

Are the PRC BITs Applicable to China's Special Administrative Regions? In Consideration of the *Sanum v. Laos* case

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After Tza Yap Shum v. Peru, the case of Sanum v. Laos, brought by a Macanese investor, re-attracted public attention to the critical issue of the applicability of the People's Republic of China Bilateral Investment Treaties in China's Special Administrative Regions. The Permanent Court of Arbitration held the PRC-Laos BIT extends to Macao according to the purpose and context of the BIT, but its reasoning is not tenable as its logic is flawed. In comparison, in the appeal, the conclusion reached by the Singapore High Court seems plausible, but there are still queries to the Court's admission of further evidence. The author argues that the PRC BITs are not applicable to Macao and Hong Kong, on the basis of analyzing the treaty interpretation methodologies of this case. Notwithstanding the fact that the final award has not been rendered as of now, the Sanum v. Laos Case carries significant meaning to investment protection in China's SARs.

Keywords: Sanum v. Laos, BITs, China's SAR, International Investment Arbitration, Territory, Treaty Application

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1. Introduction

Most bilateral investment treaties (“BITs”) are applicable to an investor who “attempts to make, is making, or has made an investment in the territory of the other Party.”¹ In this regard, ‘territory’ is essentially a geographical area as to the applicability of BITs. The ‘territory’ may be defined for the protection of investment, which is, in particular, located in maritime areas beyond territorial waters of the party.²

Clear definition of the term, ‘territory’ should be included in any investment treaty. Some BITs, however, either define it obscurely or do not define it at all. Such obscure or non-definition of the term ‘territory’ may lead to investment dispute before the International Center for Settlement of Investment Disputes (“ICSID”) and other fora. In *Philippe Gruslin v. Malaysia, e.g.*, the tribunal pointed out that qualified investment of another Party (investors) has to be made “in the territory of the Party” in accordance with Chapter Eleven of North America Free Trade Agreement (“NAFTA”).³ Another case is *Canadian Cattlemen for Fair Trade v. United States*; which dealt with the relationship between the ‘investor’ and ‘territory.’ Although there is no such requirement in the text of the NAFTA, the concept of an ‘investor’ only exists based on the ‘investment’ made. It is thus a tacit requirement for a qualified investor to be “in the territory of the Party.”⁴ A similar conclusion was drawn in the subsequent cases such as *Bayview v. Mexico*⁵ and *Apotex Inc. v. The United States*.⁶ Various investment forums also raise question whether the investment is “in the territory of other party.” In *Bayview v. Mexico, e.g.*, the tribunal deals with the definition of ‘territory’ in relation to the investment of water resource.⁷ Also, in *Fedax v. Venezuela*, the tribunal referred to the rules to decide whether electronic commerce is in the territory of a State.⁸ In recent, it is more difficult to define ‘territory’ because commercial transactions by internet or electronic measures have transcended conventional national borders.

State administration of China is another contentious factor in defining the territorial limits of BITs. *E.g.*, China is composed of four customs areas - Mainland, Taiwan and two Special Administrative Regions (“SARs”) being Hong Kong and Macao enjoying a high degree of autonomy with a distinctive set of laws and practices.⁹ They are working together under the “one country, two systems” formula. As most PRC BITs do not explicitly express whether they are applicable

