)

Eyre v Nationwide News Pty Ltd [1967] NZLR 851 (refd)

Fagernes, The [1927] P 311 (refd)

Fullam v Newcastle Chronicle and Journal Ltd [1977] 1 WLR 651 (refd)

Hagen, The [1908] P 189 (refd)

Hong Kong Housing Authority v Hsin Yieh Architects & Associates Ltd [2005] 1 HKLRD 801 (refd)

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2006] FCAFC 116 (refd)

Jameel v Dow Jones & Co Inc [2005] QB 946 (refd)

Kroch v Rossell [1937] 1 All ER 725 (refd)

Longhans v Odhams Press Ltd [1963] 1 QB 299 (refd)

Microsoft Corp v SM Summit Holdings Ltd [1999] 3 SLR(R) 465; [1999] 4 SLR 529 (refd)

Mighell v The Sultan of Johore [1894] 1 QB 149 (refd)

Murugason v The Straits Times Press (1975) Ltd [1983–1984] SLR(R) 311; [1984–1985] SLR 334 (refd)

Network Telecom (Europe) Ltd v Telephone Systems International Inc [2004] 1 All ER (Comm) 418 (refd)

Pacific Assets Management Ltd v Chen Lip Keong [2006] 1 SLR(R) 658; [2006] 1 SLR 658 (distd)

PT Garuda Indonesia v Birgen Air [2001] SGHC 262 (refd)

R v Foreign Secretary of State for Foreign and Commonwealth Affairs, ex parte *Everett* [1989] 1 QB 811 (refd)

R (on an application of Gentle) v Prime Minister [2006] EWCA 1690 (refd)

R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 (refd)

R (on the application of Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2777 (Admin) (refd)

R (on the application of Marchiori) v Environment Agency [2002] EWCA Civ 3 (refd)

Reemtsma Cigarettenfabriken GmbH v Hugo Boss AG [2003] 3 SLR(R) 469; [2003] 3 SLR 469 (refd)

Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd [1983–1984] SLR(R) 403; [1984–1985] SLR 381 (refd)

Siskina v Distos Compania Naviera SA [1979] AC 210 (refd)

Société Générale de Paris v Dreyfus Brothers (1885) 29 Ch D 239 (refd)

Tengku Jonaris Badlishah v PP [1999] 1 SLR(R) 800; [1999] 2 SLR 260 (refd)

Thomas v Duchess Dowager of Hamilton (1886) 17 QBD 592 (refd)

Transniko Pte Ltd v Communication Technology Sdn Bhd [1995] 3 SLR(R) 941; [1996] 1 SLR 580 (refd)

Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 (folld)

Legislation referred to

Civil Law Act (Cap 43, 1999 Rev Ed) ss 3(*a*), 4(10)

Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 11 r 1(*b*), O 11 r 1(*f*), O 11 r 1(*p*), O 11 r 4(1), O 11 r 4(2) (consd);
O 11 r 1, O 12 r 7, O 78 r 3(1)

State Immunity Act (Cap 313, 1985 Rev Ed) s 18

Supreme Court Judicature Act (Cap 322, 1999 Rev Ed) s 16(1) (consd); ss 18(1), 18(2), First Schedule para 5

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Cap 2101) (HK) Art 153

Companies Ordinance (Cap 32) (HK) s 356

Rules of the High Court (Cap 4A) (HK) O 10, O 65

Peter Cuthbert Low (Peter Low Partnership) for the appellants;
Davinder Singh SC, Wilson Wong, Jaikanth Shankar (Drew & Napier LLC) for the respondents.

21 February 2007 Judgment reserved

Sundaresh Menon JC:

1 In what Thomas Friedman terms a "flattening world", accessibility to instruments of mass media and communication – in particular, the Internet – is dramatically shortening the globe's communicative synapses and greatly increasing the potential reach and impact of any individual idea or expression. Such accessibility gives rise to power which holds promise, but it also portends abuse. The transformation in how we transmit and receive information and ideas inevitably has important implications for the law. One illustration of this may be found in the increasingly common occurrence of defamation suits that straddle more than one jurisdiction. The archetypal case is one where the publisher of the allegedly defamatory words is resident in one jurisdiction while the impact of those words sounds in another (or many other) jurisdiction(s). The present appeals before me involve precisely this situation.

2 The road to pressing a claim for defamation against a foreign defendant can be a long one. For a plaintiff who alleges that certain publications are defamatory of him in his home jurisdiction, among the first steps to be taken in commencing proceedings against the foreign publisher is the need to obtain the leave of court to serve the writ out of the jurisdiction. This seemingly simple step can become somewhat involved. The plaintiffs (who are the respondents in the present appeals) did obtain leave and did effect service on the defendants (who are the appellants) but the validity of these efforts is now challenged. It is said, first, that their claims do not fall within the ambit of O 11 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") so that leave to serve out of the jurisdiction could not validly have been given. Second, it is said that service of the writs was not effected in an appropriate manner. These issues in turn give rise to some ancillary but significant issues concerning the burden of proof and the separation of powers.

The factual background

3 The facts leading to the present appeals are relatively straightforward and are not contested. The respondents in these appeals are, respectively, the Prime Minister and the Minister Mentor of Singapore. The first appellant is the publisher of the *Far Eastern Economic Review* ("the *Review*"), a current affairs magazine that has an international circulation. The second appellant, Mr Hugo Restall, is the editor of the *Review* and, notably, the author of an article entitled "Singapore's 'Martyr', Chee Soon Juan", published in the July/August 2006 issue of the *Review* at pp 24–27 ("the disputed article"). This article was also published in the Web version of the *Review*, accessible on the Internet, without charge, to any who bothered to visit the website. The respondents took offence at the contents of the disputed article and, having failed to reach an acceptable settlement with the appellants, they each commenced separate actions in Suits Nos 539 and 540 of 2006 against the *Review* and Mr Restall.

4 Because the *Review* is a company incorporated in Hong Kong and Mr Restall is ordinarily resident in Hong Kong, and because both appellants declined to accept service in Singapore voluntarily, it was necessary for the respondents to serve the writs out of the jurisdiction. The respondents applied for leave to do so and their applications were granted on 28 August 2006. Service was effected by a process server on 4 September 2006 by personally serving Mr Restall and by leaving copies of the writs of summons, statements of claim and relevant court orders at the registered address of the *Review*. On 23 September 2006, the *Review* and Mr Restall entered appearance for the purpose of disputing the jurisdiction of the court pursuant to O 12 r 7 of the Rules.

5 It was accepted by the appellants before me that the challenge against the jurisdiction of this court in the final analysis rested on two main points. The first was whether the order granting leave to serve the writs out of the jurisdiction ought to be set aside as an abuse of the process of the court because the claims for damages and for injunctive relief contained in the writs were allegedly not confined to damages sustained or actions taken within Singapore. The second point of contention was that even if leave to serve the writs out of the jurisdiction had been properly granted, the writs had not been served in an appropriate manner because service had not been effected in accordance with the Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Singapore and the People's Republic of China (28 April 1997), GN No T2/2001, Bilateral Treaty No B459 (ratified by Singapore 29 April 1998) ("the Treaty").

6 Before the assistant registrar, the appellants' challenge was dismissed but with a slight reservation. While the assistant registrar was satisfied that it was sufficiently clear that the claims for damages were confined to losses arising from the publication of the disputed article in Singapore, she sought and obtained an undertaking from counsel for the respondents to limit the

reach of any injunctive relief sought to Singapore. As to whether service of process had been effected properly, the assistant registrar found in favour of the respondents. Dissatisfied, the appellants filed these appeals against the whole of the assistant registrar's decision.

Preliminary points

Application to permit foreign counsel to attend the hearing in chambers

7 Before the hearing of the appeals commenced, the appellants applied for permission for one Mr Tim Robertson SC from New South Wales, Australia to sit in at the hearing of the appeals, which (as is the norm for registrar's appeals) was conducted in chambers. According to Mr Peter Cuthbert Low, who appeared for the appellants, Mr Robertson had been retained by the appellants from the onset of the proceedings against them and had acted as their lead legal advisor. Mr Low submitted that he had been instructed as Singapore counsel by Mr Robertson. Mr Davinder Singh SC, who appeared for the respondents, objected to Mr Robertson's attendance. He submitted that the application raised a question, first of principle, and only then of discretion. Mr Singh submitted in effect that hearings in chambers were private. While permission to attend a hearing in chambers might be extended to one who was an employee or an agent of a litigant, Mr Robertson was neither. He accordingly submitted that there was no basis in principle to permit Mr Robertson's attendance.

8 I accept that the starting point of the analysis is that hearings in chambers, unlike proceedings in open court, are private in nature. Thus, members of the public have no *entitlement* to attend proceedings in chambers. Mr Robertson, however, sought permission to attend the present appeals not in his capacity as a member of the public, but as a legal adviser to the appellants. In my judgment, Mr Robertson's interest in these proceedings was sufficient to bring him within the class of persons in whose favour I could conceivably have exercised my discretion. In fact, as I informed Mr Singh, I myself, as foreign counsel, have had the benefit of the courtesy of being allowed to attend proceedings in chambers with Singapore counsel extended to me.

9 Mr Singh then submitted that I should not exercise my discretion in Mr Robertson's favour. He submitted that in considering the exercise of my discretion, it was appropriate to have regard, among other things, to the identity of the particular individual seeking permission to attend and the risk that the dignity or authority of the court might be compromised by that person, if he was allowed to attend. In this regard, Mr Singh drew my attention to an article published in the *Sydney Morning Herald* on 22 November 2005 headlined "We should impose sanctions: lawyer", in which Singapore's decision to execute a convicted drug trafficker, Nguyen Tuong Van, was criticised. Mr Robertson was quoted in the report as

characterising Singapore as an "authoritarian regime" and pointedly remarking that:

> [T]he present Singapore is controlled by the Government, as is the judiciary, and so in cases which have a political element in them the odds are stacked well and truly against the opponents of the regime.

10 Mr Singh made two submissions on this. First, he submitted that Mr Robertson had manifested a proclivity to make such statements which were ill-founded and disrespectful of the judiciary, and, in view of this, the court should not be placed in the position of having to respond to or defend itself in the face of any further remarks of a similar vein that Mr Robertson might make if he was permitted to attend the hearing in chambers. Secondly, Mr Singh submitted that inasmuch as the court was being asked to exercise its discretion, there was no reason at all for it to do so in favour of one who maintained a position that was openly disrespectful, even contemptuous, of the court. As Mr Singh put it: why open our doors to one whose mind was already shut?

11 Mr Low, in response, informed me that he had no knowledge of the remarks that had been reported in the article in question in the *Sydney Morning Herald* and attributed to Mr Robertson. I therefore stood the matter down for Mr Low to take instructions as to whether Mr Robertson had indeed made those remarks and whether he continued to stand by them. When we resumed, Mr Low informed me that Mr Robertson had made no adverse statements concerning the judiciary in relation to the present proceedings. As I pointed out to Mr Low, that, of course, was not my inquiry. Mr Low then confirmed that Mr Robertson did not deny making those statements. Nor, it appeared, was Mr Robertson inclined to withdraw or resile from those statements. Mr Low urged me to have regard to the fact that Mr Robertson came from a jurisdiction where the right to attend a hearing in chambers was not controversial. He further submitted that for someone with Mr Robertson's background, such comments might not be regarded as exceptional. He submitted that the best way to counter Mr Robertson's allegations would be to allow him to sit in and witness the fairness inherent in our court proceedings so that the truth might shine forth. To prevent him from attending the appeals, Mr Low contended, would only cement his belief that our legal system was unfair and opaque.

12 Mr Low's arguments had a beguiling attraction, but they missed a key point: What was the reason for which permission was being sought for Mr Robertson to sit in? The only grounds advanced by Mr Low were these: Mr Robertson wanted to see for himself how these proceedings were conducted and how the arguments were presented; and ultimately, it was said, allowing Mr Robertson to attend in chambers would help clear his misconceptions. In short, it seemed to me that Mr Robertson wanted to judge the judge.

13 In my judgment, I do have a very wide discretion in this regard, but it is nonetheless to be exercised judiciously. It will be relevant in this context to have regard to the interest that the person who is seeking permission has in the litigation, the interests of the litigants themselves, the reasons for which such permission is sought and the court's interest in preserving and upholding its authority and dignity.

14 In the present case, Mr Singh's submission that Mr Robertson should be excluded because he might otherwise mis-describe the conduct of the proceedings or the judiciary left as little impression on me as Mr Low's submission that he should be permitted to sit in so as to be satisfied about the fairness of these proceedings. This court has one primary interest, and that is to do justice to all without fear or favour. I have no interest whatsoever in indulging Mr Robertson by seeking to allay his fears or in otherwise seeking to change his mind about the integrity of our judiciary. The judgments of this court speak for themselves.

