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Annexure A

HISTORY OF VANDA'S SHARE TRADING PRICE AND TURNOVER

Stock Historical Data

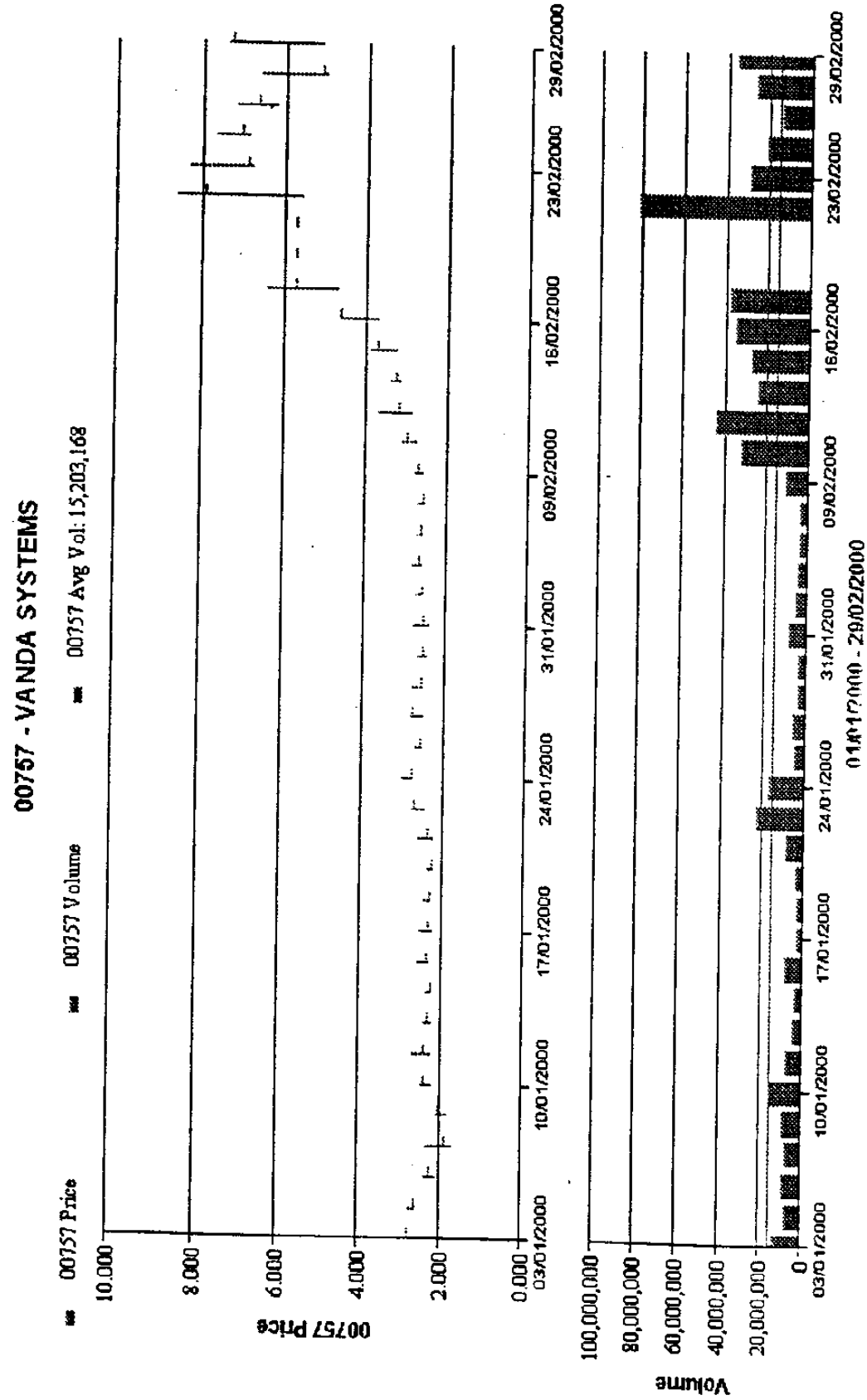
Stock	00757 - VANDA SYSTEMS
Date (dd/mm/yyyy)	01/01/2000 - 29/02/2000
Max / Min Closing Price	7.95 / 1.87
Max / Min Price	8.6 / 1.72
Weighted Average Price	4.493

Total Volume	608,126,700 shares
Daily Average	15,203,168 shares
Total $ Turnover	2,732,569,657
Average $ Turnover	68,314,241

Date	Volume	$ Turnover	High	Low	Close	%Change	HSI Close
03/01/2000	13,390,000	37,602,450	2.900	2.725	2.775	2.78	17,369.63
04/01/2000	7,508,000	19,823,250	2.750	2.575	2.600	-6.31	17,072.82
05/01/2000	9,174,000	20,709,950	2.375	2.100	2.225	-14.42	15,846.72
06/01/2000	7,652,000	15,292,430	2.300	1.720	1.870	-15.96	15,153.23
07/01/2000	8,852,000	17,746,460	2.100	1.800	2.025	8.29	15,405.63
10/01/2000	14,846,000	34,469,750	2.450	2.200	2.400	18.52	15,848.15
11/01/2000	7,824,000	19,291,550	2.700	2.225	2.400	0.00	15,862.10
12/01/2000	4,418,000	10,302,900	2.400	2.250	2.325	-3.12	15,714.20
13/01/2000	3,266,000	7,494,300	2.350	2.225	2.250	-3.23	15,633.96
14/01/2000	8,194,000	20,004,050	2.550	2.325	2.350	4.44	15,542.23
17/01/2000	2,970,000	6,958,650	2.500	2.225	2.300	-2.13	15,574.56
18/01/2000	3,148,000	7,381,800	2.425	2.275	2.275	-1.09	15,789.20
19/01/2000	3,382,000	7,822,900	2.375	2.225	2.250	-1.10	15,275.34
20/01/2000	8,752,000	21,181,200	2.550	2.250	2.375	5.56	15,215.31
21/01/2000	22,404,000	58,481,950	2.750	2.425	2.700	13.68	15,108.41
24/01/2000	16,848,000	48,295,750	3.025	2.750	2.750	1.85	15,167.55
25/01/2000	5,522,000	14,223,100	2.700	2.525	2.550	-7.27	15,103.04
26/01/2000	5,870,000	15,462,550	2.800	2.525	2.775	8.82	15,427.72
27/01/2000	3,532,000	9,347,300	2.775	2.575	2.575	-7.21	15,917.81
28/01/2000	3,976,000	10,112,150	2.625	2.450	2.500	-2.91	16,185.94
31/01/2000	8,696,000	22,383,250	2.750	2.400	2.525	1.00	15,532.34
01/02/2000	5,026,000	13,099,350	2.675	2.550	2.575	1.98	15,653.86
02/02/2000	4,638,000	12,312,650	2.800	2.600	2.625	1.94	15,789.82
03/02/2000	3,475,500	9,060,175	2.675	2.575	2.600	-0.95	15,968.12
08/02/2000	3,928,000	10,234,550	2.675	2.550	2.575	-0.96	16,228.73
09/02/2000	10,816,000	29,047,000	2.775	2.600	2.700	4.85	16,819.46
10/02/2000	32,472,000	95,902,600	3.100	2.725	2.975	10.19	16,845.17
11/02/2000	44,300,000	144,392,250	3.675	2.900	3.175	6.72	17,380.30
14/02/2000	24,068,000	79,441,400	3.400	3.150	3.250	2.36	17,188.96
15/02/2000	27,534,000	99,889,350	3.875	3.250	3.725	14.62	16,688.16
16/02/2000	35,520,000	152,811,950	4.625	3.700	4.600	23.49	17,043.39
17/02/2000	37,638,000	217,188,150	6.400	4.700	5.700	23.91	16,981.23
18/02/2000	0	0	-	-	5.700	0.00	16,599.16
21/02/2000	0	0	-	-	5.700	0.00	16,322.37
22/02/2000	81,546,000	606,754,500	8.600	5.600	7.950	39.47	16,255.17
23/02/2000	29,200,000	224,085,700	8.300	6.800	6.900	-13.21	16,376.79
24/02/2000	21,161,200	154,829,460	7.700	6.900	7.050	2.17	17,058.66

Stock Historical Data

25/02/2000	13,788,000	91,909,800	7.200	6.250	6.650	-5.67	17,200.98
28/02/2000	26,408,000	144,042,650	6.600	4.975	5.100	-23.31	16,984.44
29/02/2000	36,384,000	223,180,432	7.400	5.150	7.300	43.14	17,169.44


00757 - VANDA SYSTEMS
00757 Price
00757 Volume
00757 Avg Vol: 15,203,168
00757 Price
10.000
8.000
6.000
4.000
2.000
0.000
03/01/2000
10/01/2000
17/01/2000
24/01/2000
31/01/2000
09/02/2000
16/02/2000
23/02/2000
29/02/2000
Volume
100,000,000
80,000,000
60,000,000
40,000,000
20,000,000
0
01/01/2000 - 29/02/2000

Annexure B(i)

SAMPLE COPY OF TYPE "A" SALMON LETTER

COUNSEL FOR THE INSIDER DEALING TRIBUNAL

c/o 3/F, High Block,
Queensway Government Offices,
66 Queensway, Hong Kong.
Tel.: 2867 2558
Fax: 2536 8293

Our Ref. : IDTI 5/03C

11 April 2005

Mr. Lam Hon Nam
[redacted]

Urgent By Hand

[Total Pages (including this page): 3 + encl.]

Dear Sir/Madam,

Insider Dealing Tribunal

Inquiry into Suspected Insider Dealing in the Shares of Vanda Systems and Communications Holdings Limited (now renamed Hutchison Global Communications Holdings Limited) between 14th and 17th February 2000 (the "Inquiry")

On 28 October 2003, the Financial Secretary by Notice given pursuant to Section 16(2) of the Securities (Insider Dealing) Ordinance, Cap. 395, Laws of Hong Kong (the "Ordinance"), required the Insider Dealing Tribunal to inquire into and determine matters related to the trading in shares of Vanda Systems and Communications Holdings Limited (now renamed Hutchison Global Communications Holdings Limited ("the company") as follows:

(a) "whether there has been insider dealing in relation to the company connected with or arising out of the dealings in the listed securities of the company by or on behalf of:

Chan Yuk, Chan Lai King, Wong Cheung Hung, Fong Long, Chung Sau Wai, Chong Wai Lee and Chong Bun Bun between 14 and 17 February 2000 (both dates inclusive);

(b) in the event of there having been insider dealing as described in paragraph (a) above, the identity of each and every insider dealer; and

(c) the amount of any profit gained or loss avoided as a result of such insider dealing."

The Tribunal comprises the Honourable Mr Justice McMahon (Chairman) and two members, Professor LAM Kin and Mr NG Tze-kin, David. In accordance with section 15(5) of the Ordinance and paragraph 18 of the Schedule thereto, Mr Peter Duncan, S.C. and the undersigned, a legal officer from the Department of Justice, have been appointed to act as Counsel for the Tribunal for the purposes of the Inquiry.

The Inquiry has been convened as a result of an investigation by the Securities and Futures Commission ("SFC") into the affairs of the company, which brought to light evidence which suggests you may have been an insider dealer. The Tribunal has determined that your conduct will be the subject of the Inquiry and that you are potentially implicated or concerned in the subject matter of the Inquiry.

The Tribunal intends to conduct the Inquiry at public sittings and will require you to attend before it and give evidence. You are entitled to be represented by a barrister or solicitor and may apply to the Tribunal to call any material witnesses concerning these allegations.

I am enclosing with this letter a synopsis of the results of the SFC investigation. In due course you (or your legal representatives on your behalf) will receive copies of statements and other evidence previously obtained by the SFC and on which the synopsis is based. It is intended this evidence be adduced before the Tribunal for the purposes of the Inquiry.

Unless you are notified to the contrary, the Inquiry will commence by way of a public preliminary hearing to be held on 17 May 2005 (Tuesday) at 9:00 a.m. at the Insider Dealing Tribunal, 38th Floor, Immigration Tower, 7 Gloucester Road, Wanchai. This preliminary hearing is unlikely to last more than 2 hours and, if you wish to be legally represented before the Tribunal, application must be made by your counsel or solicitor on your behalf at this hearing. If you intend to be legally represented, could you kindly notify me at Department of Justice, Civil Division, 3rd Floor, High Block, Queensway Government Offices, 66 Queensway, Hong Kong or you may reach me by telephone at 2867 2558. If you do not wish to be legally represented, you must appear in person at this hearing.

It is expected that the Tribunal will commence its public sittings to hear evidence from the end of June 2005. Thereafter, it is intended that the Tribunal will sit to hear evidence every weekday between 9:00 a.m. and 1:00 p.m. or at such other times as are convenient (public holidays excepted) until the Inquiry is concluded.

Yours faithfully,

(Dick HO)
Counsel for the Insider Dealing Tribunal

Encl.

Annexure B(ii)

SAMPLE COPY OF TYPE "B" SALMON LETTER

COUNSEL FOR THE INSIDER DEALING TRIBUNAL

c/o 3rd Floor, High Block,
Queensway Government Offices,
66 Queensway, Hong Kong.
Tel.: 2867 2558
Fax: 2869 0670

Our Ref.: IDTI 5/03C

11 April 2005

Madam Fong Long
[redacted]

BY HAND ONLY

[Total Pages (Including this Page): 2 + Encl.]

Dear Sir/Madam,

Insider Dealing Tribunal

Inquiry into Suspected Insider Dealing in the Shares of Vanda Systems and Communications Holdings Limited (now renamed Hutchison Global Communications Holdings Limited) between 14th and 17th February 2000 (the "Inquiry")

On 28 October 2003, the Financial Secretary by Notice given pursuant to Section 16(2) of the Securities (Insider Dealing) Ordinance, Cap. 395, Laws of Hong Kong (the "Ordinance"), required the Insider Dealing Tribunal to inquire into and determine matters related to the trading in shares of Vanda Systems and Communications Holdings Limited (now renamed Hutchison Global Communications Holdings Limited ("the company") as follows:

(a) "whether there has been insider dealing in relation to the companies connected with or arising out of the dealings in the listed securities of the company by or on behalf of:

Chan Yuk, Chan Lai King, Wong Cheung Hung, Fong Long, Chung Sau Wai, Chong Wai Lee and Chong Bun Bun between 14 and 17 February 2000 (both dates inclusive);

(b) in the event of there having been insider dealing as described in

paragraph (a) above, the identity of each and every insider dealer; and

(c) the amount of any profit gained or loss avoided as a result of such insider dealing."

The Inquiry has been convened following an investigation by officers of the Securities and Futures Commission. A synopsis of the results of the investigation is enclosed. It appears to the Tribunal that you are a person who may be concerned in the subject matter of the inquiry and, as such, may be able to assist the Tribunal.

It is likely that the Tribunal will require you to attend before it to give evidence, in which event you will receive a Notice specifying a time, date and place.

As a person concerned in the subject under inquiry, you are entitled to be present at any sitting of the Tribunal and may be entitled to be represented by a barrister or a solicitor. You should note that, while the Tribunal has no present grounds for believing that you are implicated in insider dealing, it is possible that the Tribunal may comment, possibly adversely, on your conduct. Your attention is drawn to paragraphs 19 and 20 of the synopsis, in particular. You may wish to bear this in mind when considering whether or not to be legally represented.

If you wish to be legally represented, you should make an application through your counsel or solicitor to the Tribunal at a preliminary hearing. This will commence on 17 May 2005 at 9:00 a.m. at the Insider Dealing Tribunal (Second Division) at 38th Floor, Immigration Tower, 7 Gloucester Road, Wanchai, Hong Kong. The Chairman of the Tribunal is the Honourable Mr Justice McMahon.

Yours faithfully,

(Dick HO)
Counsel for the Insider Dealing Tribunal

Annexure C

FULL CHRONOLOGY OF THE REPRESENTATION OF THE IMPLICATED PARTIES

Insider Dealing Inquiry on
Vanda Systems and Communications Holdings Limited

Counsel for Implicated Persons

Name of Implicated Parties	Name of Counsel	Instructing Solicitors	Date of Chairman's Approval
1. LAM Hon Nam	Mr. Peter IP	Messrs. Ko & Chow, Solicitors (Mr K F KO)	17 May 2005 (For the First Preliminary Hearing only but also appeared on the Second Preliminary Hearing of 31 May 2005)
2. Madam CHAN Yuk, Silvia	Mr. Bernard MAK		17 May 2005 (For the First Preliminary Hearing) 13 June 2005 (For the Substantive Hearing)
	Mr. Francis Burkett Mr. Simon NG		3 February 2006 (For the Re-commenced Substantive Hearing)
3. CHOY Ming Yan, Ernest	Unrepresented (but a law firm accepts service on their behalf: Mr Dick LEE, Messrs Chan, Leung & Co., Solicitors)		
	Unrepresented (as notified via his letter dated 5 December 2005)		
4. Madam CHAN Lai King, Becky	Miss K. L. HUI, Catherine	Messrs. Chan, Leung & Co., Solicitors (Mr. Dick LEE)	28 July 2005 (For the Substantive Hearing)
	Mr. George CHU	Messrs. Louis K. Y. Pau & Co., Solicitors	28 December 2005 (For this Mention Hearing only)
	Unrepresented (as notified via her letter dated 5 December 2005)		

Name of Implicated Parties	Name of Counsel	Instructing Solicitors	Date of Chairman's Approval
5. TSE Kwok Fai, Sammy	Mr. Jacky JIM	Messrs. Alvin Cheng & Rosaline Choy, Solicitors (Mr. Alvin CHENG)	17 May 2005 (For the First Preliminary Hearing) 28 July 2005 (For the Substantive Hearing)
	Mr. Jeff HO Ms. Anna HO		6 April 2006 (For the Re-commenced Substantive Hearing)
6. Madam NG Kit Ying, Debbie	Mr. Bernard MAK	Messrs. Anthony Siu & Co., Solicitors (Mr. Anthony SIU)	28 July 2005 (For the Substantive Hearing)
	Ms. Tanya CHAN		17 May 2005 (For the Substantive Hearing)
	Unrepresented (as notified by Messrs. Anthony Siu & Co., Solicitors via their letter of 30 March 2006)		
7. LI Yat Tung, Dennis	Mr. Benjamin CHAIN	Messrs. Ricky Li & Co., Solicitors (Ms. Amy LAM)	28 July 2005 (For the Substantive Hearing)
	Mr. Raymond TSUI		17 May 2005 (For the First Preliminary Hearing) 28 July 2005 (For the Substantive Hearing)

Name of Implicated Parties	Name of Counsel	Instructing Solicitors	Date of Chairman's Approval
8. Madam WO Man Shan, Christie	Mr. M K WONG, SC	Messrs. Philip K H Wong, Kennedy Y H Wong & Co., Solicitors (Mrs. Katherine NEWMAN)	28 July 2005 (For the Substantive Hearing)
	Mr. Edwin CHOY		31 May 2005 (For the Second Preliminary Hearing) 28 July 2005 (For the Substantive Hearing)
9. WONG Cheung Hung, Chris	-	Messrs. D S Cheung & Co., Solicitors (Ms. Bonita CHAN)	17 May 2005 (For the Substantive Hearing)
	Mr. Tony C Y LI		9 August 2005 (For the Substantive Hearing)
	Mr. Tony C Y LI	Messrs. Robert Wang Solicitors (Ms. Bonita CHAN)	6 April 2006 (For the Re-commenced Substantive Hearing)
10. CHONG Wai Lee, Charles	Mr. Kevin PATTERSON	Messrs. Sit, Fung, Kwong & Shum, Solicitors (Mr. Tommy TAM)	17 May 2005 (For the Preliminary Hearings held on 17 May, 31 May, 13-14 June, 15 July, 28-29 July, 1 & 2 August 2005)
11. Madam CHONG Bun Bun, Becky	Mr. Arthur WONG		28 July 2005 (For this hearing and appeared on 29 July, 1 & 2 August 2005) 9 August 2005 (For this Mention Hearing only)

Name of Implicated Parties	Name of Counsel	Instructing Solicitors	Date of Chairman's Approval
10. CHONG Wai Lee, Charles (Cont'd)	Ms. Kirsteen LAU	Messrs. Sit, Fung, Kwong & Shum, Solicitors (Mr. Tommy TAM) (Cont'd)	23 August 2005 (For this Mention Hearing only)
11. Madam CHONG Bun Bun, Becky (Cont'd)	Mr. Simon CHIU		6 April 2006 (For the Re-commenced Substantive Hearing)

(Position as at 6 April 2006)

Annexure D

TRIBUNAL'S RULING DELIVERED ON 9TH AUGUST 2005

RE: THE APPLICATIONS MADE ON BEHALF OF

CHARLES CHONG & CHONG BUN BUN

BETWEEN 28TH JULY AND 2ND AUGUST 2005

INSIDER DEALING TRIBUNAL

IN THE MATTER of the Securities (Insider Dealing) Ordinance, Cap 395

and

IN THE MATTER of an Inquiry into certain dealings in the listed securities of Vanda Systems and Communications Holdings Limited

---

Tribunal: Chairman: The Hon Mr. Justice McMahon

Members: Professor LAM Kin

Mr. NG Tze Kin, David

Dates of Hearing: 28th July - 2nd August 2005

Date of Delivery of Ruling: 9th August 2005

RULING

---

1. Mr. Kevin Patterson represents CHONG Wai Lee, Charles (Charles CHONG) and Madam CHONG Bun Bun, Becky (Becky CHONG) for the purposes of the present applications. They are implicated persons in the present inquiry and are brother and sister. Mr. Patterson makes a series of applications on their behalf all of which seek the cessation of this inquiry so far as his clients are concerned.

