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CASE COMMENT

Sanum Investments Ltd v The Government of the Lao People's Democratic Republic[1]
Circumstantial Indicia in Treaty Interpretation

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In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*, a five-Judge panel of the Singapore Court of Appeal was specially constituted to address a foundational topic of international law—the territorial application of treaties.[3] Sundaresh Menon CJ delivered a meticulous and discursive judgment on behalf of the apex court, holding that the China–Laos investment treaty,[4] concluded when Macau was still under Portuguese sovereignty, applies to Macau on her reversion to Chinese sovereignty. A bilateral investment treaty obliges a Contracting State to maintain certain standards of protection, such as fair and equitable treatment, towards investors who are nationals of the other Contracting State investing in its territory. It also empowers a protected investor to claim relief, in accordance with the stipulated dispute resolution procedure, from the host Contracting State for conduct that violates treaty obligations. If the China–Laos investment treaty applies to the Special Administrative Region of Macau, then a Macanese investor who has made an investment in Laos will be able to bring a claim against Laos for treaty violations. There are notable detractors to this landmark decision of the Court of Appeal. Laos, a Contracting State and the respondent to a treaty claim brought by a Macanese investor, maintains that the China–Laos investment treaty does not apply to Macau. China, the other Contracting State, openly rejects the ruling of the Court of Appeal.[5] The clash

[1] *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*, [2016] SGCA 57 (*Sanum v Lao PDR*).

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[3] *Sanum v Lao PDR* (n 1).

[4] Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments (signed 31 January 1993, entered into force 1 June 1993).

[5] Ministry of Foreign Affairs of the People's Republic of China Press Release, 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016' <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml> accessed 7 May 2017.

between the Court of Appeal and the Contracting States over the China–Laos investment treaty is, at its core, a clash over treaty interpretation. It stems from the fact that neither the text nor the context of the China–Laos investment treaty evinces its applicability or non-applicability to Macau. Consequently, the task facing the Court of Appeal, and the focus of this note, is the extrapolation of State intent from indicia located outside the text and the context of the treaty being interpreted. I call these circumstantial indicia in treaty interpretation.

On 12 August 2012, Sanum, a Macanese investor, filed a Notice of Arbitration against Laos, claiming violations of the China–Laos investment treaty. Notwithstanding Laos' objection, the Arbitral Tribunal held in its Award on Jurisdiction that the China–Laos investment treaty is applicable to Macau.[6] The Arbitral Tribunal established personal jurisdiction over Sanum via the international law rule of 'moving treaty frontiers' (MTF). The MTF rule automatically transfers a territory (Macau) from the treaty regime of its predecessor sovereign (Portugal) to that of its successor sovereign (China).[7] Dissatisfied with the Award, Laos requested and received written confirmation from the Chinese Embassy in Vientiane that the China–Laos investment treaty does not apply to Macau.[8] Armed with these two diplomatic letters, Laos applied to the Singapore High Court to review the Award pursuant to Section 10(3)(a) of the International Arbitration Act.[9] Should the High Court, or the Court of Appeal on appeal, both exercising a supervisory role as courts at the seat of arbitration, find that the arbitral tribunal has no jurisdiction, the arbitration between Sanum and Laos will be discontinued.[10] The High Court upheld Laos' objection to jurisdiction. In its view, the diplomatic letters displaced the MTF rule. This excludes Macau from the territorial application of the China–Laos investment treaty, and deprives the arbitral tribunal of personal jurisdiction over Sanum.[11] With the leave of the High Court, Sanum appealed to the Court of Appeal.

Like the High Court, the Court of Appeal found that the MTF rule governs the territorial application of the China–Laos investment treaty, unless an exception to the rule is made out. But unlike the High Court, the latter was doubtful that the diplomatic letters establish an exception. The Court of Appeal located the MTF rule in Article 29 of the Vienna Convention on the Law of Treaties (VCLT),[12] and

[6] *Sanum Investments Limited v The Government of the Lao People's Democratic Republic*, UNCITRAL, PCA Case No 2013-13, Award on Jurisdiction (Andrés Rigo Sureda, President; Bernard Hanotiau, Brigitte Stern) (13 December 2013) paras 232–300.