15 The fact that the request was made on behalf of someone who had made openly disrespectful remarks about the judiciary and continued to stand by them even as he sought my indulgence was a factor I considered relevant. In my judgment, it would have been inappropriate in these circumstances for me to have turned the other cheek to Mr Robertson when I would not have done so for any citizen of this country. Furthermore, I was mindful that an exercise of my discretion in Mr Robertson's favour in these circumstances might have been misconstrued as acquiescence in his views and this would have been unacceptable, to say the least.

16 Even so, I was anxious to ensure that the appellants, who were the litigants before me, should not be prejudiced by reason of the misconceptions of their legal advisor. I therefore asked Mr Low if the request was being made on the basis that he might need Mr Robertson's assistance in the course of conducting the appeals. Mr Low candidly and explicitly stated that he did not require Mr Robertson's assistance in the appeals. Indeed, Mr Low was satisfied and confirmed that through him and his firm, the appellants were fully and ably represented.

17 In those circumstances, it was apparent that the appellants' interests generally and, in particular, their fundamental right to be heard would not be compromised by Mr Robertson's absence from my chambers during the hearing of the appeals. Furthermore, I was satisfied that in the interest of upholding the dignity and authority of this court, he should be excluded. I accordingly denied the request.

The burden of proof

18 Both counsel agreed that the burden of proving that the respondents' claim was within the ambit of O 11 rr 1(*b*), 1(*f*) and/or 1(*p*) of the Rules so as to warrant the grant of leave to serve the writ out of the jurisdiction lay with the respondents. What was initially disputed was whether the burden

of proving that service of process had (or had not) been effected in an appropriate manner was on the respondents (as plaintiffs) or the appellants (as defendants). Mr Singh relied on *Pacific Assets Management Ltd v Chen Lip Keong* [2006] 1 SLR(R) 658 ("*Pacific Assets*") at [12] and *Reemtsma Cigarettenfabriken GmbH v Hugo Boss AG* [2003] 3 SLR(R) 469 ("*Hugo Boss*") at [10], where the court was similarly confronted with applications to set aside service of process out of jurisdiction on the basis that the manner of service was irregular. In both cases, the court held that the legal burden of proving that there had been an irregularity in the manner of service lay with the party seeking to set aside such service.

19 Mr Low accepted Mr Singh's characterisation of the holdings in *Pacific Assets* and *Hugo Boss*, but he submitted that in both instances, the question of burden of proof had simply been assumed by the court without detailed argument or reasoning. Mr Singh accepted the force of this observation. The appellants further submitted that it accorded with good sense that the party that seeks to effect service out of the jurisdiction should retain the burden of proving all the elements necessary to found jurisdiction in a subsequent application to set aside. Mr Low submitted that this was because service out of the jurisdiction is an exorbitant jurisdiction which has the potential to threaten comity among nations and, for this reason, the benefit of any doubt as to whether service has been effected properly should be given to the foreign defendant: *Siskina v Distos Compania Naviera SA* [1979] AC 210 ("*The Siskina*") at 254–255, citing *The Hagen* [1908] P 189 at 201. It would run counter to this to impose the burden of proving that service had not been effected properly upon the foreign defendant. Mr Low also relied on the following *dicta* in the majority opinion of the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 ("*Voth*") at [50]:

> Where a case falls within a category in which the legislature has seen fit to allow service outside the jurisdiction if, but only if, the leave of a court is first obtained, that court should not grant leave unless it is positively persuaded that it should do so. Plainly, it should not be so persuaded unless the plaintiff satisfies it that the case is of the relevant category and that the proceedings would not be subsequently stayed as an abuse of process on forum non conveniens grounds or for some other reason. In such a case the onus should remain on the plaintiff on a subsequent application to set aside the service outside the jurisdiction. Otherwise, the ex parte order for service outside the jurisdiction, if onus of proof were to prove decisive, would confer an enduring advantage upon a plaintiff notwithstanding that the expanded evidence on a contested application to set aside service indicated that the applicant had not been entitled to that ex parte order.

20 In my judgment, and Mr Singh subsequently conceded the point, the appellants were correct in their assertion that the burden of proving all the elements necessary to found jurisdiction, including proper service, remains

on the respondents, as plaintiffs. I find the reasoning in *Voth* persuasive. Furthermore, as Mr Low submitted, in order to invoke the jurisdiction of the High Court, a plaintiff seeking to sue a foreign defendant must satisfy s 16(1) of the Supreme Court Judicature Act (Cap 322, 1999 Rev Ed) ("the SCJA"), which is in the following terms:

> 16.—(1) The High Court shall have jurisdiction to hear and try any action in personam where —
>
> (*a*) the defendant is served with a writ or other originating process —
>
> (i) in Singapore in the manner prescribed by Rules of Court; or
>
> (ii) *outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court*; or
>
> (*b*) the defendant submits to the jurisdiction of the High Court.
>
> [emphasis added]

21 It is clear from s 16(1)(*a*)(ii) of the SCJA that a plaintiff's jurisdictional title to sue a foreign defendant depends upon the claim falling within the circumstances authorised by the Rules (in other words, the sub-rules of O 11 r 1) as well as upon the writ being served in the manner prescribed by the Rules. Mr Low submitted that it was only upon both conditions being met that the jurisdiction of the court could properly be invoked. I agree with this. It is the respondents who wish to invoke the court's jurisdiction in respect of these foreign appellants, and since the respondents assert that the court has the jurisdiction, it falls upon them to prove it. That burden lay with the respondents when they applied for leave to serve the writs out of the jurisdiction, and it remained with them when a challenge was subsequently brought to dispute the jurisdiction of the court.

Abuse of process – whether the respondents' claims fell within O 11 r 1

22 In their applications for leave to serve the writs out of the jurisdiction, the respondents asserted that their claims fell squarely within O 11 rr 1(*b*), 1(*f*) and 1(*p*) of the Rules. These provisions state:

> **Cases in which service out of Singapore is permissible (O. 11, r. 1)**
>
> 1. Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3 (1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action —
>
> ...
>
> (*b*) an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
>
> ...

> (*f*) (i) the claim is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore; or
>
> (ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring;
>
> ...
>
> (*p*) the claim is founded on a cause of action arising in Singapore ...

23 The common thread running through these provisions is that the claim or cause of action or relief sought should have a sufficient nexus with Singapore. The need to establish a nexus with the home jurisdiction serves to prevent the unwarranted extension of the jurisdiction of this court beyond the territorial limits of this country. As to this, there can be and was no quarrel. The appellants, however, contended that the respondents' claims against them were not in fact as narrowly tailored as required by O 11 rr 1(*b*), 1(*f*) and 1(*p*) of the Rules. Specifically, it was submitted that:

> (a) in relation to O 11 r 1(*b*), the respondents' claim for injunctive relief was not confined to publications or re-publications in Singapore but extended to publications or re-publications anywhere else in the world;
>
> (b) in relation to O 11 r 1(*f*), the respondents' claim for damages was not limited to injury suffered in Singapore, but extended to vindication of the reputation of the respondents anywhere else in the world; and
>
> (c) in relation to O 11 r 1(*p*), the respondents' claim was not confined to causes of action arising in Singapore and that the respondents were pursuing damages and injunctive relief in respect of publications worldwide.

24 In short, the appellants' contention was that in some respects at least, the respondents' claims had no sufficient nexus with Singapore. In support of this, the appellants contended that the statements of claim ("the SOC") lacked any specification as to the place of publication and the location of the readers in whose eyes the respondents' reputations are alleged to have suffered. Furthermore, no words limited the claim for damages and injunctive relief to Singapore. It bears noting that it was only the SOC that the appellants complained were vague or exorbitant and contrary to the requirements of O 11 r 1. The appellants did not take issue with the affidavits filed by the respondents in support of their application for leave to serve out of jurisdiction. On the contrary, the appellants alleged that the certainty with which the affidavits asserted that the respondents' claims were limited to Singapore was misleading and was evidence of the respondents' contravention of their duty to make full and frank disclosure

when making the leave application *ex parte*. On this basis, the appellants submitted that it was an abuse of the process of the court for the respondents to have sought and obtained leave to serve the writ out of the jurisdiction.

25 It is useful to return to first principles and to understand the rationale for the rule that underpins the cases relating to abuse of process. In my judgment, there are a number of interests that the abuse of process doctrine is meant to protect. The first, explained above, is to guard against the unjustified extension of jurisdiction beyond the home jurisdiction's territorial limits. In *Eyre v Nationwide News Pty Ltd* [1967] NZLR 851 ("*Eyre*"), the plaintiff was resident in New Zealand. The publisher of certain defamatory remarks in a newspaper article was a company registered in Australia. While the total circulation of the newspaper was approximately 66,000 copies, the circulation in New Zealand amounted to only 21 copies and these had been delivered to individual subscribers. The Supreme Court of New Zealand, in setting aside the order for service out of New Zealand, held (at 854–855) as follows:

> Any loss of reputation [the plaintiff] has suffered abroad from publication in another country is a matter for the Courts exercising jurisdiction in the country of publication. Here it seems to me that the plaintiff is claiming damages in New Zealand for loss of reputation both in New Zealand and Australia. *The pleadings do not confine him to the cause of action arising within the jurisdiction. This exceeds the jurisdiction of the Court* and in addition I am not satisfied there is a question of substance in this country. [emphasis added]

26 A second, perhaps more pertinent, interest in so far as the present appeals are concerned is to ensure that litigants do not unjustly draw foreign defendants into a jurisdiction thereby causing inconvenience to them. This principle also explains the firmness with which the courts have resisted attempts to invoke their jurisdiction when only minor damage has taken place in their jurisdiction and the real desire is to recover damages for injuries suffered in other jurisdictions (such as in *Eyre*). In a similar vein, the courts have refused to allow their jurisdiction to be invoked where what the plaintiff intends is to draw the defendant into the home jurisdiction and then tack on other causes of action that have no connection with that jurisdiction (as was observed in *Diamond v Sutton* (1865–66) LR 1 Ex 130 ("*Sutton*")).

27 As Pearson J noted in *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239 at 242–243:

> [I]t becomes a very serious question, and ought always to be considered a very serious question, whether or not even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, *to the inconvenience and annoyance of being brought to contest his rights in this country*, and I for one say, most distinctly, that I think this

> Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction. [emphasis added]

28 More recently, in *Chadha v Dow Jones & Co Inc* [1999] EMLR 724, a plaintiff in England sought leave to serve process against a defendant incorporated in New York arising out of the publication of allegedly defamatory statements in a magazine. It was found that of the 294,346 copies of the relevant edition of the magazine sold, only 1,257 copies had been sold in England. The English Court of Appeal set aside the lower court's decision to grant leave, and commented thus (at 732–733):

> If there is a substantial complaint with respect to the English tort, having regard to the scale of the publication within the jurisdiction and the extent to which the plaintiff has connections with and a reputation to protect in this country *as against the inconvenience to the defendant in being brought here to answer for his alleged wrong-doing* then service of the writ abroad is to be ordered. The onus of showing that the plaintiff has sufficient connections with and a sufficient reputation to protect in this country is on the plaintiff ... The principle may have been better stated than I have stated it, by Lord Buckmaster in Johnson v Taylor Brothers & Co Ltd [1920] A.C. 144 at 160:
>
> > It must, however, be remembered that the issue of the writ, even in a case within the words of the rule, can only be made by leave of the court, and, in granting such leave, regard ought to be had to the real breach in respect of which the action is brought, and not merely to a breach on which it is necessary to rely, not to obtain relief, but only to found jurisdiction under the rule.
>
> In his judgment in *Kroch v Rossell* [1937] 1 All ER 725 at page 731 Scott LJ having cited the passage from the speech of Lord Buckmaster cited above, said:
>
> > *... but the point of the observation is that the reality of the question ought to be looked at, and, if the reality of the cause of action is one which belongs to a foreign country, and not to this country, and above all, where it is a question which probably would be better tried, for any particular reason which appears in the circumstances of the case, in the foreign country, leave ought not to be granted.*
>
> [emphasis added]

29 The wastage of judicial resources in adjudicating a claim which, in truth, has nothing to do with the home jurisdiction but is merely an attempt to vindicate one's global reputation is a third interest protected by the abuse of process doctrine. As explained by Lord Phillips of Worth Matravers MR in *Jameel v Dow Jones & Co Inc* [2005] QB 946 at [54]:

> An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court

> resources are appropriately and proportionately used in accordance with the requirements of justice.

While this *dictum* was expressed in the context of striking out a defamation claim as an abuse of process, Lord Phillips MR expressly noted at [70] that this rationale also applied in cases where there was a challenge to the jurisdiction of the court.