2. Firstly, he argues that the present Tribunal lacks independence and impartiality because its lay members were selected by the Chairman who in doing so was acting as an arm of the executive, i.e. of the Financial Secretary. He says in this regard also that counsel assisting (at that time Mr. Duncan, SC and Mr. Dick HO of the Department of Justice) prior to their appointment as counsel assisting had advised the Financial Secretary in respect of the present inquiry, and so were in a position of conflict vis-à-vis their duties towards the Financial Secretary and the Tribunal. He says also, so far as the Tribunal's impartiality is concerned, that the present Tribunal became seized with another inquiry the subject of a section 16(2) notice (called "Harbour Ring" for convenience) which may involve implicated parties who are also implicated parties in the present inquiry, and in so doing may be perceived as being biased against the present implicated parties.

3. The second argument of Mr. Patterson is that the Tribunal failed to comply with the provisions of paragraph 17 of the Securities (Insider Dealing) Ordinance as it has been amended by sections 78 and

80(b) of Schedule 10 of the new Securities and Futures Ordinance. He says in this regard that the Tribunal should only arrive at a decision as to whom the implicated parties are at the first sitting of the Tribunal, that is either at the preliminary hearing (which it is accepted was a sitting of the Tribunal) or at a meeting held between the Tribunal and counsel assisting on the 31st March 2005 (if that was a sitting). In either case he says his clients were entitled to make representations as to whether or not they should have been regarded as implicated parties by the Tribunal.

4. Finally, Mr. Patterson says these proceedings should be stopped because of the five year three month delay between the share trading the subject of the inquiry in February 2000 and the commencement of proceedings at the preliminary hearing held in May 2005, which period includes a 17 month delay between the Tribunal's receipt of the section 16(2) notice from the Financial Secretary and the issuance of Salmon letters to the implicated parties.

5. Those applications require the resolution of a mixture of issues of facts and law. Accordingly, in this ruling by the Tribunal matters of fact were decided by all members, matters of law by the Chairman alone, although for convenience sake a finding of either fact or law is referred to as that of the Tribunal.

6. As a preliminary matter Mr. Patterson originally sought to argue that the matters he complains of are breaches of the rights of his

clients at common law and of their rights under Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance (the Bill of Rights) and of Article 14(1) and (3) of the International Covenant on Civil and Political Rights (the ICCPR). In this Tribunal's view Article 11 of the Bill of Rights and Article 14(3) of the ICCPR (which for present purposes are in the same terms) can have no application to these proceedings and Mr. Patterson was right to inform us during the course of his argument that he no longer relied on those two Articles. They are restricted in their terms to criminal matters. The present proceedings are civil in nature: see *R - v - Securities and Futures Commission* (1993) 3 HKPLR 1. They are governed only by Article 14(1) of the ICCPR and Article 10 of the Bill of Rights. Both Articles are in the same terms and we set out the relevant part of Article 10 only:-

> "**Article 10**
> **Equality before courts and right to fair and public hearing**
>
> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."
>
> [*cf. ICCPR Art. 14.1*]

In the present case we will proceed on the basis that the principles of fairness, independence and impartiality referred to in Article 10 (and Article 14(1) of the ICCPR) are indistinguishable with those principles as

they exist in the common law: see *R - v - William HUNG* (1992) 2 HKCLR 90, *R - v - CHEUNG Wai Bun* (1993) 1 HKCLR 189.

THE TRIBUNAL'S LACK OF INDEPENDENCE AND IMPARTIALITY

7. We turn now to the first application by Mr. Patterson, to the effect this Tribunal lacks independence and impartiality.

8. There have been a number of tests of impartiality proposed by the courts here and overseas in recent years. In our view the appropriate test is that of the reasonable apprehension of bias favoured by the Court of Final Appeal in *Deacons - v - White & Case Ltd.* [2003] 3 HKC 374 which was based on the test proposed in the English Court of Appeal in *Re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700 as refined in *Porter - v - Magill* [2002] 2 AC 357. That test was subsequently adopted by the Court of Appeal in *Sun Honest Development Ltd. - v - Appeal Tribunal (Buildings)* CACV 254/2004. The test itself was definitively stated in *Porter - v - Magill* [2002] 2 AC 357 in this way:

> "The question is whether the fair minded and informed observer having considered the facts would conclude there was a real possibility that the Tribunal was biased."

That formulation of the test is the one we adopt for the purpose of these applications.

9. In support of his argument that this Tribunal lacks independence or impartiality Mr. Patterson relies primarily on two circumstances. He complains that it was wrong for the Chairman to select two individuals (who subsequently became the lay members in this inquiry) and have them nominated to the Financial Secretary for appointment.

10. He complains additionally that as counsel assisting the Tribunal at one time also advised the Financial Secretary about this case they themselves may be perceived as lacking impartiality and that perception may "taint" the Tribunal itself.

11. We will deal with those two complaints in turn.

The Chairman's Role in the Appointment of the Lay Members

12. The two lay members were appointed by the Financial Secretary on the 18th March 2005 pursuant to letters of appointment of that date.

13. Mr. Patterson argues that the "appointment" was such in name only and that in reality both members were in fact selected and nominated by the Chairman from a panel of prospective lay members and that the Financial Secretary merely rubber stamped a selection already made. Mr. Patterson says that is not a proper appointment.

14. It is true that the present members were selected from a list of prospective members by the Chairman and interviewed by him. It is accepted that interview was for the purpose of determining whether either lay member had any conflict of interest in this inquiry and whether the lay member's professional and personal commitments would allow him to sit during the anticipated timetable of the inquiry.

15. We might add that the panel of prospective members from which the present members were selected is compiled by the Financial Services and Treasury Bureau (FSB) and comprises persons who have volunteered their services from the academic, accountancy, legal and various commercial fields in Hong Kong, and includes many retired individuals and others whose working hours allow them better opportunities to sit as members of the Tribunal. All have some form of working or professional experience which qualifies them as a matter of practicality to sit as lay members.

16. The lay members' personal particulars were then forwarded to the ICAC for "vetting". The results of that were then provided to the Tribunal in brief form to the effect that there was no objection to the two members being appointed to the Tribunal.

17. The members' names were then forwarded to the FSB, which is under the supervision of the Financial Secretary, under a covering memorandum which requested the formal appointment of the two

members and included also the results of the ICAC "vetting" which had earlier taken place.

18. That memorandum was in these terms:

> "2. Mr Ng and Professor Lam have seen the Dramatis Personae and the synopsis of the evidence of the inquiry during an interview by the Chairman and they have indicated that there is no conflict of interest if they were appointed as members for the inquiry. ICAC vetting on Mr Ng and Professor Lam have been completed and the vetting result is set out in ICAC's memos ... dated 20 January and 10 March 2005 respectively, a copy each of which together with our requesting memos is attached for your reference. The curriculum vitae of Mr Ng and Professor Lam are also enclosed."

Then, following a brief description of the personal particulars of the two lay members, the memorandum concluded:-

> "4. I should be grateful if you would arrange for their formal appointment as IDT members under section 15(2) of the Securities (Insider Dealing) Ordinance, Cap. 395 by the Financial Secretary."

All correspondence relating to the nomination and appointment process was disclosed to the implicated parties.

19. In the Tribunal's view, there is a plain difference in functions concerning "nominating" or "recommending" someone for appointment and the act of appointment itself.

20. Section 15(2) of the Securities (Insider Dealing) Ordinance Cap. 395 makes this distinction as does paragraph 18 of the Schedule to it. If, as seems clear to this Tribunal, the two functions are different then the exercise of one by the Chairman does not preclude the proper exercise of the other by the Financial Secretary.

21. Further, if the legislation is silent as to who shall recommend or nominate members then there can be no prohibition express or implied on the Chairman making such a recommendation. Any such recommendation or nomination does not operate to prevent the Financial Secretary's discretion in appointing the proposed lay members being exercised. Any absence of legislation as to who may recommend the appointment of a lay member does not mean it is intended the Financial Secretary must take it upon himself to search for and find suitable persons to be then appointed as lay members to the Tribunal.

22. A person vested with a power, such as the Financial Secretary has in the present case, can accept advice, recommendations or urgings from any source he reasonably regards as proper and fit to offer such advice or recommendation. In this Tribunal's view the Financial Secretary was acting properly in considering and deciding to appoint the members on the recommendation of the Chairman.

23. Subsequently each of the present members received a letter of appointment signed by the Financial Secretary in these terms:-

> "I hereby appoint you in accordance with section 15(2) of the Ordinance to be a member of the Insider Dealing Tribunal for the inquiry specified in this letter."

24. Whatever the terminology of the covering letter which provided the names of the present members to the FSB the reality was that it remained a matter for the Financial Secretary's discretion as to whether to appoint the present members or not. Obviously he had to have some information before him which he could take into account before he exercised his discretion. That information comprised the nomination of them through the FSB by the Chairman of this Tribunal to the effect that they had no apparent conflict of interest in the subject matter of the inquiry or with the witnesses who were to be called, as well as the favourable report upon them by the ICAC. In our judgment that is sufficient information for the Financial Secretary to properly determine whether the members should or should not be appointed.

25. It most certainly was not a "rubber stamp" exercise as suggested by Mr. Patterson. The decision to appoint the two lay members was the Financial Secretary's based on the information before him. It may be that the two lay members were selected from the panel of prospective members, and were interviewed by the Chairman prior to being nominated or recommended by the Secretary of the Tribunal for

appointment, but the function of appointment was not removed from the hands of the Financial Secretary, and the lay members in this Tribunal were properly appointed.

26. As a corollary to his argument in this regard Mr. Patterson also suggests by selecting the members in the way he did the Chairman became the unofficial delegate of the Financial Secretary and performed a role which the Financial Secretary should have performed, and thereby lost his independence and impartiality in these proceedings.

27. Unlike provisions for the appointment of the Chairman and counsel assisting, there is no provision in the Securities (Insider Dealing) Ordinance ("SIDO") for the formal recommendation to the Financial Secretary of persons as lay members. Perhaps there should be.

28. But that does not mean that there can be no recommendation. As we have said the Financial Secretary is entitled to accept nominations as to the appointment of lay members to Tribunals from whatever source he reasonably regards as appropriate. Equally in selecting the candidates for appointment the Chairman was acting reasonably. He is in the best position to know the timetable of his inquiry and to explain to lay members how the inquiry will be conducted and what issues may arise. He is in the best position to determine whether a potential member may have a conflict of interest.

29. The Chairman was acting for proper reasons in selecting and recommending the lay members for appointment. In doing so the Chairman did not compromise the independence or impartiality of the Tribunal. Indeed, if one were to be pedantic the Chairman was, by so doing, going some way to limit the influence of the Financial Secretary on the composition of the Tribunal. That is a step towards the independence and impartiality of the Tribunal.

30. No fair minded persons in those circumstances in this Tribunal's view would regard the selection by the Chairman and appointment of the lay members by the Financial Secretary as generating any possibility of this Tribunal being biased. That is particularly so given the fact that all Tribunals since the commencement of SIDO have had lay members appointed in like manner. As was said by Laws LJ in *R - v - Spear* (2001) QB 804 at 819 in dealing with the reasonable man's apprehension of bias, the test was (under article 6(1) of the Convention for Protection of Human Rights and Fundamental Freedoms as incorporated into English Law):-

> "Would the reasonable man apprised of all the relevant facts about the particular case and the general practice conclude that there existed any real doubt as to the court's impartiality or independence."
>
> (*emphasis in judgment*)

31. In this Tribunal's view the fact that this Tribunal in the present inquiry has adopted a practice general to all earlier inquiries is a

factor operating against any apprehension of bias in the mind of a fair minded observer of this particular inquiry.

The Role of Counsel Assisting

32. The second challenge to the independence and impartiality of this Tribunal is mounted by Mr. Patterson in this way.

33. He says because counsel assisting the inquiry (who were originally Mr. Duncan SC and Mr. Dick HO of the Department of Justice, Mr. Duncan being replaced at the conclusion of the preliminary hearings by Mr. Marash SC) had previously acted as advisors to the Financial Secretary (via the FSB) so far as the subject matter of this inquiry is concerned, then they lacked independence and impartiality when they were appointed as counsel assisting the Tribunal and that in turn tainted this Tribunal.

34. Mr. HO disclosed his involvement with the provision of advice to the FSB. A statement summarising his role in that regard was provided to the Tribunal in open court.

35. It was as follows:-

> "**Chronology of issue of section 16(2) notice**
>
> (1) When the SFC completed its investigation in to the Vanda matter, it submitted a report to Financial Services & Treasury Bureau.

(2) FSTB then asked DoJ for legal advice, which in the case of Vanda, was provided by senior council from outside the DoJ [not Mr. D.Y. Marash S.C.]. Dick HO (Government Counsel in Civil Litigation Unit) acted as instructing solicitor.

(3) After considering that legal advice, FS issued a section 16(2) Notice to the Tribunal."

The outside counsel referred to was Mr. Duncan, SC. The advice presumably was as to the issuance of the section 16(2) notice and its terms.

36. We have given careful consideration to Mr. Patterson's complaint in this regard. As a general rule we think it proper to say that it is desirable that so far as is possible the role of counsel advising the Financial Secretary (whether directly or through the FSB) or any other governmental body involved in the investigation, or initiation or assessment of such investigation, should be kept separate from the role of counsel assisting any subsequent inquiry into those same matters.

37. But the question before us is whether in the circumstances of the present inquiry the roles of Mr. Duncan SC and Mr. HO in advising the FSB prior to their appointment as counsel assisting the present Tribunal could give rise in the mind of our notional objective observer to the conclusion that there was a real possibility this Tribunal was biased.

38. We have decided that any such observer would dismiss that possibility.

39. Firstly, Mr. Patterson does not suggest any actual bias on the part of either the Tribunal or of counsel assisting. He suggests in this regard only that the Tribunal has incurred the appearance of possible bias through its association with counsel who themselves have incurred the appearance of possible bias by advising the FSB prior to the issue of the section 16(2) notice.

40. That, to us, seems something less than an immediate connection between this Tribunal and the circumstances giving rise to the alleged apprehension of bias.

41. Secondly, Mr. Marash SC now (for unrelated reasons) replaces Mr. Duncan SC. That occurred at an early stage in this inquiry and before the calling of any evidence. The only involvement the Tribunal had with Mr. Duncan was to meet with him and Mr. HO twice prior to the preliminary hearing in this inquiry.

42. At those meetings (which we will shortly categorise as such, though Mr. Patterson argues they were "sittings") the Tribunal discussed primarily one topic; that is, which persons were to be served with Salmon "A" letters (which is the generally accepted method of informing someone that they are considered to be an implicated party).

43. Of the present eleven implicated persons no material advice was sought from or given by either Mr. Duncan or Mr. HO as to whether those persons should be regarded as implicated persons. The Tribunal required no assistance from counsel in that regard. The real issue was whether there were other persons who had dealt in the shares of the subject company and if so whether they should be considered as implicated persons.

44. In other words there was no material input by counsel assisting at those two meetings as to whether the present implicated persons (including Mr. Patterson's clients) should be regarded as such. That is plain from the transcript prepared of those two meetings. The decision as to the present implicated persons being so regarded was plainly that of the Tribunal members. The discussions between counsel assisting and the Tribunal members (principally the Chairman) revolved around those other persons who were eventually decided by the Tribunal, after the provision of further material to it at a subsequent date, not to be under sufficient suspicion to warrant amendment to the section 16(2) notice and the issue to them of Salmon letters. No realistic possibility exists, from the contents of those meetings, of the Tribunal being influenced by counsel assisting adversely to the interests of the implicated parties.

45. Thirdly, the advice that counsel gave to the FSB was not advice to a party to these proceedings. The Financial Secretary (who is

the person to whom that Bureau reports) is, in inquiries such as this, a somewhat neutral entity. He simply orders that an inquiry be conducted and does so by way of a notice to the Chairman pursuant to section 16(2) of SIDO. That notice does not specify who the implicated parties are (that is a matter to be subsequently determined by the Tribunal), nor does it suggest suspicion falls on any individual. It simply requires that the Tribunal inquire into certain share trading events and report whether there has been insider dealing, if so by whom and in what degree.

46. In other words counsel's role in advising the FSB, though undesirable, was of lesser importance in considering questions of bias than if, for example, they had advised the Securities and Futures Commission, who are the investigators of the subject matter of this inquiry, and who effectively report their conclusions to the FSB.

47. So far as the role of counsel assisting to date is concerned we wish to specifically refer to Mr. HO. He was junior counsel initially to Mr. Duncan SC and now to Mr. Marash SC. His role in providing advice to the FSB was, in those circumstances relatively minor. Mr. Duncan no doubt provided the advice after Mr. HO briefed him. In those circumstances his real involvement as a matter of fact with the FSB was that of a "go between", Mr. Duncan having the conduct of the advice. Nevertheless, though we do not think Mr. HO's continuing presence in this inquiry as junior counsel assisting could give rise to any sensible apprehension in the mind of an informed observer that either he, or more

importantly, that through him this Tribunal, was biased or lacked impartiality we think it right to say in accordance with what we have said earlier that if reasonably possible it is best Mr. HO should be replaced as junior counsel so as to preserve the separation between the roles of counsel we think is desirable. That is in no way to cast any aspersion upon Mr. HO. He has in this inquiry conducted himself entirely properly and with a high degree of professionalism.

Harbour Ring

48. Mr. Patterson mounted one last argument concerning the lack of independence or impartiality of this Tribunal. It relates to the Chairman's involvement in deciding that this inquiry should proceed separately and prior to another inquiry (to be held in Division 3 of the Tribunal) which may involve at least some of the implicated parties in the present inquiry.

49. Mr. Patterson says by the Chairman so deciding this Tribunal has seized jurisdiction of the other inquiry and dealt with his clients in a way which lacked impartiality because that decision was made without input from the CHONG's and abrogated their rights in that regard.