[7] ILC, 'Second Report of the Special Rapporteur Sir Humphrey Waldock on Succession in Respect of Treaties', Doc No A/CN.4/214, ILC YB 1969 vol II, 52.

[8] Letter from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Vientiane, Laos (7 January 2014); Letter from the PRC Embassy in Vientiane, Laos, to the Laotian Ministry of Foreign Affairs (9 January 2014), reproduced at *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15, paras 39–40.

[9] International Arbitration Act, Cap 143A (Rev Edn 2002)(IAA). Section 10(3)(a) provides:

'If the arbitral tribunal rules—

(a) on a plea as a preliminary question that it has jurisdiction; or

(b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,

any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.'

[10] IAA s 10(7) provides: 'In making a ruling or decision under this section that the arbitral tribunal has no jurisdiction, the arbitral tribunal, the High Court or the Court of Appeal (as the case may be) may make an award or order of costs of the proceedings, including the arbitral proceedings (as the case may be), against any party.'

[11] *Lao PDR v Sanum* (n 8) para 111.

[12] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT). Article 29 provides: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'

in Article 15 of the Vienna Convention on Succession of States (VCST) in respect of Treaties.[13] Pursuant to Article 29 VCLT, a treaty applies to the entire territory of a Contracting State 'unless a different intention appears from the treaty or is otherwise established'. As Laos did not rely on the exceptions in Article 15(b) VCST, the Court of Appeal devoted its analysis to the two exceptions in Article 29 VCLT.[14] The first exception was unmet by the silence in the text and context of the China–Laos investment treaty.[15] The second exception and the linchpin of Laos' case, calls for the production of any other evidence which points to China's and Laos' intent that their treaty does not apply to Macau. Official statements from China and/or Laos that directly address China's treaty regime *vis-à-vis* Macau constitute expressions of State intent. In this regard, the Court of Appeal received two pieces of evidence. The first is the China-Portugal Joint Declaration on the question of Macau, which provides in Clause VII that '[t]he application to the Macau Special Administrative Region of international agreements to which the People's Republic of China is a party shall be decided by the Central People's Government in accordance with the circumstances and needs of the Macau Special Administrative Region and after seeking the views of the Macau Special Administrative Region Government'.[16] The second is the diplomatic letters.

The Court of Appeal endorsed Sanum's argument that submitted evidence should be analysed in accordance with the 'critical date' doctrine, which deems post-'critical-date' evidence that is 'self-serving and intended by the party putting it forward to improve its position in the arbitration, as being of little, if any, weight'.[17] The Court of Appeal also agreed with Sanum that the 'critical date' is 12 August 2012—the date of the Notice of Arbitration—since this is 'the date on which the dispute had crystallised'.[18] Accordingly, the 1987 Joint Declaration is pre-'critical date' evidence, while the 2014 diplomatic letters are post-'critical date' evidence. The Court of Appeal assigned a low probative value to the Joint Declaration because the wording of Clause VII at best suggests China deferring the question of Chinese treaties applying to Macau, rather than announcing 'a general intention ... for its treaties not to extend by operation of the MTF Rule to Macau'.[19] And as none of the other pre-'critical date' evidence on the record establish an exception to Article 29,[20] the position as of 12 August 2012 is the

[13] Vienna Convention on the Succession of States in Respect of Treaties (opened for signature 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3 (VCST). Article 15 provides:

'When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

(a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and
(b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.'