30 What is clear from all these cases is that the courts examine the substance of the inquiry: Is the plaintiff seeking to bring the foreign defendant into the home jurisdiction to pursue a claim for injury arising within jurisdiction or is he, in reality, seeking in this jurisdiction to vindicate the alleged damage to his reputation in other jurisdictions? The primary mechanism to ensure that a plaintiff does not abuse the jurisdiction of the court is found in the need for the plaintiff to seek leave to serve out. In this context, the courts require that a plaintiff frames his claim such that it is limited to the home jurisdiction. If the claim is not sufficiently circumscribed or if there is ambiguity, leave may be refused or the claim may have to be amended or an undertaking may be insisted upon to the effect that the plaintiff will not pursue any claim for injury suffered elsewhere (see below at [61]–[67]).

31 The first question that arises in these appeals is whether the assistant registrar who granted the respondents leave to serve out on 28 August 2006 exercised her discretion properly and ensured that the reliefs sought would be limited to Singapore as required under O 11 r 1 of the Rules. In my judgment, she did and no grounds have been shown for the order, granting leave to serve out, to be set aside. In my view, the SOC clearly demarcated the boundaries of the respondents' claim. Beyond that, the affidavits filed in support of the respondents' applications for leave to serve out were also wholly unambiguous as to the scope of the remedies sought. Finally, if any doubts remained, the undertaking given by counsel for the respondents at the hearing of the appellants' challenge to jurisdiction in the court below on 15 November 2006 was more than sufficient to quash any uncertainty in respect of the real scope of the respondents' claim against the appellants. I elaborate on each of these conclusions below. Towards the end of the arguments before me, I asked Mr Low if he accepted that the rationale underlying the rule is to protect a foreign defendant against abuses arising in the circumstances I have identified above. Mr Low said he accepted that this was so, but he submitted that it was irrelevant. He maintained that as long as the statement of claim is capable of being read as supporting a claim for any relief that is not connected to Singapore, then regardless of what is set out in the affidavit supporting the application for leave and regardless of any undertaking offered by the plaintiff, the court must set aside the order giving leave to serve out. In my judgment, such a proposition accords neither with good sense nor with the case authorities, and, in that light, I turn to analyse each of these aspects of the arguments.

The statements of claim ("SOC")

32 The appellants' primary complaint concerning the SOC related to the manner in which certain paragraphs, in particular para 32, had been framed with such generality that there could be no assurance that the respondents were limiting their claim to losses suffered in Singapore. Paragraph 32 reads:

> 32. In the circumstances, the Defendants are jointly and severally liable to the Plaintiff.
>
> And the Plaintiff claims:
>
> (a) damages to be assessed;
>
> (b) an injunction restraining the publication, sale, offer for sale, distribution or other dissemination by any means whatsoever of the defamatory allegations, or other allegations to the same effect;
>
> (c) costs; and
>
> (d) such further and/or relief as this Honourable Court deems fit.

33 If this was all that the SOC contained, the appellants' complaints might have stood on a surer footing; but, that was not the case, and there was simply no basis to read para 32 in isolation from the rest of the SOC.

34 Before analysing the SOC, it is worth noting that the question whether an internationally disseminated libel constitutes a separate and distinct tort actionable in each jurisdiction where there has been publication or whether it gives rise to a single global cause of action was quite recently considered by the House of Lords in *Berezovsky v Michaels* [2000] 1 WLR 1004 ("*Berezovsky*"). Lord Steyn, writing for the majority, rejected the notion of a global cause of action and affirmed the principle that each publication gives rise to a separate tort. The following observations at 1012–1013 are instructive:

> But counsel [for the defendant] put forward the global theory on a reformulated basis. He said that when the court, having been satisfied that it has jurisdiction, has to decide under Order 11 whether England is the most appropriate forum "the correct approach is to treat the entire publication – whether by international newspaper circulation, trans-border or satellite broadcast or Internet posting – *as if* it gives rise to one cause of action and to ask whether it has been clearly proved that *this action* is best tried in England." If counsel was simply submitting that in respect of trans-national libels the court exercising its discretion must consider the global picture, his proposition would be uncontroversial. Counsel was, however, advancing a more ambitious proposition. He submitted that in respect of trans-national libels the principles enunciated by the House in the Spiliada case [1987] AC 460 should be recast to proceed on [the] assumption that there is in truth one cause of action. The result of such a principle, if adopted, will usually be to favour a trial in the home courts of the

> foreign publisher because the bulk of the publication will have taken place there. Counsel argued that it is artificial for the plaintiffs to confine their claim to publication within the jurisdiction. This argument ignores the rule laid down in Diamond v Sutton (1866) L.R. 1 Ex. 130, 132 that a plaintiff who seeks leave to serve out of the jurisdiction in respect of publication within the jurisdiction is guilty of an abuse if he seeks to include in the same action matters occurring elsewhere: see also Eyre v Nationwide News Pty. Ltd [1967] N.Z.L.R. 851. In any event, the new variant of the global theory runs counter to well established principles of libel law. It does not fit into the principles so carefully enunciated in Spiliada. The invocation of the global theory in the present case is also not underpinned by considerations of justice. The present case is a relatively simply one. It is not a multi-party case: it is, however, a multi-jurisdictional case. It is also a case in which all the constituent elements of the torts occurred in England. The distribution in England of the defamatory material was significant. And the plaintiffs have reputations in England to protect. In such cases it is not unfair that the foreign publisher should be sued here. Pragmatically, I can also conceive of no advantage in requiring judges to embark on the complicated hypothetical enquiry suggested by counsel. I would reject this argument.

35 In my judgment, those observations are equally applicable to this jurisdiction. It follows that in analysing the SOC, the inquiry is directed at whether in fact the respondents are seeking to include a claim to relief founded on matters occurring outside this jurisdiction, having regard to the fact that each publication gives rise to a separate tort. The respondents' position is that the SOC pleads publication only within the jurisdiction.

36 The first requirement in proving defamation is the need to demonstrate that the impugned statement is defamatory. This, in turn, may be assessed in one of two ways. The first is to show that the words are defamatory in the light of their natural and ordinary meaning as ascribed by an ordinary, reasonable person in society using his common sense and general knowledge of matters in the public domain: see, for example, *Aaron Anne Joseph v Cheong Yip Seng* [1996] 1 SLR(R) 258 and *Microsoft Corp v SM Summit Holdings Ltd* [1999] 3 SLR(R) 465 at [53]. Alternatively, a statement may be found to be defamatory because it would be understood in a particular way by an audience with special knowledge of certain facts. This is referred to as an innuendo, and where this is relied upon, the facts and matters said to support the innuendo meaning must be particularised: see O 78 r 3(1) of the Rules; *Murugason v The Straits Times Press (1975) Ltd* [1983–1984] SLR(R) 311 at [5]; *Longhans v Odhams Press Ltd* [1963] 1 QB 299 at 306 and *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 1 WLR 651 at 655.

37 In this regard, Mr Singh submitted that harm to the reputation of the plaintiff takes place when the defamatory communication is understood in the sense complained of. Unless and until it has been understood by an

audience in that sense, there has been no real publication to speak of and the tort is not complete. He relied on the following extract from the decision of the High Court of Australia in *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433 ("*Gutnick*") at [25]–[27]:

> The tort of defamation, at last as understood in Australia, focuses upon publications causing damage to reputation. It is a tort of strict liability, in the sense that a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care. ... But it is a tort concerned with damage to reputation and it is that damage which founds the cause of action. Perhaps, as Pollock said in 1887, the law went "wrong from the beginning in making the damage and not the insult the cause of action" for slander but it is now too late to deny that damage by publication is the focus of the law. ...
>
> Harm to reputation is done when a defamatory publication is *comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.*
>
> *The bilateral nature of publication underpins the long-established common law rule that every communication of defamatory matter founds a separate cause of action.*
>
> [emphasis added]

38 In my judgment, Mr Singh is correct in this submission, and I turn to consider the SOC in this light. The first indication that the SOC were not as broadly scoped as the appellants suggested may be found in the introductory paragraphs in a section entitled "Part B: Background and Context". Paragraph 4 states:

> The following matters ... are in the public domain and/or are of general knowledge. *At trial, the Plaintiff will refer to the relevant articles and programmes published in the local print and broadcast media.* [emphasis added]

39 This was a plain indication that the respondents would rely on matters published in the *local* print and broadcast media to establish what was in the public domain or formed part of the general knowledge of those to whom publication took place. At para 6 of the SOC, the respondents made reference to "widespread interest in Singapore in what has become known as the 'NKF Saga'". This was a reference to allegations of financial mismanagement surrounding the National Kidney Foundation ("the NKF"), a charitable organisation in Singapore. After particularising the details of this saga, the respondents reiterated at para 7 that "the facts and circumstances set out herein were extensively reported in the local print and broadcast media and were and are widely known in Singapore". Reference is then made in paras 10–13 to an action brought by the respondents against certain numbers of the Singapore Democratic Party in

respect of an article published by them entitled "Govt's role in the NKF scandal".

40 In Part C of the SOC, the defamatory words are set out. There are references to publication of these words in the July/August 2006 issue of the *Review* as well as on various blogsites and websites on the Internet. Part D pleads the matters relied on by the respondents to establish that the words complained of refer to them.

41 There then follows Part E which pleads the meaning that the plaintiffs contend. The material portion of para 23 states:

> In the circumstances, the Words, *in context* ... and in their natural and ordinary meaning, meant or were understand to mean ... [emphasis added]

42 Paragraph 24 then states:

> Further and/or alternatively, the Words were understood to bear the meanings pleaded at paragraph 23 above by way of innuendo.
>
> PARTICULARS
>
> PURSUANT TO ORDER 78 RULE 3 OF THE RULES OF COURT
>
> The Plaintiff will rely on the inference that *a substantial but unquantifiable number of unidentifiable Singaporeans* would have watched and/or read the media reports referred to in Part B herein and would therefore have knowledge of the facts and/or matters pleaded in Part B herein. They would therefore have understood the Words in the meanings set out at paragraph 23 above.
>
> [emphasis added]

43 Mr Singh submitted that on a fair perusal of the SOC, there is simply no basis for finding that the respondents were making a claim going beyond the jurisdiction. Throughout the SOC, the respondents referred to facts within the knowledge of Singaporeans. The entire context relied upon to establish the alleged defamatory meaning of the words used consists of matters within the knowledge of Singaporeans.

44 In my judgment, this is correct. It is plain from a fair reading of the SOC as a whole that the respondents were in fact alleging that the disputed article took its sting from the surrounding circumstances known to Singaporeans by reason of matters that had been very widely publicised in the local media. If, indeed, the respondents were seeking relief in respect of publications outside Singapore, then, as Mr Singh observed, it would have been necessary to set out the context in considerably broader terms in the SOC to sustain the contention that the defamatory meanings pleaded would also have been ascribed to the disputed article by readers in other countries.

45 Mr Singh supplemented this by reference to the decision of Gray J in *Al Amoudi v Brisard* [2006] 3 All ER 294 to the effect that there is no presumption of law that publication on the Internet takes place to a

substantial and unquantifiable number of people. Gray J noted in that case at [33] that publication could be proved by direct evidence or by establishing a "platform of facts from which the tribunal of fact could properly infer that substantial publication within the jurisdiction had taken place". Mr Singh submitted that the pleadings before me simply did not present such a platform upon which the respondents could invite any inference being drawn as to publication (in the sense described in *Gutnick*, [37] *supra*) in any jurisdiction other than Singapore.

46 In the face of all this, Mr Low was driven to submit that someone in India or Vietnam, for instance, who read the article without the context pleaded by the respondents might well conclude that it was defamatory. I observed that this was contrary to the appellants' primary position that the words used are not defamatory, and Mr Low then retreated somewhat from this.

47 Mr Low did also point to para 20 of the SOC where the respondents are described as "well known" figures "around the world". Why was there a need to particularise this fact if the claim was confined to Singapore? There is a short answer to this. There is nothing inconsistent between describing the respondents' reputations as global in nature and maintaining that the relief sought is confined to Singapore. These are merely assertions of fact. In addition, it might be argued that the respondents' worldwide reputation is inextricably linked to their reputation in Singapore, and that the gravity of their loss of reputation in Singapore (if any) should also take into account the international character of their reputation. It does not fall upon me to decide whether such an argument will succeed if advanced. What I do have to decide is whether it would be reasonable to hold, by dint of the one-line description of the respondents as well-known internationally, that in truth and reality, the respondents were seeking to draw the appellants into jurisdiction with a view to mounting a claim for reputational loss suffered globally. In my judgment, that plainly would not be reasonable.