50. We must confess we found it somewhat difficult to follow this argument. But in any event are satisfied that the Chairman's decision to proceed with this inquiry in advance of and separately from the Harbour Ring inquiry in no way impinged upon the rights of any

party implicated in the present inquiry. It certainly does not suggest any lack of impartiality in the present Tribunal.

51. For one thing all dealings with Harbour Ring by the Chairman arose from considerations of the best interests of the implicated parties. If, as seems possible, the present implicated parties are also involved in some way with the forthcoming Harbour Ring inquiry it is obviously desirable to avoid contemporaneous hearings in the two Divisions of the Tribunal dealing with the two inquiries. There is no legal jurisdiction for the two inquiries to be amalgamated as they relate to separate suspected instances of trading in different companies shares and on different information.

52. In any event the Chairman decided that the present inquiry should proceed first. The other Division has been alerted to that and the Harbour Ring inquiry, we assume, will not start until an appropriate time after the conclusion of the present inquiry.

53. These decisions were administrative. They were made to lessen any burden on the implicated parties, and they were made prior to the appointment of the lay members in the present inquiry, that is before the present Tribunal was constituted.

54. It is true the Harbour Ring inquiry was mentioned in the first meeting with counsel, when the lay members were present, but again only

in the context of timetable considerations. That was the first time the lay members were aware of the existence of the Harbour Ring inquiry.

55. In our view it stretches reality to suggest this present Division of the Tribunal seized jurisdiction of the Harbour Ring inquiry. A Chairman of a Tribunal must act as his own listing officer. He must and is entitled to consider the existence of other matters the subject of section 16(2) notices in performing that role. In doing so he does not seize jurisdiction of all future inquiries he considers in that regard. He most certainly does not do so on behalf of the future Tribunal on which he will sit in circumstances where the lay members of that Tribunal have not yet been appointed.

56. In our judgment none of the matters complained of either individually or together could bring about any apprehension of bias in the mind of our notional observer.

57. There is no merit to the first application made by Mr. Patterson.

THE DETERMINATION OF THE IMPLICATED PARTIES

58. In his second application, Mr. Patterson argues that the Tribunal's determination of who was to be considered an implicated person and thereby served with a Salmon letter was wrongly conducted in the absence of those persons.

59. Mr. Patterson's complaint arises in this way.

60. The Ordinance governing this Tribunal, that is SIDO, was repealed by section 406(1)(f) of the Securities and Futures Ordinance Cap. 571 ("SFO") which came into effect on the 1st April 2003.

61. Transitionary provisions were enacted however which allowed suspected insider dealings which occurred at least in part before the 1st April 2003 to continue to be dealt with under SIDO.

62. Pursuant to those provisions, where the section 16(2) notice was issued after the coming into effect of the SFO as occurred in the present inquiry then certain amendments were to be read into SIDO.

63. Those provisions and amendments are contained in sections 78 and 80 of Schedule 10 to the SFO:-

Section 78

"78. Where —

(a) the repealed Securities (Insider Dealing) Ordinance would but for the enactment of this Ordinance have effect with respect to an insider dealing within the meaning of the repealed Securities (Insider Dealing) Ordinance; and

(b) the insider dealing has in whole or in part taken place before the commencement of Part XIII of this Ordinance,

but the Financial Secretary has not before the commencement of Part XIII of this Ordinance instituted an inquiry with reference to the insider dealing under section 16(2) of the repealed Securities (Insider Dealing) Ordinance, then the repealed Securities (Insider Dealing) Ordinance shall continue to have application in connection with the insider dealing and with any inquiry, appeal, and other matters relating thereto (including, without limiting the generality of the foregoing, the exercise of any power to appoint any person as a member (whether as the chairman or other member) or as a temporary member of the Insider Dealing Tribunal referred to in section 15 of that Ordinance for the purposes of any inquiry relating thereto) as if –

(i) this Ordinance had not been enacted; and

(ii) the repealed Securities (Insider Dealing) Ordinance had been amended in the manner described in section 80."

Section 80

"80. Where section 78 applies, the repealed Securities (Insider Dealing) Ordinance shall apply as if it had been amended –

(a) by adding –

"27A. Recommendations to Financial Secretary to institute inquiry

At the conclusion of any inquiry or as soon as is reasonably practicable thereafter, where it appears to the Tribunal that insider dealing has taken place or may have taken place by reference to the conduct of any person, it may, where it considers appropriate, recommend the Financial Secretary to institute an inquiry under section 16 to inquire into the matter.";

(b) in the Schedule, in paragraph 17, by adding ", at the first sitting of the Tribunal relating to the inquiry," after "shall determine"."

(emphasis added)

64. The relevant and amended parts of the Schedule to SIDO therefore now read as follows:-

> "16. A person whose conduct is the subject of an inquiry or who is implicated, or concerned in the subject matter of an inquiry shall be entitled to be present in person at any sitting of the Tribunal relating to that inquiry and to be represented by a barrister or solicitor.
>
> 17. For the purposes of paragraph 16 the Tribunal shall determine, ***at the first sitting of the Tribunal relating to the inquiry,*** whether the conduct of any person is the subject of the inquiry or whether a person is in any way implicated or concerned in the subject matter of the inquiry."
>
> *(emphasis added)*

65. As a preliminary matter we are of the view that although paragraphs 16 and 17 of the Schedule to SIDO refer to three categories of persons, that is persons whose conduct is the subject of the inquiry, persons who are implicated in the subject matter of the inquiry and persons who are concerned in the subject matter of the inquiry, the principles of this judgment apply equally to all of them and in most instances we will refer to them as a group with the term "implicated persons".

66. Mr. Patterson argues that the result of the amendment to paragraph 17, taken in conjunction with the terms of paragraph 16 is that

any decision made by the Tribunal as to whom the implicated parties are to be in an inquiry must be made at the first sitting of the Tribunal and in the presence of those parties and they must be allowed to be heard on that decision.

67. One fundamental difficulty with the interpretation placed upon paragraph 17 (as amended) by Mr. Patterson's argument is that before the Tribunal determines who the implicated parties are, they are not entitled to the rights claimed by Mr. Patterson, i.e. they are not, pursuant to paragraph 16, entitled to be present or to be represented by a barrister or solicitor.

68. It is at the point of the determination by the Tribunal pursuant to paragraph 17 that an individual becomes a person "implicated or concerned in the subject matter of the inquiry" or that a person's "conduct ... is the subject of the inquiry", that the person then has the right pursuant to paragraph 16 to be present personally or to be represented by counsel or a solicitor, and not before.

69. Accordingly, it is difficult to see how at any stage prior to the Tribunal's determination that an individual is an implicated person that he or she has any rights of appearance and accordingly has any rights to make submissions or representations as to whether he or she should be found to be an implicated person. In our view, paragraph 16 only comes into operation after the Tribunal has made a determination as to which

persons (if any) are to be regarded as implicated persons. The words "shall be entitled to be present in person at any sitting of the Tribunal" can only have prospective effect.

70. There are other matters which support this conclusion. In our judgment the intent of the legislature in amending the terms of paragraph 17 by way of the transitionary provisions in section 80(b) was not to create a unique and previously unknown procedure but to cure a specific evil (if that is not too harsh a word). That "evil" was that under the previous provisions of SIDO there was nothing to prevent a person being brought into the proceedings after they had commenced and were underway.

71. The new SFO prohibits that course of action and requires that a notice under section 252(2) (which is the equivalent of the section 16(2) notice under SIDO) specify the identity of any person who appears to have perpetrated any market misconduct (including insider dealing): Schedule 9, section 13; and that there shall be no amendment of the identities of such persons specified: Schedule 9, section 15. It restricts the Tribunal's finding of market misconduct (including insider dealing) to those persons identified in the original section 252(2) notice: Schedule 9, section 17.

72. Accordingly the addition of implicated persons during the course of an inquiry is prohibited by the new legislation. If suspicion

does fall on a previously unidentified person then the provisions of the SFO are to the effect that a recommendation may be made by the Tribunal at the conclusion of the inquiry to the Financial Secretary that a further inquiry be instituted into that person's conduct: Schedule 9 section 19.

73. In this Tribunal's view, sections 78 and 80 of Schedule 10 to the New Ordinance attempt to achieve the same result in the transitionary operation of SIDO.

74. Section 80 of the SFO imports two amendments into SIDO. Firstly, it allows the Tribunal to recommend to the Financial Secretary that a further inquiry be instituted into the conduct of any person to determine whether insider dealing has taken place: section 80(a). And secondly it, in our view, requires the determination of precisely which persons are involved as implicated persons at the time of the first sitting of the Tribunal: section 80(b).

75. The "evil" therefore section 80(a) and (b) together address is the uncertainty as to who may eventually become an implicated party in an inquiry and more specifically it prevents people being bought into an inquiry as implicated persons after that inquiry has commenced, which, reasonably, may be thought to be potentially unfair, but with an additional provision allowing the institution of subsequent and separate proceedings against those persons.

76. If that is the purpose of section 80(a) and (b), and it seems to this Tribunal that it is, then the intent of section 80(b) is to require the Tribunal to make certain at the first sitting the identities of the persons to be regarded by it as implicated persons.

77. This Tribunal cannot accept that it was the intention of the legislature to go further than that and turn the first sitting of the Tribunal (i.e. the preliminary hearing) into a series of preliminary submissions on the part of individuals or their counsel as to whether or not they should be considered implicated parties. For one thing as we say it goes against the plain language of paragraphs 16 and 17 of the Schedule to SIDO to suggest a person has a right to be heard before he is determined to be an implicated party. For another it would be most undesirable for the Tribunal to deal with the pros and cons of a particular individual's case in a public session before that person was determined to be an implicated party and before evidence was called. A practical question is how the parties would know at that stage, in any event, that they should appear. Should they be served with some form of preliminary Salmon letter? Mr. Patterson suggests they should be served with "a letter of mindedness" which informs them that the Tribunal considers they are at risk of being considered implicated persons. Are all the documents to be served on them? That would appear to be necessary if they had the right to make submissions at that stage. Where would the prospective implicated parties' right to be heard end? Would the prospective

implicated parties have the right to call evidence at that stage? And if limits were to be placed upon those individuals right to make submissions and call evidence where would those limits stem from? There would be no guidance in the legislation as to where any such supposed right in a person, not yet an implicated person, to be heard would end.

78. All this would be a wholly new procedure and seems highly unlikely to have been intended by the amendment to paragraph 17 of the Schedule to SIDO.

79. If there is any analogous procedure to the issuance of Salmon letters, it is the signing of a charge sheet before a criminal trial. There is no right for a defendant to be heard before he is charged. His rights commence once he is charged and has the legal status of a party to the criminal proceedings.

80. Further, under the provisions of the new SFO the section 252(2) notice must specify those persons who appear to have been insider dealers: see sections 13 and 14 of Schedule 9 to the Ordinance. In other words the Financial Secretary under the new legislation decides who the "implicated persons" are. No right is given to such persons to make submissions as to their status in that regard prior to the issue of the section 252(2) notice. It would be extremely odd if the transitionary provisions in the new Ordinance (i.e. the SFO) intended to import into

SIDO a procedure and set of rights which are non-existent in the new Ordinance.

81. We do not think the amendment to paragraph 17 of the Schedule to SIDO requires the Tribunal to hear from any person prior to determining whether they are an implicated party to the inquiry.

82. But regardless of whether anyone has a right to be heard as to whether or not they should be regarded as implicated parties, does paragraph 17 as amended now require the Tribunal to actually decide at its first sitting who the implicated persons are? That is the meaning Mr. Patterson attaches to the word "determine" in the amended paragraph 17.

83. Again that seems an extremely unlikely intention of the legislature in amending paragraph 17, even allowing for the provisions of paragraph 14 which allow a Tribunal to have a "chambers" or a private sitting. In our view the latter provision is intended to apply only in exceptional circumstances and not to operate routinely in the course of the Tribunal deciding who is an implicated party. We might say here that a sitting is not a meeting. A sitting occurs, other than in exceptional circumstances in open court. A meeting is not intended to be a court proceeding. It is informal and is organised as a meeting, not as a sitting. Paragraph 19 of the Schedule to SIDO recognises their different natures. More fundamentally such meetings (which have been held in most of these inquiries since the commencement of the legislation) occur prior to

the issuance of Salmon letters. They are administrative in nature and their purpose was recognised in *Dato Tan Leong Min and the Insider Dealing Tribunal* (1998) 1 HKLRD 630 at 637 per Sears J:

> "It is obviously desirable and indeed necessary for the Tribunal and counsel to meet before the inquiry opens and to discuss the procedure, relevant lines of inquiry and potential problems and for the counsel to interview witnesses or investigate various avenues for importance."

That position changes once the substantive inquiry begins. Only rarely thenceforth would a meeting occur in the absence of the implicated parties. For the purposes of this application we regard the first preliminary hearing held on the 17th May 2005 as being the first sitting of the Tribunal.

84. If Mr. Patterson is right in his understanding of the word "determine" it would mean, assuming that as there are as yet no implicated parties there are no rights in any party to be heard, that the Tribunal would at the first preliminary hearing discuss the prima facie evidence concerning each prospective implicated party in the presence of anyone who chose to be present, including those persons. In other words, the Tribunal would be expected to conduct a public sitting of and discussion amongst its members as to who should become implicated parties in the presence of various persons some of whom may eventually become implicated parties.

85. That seems an undesirable unworkable and unnecessary procedure particularly if those persons, at that stage have no right to be heard. If there is no right vested in any person to be heard, what point would there be in requiring the Tribunal to arrive at its decision as to whom the implicated parties are during the course of the first sitting rather than at some previous time?

86. In this Tribunal's view, the amended paragraph 17 simply means that the Tribunal shall, at the first sitting of the Tribunal (that is the preliminary hearing), state as a matter of finality who precisely the implicated parties are for the purpose of the inquiry. The Shorter Oxford English Dictionary Volume 2 (5th Edition) defines "determine" as follows:-

> "**determine** from Latin determinare bound, limit.
> 1. Put an end to: come to an end. [Now chiefly LAW.] Bring to an end, conclude.
> 2. [Now chiefly LAW.] Come to an end;
> 3. Bound, limit. ... Limit to, restrict to.
> 4. Settle or decide
> 5. Come to a judicial decision; make or give a decision about something."

"Determine" in paragraph 17 is used in the sense of making certain, stating conclusively or limiting the persons who are implicated in the inquiry rather than in the sense of actively arriving at a decision. The persons who are implicated parties were named as such at the first preliminary hearing of this matter. It matters not that the decision that

they were to be implicated parties was made before that hearing, so long as that decision was given at that first sitting. That complied with the provisions of the amended paragraph 17 of the Schedule to SIDO.

87. This second complaint of Mr. Patterson's fails for those reasons.

DELAY

88. We turn now to the final of Mr. Patterson's complaints. He says that there has been considerable delay in this matter and that it would be unfair to proceed. He asks the Tribunal to take what steps it can to prevent these proceedings continuing. He is effectively asking that the proceedings be stayed.

89. As we have said the law applicable to this aspect of Mr. Patterson's submissions is the common law. The relevant provision in Article 14(1) of the ICCPR and Article 10 of the Bill of Rights (see above) is the requirement that these proceedings be "fair". That concept of fairness is the same as that of the common law. There is an impressive body of case law as to when the delay of proceedings may render them unfair.

90. Those cases can be distilled for present purposes into the following proposition:-

> "the imposition of a permanent stay should be the **exception rather than the rule** ... (and)
>
> no stay should be imposed unless the defendant shows on the balance of probabilities that, owing to the delay, he will suffer *serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court.*": ***Attorney-General's Reference (No. 1 of 1990)*** [1992] 1 QB 630 at 644 per Lord Lane CJ.
>
> (*emphasis added*)

91. In our view if that is a statement of the law as it applies to criminal offences then the hurdle cannot be sensibly set lower in proceedings such as the present. That statement of the law by Lord Lane CJ will be applied by this Tribunal to the present application.

92. Mr. Patterson is right that there has been delay. The events the section 16(2) notice requires us to inquire into occurred in February 2000. That is now five years six months ago (though the last two months have been taken up with various arguments and matters of disclosure relating to these applications). That, in the view of this Tribunal, is a most undesirable period of delay between events and any inquiry into them. And unfortunately the present inquiry is not an exception to the rule. For some time past a delay of about five years and sometimes more has elapsed between the events the subject of a section 16(2) notice and the issue of Salmon letters in inquiries conducted by the Divisions of the Insider Dealing Tribunal.

93. Mr. Patterson also complains that as a part of this delay the section 16(2) notice which triggered the constitution of this Tribunal and the inquiry into these events was issued to a Chairman of the Tribunal on, or shortly after, the 28th October 2003. He says that his clients (as with the other implicated parties) were not aware that any inquiry was to take place, or that they were implicated parties until the service of Salmon letters in April 2005. That is some 17 months after the date of issue of the section 16(2) notice.

94. Again, unfortunately the time period between the issue of a section 16(2) notice and the service of Salmon letters has expanded over recent years in respect of most cases to a period of a year or more.

95. It appears these delays, which have slowly increased over time, were caused by an increase in the number of cases which the Tribunal and Department of Justice received at the end of 2003.

96. We will deal firstly with Mr. Patterson's complaints regarding his clients (and the other implicated parties) not being notified of their status. He says it is wholly wrong for an implicated party not to be notified of the issuance of a section 16(2) notice concerning them for a period of 17 months after its issue. He suggests that any person named in a section 16(2) notice should be notified as soon after its issue as is possible.

97. He may be right that in some circumstances that is an appropriate course of action. But we do not think that in this case or in most cases it would be practical to notify implicated parties of the issuance of a section 16(2) notice immediately. For one thing, the notice does not purport to name the implicated parties. They have yet to be decided. A section 16(2) notice names only those individuals whose share trading is to be the subject of an inquiry. They may or may not become implicated parties. Other persons who do become implicated parties are not named and cannot be named until the Tribunal has been constituted and its members have appointed counsel assisting and have been served with the inquiry materials and had an opportunity to read those materials, that is the various witness statements and interviews, and examine the documents, then meet with counsel assisting and decide which of the various individuals referred to in those materials are to be considered as implicated parties and will accordingly be issued with Salmon letters (which include the terms of the section 16(2) notice).

98. No doubt that process could be hastened and be conducted in a timeframe of less than the 17 months it took in the present inquiry. But it should be remembered that this process is usually conducted during the course of another inquiry. No Salmon letters can be issued without the appointment of lay members and the constitution of the Tribunal. Lay members can only be appointed with some specific hearing timetable in mind, they cannot be appointed and then be expected to be available at large ready to sit whenever at some future time the inquiry is to begin.

For that reason a compromise has to be arrived at, where members are best appointed to new inquiries only once the end of a currently proceeding inquiry is in view and the dates for the new inquiry can be set with some (though far from complete) certainty.

99. It should be borne in mind that a section 16(2) notice is not a charge sheet. It is a direction to a Chairman institute an inquiry. We do not accept that there is any relationship between a section 16(2) notice and a criminal charge. As MA JA (as he then was) said in *Riady - v - Insider Dealing Tribunal* (2003) 2 HKC 10:-

> "Terms of reference for Insider Dealing Tribunals are not charge sheets or indictments or even, in civil terms, pleadings. They are, as the phrase suggests, the terms of reference of the inquiry to be conducted by an Insider Dealing Tribunal."

Accordingly, the authorities Mr. Patterson urged upon us relating to delay between the charging and trial of defendants in criminal trials have no bearing on the question of delay in this case. It is, if anything, the Salmon letters which approximate a charge sheet although the analogy is tenuous. In our judgment, no additional or special prejudice attaches to an implicated party because they were not immediately informed of the issuance of a section 16(2) notice.