[14] *Sanum v Lao PDR* (n 1) paras 47–53.
[15] *Sanum v Lao PDR* (n 1) paras 54–60.
[16] China-Portugal Joint Declaration on the question of Macau (signed 13 April 1987) 1498 UNTS 229.
[17] *Sanum v Lao PDR* (n 1) paras 64–65, 69, and 104.
[18] *Sanum v Lao PDR* (n 1) para 67.
[19] *Sanum v Lao PDR* (n 1) paras 77 and 81.
[20] These include 'the [analogous] experience of the PRC and the UK in relation to [the applicability of Chinese treaties to] HK', a list of Chinese treaties applicable to Macau in a 1999 UN document entitled 'Multilateral Treaties deposited with the Secretary-General', and a 2001 World Trade Organisation Report which states that other than two agreements concluded with Portugal, 'Macau has no other bilateral investment treaties', *Sanum v Lao PDR* (n 1) paras 83–91, 93–99.

application of the China–Laos investment treaty to Macau. The diplomatic letters, which record the non-application of the China–Laos investment treaty to Macau, appear to override the general rule in Article 29 VCLT. However, this does not make them a valid Article 29 exception. The Court of Appeal held that the diplomatic letters are inadmissible 'because they are post-Critical Date evidence adduced to *contradict* the pre-Critical Date position'.[21]

At the end of the Court of Appeal's treaty interpretation exercise, the default position in international law trumped the declared intention of the Contracting States on the territorial application of the China–Laos investment treaty. This 'counter-intuitive' outcome,[22] offers a rare opportunity to examine the correlation between three discrete circumstantial indicia in treaty interpretation which are encapsulated in Article 31(3) VCLT. Article 31 articulates the canonical general rule of interpretation of treaties in three sections. Articles 31(1) and 31(2) identify the considerations that guide the interpretation of a treaty's text and context respectively.[23] Additionally, and especially where a treaty's text and context are silent on a contested issue, Article 31(3) directs treaty interpreters to take into account:

(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.

Article 31(3)(a) VCLT does not impose temporal limits on when Contracting States can agree on the territorial application of their treaty. The Court of Appeal rejected Laos' characterization of the diplomatic letters as a 'subsequent agreement' because such an agreement 'cannot have retroactive effect'.[24] However, when Contracting States agree in the present on what they intended in the past, a 'subsequent agreement' that imparts meaning to the antecedent treaty is necessarily retroactive in operation. The real complaint about the diplomatic letters is their creation at the behest of Laos in response to a specific treaty claim. It led the Court of Appeal to introduce the 'critical date' doctrine to exclude timely evidence from the record. The 'critical date' doctrine in international law emerged in territorial disputes to pinpoint the moment of passing of sovereignty.[25] It has been adapted to identify the moment after which evidence generated to improve the legal position of a State in international proceedings is

[21] *Sanum v Lao PDR* (n 1) para 112 (original emphasis).
[22] *Sanum v Lao PDR* (n 1) para 116.
[23] VCLT art 31(1) provides:
'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.'
VCLT art 31(2) provides:
'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

[24] *Sanum v Lao PDR* (n 1) para 116.
[25] *Island of Palmas Case* (*Netherlands v USA*) (1928) II RIAA 829, 843.

inadmissible.[26] Applying this doctrine to exclude evidence is rare among international tribunals hearing disputes involving States, most of whom admit all evidence.[27] It does not accommodate the possibility that Sanum caught Laos by surprise. If Laos was unaware of a brewing treaty claim before 12 August 2012, and there is no indication on the facts that it was, there was no impetus for Laos to seek written confirmation from China that their treaty does not apply to Macau. Yet, it is equally possible that the diplomatic letters reflect modified intent on the territorial application of the China–Laos investment treaty, timeously portrayed as original intent to foreclose Sanum's claim against Laos. In light of these competing possibilities, conventional international practice is more likely to admit the diplomatic letters as evidence of a 'subsequent agreement', but accord them a lower probative value.