48 In the final analysis, it comes down to this: Is there any basis upon which the SOC as pleaded and taken as a whole can sustain a finding of publication to someone outside Singapore? In my judgment, the answer to that is no. It follows that the remedies pleaded at para 32 when read in context are confined to Singapore because the remedies that a court may order are contingent on the facts that are pleaded in the SOC and subsequently proved. Given my finding that the particular facts pleaded by the respondents as to context and publication were suitably tailored to confine their claims to Singapore, I am satisfied that the SOC were not in breach of the requirements of O 11 r 1 of the Rules.

The affidavits

49 Even if I were mistaken in my reading of the SOC, any ambiguity is easily resolved by examining the respondents' affidavits filed in support of

their applications to serve out of jurisdiction, which clearly limit their claims to Singapore. The appellants accepted that the affidavits clearly confined the claim within Singapore. However, they submitted first, that it was not proper to have reference to the affidavits and, second, that the respondents in fact misrepresented their claim in the affidavits.

50 In support of their argument that the affidavits should not be referred to in assessing whether a claim falls foul of O 11 r 1 of the Rules, the appellants cited a passage in *Singapore Court Practice 2006* (Jeffrey Pinsler, gen ed) (LexisNexis, 2006) at para 11/2/3, which states that the legal basis of a plaintiff's claim must be set out in the statement of claim. It is difficult to see how this assists the appellants' position because that passage merely explains the distinction between a writ that is to be served out of the jurisdiction and one that is not. In the latter case, the only obligation in pleading is to raise the material facts that will be relied on. Nowhere in that passage is it suggested that the affidavit may not be looked at to clarify or resolve any ambiguity in a statement of claim when deciding whether a plaintiff's claim falls within O 11 r 1 of the Rules. Indeed, an affidavit is generally the surer indication of the plaintiff's intentions because he is not only required to exercise utmost good faith in deposing to his affidavit (*Transniko Pte Ltd v Communication Technology Sdn Bhd* [1995] 3 SLR(R) 941 ("*Transniko*")), he is liable to be prosecuted if he does so falsely. It is true that there are cases, such as *Eyre*, where the court set aside the writ on the basis that the plaintiff's pleadings did not confine his action to the home jurisdiction. But this is a far step from holding that an affidavit which makes it clear that the plaintiff is confining his action to the home jurisdiction is completely irrelevant and to be ignored. It is also inconsistent with a line of cases to the opposite effect.

51 In *Thomas v Duchess Dowager of Hamilton* (1886) 17 QBD 592 ("*Thomas*"), the English Court of Appeal, in deciding whether the judge below had been correct to impose an undertaking on the plaintiff to limit his claim within jurisdiction, found that it was proper to have reference to the affidavit filed in support of the leave application. Lord Esher MR, at 596–597, wrote:

> I think that Day, J. [the judge in the court below], was right in entertaining doubt whether *on the affidavits* any breach of the contract was shewn to have taken place in England, and having that doubt I think it was competent to him to make the order he did make, and that it should be restored. [emphasis added]

52 In *Kroch v Rossell* [1937] 1 All ER 725, Slesser LJ at 727 cited favourably the following observation in *Badische Anilin und Soda Fabrik v Chemische Fabrik vormals Sandoz* (1903) 88 LT 490 at 496:

> There are many cases in the books in which, after leave has been given to issue a writ for service out of the jurisdiction and a motion to discharge it has been refused by a judge of first instance, the Court of

> Appeal has said that they thought the order ought to be discharged. *And they have, under certain circumstances, beyond all doubt gone into the facts of the case with a view to considering whether the plaintiff had or had not a probable cause of action such as ought to be tried against a defendant out of the jurisdiction. It seems to me that the court is bound to some extent to look to the affidavits, and to see, if it can, what is the real point in issue between the parties.* [emphasis added]

53 In my view, the point simply is this: If, at the stage of the application for leave to serve out, a court is entitled to scrutinise a plaintiff's affidavit to assess whether the claim falls within O 11 r 1 of the Rules (that, after all, being the very point of filing the affidavit in support of the application), it would be illogical to hold that if a challenge is subsequently brought against the jurisdiction of the court, the reviewing court may not look at the affidavit. When the affidavits filed by the respondents in this action are considered, the specificity with which these affidavits address the scope of the reliefs sought against the appellants is more than sufficient to dispel any lingering uncertainty that may persist. In this regard, as I have noted at [24] above, there was no dispute that the affidavits did make it very clear that the respondents' claims were confined to Singapore.

54 The appellants then submitted that the respondents, in stating in their affidavits that their claim was limited to Singapore, had misrepresented the true nature of their claim and had therefore failed in their obligation to give full and frank disclosure. This argument was quite seriously misconceived on several grounds. First, it rests upon this court agreeing that the SOC did not properly limit the claim to Singapore. Since I have found that the SOC did limit the scope of the respondents' claim to Singapore, this argument cannot stand on the facts.

55 More importantly, I had considerable difficulty following Mr Low's argument on this point. The affidavit for leave to serve out of the jurisdiction was filed within three days of the writ. I note that the allegation being made was that the respondents, by stating in their affidavits that their claims were confined to Singapore, had deliberately misrepresented the position. I asked Mr Low if he was suggesting that the respondents were aware that the SOC impermissibly sought relief outside Singapore and were saying the contrary in the affidavit in an attempt to fool the court into giving leave to serve the SOC out of the jurisdiction. He initially answered in the affirmative, but this led to my next query: Why would they do that since it was inconceivable in the light of what was clearly set out in the affidavits that they could possibly have maintained such claims? Mr Low was unable to respond to this beyond stating, quite candidly, that he saw the force of the observation that underlay my question. In my judgment, this was a hopeless allegation that made no sense at all. The respondents could not have been trying to preserve a claim for relief outside Singapore when their affidavits clearly disavowed any such intent.

56 I finally add the observation that even if a plaintiff is found to have been less than forthcoming in his affidavit, that would only entitle, but not require, a court to set aside the order granting leave to serve out of jurisdiction. In *Transniko* ([50] *supra*), Kan Ting Chiu J summarised the applicable principles in the following manner (at [11]–[12]):

> 11 Where an ex parte application for leave to serve a writ out of jurisdiction [is] made, the applicant is under a duty to make full and frank disclosure of all matters material to the application. We need only to refer to the most recent of the cases on this point cited by counsel for the defendants, the English Court of Appeal's decision in *Trafalgar Tours Ltd v Alan James Henry* [1990] 2 Lloyd's Rep 298, where Purchas LJ (with whom Nourse LJ and Beldam LJ concurred) said (at 308) that:
>
> > there is a heavy duty upon those applying *ex parte* under RSC O 11, r 1 for leave to serve a writ out of the jurisdiction ... to make full and frank disclosure.
>
> 12 The duty on the applicant is onerous, and if he fails to discharge it, the leave granted may be set aside even if the non-disclosure is innocent. In *Lazard Brothers and Company v Midland Bank, Limited* [1933] AC 289, Lord Wright held (at 306–307) that although the failure in that case was not tainted with the slightest suggestion of bad faith, '*The court has a discretion to set aside an order made ex parte when the applicant has failed to make sufficient or candid disclosure.*'
>
> [emphasis added]

This was followed by Woo Bih Li JC (as he then was) in *PT Garuda Indonesia v Birgen Air* [2001] SGHC 262.

57 That the power of the court to set aside leave granted to serve out of jurisdiction is discretionary may also be gleaned from the approach of the courts taken in relation to affidavits filed in support of *ex parte* injunctions. In *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd* [2006] 1 SLR(R) 901, the Court of Appeal held:

> 43 We now turn to the final issue as to whether there had been material non-disclosure. It is settled law that on an *ex parte* application, the applicant must disclose to the court all matters within his knowledge or which ought to have been within his knowledge, which are material to the proceedings and which may be in favour of the party against whom the application is made: see *The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond de Polignac* [1917] 1 KB 486 at 514 and *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 ("*Tay Long Kee Impex*") at [21].
>
> ...
>
> 45 However, it does not follow that every non-disclosure would warrant a discharge forthwith. Whether a non-disclosure is of sufficient materiality to justify or require an immediate discharge of the *ex parte* order without going into the merits, must depend on the

> importance of the fact to the issues which are to be decided by the judge on the *ex parte* application. Even then, sometimes, "[a] locus poenitentiae may ... be afforded": see *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1357. Of course "material" does not mean decisive or conclusive: see *Tay Long Kee Impex* at [21].

58 There is no reason in principle why there should be a difference in approach between an application for leave to serve out of jurisdiction (under s 16(1) of the SCJA) and one for an injunction (pursuant to s 18(1) of the SCJA read with ss 3(*a*) and 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) as well as s 18(2) of the SCJA read with para 5 of the First Schedule to the SCJA). Both situations deal with the consequences of misleading a court to exercise its powers in circumstances where, by their nature, the court would not have had the benefit of opposing counsel. If, in relation to the imposition of *ex parte* injunctions (including draconian *Anton Piller* orders and worldwide *Mareva* injunctions), it is not necessarily just to set aside the order solely because the affidavit supporting the injunction had been misleading in some way, it follows that the power to set aside an order granting leave to serve out of the jurisdiction on the basis of a supporting affidavit that was similarly misleading is equally a matter for the court's discretion. In this regard, it is apposite to refer to a recent judgment of the English High Court in *Network Telecom (Europe) Ltd v Telephone Systems International Inc* [2004] 1 All ER (Comm) 418. In that case, the court had to decide whether there was a continuing obligation on a plaintiff who had been granted leave to serve out of the jurisdiction to inform the court of any new circumstances that occurred between the time when leave was granted and when process was served. The court concluded that there was such an obligation. In that case, Burton J referred to the similar nature of the requirements applicable to affidavits supporting *ex parte* injunctions on the one hand and leave for service out on the other. At [53], he held:

> A court willing to make that kind of order at the instance of one party has to rely on that party to make the fullest and frankest disclosures of any matter that might affect the mind of the judge in granting the order, even to waver, never mind actually to refuse to make the order, but the rule as to full and frank disclosure is not limited to Mareva or Anton Pillers or to ex parte injunctions. Indeed just as old as the 'golden rule' in relation to injunctions is the identical rule in principle, applicable to service out of the jurisdiction.

59 Then, in discussing the possible sanctions for non-disclosure of material facts, Burton J remarked, at [66], that:

> This issue applies as much in relation to service out of the jurisdiction as it does in relation to a Mareva injunction or an Anton Piller.

60 In my judgment, while a court has the power to set aside an order granting leave to serve out for breach of the "golden rule" that there be full and frank disclosure during the leave application (even if that breach was committed innocently), this is ultimately a discretionary power and a court

is entitled to examine all the circumstances of the case to determine whether, in any given case, that is to be exercised. Because I have found that there has been no material non-disclosure at all in this case (see [55] above), it is not necessary for me to say anything further on this point.

The undertaking

61 Finally, Mr Singh submitted that even if the SOC were ambiguous as to the scope of the reliefs sought against the appellants, and assuming, further, that the affidavits filed in support of the respondents' application for leave to serve out did nothing to clarify matters, the undertaking that he had proffered sufficed to address any possible cause for concern.

62 The appellants, on the other hand, disputed the notion that any uncertainty in the SOC could be cured by an undertaking. In particular, Mr Low relied on this passage in *Eyre* ([25] *supra*) at 854–855:

> Here it seems to me that the plaintiff is claiming damages in New Zealand for loss of reputation both in New Zealand and Australia. The pleadings do not confine him to the cause of action arising within the jurisdiction. This exceeds the jurisdiction of the court and in addition I am not satisfied there is a question of substance in this country. *I have not overlooked the fact that counsel for the plaintiff has offered to give me an undertaking that proceedings will not be commenced in Australia.* [emphasis added]

63 There were two reasons underlying the court's decision in *Eyre* to set aside the order granting leave: the first was that the pleadings exceeded the jurisdiction of the court (*ie*, the issue that has been raised before me) and the second was because the extent of the tort allegedly committed in New Zealand was not sufficiently substantial. The observation of the court on the relevance of the undertaking was directed at the first of these reasons. It is clear in my view that *Eyre* cannot support the proposition that the appellants urge upon me. An undertaking not to commence proceedings in other jurisdictions cannot redress the wrong that consists in the pleadings not limiting the claim to reliefs within the home jurisdiction. That is commonsensical. The undertaking in *Eyre* addressed a completely different point, namely, the concern of multiplicity of proceedings. But it did nothing to address the concern that the proceedings in New Zealand sought relief for wrongs allegedly done and damages allegedly suffered in Australia. The present appeals are starkly different because the respondents have undertaken not to pursue in Singapore any claim except those relating to Singapore. This is precisely what the undertaking offered by the plaintiff in *Eyre* did not do.