to China's SARs, controversies would come out with respect to their territorial limits. *Tza Yap Shum v. Peru* is the first such case in this regard.¹⁰ In *Tza Yap Shum v. Peru*, the Tribunal opined that the applicability of the 1994 PRC-Peru BIT to Hong Kong for jurisdiction is not the subject matter for determination.¹¹ Nevertheless, the tribunal held that Tza Yap Shum is eligible to be an investor under the Treaty.¹² Immediately after the *Tza Yap Shum v. Peru* decision was rendered, controversies followed. An CHEN, *e.g.*, commented that the 1994 PRC-Peru BIT, which had been signed before Hong Kong's handover to China, should not be applied to Hong Kong.¹³ Extensive criticism focuses, *inter alia*, on the Tribunal's ruling of the nationality issue and its omission in reviewing the uniqueness of Hong Kong as an actor under both international law and international investment law.¹⁴ There are also positive attitudes toward the Tribunal's ruling. Some practitioners argue from another perspective that the *Tza Yap Shum* award should overturn traditional hypothesis, *i.e.*, a narrow and restrictive investor-State arbitration clause in an old Chinese BIT was a 'blocking' factor for the foreign investors to resort to its protection.¹⁵ In other words, the award is critical to have confirmed that foreign, Chinese as well as Hong Kong investors are entitled to more extensive protection under the restrictive Chinese BITs.¹⁶ Notwithstanding, an agreement could not be reached in with respect to the applicability of PRC BITs in SARs; nor have there been any clarifications by the PRC or Hong Kong directly regarding this issue. The question, however, reappeared in the recent *Sanum v. Laos* case.

2. Sanum v. Laos

A. Overview

Sanum Investments Limited (Sanum), a company incorporated in Macao, made certain investments in the gaming and hospitality industry in the Lao People's Democratic Republic (Laos). On August 14, 2012, Sanum brought Laos to an arbitration proceeding before the Permanent Court of Arbitration ("PCA") under Article 8(3) of the PRC-Laos BIT. Sanum complained that Laos deprived it of the benefits from its capital investment by imposing unfair and discriminatory taxes.¹⁷ There were two basic issues: (1) Can the PRC-Laos BIT be applied to Macau?;

and (2) is there a qualified investor and investment under the Treaty? This paper focuses on the first issue.

B. Award of the Tribunal (PCA Case No. 2013-13)

The PCA rendered the award on December 13, 2013. Here, the Court found that the 1999 Notification filed by the PRC to the UN Secretary-General regarding Macao SAR had no relevance and thus could not be relied on.¹⁸ Instead, it confirmed the relevance of Article 29 of the 1969 Vienna Convention on the Law of Treaties (“VCLT”) and Article 15 of the 1978 Convention on the Succession of States in Respect of Treaties.¹⁹ The PCA further recognized that the extension of the PRC-Laos BIT to Macao is not incompatible with the Treaty’s object and purpose because more investors could be internationally protected.²⁰ On the basis of above analysis, the Court concluded that the PRC-Laos BIT is applicable to Macao for two major reasons.

First, the application of the PRC-Laos BIT to Macao would not radically change the conditions for the Treaty’s operation. The PCA noted that the PRC and Laos are States with planned economies, while Macao is a capitalist region.²¹ However, the Court did not find that Laos had any indication or attempt to prove the existence of different conditions for the application of the PRC-Laos BIT in both Mainland China and Macao SAR.²² In addition, application of the PRC-Laos BIT would endanger neither Macao’s capitalist system nor its liberal way of life.²³ One may find similarities in the expressions of investment dispute settlement clauses in the PRC-Netherlands BIT and the Macao-Netherlands BIT, as well as in the PRC-Portugal BIT and the Macao-Portugal BIT.²⁴ This also indicates that the PRC-Laos BIT is compatible in terms of application to Macao.²⁵

Second, the PCA notes that it neither appears from nor otherwise establishes that the PRC-Laos BIT is not applicable to the whole territory. Unlike the 2006 PRC-Russia BIT, the PRC-Laos BIT has not expressly excluded its application to Macao.²⁶ If the PRC-Laos BIT is applied to Macao it would offer Macanese investors more dispute settlement options enabling them to have better investment protection.²⁷

C. Award of Singapore High Court (Case No. [2015] SGHC 15)

As regard the PCA’s positive ruling, Laos sought a review of the PCA’s judgment

on jurisdiction by the Singapore High Court (“SGHC”) based on s 10(3)(a) of the International Arbitration Act.²⁸ Apart from the positive evidences submitted to the PCA at the first arbitration hearing, Laos submitted two diplomatic letters (hereinafter Two Letters) in 2014. One was sent from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Vientiane, Laos; it stated that the PRC-Laos BIT did not extend to Macao and sought the PRC Government’s views on the same. The other letter was a reply from the PRC Embassy in Vientiane, which stated that the PRC-Laos BIT did not apply to Macao.