Article 31(3)(b) VCLT lists the conduct of Contracting States subsequent to the conclusion of a treaty as circumstantial indicia in treaty interpretation. Conduct encompasses both action and inaction. This means that 'evidence of the inaction of a party, although not conclusive, may be of considerable probative value'.[28] Although neither Sanum nor Laos tendered submissions on Article 31(3)(b) VCLT to the Court of Appeal, the facts point to the existence of the circumstantial indicia of 'subsequent practice'. Had Sanum invoked Article 31(3)(b), it could have argued for the application of the China–Laos investment treaty to Macau through acquiescence. In the 1987 Joint Declaration, China pledged in Clause VII to decide the applicability of Chinese treaties to Macau upon the handover. Then in 1993, the China–Laos investment treaty, which does not mention Macau, entered into force. Finally, just before Macau's handover in 1999, both China and Laos ratified the VCLT. Neither State made a reservation to Article 29 which regards a treaty as binding on a Contracting State's entire territory, unless otherwise established. The combined effect of Clause VII, ambiguity in the territorial application of the China–Laos investment treaty after Macau's handover, as well as China's and Laos' unconditional acceptance of the general rule in Article 29 VCLT, called for positive action by the Contracting States to exclude Macau from treaty coverage. By remaining silent for more than two decades when they could have spoken out, China and Laos arguably acquiesced in the likelihood of Macanese investors invoking the treaty after Macau's handover. Furthermore, acquiescence may create an estoppel, precluding China and Laos from objecting to an interpretation of the treaty in which they had acquiesced.[29] In the event that Sanum suffers prejudice, in the form of frustration of its expectation to receive treaty protection, China and Laos are estopped from taking the stance they did in the diplomatic letters.[30] When looked at as a whole, it is plausible that the conduct of China and Laos establish, by acquiescence, an agreement that the China–Laos investment treaty applies to Macau. Had Sanum invoked Article 31(3)(b) VCLT, the Court of Appeal's decision might have swung even more firmly in its favour.

[26] *The Minquiers and Ecrehos Case* (*France v UK*) (Judgment) [1953] ICJ Rep 47, 59.
[27] Durward V Sandifer, *Evidence before International Tribunals* (rev edn, University Press of Virginia 1975) 121–23.
[28] IC MacGibbon, 'The Scope of Acquiescence in International Law' (1954) 31 BYBIL 143, 146.
[29] IC MacGibbon, 'Estoppel in International Law' (1958) 7 ICLQ 468, 501–502.
[30] Dissenting Opinion of Judge Spender, *Case Concerning the Temple of Preah Vihear* (*Cambodia v Thailand*) [1962] ICJ Rep 6, 143–44, cited with approval in *Chevron Corporation (USA) & Anor v Republic of Ecuador*, UNCITRAL, PCA Case No AA 227, Partial Award on the Merits (30 March 2010) para 350.

Article 31(3)(c) VCLT is the gateway through which rules of international law feature in treaty interpretation. There are two rules of international law that are directly relevant to the territorial reach of the China–Laos investment treaty. The first is the general rule in Article 29 VCLT that a treaty is binding on the entire territory of the Contracting States, and the second is the MTF rule in Article 15 VCST. Article 29 does not, as some writers posit, incorporate the MTF rule. The date from which treaty coverage for Macau takes effect differs depending on which rule is applied. An Article 29 VCLT determination can be made on any date regardless of State succession, whereas the MTF rule is only triggered on the date when State succession causes territorial frontiers to change. Notably, the International Law Commission deliberately left out questions of State succession, which the MTF rule concerns, when drafting the identical, forerunner provision to Article 29.[31] The separation between the Article 29 VCLT rule and the MTF rule is reinforced by Article 73 VCLT, which provides that no provision in the VCLT shall 'prejudge any question that may arise in regard to a treaty from a succession of States'. In addition to relevancy, the rules must also be applicable in the relations between China and Laos. The Article 29 rule is applicable through agreement as both China and Laos have ratified the VCLT. In contrast, the applicability of the MTF rule is equivocal. Neither China nor Laos have signed the VCST. Moreover, the International Law Commission was uncertain that its codification project, which will culminate in the VCST, merely assembled rules of customary international law binding on all States.[32] Laos' agreement to be bound by the MTF rule in the arbitral and judicial proceedings, when paired with China's unknown attitude, prioritises the Article 29 VCLT rule over the MTF rule when interpreting the China–Laos investment treaty.