64 Set against this is a line of cases holding that an undertaking such as the one proffered on behalf of the respondents in the present appeal would ordinarily suffice to cure any deficiency in the pleadings. From as far back as *Sutton* ([26] *supra*), the courts have accepted that an undertaking not to

pursue claims exceeding jurisdiction would cure a potentially defective writ or statement of claim. That case concerned an action for libel printed in a newspaper edited and published in Jersey, but also circulated in England. The court was of the view that while there was sufficient publication in England to justify service out of jurisdiction, the plaintiff had to give an undertaking to confine his cause of action to the harm suffered in England. Having failed to give the undertaking, the court set aside the writ.

65 In *Thomas* ([51] *supra*), the English Court of Appeal held that it was proper for the judge in the court below to extract an undertaking from the plaintiff to limit his claim to relief within the jurisdiction if it was doubtful whether the claim would be so restricted. Lord Esher MR , who delivered the leading judgment, observed, at 596, that:

> I cannot say that the affidavits shew clearly to my mind that there was any breach of the contract in England. It may turn out that there was, but the affidavits leave the matter in great doubt, and when that is the case *I am of [the] opinion that a judge does not go beyond his discretion when he imposes such conditions as have been imposed here.* [emphasis added]

66 Bowen LJ, citing *Sutton*, also made the same point, remarking at 597 that:

> When the matter comes before the judge at chambers it is for him to consider whether there is a real danger that the plaintiff may be unjustly and unnecessarily bringing the defendant into the jurisdiction of the English Courts, whether the application is made bona fide, and whether the action appears to be based upon any breach of the contract within the jurisdiction. In exercising his discretion what more natural and simple than that the judge should impose an undertaking upon the plaintiff that he will not abuse the process of the Court?

67 In my judgment, it was well within the discretion of the assistant registrar to extract the undertaking that she did from the respondents if she entertained any doubt that the relief sought by the respondents was not confined to the jurisdiction. However, this was unnecessary in the circumstances. Having regard to the proper construction that is to be placed upon the SOC as well as the express terms of the affidavits, there was simply no room for any concern that the respondents would abuse the court's process by claiming damages or injunctive relief for injury suffered outside Singapore.

Conclusion on abuse of process

68 I fully accept the proposition that the jurisdiction of our courts should only be invoked to bring a foreign defendant here if the requirements of O 11 r 1 of the Rules have been met; in other words, where there is the requisite nexus between the claim pursued and this jurisdiction. The question on appeal was whether the respondents (as plaintiffs) had limited their claim to Singapore. In my judgment, they had done so. Whether one

analyses, severally or cumulatively, the SOC, the affidavits filed in support of their application for leave to serve out and the undertaking proffered by Mr Singh, there is no doubt in my mind that the risk of the respondents abusing this court's process is fanciful and therefore to be disregarded.

Manner of service

69 The second basis upon which the appellants challenge the jurisdiction of this court relates to the manner in which service was effected. The appellants contend that the jurisdiction of this court over a foreign defendant may be exercised only if service of the writ in the foreign jurisdiction has been effected in an appropriate manner: see s 16(1)(*a*)(ii) of the SCJA and [20]–[21] above. The respondents had sought to effect service using a process server in Hong Kong who personally served Mr Restall and left a copy of the relevant documents at the registered address of the *Review*. The respondents submitted that this method of service was appropriate because all that O 11 r 4(2)(*c*) of the Rules requires is that service be effected "by a method authorised by the law of *that* country for service of any originating process *issued by that country*." The methods of service employed by the respondents are consistent with those allowed under the relevant rules of Hong Kong: see O 10 read with O 65 of Hong Kong's Rules of the High Court (Cap 4A) and s 356 of the Companies Ordinance (Cap 32); and further, W S Clarke, *Hong Kong Civil Court Practice* (LexisNexis, Desk Edition, 2003) at pp 50–54 and 747–751.

70 The appellants, on the other hand, submitted that the respondents' position was misconceived because the applicable provision under the Rules for purposes of this case was O 11 r 4(1) – and not O 11 r 4(2) – as there subsists a civil procedure convention between Singapore and Hong Kong by which the respondents were to abide. The appellants submitted that service that was not effected in accordance with O 11 r 4(1) was not proper service and ought to be set aside. The civil procedure convention in question is the Treaty ([5] *supra*) which was concluded between the People's Republic of China ("PRC") and Singapore on 28 April 1997 (*ie*, at a time when Hong Kong was still under British rule).

71 The respondents countered this in two ways. First, they produced a letter from the Ministry of Foreign Affairs dated 13 October 2006 ("the MFA letter") which stated as follows:

> 2. The application of a treaty to Hong Kong is governed by Article 153 of the Hong Kong Basic Law, which provides that such matters are to be decided by the Central People's Government after seeking the views of the Government of the Hong Kong Special Administrative Region.
>
> 3. The Department of Justice of the Hong Kong Special Administrative Region has confirmed to us that the Treaty is not applicable.

This was later reiterated in a letter dated 8 November 2006 in which the Ministry of Foreign Affairs also stated that it regarded the confirmation by the Department of Justice of Hong Kong that the Treaty does not extend to Hong Kong as authoritative. Second, the respondents maintained that whether the Treaty extended to Hong Kong was a question of Hong Kong law, and, in support of their position, they produced an expert opinion from a senior practitioner at the Hong Kong Bar, Mr Rimsky Yuen SC. Mr Yuen's opinion also addressed the question of whether the manner of service employed on the respondents' behalf was in accordance with the laws of Hong Kong.

72 In response, the appellants produced an expert opinion from Prof Gillian Doreen Triggs who opined that the question whether the Treaty extended to Hong Kong was one of public international law. In her opinion, the Treaty did so extend. The respondents then filed the expert opinion of Prof Alan Vaughan Lowe, who reached the opposite conclusion to Prof Triggs as a matter of public international law.

73 I propose to analyse the submissions as to the applicability of the Treaty to Hong Kong in two stages. First, what is the effect of the MFA letter? How much weight is to be accorded to it? Is it merely relevant evidence, or is it, as Mr Singh proposed, decisive? Second, if the MFA letter does not dispose of the matter, have the respondents proved their position on a balance of probabilities?

Effect of the MFA letter

74 Article 29 of the Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331 (entered into force 27 January 1980) ("the VCLT") provides that unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory. The question then is whether a different intention appears from the Treaty or has otherwise been established in this context. The MFA letter may be potentially relevant to the extent that it sheds light on the intention of the signatories to the Treaty at the relevant time. If both Singapore and the PRC had intended that the Treaty would or would not apply to Hong Kong, that would certainly be relevant evidence. A second way in which the MFA letter might potentially be material is as evidence of subsequent state practice in the application of the treaty, which, under Art 31(3)(*b*) of the VCLT, is to be taken into account in interpreting a treaty.

75 Mr Singh, however, went further than this and submitted that the MFA letter ought to be given conclusive and irrebuttable evidential weight because, it was said, the courts would not in matters of this nature depart from the views of the executive branch of government. He rested this submission on the principle of separation of powers. He cited four cases in support. The first of these was *The Fagernes* [1927] P 311, which concerned

the question of whether the waters in which a collision had taken place were within the territorial sovereignty of England. Lawrence LJ noted that there was no controlling treaty or convention or other executive act of the government expressly sanctioning or recognising any territorial rights over the area in question. However, the court requested the opinion of the Attorney-General. Upon being informed by him that the Secretary of State for the Home Affairs had answered the question in the negative, the court (with the exception of Bankes LJ who remained silent on the point) held that it should take judicial notice of the executive's statement and treat it as conclusive. Atkin LJ observed (at 324):

> What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definitive statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. ...
>
> I think, however, that it is desirable to make it clear that this is not a decision on a point of law, and that no responsibility rests upon this Court save that of treating the statement of the Crown by its proper officer as conclusive.

76 Lawrence LJ made a similar observation, at 329–330:

> [I]t is highly expedient, if not essential, that in a matter of this kind the Courts of the King should act in unison with the Government of the King. ...
>
> In view of [the] answer [by the Attorney-General], given with the authority of the Home Secretary upon a matter which is peculiarly within the cognizance of the Home Office, this Court could not, in my opinion, properly do otherwise than hold that the alleged tort was not committed within the jurisdiction of the High Court.

77 The next case Mr Singh relied on was *Aksionairnoye Obschestvo AM Luther v Sagor & Co* [1921] 3 KB 532 where the Russian Socialist Federal Soviet Republic had passed a decree in June 1918 declaring all mechanical sawmills to be of a certain capital value and all woodworking establishments belonging to private or limited companies to be the property of the Republic. Agents of the Republic seized the plaintiffs' factory in 1919 and sold its stock to the defendants, who subsequently exported it to England. The plaintiffs commenced an action for a declaration that they were entitled to the wood. The question to be answered was whether, from June 1918, the Republic was recognised by the UK as a sovereign state. If so, the plaintiffs would necessarily fail because it was not open to the courts of one country to question the acts of a government of another sovereign state.

Before the English Court of Appeal, evidence was adduced in the form of two letters from the Foreign Office confirming that the United Kingdom did recognise the Soviet Government as the *de facto* Government of Russia. Bankes LJ appeared to assume the conclusiveness of these letters, holding at 543 that:

> The Government of this country having ... recognized the Soviet Government as the Government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the Courts of this country with all the respect due to the acts of a duly recognized foreign sovereign state.

78 Both Warrington LJ at 548, and Scrutton LJ at 556, relied on the decision of Lord Esher MR in *Mighell v The Sultan of Johore* [1894] 1 QB 149 at 158 that:

> [O]nce there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive.

As such, the letters from the Foreign Office were treated as conclusive as to the status of the Soviet Government.

79 The third case cited was a decision of the Court of Appeal in *Civil Aeronautics Administration v Singapore Airlines Ltd* [2004] 1 SLR(R) 570 ("*Singapore Airlines*"). That case also dealt with the question of the recognition of sovereign status. Singapore Airlines was sued by passengers injured in an accident that occurred at an airport under the control of the Civil Aeronautics Administration of Taiwan ("the CAA"), and the former applied to join the latter as a third party to the suit. The CAA resisted this, arguing that it was a department under the Government of Taiwan and hence immune from the jurisdiction of the Singapore courts under the State Immunity Act (Cap 313, 1985 Rev Ed). This argument could only succeed if Taiwan was recognised by Singapore as a sovereign state. When the CAA attempted to have the Ministry of Foreign Affairs issue a certificate recognising Taiwan as a state, the Ministry declined to do so. The Court of Appeal eventually heard the case and made the following remarks:

> 22 A question such as that which arises in the present case, whether an entity is a State so as to enjoy sovereign immunity in Singapore, is eminently a matter within the exclusive province of the Executive to determine, as what are involved in the question are not only matters of fact but also matters of policy. The courts are not in the best position to decide such a question. This explains why Parliament had by s 18 in the Act conferred upon the Executive the power to make a conclusive determination whether a State is recognised for the purposes of the Act. In our adversarial system of administration of justice, evidence is adduced by the parties. But even as regards facts, there may be matters of fact which are not within the public domain but which may be known only to the Executive. Therefore, to allow such a question to be determined wholly on the basis of evidence adduced by the parties not

> only protracts a trial, it also leaves much to be desired as it could very well be that all pertinent facts and circumstances might not be before the court.
>
> ...
>
> 27 It is really not for the courts to get themselves involved in international relations. The courts are ill-equipped to deal with them. If the answer of the Executive to a query is not clear enough, the proper recourse would be for the court to seek further clarification and not to second-guess the Executive or to determine the answer independently based on evidence placed before it. This is the most expedient and sensible option, an option resorted to by Roche J in *Aksionairnoye*. See also *Carl-Zeiss-Stiftung v Rayner and Keeler, Ltd (No 2)* [1966] 2 All ER 536 at 546 *per* Lord Reid. The court should not, on its own, reach a conclusion which is inconsistent with the answer given by the Executive.

80 To put the case in its proper context, it is important to appreciate that the court did not hold that even within the limited field of state recognition, all such questions are to be conclusively answered by the Executive. In fact, the court observed that the issue of jurisdictional immunity was "special":

> 25 But, as mentioned before, the question of sovereign immunity is special and should be treated differently from the general question whether a State has come into being. It is incongruous to say that a State is required to accord sovereign immunity to another State when the latter is not recognised by the former. Bearing in mind the pre-eminence given to recognition by virtue of s 18 of the Act, the question of sovereign immunity clearly stands on a different footing from other questions in which the existence of a State comes into issue.
>
> 26 Even *Starke's International Law* (11th Ed, 1994), which is relied upon by counsel for CAA in support of their argument, recognises that the question of state immunity is special. In discussing the UK State Immunity Act 1978, the author states (at 136):
>
> > However, a statement by the executive that a particular government is *not* treated as such does not preclude a British court from holding that such government is a sovereign government, or is in control of the territory concerned, especially in relation to questions not involving jurisdictional immunity.
>
> [emphasis in original]

81 The fourth, and perhaps most interesting, case was a recent decision of the English Court of Appeal. *R (on an application of Gentle) v Prime Minister* [2006] EWCA 1690 is one among a number of suits filed in relation to the ongoing war in Iraq led by the US and the UK. The plaintiffs in the case were mothers of soldiers who had lost their lives serving in Iraq who sought an independent inquiry into the circumstances leading to the invasion of Iraq and whether the Government had taken reasonable steps to be satisfied that the invasion of Iraq was lawful. This, the mothers urged,

was the Government's obligation by virtue of Art 2 of the Convention for the Protection of Human Rights and Funamental Freedoms (4 November 1950), Eur TS No 5 (entered into force 3 September 1953) ("the ECHR"), which imposes on member states substantive and procedural obligations not to take life without justification and to establish a framework of laws, precautions, procedures and means of enforcement which would, to the greatest extent reasonably practicable, protect life. The Government opposed this and contended, among other things, that the decision to deploy armed forces in a foreign conflict was not justiciable and nothing in the ECHR made it so.