Before discussing whether the PRC-Laos BIT is applicable to Macao or not, the Court scrutinized the admissibility of the Two Letters, which were intentionally adduced as fresh evidence by Laos, realizing that the Court of Appeal could receive further evidence only under circumstances of ‘special grounds.’²⁹ The PCA interpreted these grounds in line with *Lassiter Ann Masters v. To Keng Lam*, which established a rule that three conditions have to be satisfied simultaneously for fresh evidence to be admitted.³⁰ In this regard, the Court sequentially discussed the three conditions in this case. Considering that Laos needed time for diplomatic communications and discussions with the PRC government, first, the Court examined if there were sufficiently strong reasons why the Two Letters were not adduced at the arbitration hearing.³¹ Second, the Two Letters indicated intentions of both Laos and the PRC government in drafting the PRC-Laos BIT, and thus they would probably have an important influence on the result of the application.³² Third, the PCA found no reason to doubt the authenticity of the Two Letters.³³ Consequently, the three conditions were satisfied in *Laos v. Sanum*, hence the Two Letters were admitted.

Following similar considerations, the 2001 World Trade Organization Trade Policy Report (hereinafter 2001 WTO Report) was also admitted by the Court.

Subsequent discussion arose as to whether the PRC-Laos BIT applies to Macao. Now that the Two Letters were admitted as evidences, the Court regarded the Two Letters as confirmation of the *status quo* which signified an agreement between the PRC and Laos that the PRC-Laos BIT does not apply to Macao.³⁴ Sanum and Laos both argued on the 1987 PRC-Portugal Joint Declaration (hereinafter the Declaration) about whether the Declaration confers the right on the government of the PRC to decide the applicability of the PRC-Laos BIT to Macao, or whether the Declaration is only binding on the Contracting parties without

creating rights or duties for Laos. The Court supported the plaintiff's submission stating that there was no evidence the PRC had taken measures to extend the scope of the Declaration to Macao.³⁵ Furthermore, the PRC government's approach towards Hong Kong was held analogous to Macao on the ground that the identical wording was found in the 1984 PRC-UK Joint Declaration and the 1987 PRC-Portugal Joint Declaration with respect to the applicability of the PRC's treaties to Hong Kong and Macao, respectively.³⁶ The work of the Joint Liaison Group for Hong Kong suggests that the PRC's treaties would not automatically apply to Hong Kong.³⁷

Accordingly, the PRC's treaties may not apply to Macao, either.³⁸ The Court also relied, to a limited extent, on the 2001 WTO Report, which underscored that Macao had concluded neither BITs, nor bilateral tax treaties except for a double taxation agreement and a BIT with Portugal in 1999.³⁹ As a result, the PRC-Laos BIT should not apply to Macao. In response to the SGHC's judgment, Sanum brought an appeal to the Court of Appeal of the Singapore Supreme Court, but a final decision has not yet reached to as of January 2016.

3. Comments on the PCA's Holding

The PCA acknowledged in its award that:

It is difficult "in ascertaining the application or non-application of the PRC/Laos BIT to the Macao SAR due to the paucity of factual elements presented by the Parties: there were no affidavits from the PRC, Laos or the Macao SAR, which could probably have been obtained from the respective authorities."⁴⁰

Neither the PCA's conclusion, nor its reasoning that the PRC-Laos BIT would apply to Macao, however, are reasonable. The PCA's award may have the following flaws. First, more internationally protected investors would not recognize that the extension of the PRC-Laos BIT to Macao accords with its object and purpose. Actually, the more BITs applied to Macao, the more Macanese investors could be internationally protected.⁴¹ However, it is not always the *vice versa*. *E.g.*, a Macanese could definitely get a higher protection if the Malaysia-Slovakia BIT applies to Macao.⁴² Is the application of the Malaysia-Slovakia BIT

to Macao compatible with the Treaty's object and purpose? This is clearly not the situation. Therefore, Macanese investors may get better protection, but they could not contribute to the application of a BIT to Macao.