To the extent that the circumstantial indicia in Article 31(3) VCLT are present, they assume the same importance as the text and the context in treaty interpretation.[33] The absence of a substantive hierarchy among Articles 31(1), (2) and (3), strongly suggests the corresponding absence of a hierarchy within Article 31(3). The diplomatic letters as a 'subsequent agreement', China's and Laos' prolonged inaction as 'subsequent practice', and the relevant and applicable rules of international law, 'would be thrown into the crucible and their interaction would then give the legally relevant interpretation'.[34] Applying the China–Laos investment treaty to Macau poses no difficulty when all, most, or the only available circumstantial indicia in Article 31(3) VCLT mandate this outcome. The difficulty arises when two out of the three circumstantial indicia are present or pleaded, each pointing to a different outcome. The diplomatic letters as an Article 31(3)(a) indicia, when taken at face value, place Macau *outside* the territorial application of the China–Laos investment treaty. Conversely, the confluence of the principal Article 29 VCLT and MTF rules, and the supplementary acquiescence and estoppel rules of good faith as Article 31(3)(c) indicia, place Macau *inside* the treaty's territorial application. As noted above, neither party addressed Article 31(3)(b) indicia, so there was no convenient tie-breaker. Deciding whether a

[31] ILC, 'Draft Articles on the Law of Treaties with commentaries 1966' ILC YB 1966 vol II, 187, 213.
[32] ILC, 'First Report of the Special Rapporteur Sir Humphrey Waldock on Succession in Respect of Treaties', Doc No A/CN.4/202, ILC YB 1968, vol II, 89; on the MTF rule cf *Sanum v Lao PDR* (n 1) paras 75–78, 80, 116(a).
[33] ILC, 'Sixth Report of the Special Rapporteur Sir Humphrey Waldock on the Law of Treaties', Doc No A/CN.4/186, ILC YB 1966, vol II, 85.
[34] ibid 85.

'subsequent agreement' or relevant and applicable rules of international law prevails, involves a delicate choice between consent or certainty. While every investment treaty is created with State consent, letting a State withdraw treaty protection after an investor files a claim defeats the purpose of offering investors legal stability and security through investment treaties. '[A] State cannot blow hot and cold'.[35] When the relevant and applicable rules of international law unite to lift an investor from the territorial application limbo in which the Contracting States left their investment treaty, these rules have to prevail. Whether the diplomatic letters are framed, as the Court of Appeal has done, as a potential exception to the Article 29 VCLT rule, or as a 'subsequent agreement' that conflicts with Article 31(3)(c) VCLT rules, they should not, on their own, disqualify Sanum from treaty protection. In this regard, one cannot but agree with the Court of Appeal that the clarification to the territorial application of the China–Laos investment treaty in the diplomatic letters only has prospective effect.[36]

With *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*, the Singapore Court of Appeal joins the growing ranks of national courts that have analysed and applied international law. Decisions of national courts, once confined to local or regional significance, now take on global significance as a source of international law. Enhanced significance entails enhanced scrutiny. The decision of the Court of Appeal applying the China–Laos investment treaty to Macau is less controversial than what its denial by China might imply. The decision finds ample support in Article 31(3) VCLT. It is also infused with the keen appreciation of the Court of Appeal that while deciphering the intent of the Contracting States is cardinal to treaty interpretation, there is something amiss with giving Contracting States the last word in an extremely belated assertion of mutual intent. Ruling against mutual intent may seem 'counter-intuitive'. In the present case though, the instinctive caution exhibited by the Court of Appeal laid the foundation for a credible decision.

[35] Lord McNair, 'The Legality of the Occupation of the Ruhr' (1924) 5 BYBIL 15, 35.
[36] *Sanum v Lao PDR* (n 1) para 116(e).