82 Sir Anthony Clarke MR, writing for the court, commenced his analysis by examining the position apart from the ECHR. He observed, at [26]:

> Absent the Convention, the starting point is the proposition that issues relating to the conduct of international relations and military operations outside the United Kingdom are not justiciable. That proposition is supported by two further propositions. The first is that constitutionally such matters lie within the exclusive prerogative of the executive and the second is that they are governed by international and not domestic law ...

83 Explaining the first of these propositions, Sir Anthony Clarke MR cited *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 ("*Abbasi*"), which in turn referred to the landmark decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("the *GCHQ* case"), which involved an executive decision to forbid employees of the Government Communications Headquarters from being members in a trade union on the grounds of national security. In the *GCHQ* case, Lord Scarman held at 407 that "the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter." Elaborating on the categories of prerogative decision which are unjusticiable, Lord Diplock, at 409–410, observed:

> Nevertheless, whatever label may be attached to them there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority but nevertheless have consequences on the private rights or legitimate expectations of other persons which would render the decision subject to judicial review if the power of the decision-maker to make them were statutory in origin. From matters so relatively minor as the grant of pardons to condemned criminals, of honours to the good and great, of corporate personality to deserving bodies of persons, and of bounty from moneys made available to the executive government by Parliament, they extend to matters so vital to the survival and welfare of the nation as the conduct of relations with

> foreign states and – what lies at the heart of the present case – the defence of the realm against potential enemies.

84 Explaining why certain decisions should not be reviewed by the courts, Lord Diplock went on to say, at 411:

> Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another – a balancing exercise which judges by their upbringing and experience are ill-qualified to perform.

85 Lord Fraser in the *GCHQ* case also observed that many of the most important prerogative powers were concerned with the control of armed forces and with foreign policy.

86 Sir Anthony Clarke MR then illustrated the second of the propositions by reference to *R (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin) ("*CND*"), where the English High Court refused judicial review in the context of construing United Nations Security Council Resolution 1441 ("Resolution 1441") primarily on the basis that the court should not declare the meaning of an international instrument that operates purely on the plane of international law. The courts may only pronounce on some issue of international law where it is necessary to do so in order to determine rights and obligations under domestic law. Simon Brown LJ held as follows:

> 36. Should the court declare the meaning of an international instrument operating purely on the plane of international law? In my judgment the answer is plainly no. All of the cases relied upon by the applicants in which the court has pronounced upon some issue of international law are cases where it has been necessary to do so in order to determine rights and obligations under domestic law. ... [T]he domestic courts are the surety for the lawful exercise of public power only with regard to domestic law; they are not charged with policing the United Kingdom's conduct on the international plane. That is for the International Court of Justice. Mr Singh [counsel for the applicant] was quite unable to point to any case in which the domestic courts have ruled on a matter of international law in no way bearing on to the application of domestic law.
>
> 37. ... What is sought here is a ruling on the interpretation of an international instrument, no more and no less. It is one thing...for our courts to consider the application of an international treaty by reference to the facts of an individual case. ... It is quite another thing to pronounce generally upon a treaty's true interpretation and effect. There is no distinction between the position of the United Kingdom

> and that of all other States to whom Resolution 1441 applies. Why should the English courts presume to give an authoritative ruling on its meaning? Plainly such a ruling would not bind other States. How could our assumption of jurisdiction here be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?

87 Rationalising the decision not to pronounce on the meaning of Resolution 1441, Maurice Kay J remarked at [50]:

> It is clear from [the *GCHQ* case] that the controlling factor in considering whether a particular exercise or, for present purposes, prospective exercise of prerogative power is susceptible to judicial review is "not its source but its subject matter" (Lord Scarman, at p 407). It is also clear from that milestone authority that there are subject matters which are, in the language of Lord Phillips of Worth Matravers MR in [*Abbasi*], "forbidden areas" (para 106(iii)). The first reason why the present application must fail is that its subject-matter is one of those forbidden areas. In my judgment this is not because of an exercise of judicial discretion. It is a matter of principle. If it were purely a matter of discretion there would be circumstances in which the discretion could only be exercised after full consideration of the substantive case. It is because it is a matter of principle that I feel able to dismiss the present application on a preliminary issue without full consideration of the substantive case. ... I readily accept that the ambit of the "forbidden areas" is not immutable and that cases such as [*R v Foreign Secretary, ex parte Everett* [1989] QB 811 and *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349] illustrate how the areas identified by Lord Roskill in the [*GCHQ*] case have been reduced. However, the authorities provide no hint of retreat in relation to the [subject matter] of the present case. This is hardly surprising. Foreign policy and the deployment of the armed forces remain non-justiciable. That is the first basis upon which I would refuse the present application.

88 Richards J also took a similar approach. He gave two reasons for his conclusion. First, he said (at [59]):

> [I]t is frequently important for the successful conduct of international affairs that matters should not be reduced to simple black and white, but should be left as shades of grey and open for diplomatic negotiation; and in relation specifically to Resolution 1441 it would be detrimental to the conduct of this country's international relations for the Government to go further than its considered position. In the face of that evidence, it seems to me clear that the legal issue cannot in practice be divorced from the conduct of international relations and that by entertaining the present claim and ruling on the interpretation of Resolution 1441 the court would be interfering with, indeed damaging, the Government's conduct of international relations.

89 Secondly, he found that the true purpose of seeking a definitive interpretation on Resolution 1441 was to tie the Government's hands in future military action (at [59]):

> A plain purpose of the present claim is to discourage or inhibit the Government from using armed force against Iraq without a further Security Council resolution. Thus the claim is an attempt to limit the Government's freedom of movement in relation to the actual use of military force as well as in relation to the exercise of diplomatic pressure in advance. That takes it squarely into the fields of foreign affairs and defence. In my view it is unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision.

90 Returning to the decision in *Gentle*, having decided that the claim was not justiciable as a matter of common law, Sir Anthony Clarke MR then went on to construe whether Art 2 of the ECHR made the plaintiffs' claim justiciable. He held that it did not because an inquiry as to whether the Government had taken reasonable care to ensure that its armed forces would not be sent on an operation which was unlawful under international law would invariably implicate the question of whether the decision to send troops to Iraq was lawful. Yet, as even counsel for the plaintiffs accepted, it is universally accepted that absent bad faith, it was inappropriate for the court to judicially review such a decision.

91 Before I distil the principles that arise from these cases, it is useful to refer to a couple more cases that were not cited to me but which are helpful in clarifying to some extent where the boundaries of unreviewable executive prerogative lie. The first is *R v Foreign Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 QB 811 ("*Everett*"), which followed close on the heels of the *GCHQ* case ([83] *supra*) and concerned the question of whether an executive decision to issue a passport was subject to judicial review. Rationalising the decision in the *GCHQ* case, Taylor LJ, at 820, observed:

> The majority of their Lordships indicated that whether judicial review of the exercise of a prerogative power is open depends upon the subject matter and in particular upon whether it is justiciable. At the top of the scale of executive functions under the Prerogative are matters of high policy, of which examples were given by their Lordships; making treaties, making war, dissolving parliament, mobilising the Armed Forces. Clearly those matters, and no doubt a number of others, are not justiciable but the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases.

92 *Everett* was cited by the English Court of Appeal in *Abbasi* ([83] *supra*), which dealt with whether it was proper to compel the Foreign Office to make representations on behalf of a citizen alleged to have been arbitrarily detained by the United States or to take other appropriate action or, failing that, to give an explanation as to why this has not been done. The court held that this was unjusticiable and said, at [85]:

> Those extracts [from the *GCHQ* case] indicate that the issue of justiciability depends, not on general principle, but on subject matter and suitability in the particular case. That is illustrated by the subsequent case of [*Everett*]. This court held, following the *GCHQ* case, that a decision taken under the prerogative whether or not to issue a passport was subject to judicial review, although relief was refused on the facts of that particular case. Lord Justice Taylor, at p.820, summarised the effect of the *GCHQ* case as making clear that the powers of the court "cannot be ousted merely by invoking the word 'prerogative'"...

93 Lord Phillips MR continued thus at [107]:

> On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.

94 Finally, in *R (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3 ("*Marchiori*"), the English Court of Appeal faced a request for judicial review of an executive decision authorising certain contractors to discharge radioactive waste from two nuclear sites, both military installations manufacturing nuclear warheads, as part of the Government's controversial Trident programme. It is worth quoting from the judgment of Laws LJ at some length:

> 38. Taking all these materials together, it seems to me, first, to be plain that the law of England will not contemplate what may be called a merits review of any honest decision of government upon matters of national defence policy. Without going into other cases which a full discussion might require, I consider that there is more than one reason for this. The first, and most obvious, is that the court is unequipped to judge such merits or demerits. The second touches more closely the relationship between the elected and unelected arms of government. The graver a matter of State and the more widespread its possible effects, the more respect will be given, within the framework of the constitution, to the democracy to decide its outcome. The defence of the realm, which is the Crown's first duty, is the paradigm of so grave a matter. Potentially such a thing touches the security of everyone; and everyone will look to the government they have elected for wise and effective decisions. Of course they may or may not be satisfied, and their satisfaction or otherwise will sound in the ballot-box. There is not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government. The position is not unlike that taken by their Lordships' House in relation to attempts to challenge government decisions of what is sometimes called "macro-economic" policy: see for example [*R v Secretary of State for the Environment, ex parte Nottinghamshire County Council* [1986] AC 240] and [*R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough*

> *Council* [1991] 1 AC 521]; and this approach is, I conceive, consistent with recent observations in the House of Lords in cases such as [*R v DPP, ex parte Kebilene* [2000] 2 AC 326] and [*R v A (No 2)* [2002] 1 AC 45] as to the deference owed by the court to the democratic decision-maker.
>
> 39. I recognize that the notion of so grave a matter of state lacks sharp edges. But it is now a commonplace that the intensity of judicial review depends upon the context (see, for example, [*R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532] per Lord Steyn at paragraph 28). One context will shade into another; there is for instance a distinction between a deportation decision affecting a specific individual (as in [*Secretary of State for the Home Department v Rehman* [2001] 1 AC 153]) and a decision of defence policy ... though both involve matters of national security.
>
> 40. Secondly, however, this primacy which the common law accords to elected government in matters of defence is by no means the whole story. Democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety. No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds. There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy.

95 It is appropriate now to take stock of the general principles that may be distilled from the foregoing discussion. In my judgment, the issue is much more textured than it at first appears. The first point to be made is that there are clearly provinces of executive decision-making that are, and should be, immune from judicial review. This comes as no surprise and is merely a reflection of the constitutional doctrine of the separation of powers. The doctrine of the separation of powers, as seen from the *dicta* cited above, undoubtedly informs the constitutional structure of the Westminster model of governance, on which our own constitutional framework is based.

96 Second, within the span of executive decisions that are immune from judicial review are those involving matters of "high policy". This includes such matters as dissolving Parliament, the conduct of foreign affairs, the making of treaties, matters pertaining to war, the deployment of the armed forces and issues pertaining to national defence. These are what the American courts call "political questions" and the reasons underlying the deference accorded to the executive branch of government in such areas have been articulated in the cases I have referred to. In my judgment, cases

concerning international boundary disputes or the recognition of foreign governments comfortably fall within this class of cases.

97 Third, apart from issues of foreign affairs or national defence, there are other areas that the court will no doubt find unjusticiable. These include cases concerning the interpretation of international treaties operating solely on the international plane, or where the legislature has made it clear that the question is reserved to the executive to answer, such as in the *Singapore Airlines* case ([79] *supra*), where s 18 of the State Immunity Act specifically requires a certification from the government that the country in question is recognised for the purposes of exempting them from lawsuits in Singapore.