Second, the PCA merely noticed the similarities among the BITs of the Netherlands and Portugal with the PRC and Macau, but what matters indeed is the 'difference.' Despite the similarities of many clauses between the US and Canadian BITs,⁴³ no one may agree that the US BITs are compatibly applied in Canada. Considering the "one country, two systems" formula, it is no wonder for China to have the concerns of the differences, despite the many similarities between the Mainland and the SARs, such as language, culture, etc. It is the differences in the PRC-Netherlands BIT and the Macao-Netherlands BIT, the PRC-Portugal BIT and the Macao-Portugal BIT that reflect the differences of investment regimes in Macao and Mainland China.⁴⁴ *E.g.*, there is a definition of the term 'area' in the Macao-Netherlands BIT, while the PRC-Netherlands BIT stipulates definition of 'territory.' Another difference lies in the definition of term 'investor.' The Macao-Netherlands BIT defines 'investor' on the basis of "the Resident Identity Card,"⁴⁵ while the PRC-Netherlands BIT does it on the basis of "natural persons' nationality."⁴⁶ Therefore, the Court should have laid more emphasis on the 'differences' rather than 'similarities' between the PRC BITs and the Macao BITs so as to find out whether the application of the PRC-Laos BIT in Macao would result in incompatibilities or 'legal chaos' in Macao.

Third, although the PRC-Laos BIT does not explicitly exclude Macao, it would not necessarily mean that the Treaty would apply to Macao. The PRC-Russia BIT was signed in 2006, when Macao was already handed over to China. Conversely, the PRC-Laos BIT was concluded in 1993, when the PRC did not exercise sovereignty over Macau. Hence, the PRC and Laotian government may deem it unnecessary to exclude Macao expressly in the PRC-Laos BIT. In toto, the PCA's holding is not well-grounded.

4. Comments on Singapore High Court's Holding

A. The Adduction of Further Evidence

Although the conclusion of the SGHC is agreeable in principle, the judicial

review adopted by the SGHC regarding the addition of further evidence does not seem convincing. In accordance with the Singapore Supreme Court of Judicature Act, the Court of Appeal should not receive further evidence, unless there are ‘special grounds.’⁴⁷ In practice, the Court of Appeal does not usually admit further evidence on a substantive appeal.⁴⁸ As to ‘special grounds’ on which further evidence is admissible in the Court of Appeal, L.J. Denning in *Ladd v. Marshall* stated:

To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.⁴⁹

Applying the principles of this case, the Laotian government was not considered to act with ‘reasonable diligence’ to obtain the Two Letters. The Laotian government contended that “diplomatic communications between the PRC and Laos took time and effort to bear fruit and the Two Letters could not have been produced at an earlier date.”⁵⁰ However, this argument is deniable if scrutinizing the date of each letter produced. The Laotian Ministry of Foreign Affairs sent a letter to the PRC Embassy in Vientiane on January 7, 2014, more than half a month after the PCA award, which was rendered on December 13, 2014. It was, however, replied to just after two days on January 9, 2014 by the PRC Embassy in Vientiane. There were no difficulties for the Laotian government to contact the PRC Embassy in Vientiane before the conclusion of first trial. Considering that the burden of proof, to verify the Two Letters could not be obtained earlier, lies on the Laotian government, without fulfilling its reasonable diligence obligations, Laos lacked sufficient grounds to invoke ‘special grounds’ to adduce the Two Letters.