100. Therefore, the relevant consideration is solely whether the implicated parties can have a fair hearing given the period of delay which has elapsed since the date of the events the subject of the inquiry.

101. It is not suggested in this case that the delay was deliberate or in any way caused other than by institutional matters, that is the time required to investigate and prepare a complex commercial matter for hearing, and by the volume of inquiries coming before this Tribunal for hearing and the processing time of those inquiries.

102. In our view the real issue, given that there was delay, is whether the delay which did occur was such as to so prejudice the implicated party's position as to require this Tribunal to regard further proceedings as unfair and to take what steps in law it is able to take so as to bring the present proceedings to an end.

103. Mr. Patterson argues that the fact of delay in these proceedings is by itself and without proof of prejudice to any party sufficient to render these proceedings unfair and an abuse of process if they were to continue. We do not think that proposition can be correct under either the provisions of Article 14(1) or Article 11 or the common law, which for our purposes are identical (see above). It may be that the period of delay complained of in some cases (but we do not think the present one) is so long that a presumption of prejudice can arise. The law is clear. The relevance of delay to a fair hearing is the effect it has on that hearing. Has evidence been lost? Has an available defence or explanation been rendered less potent? Have memories faded to an

extent that the evidence to be called could not sensibly be regarded as reliable?

104. In the view of this Tribunal the applicants must satisfy us that the present hearing if it proceeds with them as implicated parties would be unfair. In the circumstances of the present inquiry that means they must point to some prejudice suffered by them as a result of the period of delay.

105. We bear in mind that the present proceedings are the equivalent of a reasonably complex commercial trial. It is not unusual in this jurisdiction for such trials to be heard after five years or more have elapsed. Such cases require considerable investigation and preparation.

106. Nevertheless it is true that five and a half years have elapsed since the events the subject of this proceeding took place. While that is a substantial period of time and while there is no doubt that the detail and clarity of those events will to some extent have faded in the recollection of witnesses called in the course of the present inquiry we do not believe that it is so long a period as to undermine witnesses' recollections to a degree as to render the proceedings unfair.

107. Although individuals vary, in our experience events of other than a trivial nature can be remembered reasonably adequately over that period of time. That is particularly so when in most cases the witness,

whether an implicated party or otherwise, made a statement to or was interviewed by an SFC officer shortly after the events and the record of that statement is still available both to the witness and the Tribunal. Many complex criminal commercial cases have gone to trial many more years after their events than the present proceedings and the evidence given was sufficiently reliable to found convictions before juries. Further, the period of delay is a matter which can be taken into account in a commonsense way in assessing a witness's credibility and reliability in determining the facts of the case.

108. Importantly a large part of the evidence which will be placed before the Tribunal is documentary, and those documents are themselves in large part commercial in nature from sources such as banks, securities firms and other commercially orientated institutions which keep their records for a minimum of seven years. Any such document required for these proceedings which has not already been obtained is still available.

109. For the purposes of the present applications we place no weight on the affirmation of Becky CHONG so far as that affirmation says she has little or no recollection of the events we are to inquire into. In our view it is far too early to know or decide how much Becky CHONG (or indeed any other witness) can or cannot remember. We will however regard her evidence afresh in due course.

110. No other specific matter of prejudice is relied upon by Mr. Patterson. Accordingly we do not think any material prejudice has been occasioned to the applicants, or any other implicated party by the period of delay and this last ground of complaint cannot succeed.

111. Accordingly, Mr. Patterson's applications are dismissed and the inquiry will proceed as presently constituted.

Signed
(The Hon. Mr. Justice McMahon)
Judge of the Court of First Instance
& Chairman of the Insider Dealing Tribunal

Signed
(Professor LAM Kin)
Member

Signed
(NG Tze Kin, David)
Member

Annexure E

JUDICIAL REVIEW JUDGMENT

RE: INTERIM STAY OF PROCEEDINGS APPLICATION

MADE BY CHARLES CHONG & CHONG BUN BUN

HCAL 116/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 116 OF 2005

BETWEEN

CHONG WAI LEE CHARLES	1st Applicant
CHONG BUN BUN	2nd Applicant

and

THE INSIDER DEALING TRIBUNAL	1st Respondent
THE FINANCIAL SECRETARY	2nd Respondent

AND

HCAL 122/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 122 OF 2005

BETWEEN

LAU LUEN HUNG THOMAS Applicant

and

THE INSIDER DEALING TRIBUNAL 1st Respondent

THE FINANCIAL SECRETARY 2nd Respondent

Before: Hon Lam J. and Hon Reyes J. in Court

Dates of Hearing: 3 and 4 January 2006

Date of Judgment: 4 January 2006

Date of Handing Down Reasons for Judgment: 13 January 2006

JUDGMENT

Hon Reyes J (giving the reason for judgment of the Court):-

I. Introduction

1. These 2 applications concern the constitution and procedures of the Insider Dealing Tribunal (IDT). They have been heard together as they raise similar issues. HCAL 116/2005 relates to dealings by Charles and Becky Chong (brother and sister) in the shares of Vanda Systems and Communications Holdings Ltd. in 2000. HCAL 122/2005 relates to dealings by Thomas Lau in the shares of Asia Orient Holdings Ltd. (AOH) in 1999.

2. Lau and the Chongs challenge the manner in which the tribunals to hear their respective cases were constituted. They also question the procedure by which those tribunals "determined" them to be persons implicated in possible insider dealing. It is additionally claimed that there has been such delay in the convening of the tribunals that there can no longer be fair trials. It is further alleged that the handling of another insider dealing inquiry (relating to the Chongs' trading of Harbour Ring International Ltd. shares in 2000) prejudices the fair hearing of the Vanda Inquiry.

3. The Applicants say that, in all the circumstances, there should be a permanent stay of the proceedings before their respective tribunals. The Applicants applied to their tribunals for such stays. Their applications were refused. The Applicants now seek judicial review of those refusals.

4. Having heard both applications last week, we dismissed them. We state our reasons for so doing in this Judgment.

II. Background

A. The Vanda Inquiry

5. Between February 2000 and August 2002 the Securities and Futures Commission (SFC) investigated suspected insider dealing by the Chongs in Vanda's shares. As part of its investigation, the SFC interviewed Becky on 26 July 2001 and Charles on 14 August 2001. The SFC referred the results of its Vanda investigations to the Financial Secretary (FS) on 28 August 2002.

6. At the same time, the SFC looked into suspected insider dealing by the Chongs in Harbour Ring shares. On this, the SFC questioned Becky on 17 August 2000 and Charles on 7 September 2000. The SFC passed its conclusions on Harbour Ring to the FS on 25 September 2003.

7. The FS has power under the Securities (Insider Dealing) Ordinance (Cap.395) (SIDO) s.16(2) to require the Insider Dealing Tribunal (IDT) to inquire into possible insider dealing. Exercising such power, on 25 September 2003 the FS directed that a division of the IDT inquire into whether the Chongs (among others) had engaged in insider trading of Harbour Ring shares. On 28 October 2003 the FS directed a division of the IDT to look into possible insider dealing by the Chongs in Vanda shares.

8. In October and November 2003 the IDT asked the Department of Justice (DOJ) to supply synopses and dramatis personae relating to the Vanda and Harbour Ring cases. The documents were requested to enable the IDT quickly to grasp the issues in the Vanda and Harbour Ring Inquiries. The documents would also help in identifying the persons involved and so assist the IDT to appoint tribunal members who would not have a conflict in relation to the subject matter of an inquiry. The DOJ forwarded the requested documents to the IDT in early February 2004

9. By letter to the DOJ dated 23 December 2004, the Chairman of the IDT's 2nd division (McMahon J) said that he intended to start the Vanda Inquiry in May/June 2005. Before constituting a tribunal for the matter, the Chairman asked whether the DOJ anticipated any problems with his proposed time frame. Mr. Wesley Wong (Senior Assistant Law Officer

(Civil Law) at the DOJ) replied on 30 December 2004 that, in light of the suggested dates, the DOJ was thinking of recommending Mr. Peter Duncan SC and Mr. Dick Ho (Senior Government Counsel (Ag)) to act as counsel for the Vanda tribunal. The IDT later confirmed that the Chairman had no objection to Mr. Duncan's appointment.

10. On 18 January 2005 the IDT informed the ICAC that the Chairman was intending to appoint Mr. David Ng Tse Kin as a member for the Vanda tribunal. The IDT requested that Mr. David Ng be vetted for any security problems. On 9 March 2005 the IDT made a similar request of the ICAC in respect of the appointment of Professor Lam Kin as a tribunal member.

11. On 19 January 2005 Mr. Ho wrote to the IDT that the Secretary for Justice had nominated him to act as counsel for the Vanda tribunal.

12. On 4 March 2005 the IDT requested that witness statements be provided as soon as possible. This was because the Chairman envisaged an initial preliminary hearing in late April 2005 with the substantive inquiry starting in May 2005. Mr. Ho sent paginated bundles of witness statements on 12 March 2005.

13. On 8 March 2005 the IDT asked Mr. Ho to consider whether it was possible or desirable for the Vanda and Harbour Ring Inquiries to be heard together, given similar factual backgrounds and the involvement of the same individuals in both cases.

14. On 11 March 2005 the Chairman nominated Mr. David Ng and Professor Lam to act as lay members of the Vanda tribunal. The IDT requested the Government's Financial Services and Treasury Bureau (FSTB) to arrange for formal appointments by the FS pursuant to SIDO s.15(2). The FS appointed both persons to the Vanda tribunal by letters dated 18 March 2005.

15. Towards the end of March 2005, the Vanda tribunal appointed Mr. Duncan and Mr. Ho as its counsel.

16. On 31 March and 8 April 2005 the Vanda tribunal met with its counsel.

17. The 31 March meeting lasted for 50 minutes. It was there decided to send Salmon A letters to the Chongs and 9 other persons.

18. Salmon A letters are sent to persons who are thought by an IDT to have engaged in possible insider dealing. Such individuals are sometimes referred to as "implicated persons". Salmon B letters, on the other hand, are sent to persons who are not believed to have engaged in insider dealing, but who may be asked to give evidence or who may be adversely affected by an inquiry's findings.

19. The 8 April meeting lasted for 100 minutes. The meeting confirmed that Salmon A letters would be sent to the Chongs and the 9 others. It was further decided to send Salmon B letters to 2 persons. The tribunal resolved to consider later whether 3 more persons (the 3 others) should also be included as potentially implicated persons and sent Salmon

A letters. The tribunal approved draft Salmon A and B letters previously provided by Mr. Ho to the Chairman.

20. In the course of the 8 April meeting the Chairman referred to the Harbour Ring Inquiry. He observed that what he said about the Harbour Ring was confidential. He expressed concern that the latter case would be "quite old" before it could be heard by the IDT.

21. By Salmon A letters dated 11 April 2005 the Chongs were informed that they were the subject of the forthcoming Vanda Inquiry by the IDT. The letters stated:-

> "The Inquiry has been convened as a result of an investigation by the [SFC] into the affairs of [Vanda], which brought to light evidence which suggests you may have been an insider dealer. The Tribunal has determined that your conduct will be the subject of the Inquiry and that you are potentially implicated or concerned in the subject matter of the Inquiry."

22. The letters asked the Chongs to appear before the IDT at a preliminary public hearing on 17 May 2005. Prior to receipt of their Salmon A letters, the Chongs had been unaware that the dealings in Vanda were to be examined by the IDT.

23. On 13 April 2005, the Vanda tribunal informed Mr. Ho that, having considered materials provided by the FS, there was not enough evidence to establish to a high degree of probability that the 3 others had engaged in insider trading. The tribunal decided that no other Salmon A letters were needed in the Vanda Inquiry.

24. On 20 April 2005 the IDT sent a draft press release on the Vanda Inquiry to the FSTB.

25. On 17 May 2005 the preliminary public hearing of the Vanda Inquiry took place.

26. On 31 May 2005 there was a 2nd public hearing of the Vanda Inquiry. Mr. Kevin Patterson (then acting for the Chongs) there applied for a permanent stay. That application was heard over subsequent sittings of the tribunal.

27. On 8 July 2005 the Chongs were informed that the IDT had been asked by the FS to look into their dealings in 2000 in Harbour Ring shares. At about this time, the Chongs also learned that Mr. Vincent Kwan Po Chuen and Mr. Louis Fung Kai Lin had been appointed as lay members to hear the Harbour Ring Inquiry with Deputy High Court Judge Saunders (by then Chairman of the IDT's 3rd division).

28. On 9 August 2005, in a detailed Ruling, the Vanda tribunal rejected the Chongs' application for a permanent stay.

B. The AOH Inquiry

29. From around December 1999 to October 2001 the SFC investigated suspected insider dealing by Lau in AOH shares. The SFC then communicated its views to the FS.

30. On 15 May 2003 the FS asked a division of the IDT to look into possible insider trading by Lau in AOH shares between 14 and 20 September 1999.

31. On 24 June 2003 Mr. Herbert Li (Deputy Principal Government Counsel (Ag) at the DOJ) informed the FSTB that he was preparing a case synopsis in anticipation of a request from the Chairman of the IDT division being convened to hear the AOH Inquiry. The Chairman of the IDT's (3rd division) (then Lugar-Mawson J) formally requested such synopsis by letter to Mr. Li dated 31 October 2003. Mr. Li sent the synopsis with a dramatis personae on 26 November 2003.

32. By letter dated 27 November 2003 the Chairman asked Mr. Li to nominate counsel to act for the AOH tribunal.

33. The Chairman commenced interviewing possible lay members for the AOH tribunal in December 2003. He eventually decided to nominate Mr. Nigel Bacon and Mr. Eric Ng. Accordingly, on 21 January 2004, he asked the ICAC to check their backgrounds.

34. On 3 February 2004 the IDT confirmed to the FSTB that Mr. Bacon and Mr. Eric Ng had been cleared by the ICAC and the Chairman wished them to sit on the AOH tribunal. The IDT observed that "[t]he Chairman finds that their wealth of experience in their respective field makes them suited to hear the present case".

35. The FS formally appointed Mr. Bacon and Mr. Eric Ng to the AOH tribunal by letters dated 19 April 2004.

36. On 21 June 2004 the IDT asked Mr. Wesley Wong (Senior Assistant Law Officer (Civil Law)) at the DOJ) to recommend counsel for the AOH tribunal. The DOJ nominated Mr. Li on 14 July 2004 and he was appointed by the tribunal as its counsel on 17 August 2004. Mr. Andrew

Bruce SC was appointed as leading counsel for the tribunal on 18 January 2005.

37. On 13 January 2005 the IDT wrote to Mr. Li:-

> "The Tribunal has considered both the Synopsis and Dramatis Personae in respect of the inquiry and reached a decision that Thomas Law Luen Hung is the only implicated person and to be served a Salmon Letter. Please let me have the draft of the Salmon Letter with a summary of evidence as soon as possible."

38. Shortly thereafter, Mr. Li provided the IDT with a draft Salmon A letter.

39. Until receipt of the Salmon letter, Lau did not know that his transactions in AOH shares were to be the subject matter of an insider dealing inquiry.

40. The finalised letter was sent to Lau on 28 January 2005. It read (in part):-

> "The Tribunal has determined that you are implicated or concerned in the subject matter of the Inquiry and that your conduct in relation to the dealings in the listed securities of the company as described in the notice will be one of the subjects of the Inquiry."

41. The letter also stated that a preliminary public hearing would take place on 28 February 2005.

42. On 15 February 2005 the IDT sent a draft press release on the AOH Inquiry to FSTB.

43. By letter dated 21 February 2005 Messrs. Sit Fung Kwong & Shum (SFKS) (the Applicants' solicitors) queried whether it was appropriate for Mr. Eric Ng to hear the case. SFKS wrote:-

> "We note that Mr. NG Kwok-hai has been appointed as a member of the Tribunal. He was of course a member of the Tribunal chaired by Hartmann J, which sat in the Chinese estates Insider Dealing Inquiry to hear allegations against Mr. Joseph LAU, the brother of our client Mr. Thomas LAU. Our client was a material witness in that earlier inquiry. It is also a matter of public record that the Tribunal's ultimate finding in the Chinese Estates Insider Dealing Inquiry, whilst favourable to Mr. Joseph LAU, was a majority decision (i.e. one member dissented). In view of these facts, we would be obliged in you would confirm by return whether or not Mr. NG Kwok-wai is the member who dissented in the earlier inquiry. We would also appreciate being advised when Mr NG was first appointed as a member of the [IDT], of the number of insider dealing inquiries in which he has sat as a member of the Tribunal and, how is it that he was appointed to hear a second inquiry into the alleged conduct of a member of the LAU family. We await hearing from you."

44. The issue of Mr. Eric Ng's suitability to sit as a member of the AOH Inquiry tribunal was raised at the preliminary hearing on 28 February 2005. Having heard submissions from counsel and after discussing the matter with Judge Saunders (who had succeeded Lugar-Mawson J as Chairman in November 2004), Mr. Eric Ng decided to resign from the IDT. He tendered his resignation to the Chief Executive (CE) accordingly.

45. The Chairman then recommended to the FS that Mr. Pang Hon Chung replace Mr. Eric Ng. Mr. Pang was eventually appointed to act as a temporary member of the IDT on 1 April 2005. The appointment was made by the FS as the delegate of the power conferred on the CE by SIDO Schedule §8.

46. On 14 April 2005, at a resumed hearing of the tribunal, Lau by his counsel challenged the constitutionality of the AOH Inquiry. Lau sought a permanent stay of the proceedings.

47. On 11 August 2005 the AOH tribunal held that its inquiry was validly constituted. The application for a stay was rejected.

III. Discussion

A. The issues

48. Mr. McCoy SC (appearing for the Applicants) has identified the following issues:-

(1) Whether the Vanda and AOH tribunals are "independent and impartial tribunals established by law" within the meaning of International Covenant on Civil and Political Rights (ICCPR) art.14(1) and Hong Kong Bill of Rights Ordinance (Cap.383) (HKBORO) art.10.

(2) Whether the Applicants had a right to be heard at the first public hearing of their respective tribunals on whether they should be "implicated persons".

(3) Whether Mr. Eric Ng's involvement as a member of the AOH tribunal gave rise to apparent bias and (if so) whether that tribunal's "determination" at its first sitting that Ng was an "implicated person" was invalid.

(4) Whether the CE had properly delegated to the FS the power to appoint temporary members (such as Mr. Pang) to the IDT.

(5) Whether there has been a breach of ICCPR art.14(3) and HKBORO art.11(2) insofar as the Applicants:-

(a) were not promptly informed that they were the subject of an insider dealing inquiry; and,

(b) are being tried after a period of undue delay.

(6) Whether the Vanda and AOH Inquiries should be permanently stayed.

B. Issue 1: Whether independent and impartial tribunals

49. Basic Law art.39 incorporates the ICCPR into Hong Kong law. ICCPR art.14(1) provides that in the determination of criminal charges or civil suits a person shall be entitled to a fair and public hearing by a "competent, independent and impartial tribunal established by law". HKBORO art.10 is in similar terms.

50. There is no dispute that ICCPR art.14(1) and HKBORO art.10 apply to an IDT. The tribunal must not only be, but be seen to be, independent and impartial.

51. Nor is there any dispute about the tests for impartiality and independence. Although impartiality and independence are not wholly synonymous, the tests for assessing the existence of the two qualities are essentially the same.

52. The Court asks itself in effect whether, having considered the facts, a fair-minded and informed observer, would conclude that there was a real possibility that a tribunal was biased. See *Porter v. Magill* [2002] 2 AC 357 (HL) (at §103); *Sun Honest Development Ltd. v. Appeal Tribunal*

(Buildings) [2005] 2 HKC 582 (CA) (at §8); *R. v. Genereux* (1992) 88 DLR (4th) 110 (SCC) (at 130c-g).