98 Fourth, even if, *prima facie*, a case comes within what appears to be a non-justiciable area, the courts may intervene if, on closer scrutiny, it becomes clear that it does not. Thus, where what appears to raise a question of international law in fact bears on the application of domestic law, that is something the courts may well find justiciable. There may also be situations where the courts are able to isolate a pure question of law from what may generally appear be a non-justiciable area (see, for example, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 at [12], a decision of the Federal Court of Australia that was cited by Mr Low). These instances do not suggest that the theory of the separation of powers is illusory, only that it is to be interpreted and applied sensibly. In my judgment, the correct approach is not to assume a highly rigid and categorical approach to deciding which cases are not justiciable. Rather, as Laws LJ put it in *Marchiori* ([94] *supra*) at [39], the intensity of judicial review will depend upon the context in which the issue arises and upon common sense, which takes into account the simple fact that there are certain questions in respect of which there can be no expectation that an unelected judiciary will play any role. In this regard, the following principles bear noting:

(a) Justiciability depends, not on the source of the decision-making power, but on the subject matter that is in question. Where it is the executive that has access to the best materials available to resolve the issue, its views should be regarded as highly persuasive, if not decisive.

(b) Where the decision involves matters of government policy and requires the intricate balancing of various competing policy considerations that judges are ill-equipped to adjudicate because of their limited training, experience and access to materials, the courts should shy away from reviewing its merits.

(c) Where a judicial pronouncement could embarrass some other branch of government or tie its hands in the conduct of affairs traditionally regarded as falling within its purview, the courts should abstain.

(d) In all cases of judicial review, the court should exercise restraint and take cognisance of the fact that our system of government operates within the framework of three co-equal branches. Even though all exercise of power must be within constitutional and legal bounds, there are areas of prerogative power that the democratically elected Executive and Legislature are entrusted to take charge of, and, in this regard, it is to the electorate, and not the Judiciary, that the Executive and Legislature are ultimately accountable.

99 With these principles in mind, I turn to the question posed: whether the view given in the MFA letter as to the applicability of the Treaty to Hong Kong should be treated as binding on this court. It is useful here to take a moment to properly characterise the nature of the question in issue. The essence of what has to be determined in these appeals is not whether the making of the Treaty was advisable or whether Singapore recognised Hong Kong as part of the PRC or even whether the Singapore Government did in fact sign a treaty with Hong Kong. What falls to be determined is whether the Treaty applies to Hong Kong; and the answer to that critical question depends, first and foremost, upon an interpretation of that Treaty, a number of other international instruments and, as the MFA letter itself points out, Art 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Cap 2101) ("the Basic Law"). In other words, we are here concerned with the *interpretation* of a treaty and a foreign statute in the light of some international instruments.

100 This description of what is at stake in these appeals removes us from almost all the cases cited by Mr Singh. Those cases concerned the recognition of foreign governments, boundary disputes, sovereign immunity and the deployment of troops overseas – all involving exercises of sovereign or legislative prerogative in matters of "high policy". The issue that concerns the present appeals, on the other hand, does not implicate the exercise of executive prerogative at all. The concern here is not with the *making* of the Treaty, but with its *effect*. To put it another way, the MFA letter does not represent an exercise of prerogative powers; it is essentially a statement of the MFA's opinion as to what the effect of the Treaty is.

101 The closest of the foregoing principles relevant to the present appeals is the holding of Simon Brown LJ in *CND* ([86] *supra*) that the courts should not expound on the meaning of an international document operating purely on the international plane. But, as I read that case, the true concerns there were that the judiciary should not be involved in policing the government's conduct of its international affairs, and that it would be arrogant to assume that it should interpret a treaty that affects the international community, particularly given that there is the International Court of Justice to do so. Moreover, *CND* involved considerations of foreign policy.

102 The present appeals are different. They do not engage any sort of foreign policy considerations. Indeed, the respondents' position would be contradictory if they asserted otherwise since, in explaining why any extension of the Treaty to Hong Kong would have been accompanied by formal consultations and procedures, they argue that the Treaty does not fall within the "foreign policy" exception to Art 153 of the Basic Law (see, below, at [117]–[118]). Neither does this case involve the policing of the government's conduct of international affairs. Quite the opposite: we are concerned only with the procedures to be adopted when private litigants wish to serve the process of this court on defendants resident in Hong Kong.

103 Furthermore, to the extent that this court is required to construe a bilateral treaty in the light of international law principles and certain international instruments, it is only to determine the domestic legal obligations applicable to litigants seeking to invoke this court's jurisdiction pursuant to the Rules and the SCJA. As was noted in *Pacific Assets* ([18] *supra* at [14]), citing *Hong Kong Housing Authority v Hsin Yieh Architects & Associates Ltd* [2005] 1 HKLRD 801 at [85], it is a long-standing principle of private international law that matters of procedure (including procedures concerning service) are ultimately governed by the *lex fori*. In my view, such an inquiry would comfortably fall within the proper sphere of judicial inquiry.

104 Accordingly, in my judgment the MFA letter, though potentially of assistance to this court, is not decisive of the matter.

Whether the Treaty applies to Hong Kong

105 I now turn to the core question that persists: Is the Treaty applicable to Hong Kong? Three sets of expert reports were submitted: two for the respondents and one for the appellants. It is trite law that where there is conflicting expert testimony, it is well within the court's powers to choose which position, if any, to adopt having regard to what best accords with logic and commonsense: see *Tengku Jonaris Badlishah v PP* [1999] 1 SLR(R) 800; *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd* [1983–1984] SLR(R) 403.

106 The appellants submitted the report of Prof Triggs, which may be summarised as follows. First, she maintained that as a matter of international law, there is a rebuttable presumption that a treaty applies to the full extent of a signatory's territory unless there is evidence of an express or implied intention to the contrary. In the present case, since the Treaty came into force after the handover of Hong Kong to the PRC (notwithstanding that it was signed before the handover), the presumption must be that the Treaty would apply to Hong Kong. Further, given the absence of any indication in the Treaty that it would not be extended to Hong Kong, the presumption is not rebutted. Prof Triggs conceded that the

Basic Law and the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Cap 2301) of 1984 ("the Joint Declaration") do suggest that any extension of any treaty entered into by the PRC would not automatically apply to Hong Kong, save for defence and foreign policy matters. However, she maintained that the applicability of the Treaty was a matter of foreign policy and hence was exempted from the formalities required to extend a treaty signed by the PRC to Hong Kong.

107 The respondents submitted reports by Prof Lowe and Mr Yuen. These tended to the opposite view. Taken together, their argument is that at the most fundamental level, the presumption that Prof Triggs relies on does not operate here because the Treaty was concluded before the handover, and that it is the time when a treaty is signed that is critical. They also contend that in any case there is evidence that shows that the Treaty should not apply to Hong Kong in the absence of certain requisite formalities. This, they suggest, is clear from the Joint Declaration, the Basic Law, as well as two notes issued by the Governments of Hong Kong and the UK on 20 June 1997 ("the Chinese Note" and "the UK Note" respectively). No such formalities have been taken in respect of the Treaty, and this is confirmed by Hong Kong's Department of Justice and several leading texts. In addition, Mr Yuen also drew on his experience as a practitioner in Hong Kong, including his experience in cases concerning the conflict of laws. He stated that there had been no change at all in the practice relating to service of originating process issued in Singapore after the handover of Hong Kong to the PRC in 1997. This is and has been commonly effected through a firm of solicitors in Hong Kong engaged as agents for this purpose. Mr Yuen further noted that no steps had been taken to enact the Treaty into the domestic law of Hong Kong.

108 I take the last point first. Prof Triggs did not challenge Mr Yuen's evidence as to the practice that in fact prevails in Hong Kong. Her primary response to this was that the internal laws and practice of Hong Kong are irrelevant in deciding whether the Treaty extends to Hong Kong because a state may not raise its own internal laws as a defence to a breach of a treaty obligation.

109 With respect, Prof Triggs seems to me to have missed the point. The conduct of the state parties is relevant to interpreting a treaty, and the unrebutted evidence of Mr Yuen was consistent with the Treaty being construed as not extending to Hong Kong. If the position that prevails in Hong Kong is as set out in Mr Yuen's opinion, then it would follow that either:

> (a) the PRC was in breach of its obligations under the Treaty in failing to take steps to ensure that the domestic laws and practices prevailing in Hong Kong accorded with the Treaty; or

(b) neither the PRC nor Hong Kong regarded the Treaty as extending to Hong Kong.

110 It was apparent from the evidence before me that neither Hong Kong nor Singapore regarded the Treaty as extending to Hong Kong. I have referred to the MFA letter. In addition, in a letter to the Singapore Consul General in Hong Kong, the Hong Kong Department of Justice confirmed its position that the Treaty did not extend to Hong Kong. Although the PRC's position was not expressly articulated, its stance in not taking steps to ensure that the laws and practices in Hong Kong accorded with the Treaty would have to be seen as being consistent either with the same understanding as that of Singapore and Hong Kong or with it having a contrary understanding but then acting in breach of that understanding. The former is self-evidently the more probable conclusion in the circumstances. This was never addressed by Prof Triggs and it is an important weakness in her argument. Further, as Mr Singh submitted, Prof Triggs was in effect inviting this court to give greater weight to her views than those of the governments of Singapore and Hong Kong. In my judgment, this was simply untenable.

111 I now turn to the other issues. There is common ground between the experts that a treaty signed by a country is presumed to extend to the whole of its territory unless a contrary intention is expressed in the treaty or is otherwise established. It was also agreed that there is no express stipulation within the Treaty as to whether it is to be limited in its application so as to exclude Hong Kong. The key difference between the parties lay in whether the presumption that the Treaty will apply to Hong Kong comes into operation in the first place; and whether it may be inferred that the parties to the Treaty intended to limit the applicability of the Treaty so as to exclude Hong Kong in the light of other treaties and instruments entered into by the PRC concerning the general applicability to Hong Kong of treaties entered into by the PRC. The point to note here is that the Treaty was signed before the handover of Hong Kong to the PRC, but came into effect after.

112 The first issue (*ie*, whether the presumption applies to extend the Treaty to Hong Kong) may be answered briefly. I accept, as the more logical view, Prof Lowe's opinion that it is the time at which the parties sign and conclude a treaty that is critical in the assessment of the parties' intentions. The main reason for this is that it simply does not accord with the fundamental need for there to be certainty in respect of a state's legal obligations if those obligations were to remain in suspense from the time the treaty had been signed to the time that it comes into force. As Prof Triggs herself recognises, the length of time between the signing of a treaty and its entry into force or its ratification by individual countries may often be quite long. It is, therefore, sensible to regard the intentions of the signatories as fixed at the time of signature. In Prof Triggs' view, however,

these complexities do not arise in respect of the Treaty because this was a bilateral treaty. This cannot be correct.

113 The length of time between the signing of the Treaty (28 April 1997) and its coming into force (27 June 1999) was just over two years. Singapore completed the applicable formalities for bringing the Treaty into force on 29 April 1998. The PRC, on its part, only completed the applicable procedures just over a year later on 28 May 1999, and the Treaty then came into force 30 days after that. In my judgment, this is a compelling argument for construing the Treaty by reference to the date on which the Treaty was signed so that there is certainty as to precisely what obligations each side had agreed to be subject to. The coming into force of a treaty may depend upon a number of events, some of which may fall to be carried out by the counterparties. If it were to transpire (as it did in this case) that the actions of each party towards bringing a treaty into force took place on different dates, it would leave open the prospect that one state party had done all that was required of it while the other state party only did so after there had been a change of circumstance that might affect the operation of that treaty. I find it improbable that state parties would leave themselves open to the possibility that they had committed to a set of bilateral obligations only to find those varied in some way by the unilateral act of the other party. Contrary to Prof Triggs' assertion, this conclusion does not, in my view, detract from the principle set out in Art 28 of the VCLT that a treaty provision does not bind a party until it comes into force. *When* a party is bound and *by what* a party is bound (as evidenced by the intentions of the party) are two different issues that are to be considered separately.

114 If, as I have found, it is the time at which a treaty is signed that is critical in the present case, this was before the handover of Hong Kong to the PRC. It then stands to reason that the Treaty would not apply to Hong Kong, notwithstanding the general presumption in Art 29 of the VCLT. This was the starting point of Prof Lowe's opinion, which I found cogent.