The above three conditions established in *Ladd v. Marshall* have been applied as if they are statutory provisions.⁵¹ Some judges interpreted and applied these conditions with subtle modifications usually in a private law context.⁵² In the SGHC award, the Court did not explain why the principles in *Ladd v. Marshall* were not applied strictly. Neither did the Court illustrate the basis it referred to

in *Lassiter Ann Masters v. To Keng Lam* in addition to exercising the Court's 'discretion.'⁵³ In *Lassiter Ann Masters v. To Keng Lam*, the first condition for 'special grounds' was modified as follows:

The party seeking to admit the evidence demonstrates sufficiently strong reasons why the evidence was not adduced at the arbitration hearing.

As regard the principle of 'reasonable diligence' in *Ladd v. Marshall*, the "sufficiently strong reasons" condition in *Lassiter Ann Masters v. To Keng Lam* clearly lowers the standard and leaves a wider discretion to the court.⁵⁴ However, the lower threshold may result in damaging the interests of the litigants by "allowing a second bite at the cheery without a very good reason indeed."⁵⁵ Only under an exceptional circumstance the court could accede to an application to adduce new evidence where the applicant could not satisfy the three conditions in *Ladd v. Marshall*.⁵⁶ The case, nevertheless, has not proved to be an 'exceptional' one. To say the least, the Laotian government failed to demonstrate sufficiently why the Two Letters were not adduced at the trial, but could get in a quick time afterwards. Consequently, the SGHC's adducing fresh evidence of Two Letters is not consistent with the principle of judicial review.

B. The 1999 Note to the UN Secretary-General

The PRC government filed a Notification with two Annexes on December 13, 1999 to the UN Secretary-General (hereinafter 1999 Note). The two Annexes include the names of international treaties that will continually be implemented in Macao after the date of the reunion on December 20, 1999.⁵⁷ Article IV of this Notification provides:

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

Considering all treaties listed in the Annexes are multilateral treaties rather than BITs, and no available documents suggest that the PRC government has gone

through the formalities for the application of PRC BITs to Macao, some argue that it could be inferred from the 1999 Note that PRC BITs are not applied to Macao.⁵⁸

On the implication of the 1999 Note, both awards of the PCA and the SGHC were right in the sense that the 1999 Note has no relevance as far as bilateral treaties are concerned. The PCA award categorized the role of the UN into two kinds: as ‘depository’ and as “an instance of registration.” It further explained that the UN should play its role as depository as far as reservations to multilateral treaties are concerned. This is why bilateral treaties are not listed in the Annexes of the 1999 Note. Apart from the roles of the UN, the implication of the 1999 Note could also be understood by reading the whole text. Pursuant to the VCLT, a treaty shall be interpreted in accordance with the terms of the treaty in their context.⁵⁹ Now that the 1999 Note only deals with multilateral treaties, ‘other treaties’ as stated in Article IV also refers to other multilateral treaties rather than any bilateral treaties. In this sense, the 1999 Note has no relevance with bilateral treaties so it could not serve as evidence for the inapplicability of the PRC-BITs to Macao.

C. The 2001 WTO Trade Policy Report

The 2001 WTO Report was not adduced in the arbitral proceedings, either. However, the SGHC relied, to some extent, on the Report which emphasizes that: “[Macao] has no other bilateral investment treaties or bilateral tax treaties.”⁶⁰ Put aside the legality that the Report was newly adduced in the appeal, there are queries to the Court’s finding that the Report helps demonstrate the inapplicability of the PRC-Laos BIT to Macao.

The WTO is “a set of principles and rules, underpinned by binding arrangements for settling trade disputes.”⁶¹ In particular, the Trade Policy Review Mechanism (“TPRM”) facilitates the review of each member’s trade policies and practices to the collective scrutiny of the membership as a whole.⁶² It is emphasized that the TPRM is not “intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.”⁶³ Accordingly, the TPRM is not the forum for the Laotian government to seek the judgment of the inapplicability of the PRC-BITs to China’s SARs, but an observation of the WTO. Hence, it seems implausible for the Court to find any evidence in the 2001 WTO Report that the PRC-Laos BIT does not apply to Macao.