53. As a practical guide to applying this test of the fair-minded bystander, we have found it helpful to bear in mind Kirby J's dictum in *Johnson v. Johnson* (2000) 201 CLR 488 (HCA) (at §§52-53):-

> "The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

54. The Applicants submit that a fair-minded observer could not regard the Vanda and AOH tribunals as "independent and impartial" for the following reasons:-

(1) An IDT has no judicial independence because of the way in which its lay members are appointed.

(2) The 2 lay tribunal members neither enjoy security of tenure nor financial security.

(3) Counsel for the Vanda and AOH tribunals do not have the appearance of impartiality.

55. To evaluate the Applicants' criticisms, we first set out the structure of an IDT and explain how an IDT is generally convened. We then examine each of the Applicants' criticisms against the particular tribunals convened here.

B.1 The structure of IDTs

56. SIDO was repealed on 1 April 2003. A newly established Market Misconduct Tribunal has since taken over the IDT's functions. But an amended version of SIDO remains in effect in respect of insider trading which may have occurred before 1 April 2003. The present applications concern the constitution of IDTs under that amended version of SIDO.

57. The IDT's constitution is set out in SIDO s.15 and the Schedule thereto.

58. The IDT sits in divisions. There are currently 3 divisions. A tribunal consists of a division Chairman and 2 lay members.

59. The Chairman is appointed by the CE on the Chief Justice's recommendation. He must be a judge. He is appointed for a term of not more than 3 years or ad hoc in relation to a given inquiry or inquiries. He may be re-appointed.

60. Lay members are appointed by the FS. They may not be public officers. By SIDO Schedule §2, they are appointed in relation to any specific inquiry or inquiries. They may be appointed more than once. By SIDO s.15(4), they may be paid "such amount as the [FS] thinks fit" for their services.

61. A member of a tribunal (including the Chairman) may resign by tendering written notice to the CE. Otherwise, a lay member may only be removed from office by the CE for incapacity, bankruptcy, neglect of duty or misconduct proved to the CE's satisfaction.

62. By SIDO Schedule §8, the CE may appoint a temporary member to act in place of any tribunal member who is:-

> "precluded by illness, absence from Hong Kong or any other cause from exercising his functions or who considers it improper or undesirable that he should exercise his functions in relation to any specified matter".

63. A tribunal sits as the Chairman thinks necessary for the efficient performance of its functions. All members must be present at a sitting. Questions before the tribunal are determined by majority opinion, save that questions of law are decided by the Chairman.

64. By SIDO Schedule §18, a tribunal "may appoint a legal officer nominated by the Secretary for Justice, a barrister or a solicitor to act as counsel".

65. SIDO Schedule §§14, 16, 17 and 19 govern sittings of the tribunal. They provide as follows:-

"14. Every sitting of the Tribunal shall be held in public unless the Tribunal considers that in the interests of justice a sitting or any part thereof should not be held in public in which case it may hold the sitting or part thereof in private.

16. A person whose conduct is the subject of an inquiry or who is implicated, or concerned in the subject matter of an inquiry shall be entitled to be present in person at any sitting of the Tribunal relating to that inquiry and to be represented by a barrister or solicitor.

17. For the purposes of paragraph 16 the Tribunal shall determine at the first sitting of the Tribunal relating to the inquiry whether the conduct of any person is the subject of the inquiry or whether a person is in any way implicated or concerned in the subject matter of the inquiry.

19. In paragraph 16 'sitting' does not include any meeting of the Tribunal which is held for the purpose of deliberating on any question before the Tribunal."

B.2 The convening of IDTs

66. Upon receipt of representations from the SFC, the FS considers whether to direct the IDT to look into alleged insider trading. If he decides that the matter should be investigated, he sends a notice to the Chairman of an IDT division. The notice is sent pursuant to SIDO s.16(2). It defines an IDT inquiry's terms of reference.

67. At the same time, the FS forwards the dossiers of evidence which the SFC has compiled on the case to the section of the DOJ's Civil Division handling insider dealing.

68. On receipt of the FS' notice, the relevant division Chairman considers whom to nominate as lay members for a tribunal. As a matter of practice, he consults a list of persons willing to act as members of an IDT.

69. That list is kept by the FS' office and the IDT has copies of the list. But it is unknown how and by whom the names on the list were compiled. The list is apparently updated from time to time, although it is unclear by whom, how or at what intervals. There are no published criteria for getting one's name on or off the list.

70. The practice of consulting the list for potential lay members appears to have been followed by successive IDT Chairmen over the years.

71. Having selected possible lay members, the Chairman arranges to interview them. As a matter of practice, he requests the section of the DOJ which handles insider dealing to prepare a synopsis and dramatis personae on the subject matter of the forthcoming inquiry. The synopsis and dramatis personae are intended to help the Chairman rapidly to grasp the relevant facts and thereby assess whether a potential lay member has any conflict of interest.

72. Counsel at the DOJ prepares the synopsis and dramatis personae on the basis of the dossiers of evidence which the FS has previously forwarded. Counsel then sends the synopsis and dramatis personae to the IDT.

73. When interviewing potential members, the Chairman also ascertains their likely availability. He may show them the synopsis and dramatis personae in confidence and ask whether they have any conflict of interest.

74. Having decided on 2 possible lay members, the Chairman asks the ICAC to run a security check on them. If those individuals are cleared

by the ICAC, the Chairman invites the FS formally to appoint them as tribunal members for the relevant inquiry.

75. Although he has a discretion to reject the Chairman's nominations, in practice the FS appoints the members nominated by an IDT Chairman.

76. Once constituted, the tribunal appoints its counsel. It will then meet with its counsel to identify the persons to whom Salmon A and B letters should be sent. There may be other meetings with counsel to consider administrative matters and possible lines of inquiry.

77. Following the issue of Salmon A and B letters, the tribunal holds its first public meeting in accordance with SIDO Schedule §§16, 17 and 18.

B.3 Criticism 1: Flawed appointment of lay members

78. The Applicants' case on this has not been consistent.

79. In its Skeleton, the Applicants suggested that it was "constitutionally objectionable" for the tribunal's 2 lay members to be appointed by the FS. This was because (according to the Applicants) in an insider trading inquiry "the FS's role is akin to a prosecutorial role like that of the Secretary of Justice in a criminal prosecution".

80. But, at the hearing before us, Mr. McCoy SC (appearing for the Applicants) disavowed the case advanced in his Skeleton. He submitted that there was nothing wrong in the FS appointing lay members.

The statutory scheme (Mr. McCoy said) was constitutionally acceptable and perfectly workable. Mr. McCoy had no complaint about the IDT's structure as stipulated in SIDO.

81. Instead, Mr. McCoy attacked the particular manner in which the AOH and Vanda tribunals had been established. Those tribunals (Mr. McCoy contended) had been convened following bad practice.

82. According to Mr. McCoy, the following are elements of the bad practice followed in the Vanda and AOH Inquiries:-

(1) There was a lack of transparency (utmost or otherwise) in the way the list of potential lay members was compiled and updated. The public has a right to know who is on the list and on what basis their names come to be there. But despite constant pressing of the FS by the Applicants, the genesis of the list remains (Mr. McCoy says) shrouded in darkness.

(2) It was undesirable that a Chairman recommended lay members for an IDT to the FS. A High Court judge (apart possibly from the Chief Justice or Chief Judge of the High Court) should not be allowed (or be required) to choose with whom he sat. A judge is only human. Consciously or not, he is prone to choose like-minded persons to sit with him. It is true that "in theory" the FS retained a discretion to veto the Chairman's nominees. But in practice the FS never did that.

(3) It was invidious for a Chairman to interview potential lay members. As triers of fact, lay members are of "equal status with the Chairman". But the interview process occasions "an

impression that the members ... feel inferior to the Chairman and would nore easily succumb to the view of the Chairman".

(4) It was invidious that the Chairman should ask the ICAC to vet his lay member nominees. The judiciary should not have any contact with the executive on such a matter.

(5) The way that the Chairman selected lay members for a tribunal (including his communications with the ICAC and the FS) gives the impression that "the Chairman equate[s] himself with an official in a Government Department under the FS". The appearance of independence between the executive and judiciary branches is fatally eroded.

(6) An analysis of the names of lay members who have sat in recent IDTs shows that a few persons have sat 2, 3 or even more times, while others have sat only once. This could not be a mere chance happening. It suggests that the FS or various Chairmen select the same few people over and over again. This shows that the system of selection is subject to arbitrary whim. It is not something transparent and objective, established by law. On the contrary, there is a distinct possibility that members are appointed to IDTs on the basis of past performance. The more frequently they favour Government, the more often they sit.

83. Having criticised the practice followed in setting up the Vanda and AOH Inquiries, Mr. McCoy explained how the statutory scheme in SIDO might properly operate. He submitted that a procedure with proper safeguards would run along the following lines:-

(1) It was acceptable for the FS to compile a list of potential lay members. But the criteria for getting on or off that list would have to be published. The names of persons on the list would have to be gazetted from time to time. The list would be in the form of a roster.

(2) The appropriate time to have a person vetted by the ICAC would be before his name went on the list, not afterwards.

(3) When the FS thought that there should be an inquiry into possible insider dealing, he would inform the Chairman of an IDT division accordingly by a s.16(2) Notice. At the same time, the FS would appoint as members for the forthcoming tribunal the next 2 available persons on the roster who are not in positions of conflict.

(4) Subject to availability and having no conflict, the persons on the list would sit on a tribunal as and when their name came up on the roster in strict rotation.

(5) There would be no interviews of possible lay members by the Chairman and there would be no requests by the Chairman for vetting by the ICAC. The Chairman would have no discretion as to who might sit with him as tribunal members.

84. We are not persuaded by Mr. McCoy's submissions. We make 5 observations.

85. First, Mr. McCoy's proposed system may or may not be a good way of implementing the framework for IDTs in SIDO. Let us suppose that it is a good way. It does not follow that it is the only acceptable method of convening an IDT.

86. Any system can always be improved, especially with the benefit of hindsight. Even if the system sketched out by Mr. McCoy were a superior procedure, it does not mean that the one actually followed for the Vanda and AOH Inquiries would give rise to a perception of bias in a fair-minded observer.

87. Second, Mr. McCoy may be right in submitting that the list and the criteria for inclusion in or exclusion from it should be published. As a matter of open government, the public may well be entitled to know more about the list.

88. But we do not see how the lack of information about the list could have any impact on a reasonable observer's perception of the impartiality of the Vanda and AOH tribunals. However the lay members of the 2 tribunals were appointed, the reality is that the Applicants could always object to them specifically, if they truly believed that the lay members were actually or apparently biased.

89. The fact is that, theoretical considerations about the general practice of appointment apart, the Chongs have no actual objection to Mr. David Ng and Professor Lam. There is no hint of evidence that these two members are biased or even have the appearance of being so. There is nothing to suggest that Mr. David Ng or Professor Lam would be anything otherwise than independent and forthright in the expression of their views within the tribunal.

90. On the other hand, Lau objected to Mr. Eric Ng's presence on the tribunal. We examine below in connection with Issue 3 whether there

was at law any basis for Lau's allegation of the appearance of bias. For now, assume that there was some basis.

91. Lau's challenge was successful. It prompted Mr. Eric Ng to resign and to be replaced by Mr. Pang. The result is now that, again abstract considerations about the practice of appointment apart, Lau has no real objection to Mr. Pang sitting as a member of the AOH tribunal. There is no hint of any lack of independence, impartiality or competence on the part of Mr. Pang.

92. Now apply the fair-minded observer test. Bearing in mind that the Applicants are unable to point to anything specific in the backgrounds of their lay members to impugn their suitability, we do not see how the Applicants could reasonably harbour any doubt that Professor Lam, Mr. David Ng, Mr. Bacon and Mr. Pang would be otherwise than impartial or independent.

93. As a reality check, it is instructive to compare the present situation with that in *Morris v. UK* (2002) 34 EHRR (cited by Mr. McCoy).

94. In *Morris* M was tried before a district court martial. Two members of the court were junior officers (with no legal training) appointed on an ad hoc basis. They expected to (and did) return to regular army life after the hearing. They were themselves subject to army discipline at all times. There was no statutory bar to their being influenced by the army while sitting as members. The court's decision was subject to review by a non-judicial "reviewing authority". Everything considered, the European Court of Human Rights held that the court martial could not be regarded as an independent and impartial tribunal established by law.

95. **We are miles away from a *Morris* situation in this case.**

96. Whether one thinks in terms of impartiality or independence, *Morris* involves a classic conflict of interest. In *Morris* there was an appreciable risk that, being subject to army discipline before, during and after the court martial, the two junior officers could not truly be (or be seen to be) independent or impartial. It could be embarrassing for them to decide adversely to the army, while themselves serving in relatively subordinate positions on army pay.

97. Contrast that with the position here. By statute public officers are not allowed to sit as lay members. Having served on the Vanda and AOH Inquiries, the lay tribunal members will resume their ordinary private lives, outside the sphere of Government influence.

98. We note, incidentally, that in *Morris* the European Court rejected (at §70) a submission that the ad hoc appointment of the junior officers by itself meant that the tribunal's impartiality was suspect.

99. Third, we do not see anything objectionable in the Chairman interviewing members or requesting the ICAC to vet them. Nor do we see any problem in the Chairman nominating lay members to the FS.

100. We agree with the submission of Mr. Tong SC (appearing for the FS) that, if anything, the involvement of the Chairman (a High Court judge) in the selection process enhances transparency and objectivity. The Chairman (as Mr. Tong points out) is well-placed to assess, on the basis of his experience as a judge, a candidate's suitability for a particular IDT in light of the technical expertise called for by a given case. We know, for

example, that Lugar-Mawson J considered that Mr. Bacon and Mr. Eric Ng possessed special knowledge which rendered them particularly suitable to hear the AOH case.

101. We do not accept Mr. McCoy's contention that the FS in approving a Chairman's recommendation acts (in effect) as a rubber stamp. Instead, the convention has arisen (we believe rightly in the interests of transparency) that the FS will not normally reject a Chairman's nominations without good reason. Otherwise, there is a danger that the FS may be seen to be unduly interfering in the conduct of justice. The FS might then be perceived to be appointing persons on the basis of past record.

102. We regard as fanciful the suggestions that, in interviewing lay members and having them vetted by the ICAC, the Chairman somehow transforms himself into a Government functionary. On the contrary, we again see the FS being kept as far away as possible from the selection process, so as not to be open to a charge of influencing an outcome.

103. Nor do we think that there is any merit in the submission that judges are simply going to nominate "like-minded persons".

104. As Kirby J notes, the fair-minded observer would be aware of the "pressures" (we would say, "beneficent pressures") on a judge, by virtue of his position, to uphold the independence and impartiality of the judiciary.

105. The reality is that some judge (not just the Chief Justice or the Chief Judge) has to decide with whom he or other judges will sit on a daily

basis, whether it be on a 2-man or 3-man bench in the Court of Appeal, or on a 2-man bench of the High Court reviewing a decision of a tribunal presided over by a judge, or in some other context. The reasonable bystander will not jump to the conclusion that a judge is likely to ignore the pressures and traditions of his office and "gerrymander" (to use Mr. McCoy's words) the membership of a tribunal with an eye to a particular result.

106. In short, whatever the merits or demerits of Mr. McCoy's ideal system, the present practice for convening IDTs can hardly be described as flawed as alleged by the Applicants. In our view, the present procedure arose precisely in order to promote impartiality and independence and negative any suggestion of Government influence.

107. Fourth, at one time, Mr. McCoy seemed to be suggesting that the practice followed in appointing lay members could not be characterised as "established by law". This was apparently because the practice being followed is obviously not found in an ordinance or other publicly available formal document having legal effect. *Hamid Ali Husain v. Asylum Support Adjudicator* [2001] EWHC Admin 852 was cited in support of this contention.

108. In *Husain* Burnton J stated (at §§64-66):-

> "In the absence of authority, and untrammelled by the wording of the [European] Convention [on Human Rights] [ECHR], I should have thought that the independence of a tribunal should be established by law. If its independence is grounded in the law, then, since that law is publicly available, the second question [namely, what facts may be taken into account when deciding whether a tribunal is independent?] does not arise. If the independence of a tribunal may properly be assured by other provisions, then the matters which go to establish that a tribunal is independent should be publicly available. It is important that

> justice be seen to be done, and that requires that the tribunal that is responsible for doing justice is seen to be independent. Of course, any facts, publicly known or not, which go to show that a tribunal is not in fact independent, must be taken into account in determining whether there has been a violation of Article 6. In other words, legally established independence should be a necessary, but not a sufficient, qualification for a tribunal that determines civil rights and obligations or criminal charges.
>
> However, this view is not supported by the wording of Article 6 or by authority. The wording of Article 6 indicates that the tribunal must be established by law ... but that their independence need not be. This interpretation receives support from the judgment of the European Court of Human Rights in *Sramek v. Austria* (1984) 7 EHRR 351, which considered under separate headings the requirements that the determination of a civil right or obligation should be by a 'tribunal established by law' and that there should be an 'independent and impartial tribunal': see paragraphs 36 and 37 ff. of the judgment. More explicitly, in *Campbell and Fell v. UK* (1984) 7 EHRR 165 the Court said, at paragraph 80:-
>
> > 'It is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6.1. However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present.'
>
> It follows that Article 6 does not require that the independence of a tribunal that determines civil rights and obligations be guaranteed by statute."

109. It will readily be seen that, far from supporting Mr. McCoy's proposition, *Husain* is against it. ICCPR art.14 and ECHR art.6 are in similar terms. Given that, when assessing whether there is independence under art.6, one can examine non-formal elements (including an established practice), the same must hold true for art.14.

110. Thus, a Court can (as we have done) look at the practice regularly followed by Chairmen in the appointment of lay members to an

IDT. The practice can be evaluated to assess whether the IDT is an "independent tribunal established by law".

111. Fifth, it is instructive that in *Morris* the European Court was not content to decide the matter solely by reference to the two junior officers' employment. The Court's approach was instead to examine the entire court martial structure and process. In evaluating the tribunal's independence, the European Court asked itself whether there were adequate safeguards to counterbalance any potential lack of independence on the part of the two junior officers. Despite noting certain positive factors, the Court concluded that the risk of outside pressure being brought to bear on the two officers was not sufficiently excluded.

112. The same cannot be said here. We do not think that the method of appointing IDT lay members gives rise to any palpable risk of outside pressure from the FS. Even if it could conceivably do so, we believe that there are adequate safeguards in the entire IDT process to render such possibility far-fetched in the extreme.

113. Among the safeguards that we have in mind are the following:-

(1) An IDT is chaired by a High Court judge for a fixed term of 3 years. The judge is not appointed by the FS and his salary is paid by the Judiciary.

(2) The Chairman alone determines questions of law.

(3) Lay members cannot be public officers.

(4) Only the CE can remove lay members and then only if certain matters have been proved to his (as opposed to anyone else's) satisfaction.

(5) There is an appeal procedure to the Court of Appeal.

(6) The decisions of the IDT are susceptible to judicial review.

B.4 Criticism 2: Lack of security of tenure and financial security

114. This criticism did not appear in the Applicants' original application for leave. The Applicants sought to introduce the complaint by way of a late amendment.