115 However, even if I am wrong in this conclusion, I am persuaded that there is sufficient evidence of an intention not to extend the Treaty to Hong Kong. The starting point is, of course, Hong Kong's own Basic Law which, by Art 153, states expressly that international agreements or treaties to which the PRC is or becomes a party will only be extended to Hong Kong if it is so decided by the Central People's Government after taking into account the circumstances and the needs of Hong Kong and after seeking the views of the Government of Hong Kong. To similar effect is Section XI of Annex I of the Joint Declaration. In addition, para 3(3) of the Joint Declaration makes it known that the default position is that:

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

116 Further, the Chinese and UK Governments issued notes on 20 June 1997 listing the treaties that would be applicable to Hong Kong. Apart from excluding the Treaty from those listed, the Chinese Note went on to say:

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

117 Such language is unequivocal. It means that in the absence of formalities undertaken to extend a treaty to Hong Kong, such a treaty will simply not apply. There was no real dispute before me that no formalities had been taken to extend the Treaty to Hong Kong, and this seems to point irresistibly to the conclusion that the Treaty does not extend to Hong Kong. The only exception contemplated in these constitutional documents is if the Treaty was to be regarded as involving foreign affairs or defence matters, in which case it would extend to Hong Kong without the need for any consultations or formalities.

118 As to this, I do not accept Prof Triggs' contention that the Treaty involves matters touching on the conduct of foreign affairs. There was no evidence of relevant state practice to support such an assertion. Further, this is a civil procedure convention between two countries and, more specifically, an agreement between two countries to render mutual judicial assistance. This has no more to do with foreign affairs than any other treaty which, by definition, is an agreement between state parties and to that extent touches on each state's foreign affairs. But the Chinese Note clearly refers to a specific class of treaties within the category of foreign affairs or defence. It follows that not every treaty would fall within this classification. Rather, it would depend on the subject matter of the treaty in question. In that light, it is difficult to see how or on what basis it could be said that the Treaty, being one for mutual judicial assistance, falls into this category. Furthermore, it is contemplated in these documents that Hong Kong is to operate its own autonomous judicial system, and, consistent with this, Art 96 of the Basic Law contemplates that the Government of Hong Kong is at liberty with the assistance or authorisation of the PRC to enter into appropriate arrangements with foreign states for reciprocal juridical assistance. Significantly, in 2003 there came into being in Hong Kong the Mutual Legal Assistance in Criminal Matters (Singapore) Order (Cap 525P). All this clearly suggests that any agreement between Singapore and the PRC relating to mutual judicial assistance would not automatically extend to Hong Kong without the requisite formalities being undertaken.

119 Prof Triggs offers a two-fold response to this. First, she makes the argument that it is inconceivable that Singapore and the PRC would sign the Treaty two months before Hong Kong's reunification with the PRC without intending it to apply to Hong Kong. In my view, this begs rather than answers the question. It may equally be argued that the decision to sign the Treaty before the handover rather than to wait until after strongly suggests that the parties did not see the need for the Treaty to apply to Hong Kong. Furthermore, there are perfectly sensible reasons why Prof Triggs' surmises may not be correct. The fact is that Hong Kong has a legal system similar to ours and there is nothing to suggest that there has been any difficulty with effecting service as between Singapore and Hong Kong without having recourse to a judicial assistance treaty or a civil procedure convention. In any event, as noted by Prof Lowe, the question of the PRC's intention on this point, in entering into the Treaty, cannot not be determined without reference to such instruments as the Joint Declaration and the Chinese Note, and I have already touched on these.

120 Prof Triggs' second response is that it is illegitimate for a country to employ its own internal laws as a defence to a breach of its international obligations, but I have dealt with this above and see no reason to add to what I have already said on this.

121 Before closing, I consider two practical implications of any decision I make in this respect. The first, which the appellants put forward, was that the effect of the Treaty would be significantly undermined if this court were to hold, in effect, that there are lacunae or pockets of immunity beyond the reach of the Treaty because defendants could then simply cross from the PRC into Hong Kong. In my judgment, this is not persuasive. First, it is not within the purview of this court to assess the desirability of or the wisdom behind the treaties entered into by the government. The task for this court is simply to construe the effect of what has been entered into. If the conclusion is that the Treaty does not apply to Hong Kong, and if this results in a situation that is considered unsatisfactory, the solution lies in the Executive exploring whether it is desirable to sign a similar treaty with Hong Kong. However, as I have noted above, there is nothing to suggest that such concerns are real. Moreover, if the effect of this decision is to hold that service of Singapore process can be effected in Hong Kong through a private agent, this further diminishes any such concern since there would in reality be no lacuna or pocket of immunity and nothing at all to be gained by individuals crossing into Hong Kong.

122 The second practical implication stems from adopting the appellants' position, and it is troubling indeed. It is relevant to note that whereas the respondents produced evidence showing that the common position of the governments of Singapore and of Hong Kong was that the Treaty did not extend to Hong Kong, the appellants maintained that the Treaty did and that service should therefore be effected though the method prescribed in

the Treaty. However, the respondents did not adduce any evidence as to the position of the PRC confirming that service could and would be effected in accordance with the Treaty if a request were made thereunder. This gives rise to a difficulty. If this court held that the Treaty did apply to Hong Kong, it would mean, according to the appellants, that the respondents would have to renew their efforts to serve their writs – this time through the official channels prescribed by the Treaty. What then if the authorities in the PRC took the view that such a manner of service was not required or contemplated in relation to Hong Kong and therefore refused to serve the writs as requested? After all, this judgment does not bind the PRC. The respondents would be caught in a black hole as far as these proceedings are concerned and that cannot be right.

Conclusion on manner of service

123 In the final analysis, all that I am required to do is to decide whether, on a balance of probabilities, the respondents are correct in claiming that they only have to abide by O 11 r 4(2) of the Rules and that, having done so, service of process in the present proceedings has been properly effected. I emphasise this to highlight that in deciding cases of this kind, the courts are not deciding on the PRC's or Hong Kong's behalf what laws are in fact in operation there. As one commentator has noted, given the very many sensitivities involved, the courts are wary of making such findings and would do well to take the conservative path of resolving these issues on the narrow ground as to which party has been able to discharge its burden of proof (see Paul Tan, "Serving Writs Out of Jurisdiction on Defendants in Malaysia: *Pacific Assets Management Ltd v Chen Lip Keong*", *Law Gazette* (October 2006) at 18). Our courts are only concerned with what laws are likely to be in operation there for the purposes of determining whether *Singapore* writs have been served out of the jurisdiction in compliance with the requirements of s 16 of the SCJA read with O 11 r 4 of the Rules and, hence, whether *our* courts are properly seized of jurisdiction.

124 In the present case, I am persuaded by the logic of both Prof Lowe's and Mr Yuen's evidence and hold, on a balance of probabilities, that the Treaty does not extend to Hong Kong for the reasons set out in this judgment. The views of the MFA and the Hong Kong Department of Justice also weigh strongly in favour of the respondents' position. The position of the PRC was not expressly articulated, but its stance, in my judgment, is far more consistent with the position of Singapore and Hong Kong rather than with that urged upon me by the appellants. As against this, Prof Triggs' report is not only counter-intuitive as explained above, it lacks foundation in some important respects. For instance, while Prof Triggs states that it is critical to get the views of the PRC, she has not herself obtained such views. She made her initial findings without having had sight of the Chinese and UK Notes, despite those being available on the Internet. She failed to consider the Joint Declaration in her first report even though this had

already been raised and discussed in Mr Yuen's report. While the appellants do not bear the legal burden of proving that the writs were served in the wrong manner, they do have the evidential burden to rebut the case submitted by the respondents. This, they failed to meet. In the light of the foregoing discussion, I am satisfied that the respondents have discharged their burden of proving that the service of process was proper and ought not to be set aside.

Conclusion

125 The central question raised in these appeals is whether the respondents have complied with the rules and procedures necessary to invoke this court's jurisdiction. In the main, this turned on two questions: (a) whether their claims, as required by the sub-rules of O 11 r 1 of the Rules, are limited to damages and injunctive relief within Singapore; and (b) whether the manner of service employed was appropriate in the circumstances. The burden of proof on both these issues lay with the respondents. In my judgment, they have discharged that and I answer the two questions in the affirmative. I therefore dismiss the appeals. As I indicated to both parties at the hearing of these appeals, I will hear them on costs and any other ancillary matters.

Reported by Douglas Chi Qiyuan.

Errata

[2014] 1 SLR 372 at [138] line 8: replace "Tay Kay Kheng" with "Tan Kay Kheng".

Annexe 31

to the Expert Report
of Professor Simon Chesterman

tribunals will appeal to customary practice to devise the threshold standard of proof.

7.28 The standard predominantly applied is quite often the *balance of probabilities* test, as was confirmed by an ICSID tribunal composed of well-experienced arbitrators.[51] The balance of probabilities standard generally calls for a claim to be upheld if the tribunal is convinced by the evidence that the claim is more likely than not true. This standard has been applied to the great majority of categories of claims in international arbitration, including causes of action arising from a breach of contract or other obligation,[52] interpretation of contractual clauses or the intent of the parties to the contract,[53] and claims based on breach of international treaties regulating the treatment afforded to investors (a modified prima facie standard of proof has been adopted in regard to jurisdictional objectives by some tribunals).[54]

7.29 A standard derived from civil law jurisdictions sometimes mentioned as an alternative to the *balance of probabilities test* is the *inner conviction* test. This test is centred on the personal reaction to the evidence given by the arbitrator and is a matter of whether the arbitrator regards the evidence to have reached a level where he or she is personally satisfied of the veracity of an allegation. It has been suggested that the *inner conviction* test may impose a somewhat higher level of proof than that which is often otherwise applied by international arbitrators;[55] however, this conclusion is debatable.[56] As noted, this test is customarily regarded as an alternative to the more widely used *balance of probabilities* standard.[57]

7.30 It is generally conceded that a tribunal may take note of the substantive nature of a charge brought against a party when fashioning the applicable standard of proof as a matter of international evidentiary procedure.[58] For those allegations of particular gravity, a tribunal may find it necessary to apply a higher standard of proof. One finds examples of this in sports arbitrations convened to consider questions over the use of performance-enhancing drugs, where tribunals often will, as a matter of practice, require more than the general balance of probabilities standard of proof applicable to most commercial and contract claims, but less than the standard of *beyond reasonable doubt* applied in criminal proceedings.[59] Other claims, such as those brought on the basis of fraud or forgery, will attract a higher standard of proof which is articulated as requiring evidence that is *clear and convincing* or higher.[60] The gravity of a claim is determined according to the nature of the allegation, not according to personage of the party against whom it is levelled.[61]

7.31 If a request for an interim measure is before a tribunal, the arbitrators may be influenced to apply a standard of proof that is lower. For instance, it has been the view of some tribunals that the standard of proof is lower than the balance of probabilities test for requests for interim measures such as security for costs.[62]

Prima facie evidence and shifting of the burden of proof

7.32 In international arbitral procedure, prima facie evidence has been described as evidence "which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed."[63] More broadly, a case characterised as prima facie has been described in the following manner: "A prima facie case is a case sufficient to call for an answer."[64] Both definitions stand for the notion that prima facie evidence is proof that is sufficient, if not contradicted, to establish the contention—a position widely accepted in international arbitration.[65] Whether evidence will meet such a standard is a subjective question depending on the facts and circumstances of the case; however, it is generally recognised that the evidence must not be open to several equally plausible and opposing interpretations if it is to be considered prima facie proof of a contention.[66] Similarly, while witness or expert testimony may be sufficient to establish a prima facie case on its own,[67] vague and uncorroborated recollections are often not considered probative to the degree of constituting prima facie evidence establishing a contention.[68] As a general rule, therefore, evidence that does little more than repeat an allegation, or allude to it, but does not independently corroborate it, will not sufficiently rise to the level of prima facie evidence.[69]

7.33 In international arbitration, it is generally considered that evidence that establishes a contention to a level of prima facie certainty is sufficient to move the burden of proof from one party to the other.[70] With respect to the production of evidence, the shifting of the burden concerns the risk of non-production and does not displace the procedural duty on both parties throughout the arbitration to substantiate their allegations as per article 27.1 UNCITRAL Rules or the maxim *onus probandi actori incumbit*. This general principle concerning the shifting of the risk of non-production was explained by a well-experienced tribunal as follows:

> "The Tribunal notes that the Parties do not seem to diverge on the principles governing the burden of proof. The Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion. If said Party adduces evidence that prima facie supports its allegation, the burden of proof may be shifted to the other Party, if the circumstances so justify."[71]

7.34 Therefore, once the burden shifts, the party that has presented the evidence has passed the risk of non-production to its opponent,[72] and may prevail on its allegation unless sufficient rebuttal evidence or argument is produced. The above notwithstanding, it should also be noted that the burden may be shifted because of a presumption found in the applicable law, contractual rules or standards[73] as well as due to the presentation of affirmative defences.[74]

7.35 There is some support for the notion that a tribunal may shift the risk of non-production to a party which has exclusive control over relevant evidence, but has refused to produce it.[75] burden' however, the better view may be that this principle permits a tribunal to accept the veracity of the primary evidence brought to support the allegation, if rebuttal evidence that should otherwise have been brought was not.[76]

7.36 The moment when the burden shifts is often not a formal event within the procedure. As explained above, each party has the