5. Conclusion

In sum, the author would argue that the PCA's award has some logical flaws in its reasoning. Accordingly, the PRC-Laos BIT could not necessarily be applied because Macanese investors may get better protection; there are similarities between BITs of the Netherlands and Portugal with the PRC and Macao; or the absence of an explicit exclusion exists for Macao in the PRC-Laos BIT. As a consequence, the treaty interpretation methodologies adopted by the SGHC are more convincing. There are, nevertheless, some queries to further evidence, including the Two Letters and the 2001 WTO Report, that the SGHC adduced into the appeal. The fresh evidence is not referred to in the principles established in *Ladd v. Marshall*. Moreover, even the Laotian government does not demonstrate the sufficient reasoning enough to adduce the Two Letters at the trial.

Both the PCA and the SGHC acknowledged the difficulties in ascertaining the applicability of the PRC-Laos BIT to Macao mainly due to little evidence available.⁶⁴ Under such a difficult circumstance, the “preparatory work of the treaty” as well as “the circumstances of its conclusion” would be very helpful to understand the meaning of the treaty.⁶⁵ In addition to the 1987 PRC-Portugal Joint Declaration and the Hong Kong analogy that the Court referred to,⁶⁶ some other elements suggest how the preparatory work of the PRC-Laos BIT was conducted, such as the consultations conducted by the Joint Liaison Group set up by the Chinese and Portuguese government. Furthermore, a historical overview of Hong Kong and Macao before and after their return to China and the basic policies declared in the 1984 PRC-UK Joint Declaration and the 1987 PRC-Portugal Joint Declaration could serve to understand the circumstances of the Treaty.

As the first international investment arbitration brought by a Macanese investor, *Sanum v. Laos* is of tremendous significance, shedding light on determining the antecedent conditions for the investors from China's SARs to seek for protecting themselves under the BITs. Notwithstanding, evidenced by more than 130 bilateral investment treaties signed, China has been an active ‘treaty-maker’ in international investment arbitration. Although China has appeared several times before the ICSID in the past five years,⁶⁷ she has never been so active in ICSID arbitration practice. In 2014, Asia became the world's largest investment region. Especially, Hong Kong became the second largest investor

in the world after the US.⁶⁸ With China's "One Belt, One Road" initiative, the investment and trade in Hong Kong and Macao are expected to become even more active. In this regard, more foreign and Chinese investors may try to protect their investments in China or other jurisdictions by the PRC BITs. However, the effectiveness and repercussions of bringing a treaty claim under a Chinese BIT has not been completely tested. The final holding of the SGHC is awaited. At any rate, *Sanum v. Laos* brings China's special national conditions to the universal rules of investment treaty arbitration. Time to expect China's responses is coming.

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29. The Republic of Singapore Supreme Court of Judicature Act (Cap. 322, 2007 revised ed.), § 37(4), *available at* <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%224a6359f9-a3f3-45b9-aa01-c366b2b7c844%22%20Status%3Apublished%20Depth%3A0;rec=0> (last visited on Feb. 13, 2016).
30. *Lassiter Ann Masters v. To Keng Lam (alias Toh Jeanette)* [2004] 2 SLR(R) 392, *available at* <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/12525-lassiter-ann-masters-suing-as-the-widow-and-dependant-of-lassiter-henry-adolphus-deceased-v-to-keng-lam-alias-toh-jeanette-no-2-2005-2-slr-8-2005-sghc-4> (last visited on Feb. 13, 2016).
31. *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd.*, [2015] SGHC 15, ¶¶ 45-49 (Singapore High Ct. 2015), *available at* <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15860-government-of-the-lao-people-s-democratic-republic-v-sanum-investments-ltd-2015-sghc-15> (last visited on Feb. 13, 2016).
32. *Id.* ¶ 50.
33. *Id.* ¶¶ 51-55.
34. *Id.* ¶¶ 70-78.
35. *Id.* ¶ 92.
36. Clause XI of Annex I of the Joint Declaration of the Government of the United Kingdom of

Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong states: "The application to [Hong Kong] of international agreements to which [the PRC] is or becomes a party shall be decided by the [the PRC government], in accordance with the circumstances and needs of [Hong Kong], and after seeking the views of the [Hong Kong government]." Identical wording could be found in Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao. Clause VIII of Annex I of this Declaration states: "The application to [Macao] of international agreements to which [the PRC] is or becomes a party shall be decided by the [the PRC government], in accordance with the circumstances and needs of [Macao] and after seeking the views of the [Macao government]."

37. *Id.* ¶ 104.

38. *Id.* ¶¶ 103-105.

39. *Id.* ¶¶ 107-109.

40. Sanum v. Lao, *supra* note 15, ¶ 232.

41. *Id.* ¶ 240.

42. Agreement between the Government of the Slovak Republic and the Government of Malaysia for the Promotion and Protection of Investment, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1966> (last visited on Feb.20, 2016).

43. *E.g.*, clauses concerning substantive standard such as Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment) and Article 5 (Minimum Standard of Treatment) of the Agreement between Canada and [...] for the Promotion and Protection of Investments (2004 Canadian Model BIT) are almost identical with Articles 3, 4 and 5 of the Treaty Between the Government of the United States of America and the Government of [country] Concerning the Encouragement and Reciprocal Protection of Investment (2004 US Model BIT).

44. Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/763>; Agreement between the Kingdom of the Netherlands and the Macao Special Administrative Region of the People's Republic of China on Encouragement and Reciprocal Protection of Investments, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3275>; Agreement between the People's Republic of China and the Portuguese Republic on the Encouragement and Reciprocal Protection of Investments, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3363>; Acordo entre a república portuguesa e a região administrativa especial de macau da república popular da china sobre a promoção e protecção recíproca de investimentos, *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1931> (all last visited on Feb. 20, 2016).

45. Agreement between the Kingdom of the Netherlands and the Macao Special Administrative

- Region of the People's Republic of China on Encouragement and Reciprocal Protection of Investments, art. 1(b)(ii), *available at* <http://Investmentpolicyhub.Unctad.Org/Download/Treatyfile/3275> (last visited on Feb. 13, 2016).
46. Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands, art. 1(2)(a), *available at* <http://investmentpolicyhub.unctad.org/Download/TreatyFile/763> (last visited on Feb. 13, 2016).
47. The Republic of Singapore Supreme Court of Judicature Act, *supra* note 26, §37(3). It reads:
- (3) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Section 37(4) states: "Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, except as to matters subsequent as specified in subsection (3), shall be admitted on special grounds only, and not without leave of the Court of Appeal."
48. *See, R v. Secretary of State for the Home Department ex p. Gardian* (1996) COD 306, CA (further evidence not admitted); *R v. Chief Constable of Sussex ex p. International Traders' Ferry Ltd* (1998), QB 477 at 490F-491G, CA (further evidence reluctantly considered, at the request of the parties).
49. *Ladd v. Marshall*, 1 WLR 1489 (1954) (L.J. Denning dissenting opinion), *available at* <http://www.uniset.ca/other/cs2/19541WLR1489.html> (last visited on Feb. 15, 2016).
50. *Laos v. Sanum*, *supra* note 28, ¶ 45.
51. *Thon Kien Peng & Mah Siew Peun v. Thannimalai A/L Subramaniam*, Civil Appeal No. P-04-50-2006, the Court of Appeal Presiding at Putrajaya, Judgment of Abul Malik Bin Ishak, JCA (Dissenting), ¶ 39, *available at* [http://www.kehakiman.gov.my/directory/judgment/file/P%2004%2050%202006%20%20Teoh%20Kien%20Peng%20\[Thannimalai\]%20\[Dissenting\].pdf](http://www.kehakiman.gov.my/directory/judgment/file/P%2004%2050%202006%20%20Teoh%20Kien%20Peng%20[Thannimalai]%20[Dissenting].pdf) (last visited on Feb. 13, 2016).
52. *J. Hart, Natvest Lombard Factors Ltd v. Arbis*, THE TIMES, Dec. 10, 1999, *available at* <http://wbus.westlaw.co.uk/pdf/2000/0100.pdf> (last visited on Feb. 13, 2016).
53. *Laos v. Sanum*, *supra* note 28, ¶ 44.
54. *Id.* Paragraph 44 of the Award states: "I thought it appropriate to refer to the three conditions of the *Ladd v. Marshall* test, with a *slightly less stringent first condition*." [Emphasis added] For details, *see Lassiter Ann Masters v. To Keng Lam*, *supra* note 27, at 24.
55. *Hertfordshire Investments Ltd. v. Bubb and Another*, 1 W.L.R. 2318 (2000), *available at* <http://swarb.co.uk/hertfordshire-investments-ltd-v-bubb-and-another-ca-25-jul-2000> (last visited on Feb. 13, 2016).
56. *Sara Lee Household & Body Care U.K. Ltd v. Johnson Wax Ltd* (2001), *available at* <http://court-appeal.vlex.co.uk/vid/-52578957> (last visited on Feb. 15, 2016).
57. United Nations, Multilateral Treaties Deposited with the Secretary-General: Status as of April 1, 2009, Historical Information, China, Note 3, at VIII. *See also* Annexes 'multilateral