115. We believed that the argument was untenable and therefore refused leave to amend.

116. The Applicants rely heavily on the following passage from the judgment of Lamer CJC in *Genereux* (at 127d, 129a - 130c):-

> "Section 11(d) of the [Canadian] Charter [of Rights] guarantees a person who is charged with an offence the right 'to be presumed innocent until proven guilty according to law in a fair and impartial public hearing by an independent and impartial tribunal.
>
> ....
>
> The essential conditions of independence, or basic mechanisms by which independence can be achieved, were discussed by Le Dain J in *Valente [*(1985) 24 DLR (4th) 235]. He emphasised that a flexible standard must be applied under s.11(d). Since s.11(d) must be applied to a variety of tribunals, it is inappropriate to define strict formal conditions as the constitutional requirement for an independent tribunal. Mechanisms that are suitable and necessary to achieve the independence of the superior courts, for example, may be highly inappropriate in the context of a different tribunal. For this reason, the court chose to define three essential conditions of independence that can be applied flexibly, being capable of attainment by a variety of legislative schemes or formulas....

The first essential condition of judicial independence, as defined in *Valente*, is security of tenure. This condition, like the other two, can be satisfied in a number of ways. What is essential is that the decision-maker be removable only for cause. In other words,...

> 'The essence of security of tenure for purposes of s.11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.'

Similarly, s.11(d) of the Charter requires that a decision-maker have a basic degree of financial security. The substance of this condition is as follows...:-

> 'The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.'

Within the limits of this requirement, however, the federal and provincial governments must retain the authority to design specific plans of remuneration that are appropriate to different types of tribunals. Consequently, a variety of schemes may equally satisfy the requirement of financial security, provided that the essence of the condition is protected.

The third essential condition of judicial independence is institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's function. It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution...

A tribunal will not satisfy the requirements of s.11(d) of the Charter if it fails to respect these essential conditions of judicial independence. Although the conditions are susceptible to flexible application in order to suit the needs of different tribunals, the essence of each condition must be protected in every case...."

117. The Applicants first argue that the lay members are not independent because they have no security of tenure. They are only appointed on a case-by-case basis.

118. There is no merit to this point. In the *Genereux* passage just quoted, the Canadian Supreme Court accepted that an appointment may be for "a specific adjudicative task". We have seen that the European Court in *Morris* reached a similar conclusion.

119. The Applicants' Skeleton states that *Genereux* (at 143c-d) is authority for the proposition that "security of tenure during the period of a specific inquiry is not adequate". But the text cited actually reads:-

> "It was stated in *Valente* that according a decision-maker tenure for a 'specific adjudicative task' may be a sufficient guarantee of security of tenure. I do not believe that this statement is applicable in this context. Although a General Court Martial is convened on an ad hoc basis, it is not a 'specific adjudicative task'. The General Court Martial is a recurring affair. Military judges who act periodically as judge advocates must therefore have a tenure that is beyond the interference of the executive for a fixed period of time. Consequently, security of tenure during the period of a specific General Court Martial, achieved by the fact that no provision of the statute or regulations allows for the removal of a judge advocate during a trial (except if the judge advocate is unable to attend:...) , is not adequate protection for the purposes of s.11(d) of the Charter."

120. The situation here is different. A lay member's appointment to an IDT is not a recurring affair. Once a specific inquiry or inquiries are over, a lay member's service comes to an end. On the other hand, while a tribunal is sitting, he may only be removed by the CE if one of a limited number of identified causes is established to the CE's satisfaction.

121. The Applicants then say that the lay members do not have financial security. This is because it is unknown how much (if any) remuneration the FS has allowed them under SIDO s.15(4).

122. The Applicants' argument here is equally without merit.

123. *Genereux* stresses that the conditions identified by the Canadian Court must be applied flexibly. The nature of any given tribunal must be carefully examined in assessing whether the relevant conditions have been met.

124. It is evident from Lamer CJC's discussion of financial security in *Genereux* that he was especially concerned about longer term judicial appointments, where the provision of secure salary and pension rights would be vital.

125. In contrast, IDT inquiries typically run for weeks or at most a few months. Sittings are half-day long to enable lay members to continue with their ordinary lives and work.

126. In those premises, it is hard to see what salary or remuneration package for the relatively short duration of an IDT inquiry would give a lay member true "financial security". The reality is that a lay member's participation in a tribunal must primarily be a matter of public service. In practice, unless the member is already financially secure in his ordinary life, it is unlikely that any reasonable remuneration for his half-days of service during the brief period of an IDT hearing could give him effective "financial security" as opposed to momentary financial relief.

127. We bear in mind that the Applicants have disavowed any intention of challenging the whole of the IDT system. Their complaint is solely in respect of the AOH and Vanda tribunals.

128. In the circumstances of an IDT in Hong Kong and consistently with the parameters of the Applicants' own challenge, it is appropriate to look at the circumstances of the lay members actually appointed. In so doing, a reasonable observer would (we believe) readily conclude that in all likelihood their normal employments bring them more than enough income security to assure their independence as adjudicators.

129. Mr. David Ng works for Hong Kong Great Wall Certified Public Accountants Ltd. He appears to be an accountant. Professor Lam is Chair Professor and Head of the Department of Finance and Decision Sciences at the Hong Kong Baptist University. Mr. Eric Ng is a Certified Public Accountant and the Managing Director of Eric Ng CPA Limited. Mr. Bacon practises as a solicitor and was a partner at Messrs. Herbert Smith in Hong Kong from 1987 to 1996. Mr. Pang is an accountant and the Director of Finance and General Manager of Lotus International Ltd., an investment and trading business.

130. On the face of their resumes, the persons chosen by the respective Chairmen for their tribunals seemingly have comfortable financial backgrounds. The Applicants have not adduced any evidence to the contrary. There is thus no basis for any informed bystander to form a conclusion that the selected lay members may be affected by financial pressures.

131. There is no merit in Criticism 2.

B.5 Criticism 3: Lack of independent counsel

132. The Applicants' complaint here is essentially that, because of their involvement in advising the FS in connection with the Vanda and AOH share dealings under inquiry, counsel for the two tribunals cannot be regarded as independent.

133. The case as eventually argued by Mr. McCoy was markedly different from that espoused in the Applicants' Skeleton. In the latter, the blanket assertion was made that it was inappropriate for any legal officer of the DOJ to be appointed as counsel for an IDT. The Applicants have now resiled from that extreme position.

134. In the examination of these complaints, it has to be borne in mind that counsel to the tribunal are not part of the tribunal, see *Dato Tan Leong Min v The Insider Dealing Tribunal* [1998] 1 HKLRD 630; [1999] 2 HKC 190. They have no role to play in the judicial function of the tribunal. Hence, the independence or otherwise of such counsel has no real impact on the independence of the tribunal. A fair minded bystander would not jump to the fanciful conclusion that simply by virtue of the connection of a counsel with the small unit in the Department of Justice dealing with insider dealing matters, the independence of the tribunal is thereby compromised. In any event, as analysed below, the complaints could not avail the Applicants.

135. We shall proceed by examining the precise complaints made in respect of each relevant counsel.

136. Mr. Andrew Bruce SC had no prior dealing at all with the FS in connection with the AOH or Vanda share transactions. There is no basis for suggesting that he is in any way tainted by some conflict of interest.

137. Mr. McCoy faintly suggested that Mr. Bruce should be ruled out because he had contact with his junior counsel Mr. Li, who (Mr. McCoy submitted) may have been in the "small unit" which advised the FS on Vanda and AOH. As will become evident shortly when we examine Mr. Li's situation, the contention is far-fetched and unmeritorious. A bystander who formed a suspicion of Mr. Bruce on the ground advanced by Mr. McCoy would strike us as being unduly sensitive.

138. In the case of Mr. Li, a statement was read out in open hearing on 26 July 2005 to the effect that, before becoming counsel to the AOH tribunal, he had no involvement in advising the FS about Vanda and AOH.

139. The statement read in part:-

> "In relation to the unit which deals with [IDT] cases, a case may be handled in one of three ways:-
>
> - Counsel gives advice to the financial Secretary and/or the financial services and the Treasury bureau and becomes counsel to the Insider Dealing Tribunal
>
> - counsel advises the financial Secretary and/or the financial services and Treasury bureau and has no further involvement in the case; or
>
> - counsel is appointed as counsel to the [IDT] in relation to a case having had no involvement in the provision of legal advice in connection with that case.
>
> Junior counsel was not involved in any way in the investigation of the case presently before the tribunal nor providing legal advice to any person or persons including officers of the [SFC] in connection with that investigation."

140. The Chairman of the AOH tribunal asked Mr. Bruce (who had read out the statement) to clarify the first bullet point. The exchange ran as follows:-

> "THE CHAIRMAN: Mr. Bruce, are you able to confirm that Mr. Li did not instruct any counsel in terms of your first bullet point?
>
> MR. BRUCE: I can so confirm."

141. Mr. McCoy says that the statement and its clarification are not good enough. Even though he had no actual involvement in advising the FS on Vanda and AOH, Mr. Li would have formed part (Mr. McCoy says) of the small unit of DOJ lawyers advising the FS on insider dealing matters. As such, the Applicants might reasonably apprehend that he may be biased against them. In such a small unit, there is bound to have been (Mr. McCoy submits) discussion among counsel (including Mr. Li) about any ongoing investigation into the Applicants' dealings.

142. We believe the statement and its clarification to be clear and categorical: Mr. Li had no involvement in advising the FS or instructing counsel for the FS about share dealings in Vanda and AOH. To suggest that Mr. Li may have been privy to discussions in (say) the corridor or lift about ongoing investigations into the Applicants is purely speculative. A bystander who harboured concerns as to bias solely because Mr. Li belonged (if he did belong) to the "small unit" investigating the Applicants, would be overly sensitive and suspicious.

143. Mr. McCoy then criticises Mr. Li for sending a synopsis and dramatis personae to the Chairman of the AOH IDT before Mr. Li's formal appointment as counsel for the tribunal. Mr. McCoy is scathing about a

reference to Lau as a "Potential Implicated Person" in the dramatis personae prepared by Mr. Li.

144. It would have been perfectly correct (Mr. McCoy acknowledges) had Mr. Li sent the same synopsis and dramatis personae (including the identification of Lau as a "Potential Implicated Person") after his appointment as counsel. But it was not so before. In acting as he did before his formal appointment (Mr. McCoy submits), Mr. Li could only have been acting for the FS, and not the tribunal.

145. We see nothing in the complaint.

146. It is true that Mr. Li was only formally appointed as counsel to the IDT a few months after sending the synopsis and dramatis personae. It is true that, when he sent the synopsis and dramatis personae, he was also seeking information from the tribunal about the likely schedule for its sittings so that appropriate counsel could be suggested. But in all probability, at the time when he sent the synopsis and dramatis personae, Mr. Li already had some inkling that he was likely to be the junior counsel nominated by the DOJ for the AOH Inquiry.

147. Even if Mr. Li had no such inkling, we do not see how the reasonable observer would form the view from the sending of the synopsis and dramatis personae that Mr. Li was advancing the FS' interests as quasi-prosecutor. Given his experience in insider dealing matters, Mr. Li was presumably preparing a synopsis and dramatis personae in anticipation of the IDT's request for such documents in accordance with normal practice. The more speedily a synopsis and dramatis personae were prepared, the more quickly a tribunal could be convened and the inquiry get underway.

148. Insofar as Mr. Duncan and Mr. Ho are concerned, both were previously involved in advising the FS on Vanda and Harbour Ring share transactions. But both are no longer with the Vanda Inquiry. Mr. Duncan left the team some time ago for unconnected personal reasons. Mr. Ho resigned in September 2005 and has since been replaced by Mr. Kwan. In those circumstances, we would have thought that the Applicants have no further ground of complaint.

149. It might be suggested that the Vanda IDT has been tainted by its early association with Mr Duncan and Mr. Ho. But such submission would be unwarranted.

150. A reasonable and informed observer would not perceive bias in a tribunal only because, early in its proceedings, it had contact with counsel who had earlier advised the FS in connection with the institution of an insider dealing inquiry.

151. In the context of judges, the English Court of Appeal observed in *Locabail v. Bayfield Properties* [2000] QB 451 (at 480G):-

> "[T]he mere fact that a judge earlier in the same case or in a previous case had commented adversely on a party or witness, or found the evidence of a witness to be unreliable, would not without more, found a sustainable objection."

152. We have already cited the remarks to similar effect of Kirby J in *Johnson*.

153. In light of such dicta, we do not think that there can be the appearance of bias arising from a tribunal's mere contact with particular counsel at only a preliminary stage of the inquiry process.

154. In addition to criticising the tribunals' association with its counsel, the Applicants have belatedly sought to amend their judicial review notice to suggest potential bias arising from contact with Mr. Wesley Wong and Mr. Richard Fawls (Senior Assistant Law Officer (Civil Law) at the DOJ).

155. In respect of Mr. Wong, the complaint is that on 30 December 2004 Mr. Wong wrote to the Vanda IDT about the DOJ's intention to nominate Mr. Duncan and Mr. Ho as counsel. Later, Mr. Wong appeared on behalf of the FS in a directions hearing before Lam J in connection with this judicial review. This would convey the impression (the Applicants say) that the tribunal was under the FS' influence.

156. In respect of Mr. Fawls, the complaint is that on 23 February 2005 (at the request of the Chairman of the AOH Inquiry), Mr. Fawls met privately with the AOH tribunal for 30 minutes. The 3 tribunal members, Mr. Bruce and Mr. Li were at the meeting. The meeting had 2 purposes. One was to discuss SFKS' objection to Mr. Eric Ng sitting as adjudicator. The other was to consider the question of delay, which SFKS also raised.

157. Later, Mr. Fawls sat behind Mr. Wong at the directions hearing before Lam J mentioned above. This would have (the Applicants say) reinforced an impression of bias on the part of the tribunal in favour of the FS.

158. The FS filed an affirmation from Mr. Fawls in response to the late application to amend. That deposed to Mr. Fawls only having joined the insider dealing team within the DOJ's Civil Litigation Unit on 1 February 2005. Mr. Fawls states that he has never been involved in

advising the FS in relation to the AOH, Vanda or Harbour Ring Inquiries. He took no active part in the 23 February 2005 meeting.

159. Mr. Fawls only attended the directions hearing before Lam J because he was concerned about the implications of the interim stay imposed by this Court on the Vanda, AOH and Harbour Ring Inquiries pending the resolution of these judicial reviews. As a result of the stay, the IDT voluntarily halted proceedings in another inquiry in which SFKS are also involved. There has accordingly been serious disruption to the IDT's timetable. Mr. Fawls was thus concerned that an early hearing date for the resolution of these judicial reviews be obtained.

160. It seems to us on the facts that there is no ground for suggesting that the AOH or Vanda tribunals have been contaminated by their contact with Mr. Wong and Mr. Fawls.

161. Mr. Wong's only contact with the Vanda tribunal was to communicate the appointment of its counsel. Neither of the latter remain as counsel to the Vanda Inquiry.

162. Mr. Fawls had no involvement with the Vanda, AOH or Harbour Ring Inquiries on behalf of the FS. His concern was purely the administrative one of ensuring that these judicial reviews were speedily resolved so as to allow the IDT to get on with its pressing work.

163. There being no substance in the complaints raised in respect of Mr. Wong and Mr. Fawls, we refused the application for late amendment in such respect.

B.6 Conclusion on Issue 1

164. Criticisms 1, 2 and 3 fail. The Applicants have failed to make a case on this issue.

C. Issue 2: Whether right to be heard at first public hearing

165. Mr. McCoy says that, at the first public meetings of the AOH and Vanda Inquiries, the tribunals decided that the Applicants were "implicated persons" without affording them an opportunity to make submissions on why they should not be held to be such. In particular, Lau wished to submit that he should not be regarded as an "implicated person" because he had been buying AOH shares over a long period of time before the transactions forming the subject matter of the AOH Inquiry.

166. Mr. McCoy submits that a "determination" that someone is an implicated person pursuant to SIDO Schedule §17 will inevitably have serious repercussions on his reputation. Natural justice dictates that, before any "determination" under SIDO Schedule §17, a person's counsel should be able to address a tribunal on whether or not the person is "implicated" in insider dealing.

167. Mr. McCoy's Skeleton adds:-

> "The Applicants are not asserting a uniform right in the nature of a committal hearing in a criminal case where the defendant will be entitled to hear evidence from the witness box, to cross-examine those witnesses and, if he wishes, to call or give evidence himself."

168. Mr. McCoy suggests that, since an IDT is master of its own procedure under SIDO s.17, the tribunal might limit the scope of any first

public hearing to hearing submissions on the implications to be drawn from the case synopsis and the documents in the hearing bundles.

169. Since his clients have been denied natural justice by being refused a right to make representations, Mr. McCoy asks this Court to overturn the tribunals' determinations that the Applicants are "implicated persons".

170. We are not persuaded by Mr. McCoy's argument.

171. SIDO Schedule §17 states the an IDT "shall determine whether the conduct of any person is the subject of the inquiry or whether a person is in any way implicated or concerned in the subject matter of the inquiry".

172. This may be broken down for greater clarity. At the first hearing an IDT "shall determine" 3 categories of persons:-

(1) Persons whose conduct is the subject matter of the inquiry.

(2) Persons who are in any way "implicated" by the subject matter determined.

(3) Persons who are "concerned" in the subject matter of the inquiry.

173. The categories are not mutually exclusive.

174. Insider dealing is typically triggered by the conduct or dealing of some persons in shares. Such persons would presumably fall within the first category.

175. The persons whose conduct forms the subject matter of an inquiry may or may not be "implicated" in insider dealing through their conduct. Accordingly, a person in category 1 may also (but need not necessarily) come within category 2. It is not enough for a tribunal to "determine" whose conduct or dealings will form the subject matter of an inquiry. A tribunal must also direct its mind as to which individuals are "implicated" as a result of the conduct under inquiry.

176. Note that "implicated" persons may be parties whose dealings form the subject matter under investigation or they may be persons whose conduct is not the immediate subject matter of an inquiry. An obvious example is where a principal engages in insider dealing through an agent. The agent's conduct is the immediate subject matter of investigation. But the principal may be "implicated" by the agent's conduct.

177. There is a 3rd category of persons. These are individuals who are merely "concerned" in the subject matter of an inquiry. An example may be (say) witnesses who can give evidence in respect of the conduct under investigation. There also be individuals who, although not "implicated" themselves, might be adversely affected by the tribunal's findings. We do not believe that it is possible or useful to be more specific about this last miscellaneous group of persons.

178. So far we have employed quotations to set out the words "determine" and "implicated". It is now necessary to analyse what they mean in the context of SIDO Schedule §17.

179. Contrary to what one might think at first blush, in the context of SIDO Schedule §17 the expression "shall determine" cannot mean "shall

finally decide". The Legislature could not have expected an IDT at its first meeting to decide whether a person has engaged in insider dealing. Such reading of "shall determine" would be absurd. The whole point of an IDT is to hear the evidence over succeeding sittings in order to come to a final decision at the end of an inquiry on whether X or Y or anyone else is an insider dealer.

180. But if "shall determine" does not connote "finally decide", what sense does it have?

181. The word "determine" can also mean "establish the nature of" or "identify". In our view, such reading of "determine" would seem more apposite to SIDO Schedule §17. At the first public hearing, the tribunal must "identify" or "establish" the nature of the forthcoming inquiry. An IDT in effect merely sets down the bounds of its inquiry at its first sitting.

182. Consider now the word "implicated". It seems to us that it can have at least 2 senses.

183. Sense 1 would be the obvious one that a person is actually "guilty" of (say) insider trading.

184. Sense 2 would be that a person is "potentially guilty" of insider trading. Sense 2 would mean that the facts as perceived at the start of an inquiry "imply" that a person may have engaged in insider dealing. The person so "implicated" may nonetheless be able to rebut the "implication". Insofar as he claims to have an answer, that will form part an IDT's inquiry over succeeding sittings.

185. Once again, it would be absurd if the Legislature expected an IDT finally to decide that a person was "implicated" in the sense of "guilty" at its first public hearing. Insofar as it refers to a person being "implicated", SIDO Schedule §17 must be referring to the word in the limited sense of "potentially guilty".

186. If we now put together the results of our analysis, what a tribunal does at its first public hearing becomes plain. The tribunal announces the agenda for its future sittings. It establishes the scope of its inquiry by identifying and announcing:-

(1) the persons whose conduct will be investigated;

(2) the persons whose possible guilt as insider dealers will be investigated;

(3) the persons who may be involved as witnesses or as persons whose interest may be adversely affected by any finding at the end of the day.

187. Such a reading makes sense in the context of what has so far transpired before the first public sitting. Until then, the tribunal has only met privately to identify to whom Salmon A and B letters should be sent. The individuals receiving Salmon A letters correspond to the category 1 and 2 persons mentioned above. The individuals receiving Salmon B letters correspond to category 3 persons. The Salmon letters having been sent out, the recipients become entitled under SIDO Paragraph §16 to be present either in person or by lawyers at an IDT's first public sitting.

188. Until the first public meeting, there has been no open pronouncement (apart possibly from a brief press release) of the precise

scope of an inquiry. The first public meeting under SIDO Schedule §17 performs this function of formally announcing to the world at large just what an IDT will be looking into.

189. We note that the words "at the first sitting of the Tribunal relating to the inquiry" were recently inserted into SIDO Schedule §17 by way of an amendment.

190. In the past, as an inquiry went underway, it was frequently discovered that other persons might be "implicated" (in Sense 2) and they were usually joined as parties mid-way into an inquiry. This was thought to be unfair and undesirable. The amendment therefore requires an IDT to establish its scope right at the outset. The public pronouncement of the scope is important. Once the hearing proceeds beyond the first sitting, it will no longer be possible for an IDT to extend its bounds to include other potential insider dealers.

191. The consequence of our analysis is that at its first public hearing an IDT would not have come to any decision as to who was or was not "guilty" of insider dealing. It has merely "determined" what it will be looking into in days to come.

192. It follows that in the Vanda and AOH first hearings, there have been no abridgements of natural justice or the right to be heard. Knowing the scope of their respective inquiries, the Applicants will have ample opportunity in the course of successive sittings to make whatever representations they wish.

193. Nothing prevents Lau from applying in a subsequent sitting (for example) to strike out the proceedings against him by adducing evidence of previous AOH share dealings and submitting that such dealings are a full answer to any allegation of insider dealing. At that points, it will be for the tribunal to decide whether or not to accede to Lau's request.

194. We therefore do not believe that the Applicants have made out a case on Issue 2.

D. Issue 3: Whether Mr. Eric Ng's presence gave rise to apparent bias

195. This issue arises out of a late application to amend Lau's notice for judicial review. Lau seeks by the amendment to challenge Mr. Eric Ng's appointment.

196. Lau's argument is that Mr. Eric Ng's presence on the AOH IDT gave it the appearance of bias. It follows (Lau reasons) that the determination by the AOH tribunal (including Mr. Eric Ng) that Lau was an implicated person must be set aside.

197. The argument assumes that the "determination" that Lau was an "implicated person" at the first public sitting of the AOH Inquiry constituted a judicial finding of guilt. As we have seen, it did not. All that happened was that the tribunal set out the scope of its inquiry, including an inquiry into whether Lau should be held guilty of insider dealing in AOH shares. Thus, whether or not Mr. Eric Ng's presence on the tribunal gave rise to apparent bias, there would be no final judicial determination of Lau's guilt to quash.

198. But assume that we are wrong in our understanding of SIDO Schedule §17 and that there was some sort of judicial decision to the effect that Lau was an "implicated" person (in some adverse sense).

199. Even then we do not believe that a reasonable bystander could conceivably have regarded Mr. Eric Ng as biased or apparently so. We have cited a dictum from *Locabail* which appears to us to cover the point.

200. Suppose that Mr. Eric Ng was the dissenting voice in the Chinese Estates Inquiry. It would require a quantum leap of logic to infer that Mr. Eric Ng dissented because he regarded Lau's evidence in the Chinese Estates Inquiry as unreliable. However, suppose that the inference could just about be drawn. We would still be unable to see how an observer might reasonably conclude from this alone that Mr. Eric Ng was potentially biased against Lau.

201. Lau fails on Issue 3. His late application to amend his judicial review was dismissed accordingly.

E. Issue 4: Whether Pang rightly appointed by FS' exercise of delegated authority

202. Mr. McCoy submits that Mr. Pang was not validly appointed. He argues that the CE's power under SIDO to appoint a temporary member to an IDT is either non-delegable or (if delegable) the power was not effectively delegated to the FS.

203. We disagree with Mr. McCoy.

204. Under Interpretation and General Clauses Ordinance (Cap.4) (IGCO) s.63(1) the CE may delegate a statutory power of appointment to a public officer. IGCO s.63(3) further provides that where a public officer exercises a power vested in the CE, the power shall be deemed to have been delegated to the officer unless the contrary is proved.

205. The CE in fact delegated his power to appoint IDT temporary members to the FS. This is evidenced by a loose minute dated 16 January 1999 recording that fact. That states that "the CE also agreed with FS' proposal that the authority for approving similar appointments [of temporary IDT members] be delegated to FS in future".

206. We think that the meaning and intent of the minute is clear. We do not believe (contrary to what Mr. McCoy has submitted) that there is any ambiguity with the expression "in future" used in the minute. The minute plainly states that in the future the FS may exercise the power of appointment.

207. Mr. McCoy argues, however, that IGCO s.63 must be read subject to IGCO s.2. The latter provision states that the general ability to delegate under IGCO s.63(1) is subject to any indication to the contrary in a statute.

208. Mr. McCoy says that a contrary intention may be discerned from the fact that in SIDO the power to appoint temporary members is specifically vested in the CE, while the power to appoint lay members is otherwise vested in the FS. The Legislature (Mr. McCoy contends) must have meant by this that the CE and only the CE could appoint temporary members.

209. This would make sense (Mr. McCoy reasons) since temporary member would typically be appointed when an IDT inquiry was underway. The FS having a quasi-prosecutorial role in such inquiries, he should not (Mr. McCoy suggests) be seen to have any influence on the appointment process.

210. We do not find the argument based on IGCO s.2 persuasive.

211. There is no plain indication in SIDO rendering IGCO s.63(1) inoperative. One cannot deduce anything about the availability or otherwise of a power to delegate from the mere fact that a general power to appoint temporarily is expressly conferred on the CE.

212. First, under SIDO Schedule §8 the CE has power to appoint temporary members, including the Chairman of a tribunal. Normally, the Chairman would be appointed not by the FS, but by the CE on the recommendation of the Chief Justice. There is thus nothing remarkable in vesting a fall-back power to appoint any member temporarily on the CE.

213. Second, the power to appoint temporarily is not confined to the situation where an IDT is fully underway. The power under SIDO Schedule §8 may be exercised at any time after an ordinary member has been appointed. The power can come into play well before an IDT has had significant discussion on the conduct of an inquiry. There is no reason why the FS should not be able to appoint replacement members at that stage if necessary. One cannot infer (absent clearer words) that, because the power might be exercised when proceedings are well advanced, the Legislature intended such power to be non-delegable so as to remove an impression of the FS interfering in judicial process.

214. **Lau therefore fails on Issue 4. Mr. Pang's appointment by the FS was valid.**

F. Issue 5: Whether undue delay

215. This issue can only concern the Vanda Inquiry. The AOH tribunal postponed the hearing of submissions on delay to a future date. The AOH tribunal has not come to any reviewable decision on the question of delay.

216. On undue delay, the Chongs rely on ICCPR article 14(3) and HKBORO art.11(2).

217. Those articles apply where a person faces a "criminal charge". Although there is authority (*R v. SFC ex parte Lee Kwok-hung* (1993) 3 HKPLR 1 (Jones J)) to the effect that insider dealing proceedings are not criminal or quasi-criminal, we shall assume (without deciding) that a finding of insider dealing is analogous to a finding of guilt on a criminal charge. On that premise, the 2 articles would be applicable here.

218. The articles stipulate that a person on a criminal charge should:-

(1) promptly be informed promptly of the nature of the charge against him; and,

(2) be tried without undue delay.

219. The Chongs' alleged insider dealing took place in early 2000. They did not learn of the Vanda Inquiry until April 2005 when they

received Salmon A letters. The Chongs complain that the lapse of some 5 years is inordinate and inexcusable.

220. This is particularly so (the Chongs contend) because the Vanda IDT was directed by the FS in September 2003. The Chongs were not told of this at the time. Instead, they accuse the IDT of "secretly and deliberately hoarding" the FS' s.16(2) Notice.

221. The Chongs further say that, because of the lapse of time, their memory of events (and that of relevant witnesses) will inevitably have dimmed. The result (the Chongs conclude) is that a fair trial is no longer possible.

222. In its Ruling of 9 August 2005, the Vanda tribunal rejected the Chongs' allegations of undue delay.

223. The tribunal accepted (at §106) that more than 5 years had passed since the events which the subject of its inquiry. That was "a substantial period of time and ... there is no doubt that the detail and clarity of ... events will to some extent have faded in the recollection of witnesses".

224. But the tribunal "[did] not believe that it is so long a period as to undermine witnesses' recollections to a degree as to render the proceedings unfair" (at §106). The tribunal found no evidence of real prejudice to the Chongs as a result of delay.

225. This was especially the case where the Chongs could refresh their memories from the records of their 2001 interviews with the SFC. In any event, the tribunal could "[take delay] into account in a commonsense

way in assessing a witness's credibility and reliability in determining the facts of the case" (at §107).

226. Becky Chong affirmed that she could no longer remember events clearly. But the tribunal could place little weight on such assertion. The tribunal commented (at §109): "In our view it is far too early to know how much Becky CHONG (or indeed any other witness) can or cannot remember. We will however regard her evidence afresh in due course."

227. Finally, the tribunal observed (at §108) that a large part of the evidence was documentary. Those documents were normal commercial ones obtained from banks, securities firms and other financial institutions which retain records for 7 years. Key documents evidence remained available.

228. On the alleged failure to inform the Chongs promptly of the inquiry, the tribunal doubted that it was possible to inform them immediately upon the issuance of a s.16(2) Notice.

229. This was because (at §97):-

> "For one thing, the notice does not purport to name the implicated parties. They have yet to be decided. A section 16(2) notice names only individuals whose share trading is to be the subject of an inquiry. They may or may not become implicated parties. Other persons who do become implicated parties are not named and cannot be named until the Tribunal has been constituted and its members have appointed counsel assisting and have been served with the inquiry materials and had an opportunity to read those materials, that is the various witness statements and interviews, and examine the documents, then meet with counsel assisting and decide which of the various individuals referred to in those materials are to be considered a implicated parties and will accordingly be issued with Salmon letters (which include the terms of the section 16(2) notice)."

230. The tribunal pointed out (at §98):-

> "No doubt that process [of constituting an inquiry] could be hastened and be conducted in a timeframe of less than the 17 months it took in the present inquiry. But it should be remembered that this process is usually conducted during the course of another inquiry. No Salmon letters can be issued without the appointment of lay members and the constitution of the tribunal. Lay members can only be appointed with some specific hearing timetable in mind, they cannot be appointed and then be expected to be available at large ready to sit whenever at some future time the inquiry is to begin. For that reason a compromise has to be arrived at, where members are best appointed to new inquiries only once the end of a currently proceeding inquiry is in view and the dates for the new inquiry can be set with some (though far from complete) certainty."

231. Accordingly, the relevant consideration is "solely whether the implicated parties can have a fair hearing given the period of delay which has elapsed since the date of the events the subject of the inquiry" (at §100). On that question, as we have seen, the tribunal believed that the answer was "yes".

232. In our view, the tribunal's reasoning was impeccable. We fully agree with it. Although matters could have moved more promptly, that does not mean that delay has been inordinate or undue. Consequently, the Chongs fail on Issue 5.

233. Before moving to Issue 6, it is convenient to dispose here of a complaint raised by the Chongs. They contend that there was a "secret" (but unfair) decision by the Chairman of the Vanda IDT not to try Harbour Ring at the same time as Vanda.

234. There was plainly no such decision.

235. The Chairman simply observed to the members of the Vanda IDT that "what cannot happen is that [Vanda] and Harbour Ring are heard together".

236. We understand by the statement that, having himself explored whether the 2 inquiries could be heard together to save time and cost, the Chairman concluded that unfortunately they could not (as a matter of possibility rather than prohibition). This would have been because Harbour Ring was not yet in a state to proceed. Further, if assigned to a different tribunal, Harbour Ring could not be heard over a period which overlapped with Vanda. There would (for example) be obvious logistical problems (not least of which would be the difficulty of scheduling common witnesses), if the 2 tribunals sat simultaneously.

237. Nothing prevents the Chongs from now applying (if they see fit) for the Vanda and Harbour Ring Inquiries to be heard at the same time by a single tribunal. Their application may or may not be granted. That would be a matter which the tribunal seized of their application can only decide if and when an application is made.

G. Issue 6: Whether there should be a stay

238. The Applicants have failed on all issues. There is no ground for the grant of a permanent or temporary stay. There has been no abuse of power by any of the IDT tribunals.

239. Given in particular that we agree with the conclusion of the Vanda tribunal that fair trial is still possible despite the lapse of time and in the absence of any abuse of process, it would be wrong to order a

permanent stay of those proceedings, see *HKSAR v Lee Ming Tee (No.2)* (2003) 6 HKCFAR 336 at Paras. 182 to 184.

IV. Conclusion

240. The Applicants fail on all issues.

241. We thus dismissed the applications for judicial review and the various applications to amend the same. We also lifted the interim stays previously imposed by this Court on the Vanda, AOH and Harbour Ring Inquiries.

242. Finally, at the end of the substantive hearing, we made an order nisi that the FS was to have his costs of the judicial reviews, such costs to be taxed if not agreed. Unless the Applicants apply to vary the order nisi, it will become absolute within 14 days of the date of handing down of this Judgment.

(M. H. Lam)
Judge of the Court of First Instance
High Court

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Mr Gerard McCoy, SC (3rd January, 2006 only) leading Mr Hectar Pun and Mr Newman Lam, instructed by Messrs Sit, Fung, Kwong & Shum, for the Applicants in both actions

Mr Ronny Tong, SC leading Mr Abraham Chan, instructed by the Department of Justice, for the Respondents in both actions

Annexure F

TRIBUNAL'S RULING DELIVERED ON 4TH MAY 2006

AS TO THE ADMISSIBILITY OF EVIDENCE CONCERNING

THE HARBOUR RING PURCHASES

INSIDER DEALING TRIBUNAL

IN THE MATTER of the Securities (Insider Dealing) Ordinance, Cap 395

and

IN THE MATTER of an Inquiry into certain dealings in the listed securities of Vanda Systems and Communications Holdings Limited

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Tribunal: Chairman: The Hon Mr. Justice McMahon

Members: Professor LAM Kin

Mr. NG Tze Kin, David

Date of Hearing: 12th April 2006

Date of Delivery of Ruling: 4th May 2006

RULING

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1. For the purposes of this inquiry into the purchase of Vanda shares by implicated parties or by persons known to them counsel assisting, on the 6th April 2006 made an application that this Tribunal hear evidence of other share dealings by some of the implicated parties in a company Harbour Ring International Holdings Limited ("Harbour Ring"). Those parties affected by the application were Sammy TSE Kwok Fai, Debbie NG Kit Ying, Chris WONG Cheung Hung, Dennis LI Yat Tung, Charles CHONG Wai Lee and Becky CHONG Bun Bun. On the 12th April 2006 the Tribunal ruled that the evidence of Sammy TSE's involvement in the Harbour Ring negotiations was admissible, as was evidence of telephone communications between the six implicated parties and of their share purchases. I now give reasons for that ruling. The purpose of that evidence was said to go towards proving that those parties who purchased Harbour Ring shares and who purchased, or were involved in the purchase of Vanda shares in the present inquiry, did so only after on each occasion an implicated party in the present case Sammy TSE had received information concerning business transactions his company Hutchison Whampoa Limited ("Hutchison") was negotiating.

2. In other words counsel assisting suggests that evidence of the specified implicated parties in the present inquiry purchasing shares in Harbour Ring only after Sammy TSE had become involved in

negotiations which provided him with information concerning that company's affairs goes to negative mere coincidence in the same implicated parties purchasing Vanda shares in the present inquiry only after Sammy TSE had become involved in negotiations which provided him with information concerning Vanda's affairs and would tend to prove that the purchases were connected with Sammy TSE having received such information.

3. The Tribunal sees the merit in that argument. From the materials before the Tribunal and the evidence heard to date it appears likely that the implicated parties affected by this application will indeed be arguing that their purchases of Vanda shares were independent of any contact they may have had with Sammy TSE, and conversely Sammy TSE's case is or may be that any purchases of shares by the present implicated parties had nothing to do with any contact those parties had with him.

4. Quite plainly in circumstances where, as the evidence on its face will suggest, Sammy TSE was an associate or friend of the other five implicated parties, or at the very least a mutual associate or friend, and where those individuals participated in the purchase of quite large numbers of Vanda shares for the first time, the Tribunal will have to consider whether those purchases were brought about by Sammy TSE divulging information or encouraging the purchases in some way.

5. The Tribunal will have as an issue before it the question as to whether, even though Sammy TSE may have come into some information concerning Vanda's proposed closer relationship with Hutchison at that time, his friends and associates i.e. the other five specified implicated parties may have made their purchases of Vanda shares for reasons unconnected with Sammy TSE's involvement or knowledge of any negotiations between Vanda and his own company Hutchison as to a future relationship between the two companies.

6. It seems plain that one factor which would be relevant to the Tribunal's determination of that issue is quite simply whether there was any other history of Sammy TSE's associates purchasing shares of companies which were the subject of negotiations involving Hutchison and particularly Sammy TSE.

7. On that basis that evidence was ruled to be admissible in the present inquiry.

8. But as the Tribunal said on the 12th April when delivering its ruling it is intended to keep the evidence concerning the Harbour Ring dealings contained within strict parameters.

9. What is admissible is as follows:

(a) Evidence that Sammy TSE attended meetings concerning a proposal to have investment funds injected into Harbour Ring.

(b) Evidence of the purchase of Harbour Ring shares by or on behalf of the other five implicated parties.

(c) Evidence of any telephone communications between the six specified implicated parties at or about the time of the Harbour Ring meetings attended by Sammy TSE and the purchase of shares.

It may well be that as the evidence in this inquiry develops more specific rulings will be required as to the admissibility of particular aspects of the Harbour Ring evidence.

10. Indeed, it is likely further rulings will be made as to the relevance, and therefore the admissibility of evidence relating to the meetings Sammy TSE attended and the content of those meetings.

11. However the Tribunal wishes to emphasize that this evidence is admissible into the present proceedings for the limited purpose of negativing coincidence (if it can be expressed it that way). There is no question of the Tribunal embarking upon a hearing of the Harbour Ring issues generally or particularly determining whether information the

subject of that forthcoming inquiry was specific or price sensitive or otherwise fulfilled any criteria which will have to be determined by another Tribunal in the future.

12. The purpose of the Harbour Ring evidence is simply as stated above and its admissibility will be strictly limited by its relevance to that purpose.

13. I might add that the test the Tribunal used to determine admissibility of this evidence is entirely based upon relevance and fairness. The rules of the common law as to admissibility of evidence are not determinative of the admissibility of evidence before this Tribunal: section 17(a) of Cap. 395. In the Tribunal's view the evidence is relevant and any effect it may have in the future will not extend beyond its field of relevance. There is no additional prejudicial effect.