- international treaties list which continue to be implemented in Macao from Dec. 20, 1999,' in XI-AN WANG, *THE APPLICATION OF INTERNATIONAL TREATY IN CHINA SPECIAL ADMINISTRATION REGIONS* (2006).
58. Wang, *supra* note 11, at 90-1.
 59. VCLT art. 31.
 60. WTO, Trade Policy Review, Macau, China (Report by the Secretariat), Chart II.(7)(4), available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=69948%2c875%2c168%2c60266%2c42964%2c68283%2c67571&CurrentCatalogueIdIndex=6&FullTextHash= (last visited on Feb. 13, 2016).
 61. WTO, The World Trade Report 2003, at 78, available at https://www.wto.org/English/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf (last visited on Feb. 13, 2016).
 62. A. Qureshi & Nohyoung Park, *The WTO as A "Facilitator" in the Harmonisation of Domestic Trade Laws*, 8 *ASIAN J. WTO & INT'L HEALTH L & POL'Y* 230 (2013).
 63. Marrakesh Agreement Establishing the World Trade Organization, Annex 3 (Trade Policy Review Mechanism), Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).
 64. In Paragraph 151 of the Appeal, the Singapore High Court states: "I accept that nothing in the arrangements made by the PRC and the UK concerning Hong Kong can be regarded as *conclusive* of the arrangements made by the PRC and Portugal regarding Macau." See *Sanum v. Laos*, *supra* note 15, ¶ 232.
 65. VCLT art. 32 (Supplementary means of interpretation). It reads: "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: (a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable."
 66. *Laos v. Sanum*, *supra* note 28, ¶¶ 89-93 & 99-106.
 67. In May 2011, *e.g.*, a Malaysian corporation, Ekran Berhad, commenced an ICSID claim against China. Subsequently, in September 2012, a major Chinese insurer, Ping An, took the Kingdom of Belgium to ICSID arbitration. In November 2014, ICSID accepted second international investment claim brought by a Korean investor, Ansung against China. In December 2014, another investment claim brought from a Chinese state-owned enterprise (SOEs), Beijing Urban Construction Group, against the Yemen government was accepted.
 68. UNCTAD, Investment by South TNCs Continues to Grow: Developing Asia Became the World's Largest Investor Region, *Global Investment Trends Monitor*, No.19 (2015), at 1, available at http://unctad.org/en/PublicationsLibrary/webdiaeia2015d2_en.pdf (last visited on Feb. 13, 2016, 2016).