(The Hon Mr. Justice McMahon)
Judge of the Court of First Instance
& Chairman of the Insider Dealing Tribunal

(Professor LAM Kin)
Member

(NG Tze Kin, David)
Member

Annexure G

ANNOUNCEMENT OF VANDA DATED 21ST FEBRUARY PUBLISHED IN THE 22ND FEBRUARY 2000 ISSUE OF SOUTH CHINA MORNING POST

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VANDA GROUP

VANDA SYSTEMS & COMMUNICATIONS HOLDINGS LIMITED
中聯系統控股有限公司

(Incorporated in Bermuda with limited liability)

PROPOSED ISSUE OF CONVERTIBLE BONDS AND GRANT OF OPTIONS

THE AGREEMENT

The Directors announce that the Company entered into a conditional agreement with Hutchison, the I3P and Lam Ma & Wai Limited on 18th February, 2000 under which, among other things, (i) the Company has agreed to issue a convertible bond to Hutchison or its subsidiaries in the principal sum of HK$197,966,637.98, (ii) the Company has agreed to issue a convertible bond to I3P or its subsidiaries in the principal sum of HK$79,186,655.83, (iii) the Company has agreed to grant an option to Hutchison to subscribe for Shares representing up to a total of 7.5 per cent. of the total issued share capital of the Company as enlarged by the issue and allotment of all of the Conversion Shares and the Shares that to issued under the Baring CB upon its full conversion; (iv) the Company has agreed to grant an option to I3P to subscribe for Shares representing up to a total of 3.0 per cent. of the total issued share capital of the Company as enlarged by the issue and allotment of all of the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion, and (v) Lam Ma & Wai Limited, the controlling shareholder of the Company, has agreed to give an undertaking as to voting its Shares. The issue of the Bonds and the exercise of the Options are subject to certain conditions specified below.

THE BONDS

The Bonds bear interest at a rate of 6 per cent. per annum payable every six months in arrears. The outstanding principal amount of the Bonds is repayable by the Company upon the maturity of the Bonds on the second anniversary of its date of issue, if not previously converted by the Bondholders. The Bonds are convertible into Shares at any time after their date of issue (provided that conversions only up to a maximum of 4 times may be made during the terms of the Bonds) at an initial conversion price of HK$3.175 per Share, subject to adjustment. The Bonds must be converted into Shares in certain circumstances specified below.

The issue of the Bonds and the Conversion Shares will be subject to, among other things, the approval of the shareholders of the Company. Upon full conversion of the Bonds and assuming that there will be no adjustment to the initial conversion price, a total of 87,292,376 new Shares will be issued, representing approximately 24.4 per cent. of the existing issued share capital of the Company and 17.5 per cent. of the issued share capital of the Company as enlarged by the issuance of the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion.

THE OPTIONS

Subject to completion of the issue of the Bonds, the Options are exercisable by Hutchison and I3P at any time within two years from the date of completion of the issue of the Bonds and may be exercised in whole or in part. The exercise price per Share is equal to the conversion price under the Bonds. Assuming that the Options are fully exercised at the initial exercise price, a total of 52,375,425 new Shares will be issued upon exercise of the Option, representing approximately 14.6 per cent. of the existing issued share capital of the Company and 10.5 per cent. of the issued share capital of the Company as enlarged by the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion.

Assuming that the Bonds are fully converted at the initial conversion price and the Options are fully exercised at the initial exercise price, a total of 139,667,801 new Shares will be issued representing approximately 39.0 per cent. of the existing issued share capital of the Company and approximately 28.0 per cent. of the issued share capital of the Company as enlarged by the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion.

The issue of the Bonds, the Conversion Shares, the Options and the Option Shares are subject to, among other things, the approval of the shareholders of the Company at a special general meeting to be convened by the Company. The Company will send a notice of special general meeting together with an explanation circular to all shareholders of the Company as soon as practicable.

The Company and Hutchison have agreed to use their best endeavours to procure that a joint venture agreement be entered into by the date of the issue of the Bonds relating to the formation of a joint venture company. Certain details of the proposed joint venture are specified below.

The Shares were suspended from trading on the Stock Exchange from 10:00 a.m. on 18th February, 2000 at the request of the Company. The Company has made an application to the Stock Exchange to resume trading of the Shares on the Stock Exchange from 10:00 a.m. on 22nd February, 2000.

AGREEMENT DATED 18TH FEBRUARY, 2000

A. THE BONDS

1. The Bondholders

Subject to the satisfaction of the conditions referred to in paragraph A.3 below, the Bonds will be issued in the name of (i) Hutchison or its subsidiary(ies) and (ii) I3P or its subsidiary(ies). Hutchison and I3P are independent third parties and are not connected persons (as defined under the Listing Rules) of the Company. Hutchison is a wholly-owned subsidiary of Hutchison Whampoa Limited, a company whose securities are listed on the Stock Exchange and which operates five core businesses in 26 countries: ports and related services; telecommunications; property and hotel investment and management; retail, manufacturing and other services; and energy and infrastructure.

2. Principal Terms of the Bonds

The principal terms of the Bonds are summarised below:

(a) Issuer

The Company

(b) Principal Amount

Hutchison Bond —
HK$197,966,637.98 payable in full by Hutchison or its subsidiary(ies)

I3P Bond —
HK$79,186,655.83 payable in full by I3P or its subsidiary(ies)

(c) Maturity Date and Redemption

Unless previously converted, the outstanding principal amount of the Bonds (together with all unpaid and accrued interest) will be repaid by the Company upon its maturity on the second anniversary of the date of issue of the Bonds together with accrued interest.

(d) Interest

The Bonds will bear interest from their date of issue at the rate of 6 per cent. per annum, which will be payable once every six months in arrears on the principal amount of the Bonds outstanding from time to time.

(e) Conversion Rights

The outstanding principal amount of the Bonds or any part thereof may be converted into Shares at any time (provided that conversion only up to a maximum of 4 times may be made during the respective terms of the Bonds) prior to the maturity date at the relevant conversion price (which is initially HK$3.175 per Share, subject to adjustment). No fraction of a Share will be issued on conversion but (except in cases where any such cash payment would amount to less than HK$10) a cash payment will be made to the Bondholders in respect of such fraction.

The Bondholders must convert the whole of the outstanding amount under the Bonds into Shares if the closing price of the Shares on the Stock Exchange for each of any 20 consecutive trading days during the period commencing on the date of issue of the Bonds and ending on the maturity date of the Bonds is not less than 250 per cent. of the prevailing conversion price.

Assuming that the entire principal amount of the Bonds and the Options are converted and exercised at the initial conversion price and the initial exercise price, respectively, a total of 139,667,801 new Shares will be issued, representing approximately 28.0 per cent. of the issued share capital of the Company as enlarged by the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion.

3. Conditions to the Exercise of the Options

The exercise of the Options or any part thereof is conditional upon the completion of issue of the Bonds.

4. Completion of the Exercise of the Options

Subject to fulfillment of the condition referred to in paragraph B.3 above, completion of the exercise of the Options will take place on a date to be specified by Hutchison and I3P in the notice of exercise of the Options, being a banking day falling at least 3 banking days after the date of the option notice.

5. Use of Proceeds

The gross proceeds from the exercise of the Options are estimated to be approximately HK$166 million. It is intended that the net proceeds will be used for general working capital purposes.

6. Reasons for the Grant of the Options

The purpose of issuing the Options is to strengthen the long-term working relationship with strategic parties.

C. TOP-UP SUBSCRIPTION

Subject to the requirements of the Listing Rules and other applicable rules, laws and regulations, and provided that the Bonds have not been transferred to any person other than Hutchison's subsidiaries or I3P's subsidiaries (as appropriate), if the Company allots and issues any new Shares to any third parties (except pursuant to an exercise of any option granted or to be granted under the Company's employees' share option scheme or the Shares to be issued under the Baring CB), the Company shall offer Hutchison and I3P the right to subscribe for up to 20 per cent. and 8 per cent., respectively, of such new Shares to be allotted and issued on (in so far as reasonably practicable and appropriate) the same terms as such Shares are offered to such third parties. Such offer will be open for a period of 3 banking days from the date of notice of the offer given by the Company and to the extent that Hutchison and I3P do not subscribe [illegible]

Annexure G

The Bondholders must convert the whole of the outstanding amount under the Bonds into Shares if the closing price of the Shares on the Stock Exchange in each of any 20 consecutive trading days during the period commencing on the date of issue of the Bonds and ending on the maturity date of the Bonds is not less than 250 per cent. of the prevailing conversion price.

Assuming that the entire principal amount of HK$277,153,293.81 of the Bonds is converted at the initial conversion price, a total of 87,292,376 new Shares will be issued, which represents approximately 24.4 per cent. of the existing issued share capital of the Company and 17.3 per cent. of the issued share capital of the Company as enlarged by the issuance of the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion.

(f) Ranking of Shares to be Issued Upon Conversion

The Conversion Shares will rank pari passu in all respects with all other Shares in issue on the date of the conversion notice and will be entitled to all dividends, bonuses and other distributions the record date of which falls on a date on or after the date of the conversion notice.

(g) Conversion Price

The initial conversion price of HK$3.175 per Share, subject to adjustment in accordance with the terms of the Bonds, was determined after arm's length negotiations.

The initial conversion price of HK$3.175 represents a discount of approximately 44.3 per cent. to the closing price of the Shares of HK$5.70 on the Stock Exchange on 17th February, 2000, the last trading day preceding the suspension in trading of the Shares; a premium of approximately 1.6 per cent. to the average closing price of the Shares of HK$3.125 on the Stock Exchange in the fifteen consecutive trading days ending on 17th February, 2000 (inclusive); a premium of approximately 16.3 per cent. to the average closing price of the Shares of HK$2.731 on the Stock Exchange in the thirty consecutive trading days ending on 17th February, 2000 (inclusive);

(h) Voting

The Bondholders will not be entitled to receive notice of, attend or vote at general meetings of the Company by reason only of their being the Bondholders.

(i) Transferability

Subject to the relevant rules, laws, regulations, requirements and consents, the Bonds may not be transferred except with the prior approval of the Company and (if required) the Stock Exchange except where the Bonds are transferred to a holding company of the respective Bondholders, a subsidiary of such respective holding company or a subsidiary of the respective Bondholders. The outstanding principal amount of the Bonds may be transferred in full or in part. The Bonds may not be transferred to a connected person (as defined in the Listing Rules) of the Company or any of its subsidiaries except with the prior approval of the Company and (if required) by the Stock Exchange.

If the Bonds or any part thereof is transferred to a transferee who is a direct or indirect holding company of the respective Bondholders, a direct or indirect subsidiary of such holding company or a direct or indirect subsidiary of the respective Bondholders, and the transferee ceases to have the same relationship with the respective Bondholders, the transferee is required to transfer the Bonds (as appropriate) and the Bondholders (as appropriate) must procure that the Bonds are transferred to a party who has one of the aforesaid relationships with the original Bondholders (as appropriate).

3. **Conditions to the Issue of the Bonds**

Completion of the issue of the Bonds is conditional upon the following having taken place on or before 7th April, 2000 or such later date as may be agreed among the Company, Hutchison and I3P:

(a) the Listing Committee of the Stock Exchange granting the listing of and permission to deal in, the Conversion Shares and the Option Shares;

(b) if required, the Bermuda Monetary Authority having approved the issue of the Bonds, the Conversion Shares, the Options and the Option Shares;

(c) any other conditions as may be required under the Listing Rules and/or by the Stock Exchange;

(d) the approval of the issue of the Bonds and the issue and allotment of the Conversion Shares in accordance with the applicable terms of the Agreement and the conditions of the Bonds by shareholders of the Company at a special general meeting of such shareholders; and

(e) the approval of the granting of the Options and the issue and allotment of the Option Shares in accordance with the applicable terms of the Agreement by the shareholders of the Company at a special general meeting of such shareholders.

If the conditions are not fulfilled on or before 7th April, 2000 or such later date as may be agreed between the Company, Hutchison and I3P, failing which the Agreement will be immediately terminated subject to any antecedent claims.

4. **Completion of Issue of the Bonds**

Subject to fulfillment of the conditions described in paragraph A.3 above, completion of the issue of the Bonds will take place on the fifth banking day following the date on which the last of such conditions are fulfilled or such other date as the Company, Hutchison and I3P may agree.

5. **Listing of the Bonds**

The Company does not currently intend to make any application for listing of, or permission to deal in, the Bonds on the Stock Exchange or any other stock exchange.

The Company will make an application to the Listing Committee of the Stock Exchange for the listing of, and permission to deal in, the Conversion Shares.

6. **Use of Proceeds**

The gross proceeds from the issue of the Bonds are estimated to be approximately HK$277 million. It is intended that the net proceeds will be used to help the Company accelerate its development and expansion, particularly in the e-commerce payment solution business.

7. **Reasons for the Issue of the Bonds**

The purpose of issuing the Bonds is to facilitate the engagement of a strategic partner which would enable and facilitate further expansion of the Group.

B. **THE OPTIONS**

1. **The Optionholders**

In consideration of Hutchison and I3P agreeing to enter into the Agreement, the Company has conditionally agreed to grant the Options to Hutchison and I3P.

2. **Principal Terms of the Options**

The principal terms of the Options are summarised below:

(a) Option Shares

Hutchison and I3P has the right to exercise the Options in whole or in part to subscribe for up to a total number of Option Shares representing 14.6 per cent. of the total issued share capital of the Company as at the date of the Agreement. However, on the date of the relevant notice given by the Optionholders to exercise the Options, if the relevant Bondholders have not fully exercised the conversion rights under the relevant Bonds, the Options may only be exercised in the same proportion as the proportion in which the conversion rights under the relevant Bonds have been exercised.

and 8 per cent., respectively, of such new Shares to be allotted and issued on (in so far as reasonably practicable and appropriate) the same terms as such Shares are offered to such third parties. Such offer will be open for a period of 3 banking days from the date of notice of the offer given by the Company and to the extent that Hutchison and I3P does not subscribe for any such Shares offered, the Company will be free to issue and allot such Shares to other parties on terms no less favourable to the Company than those offered to Hutchison and I3P.

D. **BOARD REPRESENTATION**

Subject to the issue of the Bonds and the conditions set out below, Hutchison may at any time from the date of the issue of the Bonds appoint a nominee as a director of the Company. Hutchison must procure that its nominee director shall resign as director of the Company (i) during the term of the Hutchison Bond, if Hutchison disposes of the Hutchison Bond or any part thereof other than to its subsidiaries, and Hutchison and its subsidiaries together hold Conversion Shares or Option Shares representing less than 7.5 per cent. of the then issued share capital of the Company; or (ii) after the expiry of the Hutchison Bond, if Hutchison and its subsidiaries together hold less than 7.5 per cent. of the then issued share capital of the Company.

E. **UNDERTAKING BY LAM MA & WAI LIMITED**

Provided that Lam Ma & Wai Limited has the right to vote at the relevant special general meeting to be held to consider the resolutions to approve the issue of the Bonds and Options and the issue of the Conversion Shares and Option Shares, Lam Ma & Wai Limited has undertaken to exercise all its voting rights as a shareholder of 38.1 per cent. of the existing issued share capital of the Company in favour of such resolutions. Lam Ma & Wai Limited has no interest in Hutchison and I3P.

F. **JOINT VENTURE AGREEMENT**

The Company and Hutchison have agreed to use their respective best endeavours to procure that a joint venture agreement be signed by the date of issue of the Bonds. The Company and Hutchison or their respective subsidiaries intend to own 50 per cent. each of the issued share capital of the joint venture. The purpose of the joint venture is to provide a web-based comprehensive on-line payment solution to banks and e-commerce. Initial customers of the joint venture are expected to include, but not limited to, members of the Company and Hutchison.

A further announcement on the details of the joint venture agreement will be published as and when it is signed, if as required under the Listing Rules.

SUSPENSION AND RESUMPTION OF TRADING OF THE SHARES

The trading of the Shares were suspended on the Stock Exchange from 10:00 am on 18th February, 2000 at the request of the Company. The Company has made an application to the Stock Exchange to resume trading of the Shares on the Stock Exchange from 10:00 am on 22nd February, 2000.

GENERAL

The Company is principally engaged in the business of systems integration of mid-range computers, software development, distribution of computer products, telecommunications systems integration and the trading of telecommunication products and cables. Currently, the Baring CB outstanding is US$1.7 million which is convertible to a maximum of approximately 33.43 million Shares (representing approximately 14.9 per cent. of the existing issued share capital of the Company). Since 16th December, 1999, the completion date of a placement and subscription of Shares announced on 2nd December, 1999, a number of Shares have been issued on exercise of the Baring CB and certain options granted to employees of the Company. Lam Ma & Wai Limited, in their owned as to approximately 45.94% by Mr. Lam Ho Nam, 45.46% by Mr. Ma Chun Kwong, Edmund, and 8.6% by Mr. Wai Yee Jan, Messrs. Lam, Ma and Wai are Directors. Both Hutchison and I3P are independent of the directors, chief executive officer or substantial shareholders of the Company, any of its subsidiaries or their respective Associates (as defined under the Listing Rules).

The Company will convene a special general meeting as soon as practicable to consider, among other things, the resolutions referred to in paragraph A.3(d) and (e) above. The Company will send a notice of special general meeting together with an explanation circular to all shareholders of the Company as soon as practicable.

BNP Prime Peregrine Capital Limited is the financial advisor of the Company in relation to this transaction.

In this announcement, unless the context otherwise requires, the following terms shall have the following meanings:

"Agreement"	the agreement in respect of the issue of the Bonds and the Options between the Company, Hutchison, I3P and Lam Ma & Wai Limited dated 18th February, 2000
"Baring CB"	US$3,500,000 5 per cent. convertible bonds due 2002 issued by the Company to Tenfold Profits Company Limited, a wholly owned investment holding company of Baring Asia Private Equity Fund
"Bonds"	the Hutchison Bond and the I3P Bond
"Bondholders"	the persons who are for the time being the registered holders of the Bonds
"Company"	Vanda Systems & Communications Holdings Limited
"Conversion Shares"	the Shares to be issued by the Company upon exercise by the Bondholders of the conversion rights under the Bonds
"Directors"	the directors of the Company
"Group"	the Company and its subsidiaries
"Hutchison"	Hutchison International Limited, a wholly-owned subsidiary of Hutchison Whampoa Limited, whose securities are listed on the Stock Exchange
"Hutchison Bond"	the convertible bond in the principal sum of HK$197,966,637.98 to be issued by the Company to Hutchison pursuant to the Agreement
"Hutchison Option"	the option to subscribe for the Hutchison Option Shares granted pursuant to the Agreement
"Hutchison Option Shares"	the Shares to be issued by the Company upon exercise of the Hutchison Option or any part(s) thereof, such number of Shares representing 7.5 per cent. of the total issued share capital of the Company as enlarged by the issue and allotment of all of the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion
"I3P"	an independent third party not associated with any of the director, chief executive or substantial shareholder of the Company
"I3P Bond"	the convertible bond in the principal sum of HK$79,186,635.83 to be issued by the Company to I3P pursuant to the Agreement
"I3P Option"	the option to subscribe for the I3P Option Shares granted pursuant to terms of the Agreement
"I3P Option Shares"	the Shares to be issued by the Company upon exercise of the I3P Option or any part(s) thereof, such number of Shares representing 3 per cent. of the total issued share capital of the Company as enlarged by the issue and allotment of all of the Conversion Shares and the Shares to be issued under the Baring CB upon its full conversion
"Listing Rules"	the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited
"Options"	Hutchison Option and I3P Option
"Option Shares"	the Hutchison Option Shares and/or the I3P Option Shares (as the case may be)
"Shares"	issued shares of HK$0.10 each in the share capital of the Company
"Stock Exchange"	The Stock Exchange of Hong Kong Limited

By Order of the Board
LAM Hon Nam
Chairman

Hong Kong, 21st February, 2000