Wong Yuh Lan *v* Public Prosecutor and other matters
[2012] SGHC 161

Case Number : Criminal Motions No 63, 65, 66 and 67 of 2012

Decision Date : 07 August 2012

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Hamidul Haq, Thong Chee Kun, Yusfiyanto Yatiman, and Istyana Ibrahim (Rajah & Tann LLP) for the Applicants in Criminal Motion No 65, 66 and 67 of 2012; Ravinderpal Singh Randhawa s/o Savinder Singh Randhawa (Kalpanath & Company) for the Applicant in Criminal Motion No 63 of 2012; Mark Jayaratnam and Nor'Ashikin Samdin (Attorney-General's Chambers) for the Respondent.

Parties : Wong Yuh Lan — Public Prosecutor

Criminal Procedure and Sentencing – Extradition

[LawNet Editorial Note: The appeal to this decision in Criminal Motion Nos 76, 78, 79 and 99 of 2012 was dismissed by the Court of Appeal on 9 November 2012. See [2013] SGCA 40.]

7 August 2012 Judgment reserved.

Choo Han Teck J:

1 Lim Yong Nam ("Nam"), Lim Kow Seng ("Seng"), Hia Soo Gan Benson ("Hia") and Wong Yuh Lan ("Wong") (henceforth collectively termed "the Applicants") were each granted leave to issue a summons for an Order for Review of Detention under O 54 r 2(1)(b) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") on 23 February 2012. The Applicants then filed summonses seeking, *inter alia*, an Order for Review of Detention against the Singapore Police Force and Director of Institute of Mental Health (in Nam's application) and the Superintendent of Changi Prison (in Seng, Hia and Wong's application). These applications were made because pursuant to the United States of America (Extradition) Order in Council, 1935 (Cap 103, OR 1) ("US Order in Council"), the United States of America ("US") had made a requisition to the Minister for Law for the extradition of the Applicants to the US to stand trial, and warrants of arrest had been issued against them by the US District Court for the District of Columbia on 15 September 2010. The US sought the extradition of the Applicants for 12 counts of conduct, including conspiracy to defraud the US by illegal means, smuggling, illegal exports and attempted illegal exports to the Republic of Iran ("Iran"), scheme to make false statements to the US and a scheme to conceal. However, the Attorney-General's Chambers on behalf of the State sought the committal of Wong and Nam only in respect of Count One of the Superseding Indictment for conspiracy to defraud the US by dishonest means under Title 18 United States Code Section 371 ("18 USC § 371"). Wong and Nam were accused of being part of a "procurement shipping network" together with one Hossein A Larijani ("Larijani"), an Iranian national, Seng and Hia to export 6,000 radio frequency modules ("Company A modules") manufactured by Company A, a US company, from the US to Iran via Singapore. This was in breach of US export restrictions against unauthorised shipment of US-origin goods from a third country to Iran. As against Seng and Hia, the State sought their committal only in respect of Count Eight, also pursuant to 18 USC § 371. Seng and Hia were accused of being part of a separate scheme with two other US nationals to cause antennae which were classified as "defense articles" under US law to be exported without a licence. Title 18 United States Code Section 371 ("conspiracy to defraud the US") reads:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2 The learned District Judge ("the DJ") issued a warrant for the apprehension of the Applicants on 12 October 2011, pursuant to s 9(1)(a) read with s 10(1)(a) of the Extradition Act (Cap 103, 2000 Rev Ed) ("the Extradition Act 2000"). The Applicants were apprehended on 25 October 2011 and held in remand until their committal hearing on 9 and 12 December 2011. On 10 February 2012, the DJ committed the Applicants to custody under a warrant of commitment under s 11(7) of the Extradition Act 2000. Pending extradition, the Applicants sought an Order for Review of Detention before me under s 417 of the Criminal Procedure Code 2010 (Act No 15 of 2012) ("CPC 2010) (previously known as a writ of *habeas corpus*). The State, an interested party to the proceedings, opposed the summonses for an Order for Review of Detention. On 6 August 2012, just before judgment was to be delivered, a question arose as to whether the summonses for an Order for Review of Detention should have been filed as criminal motions under the CPC 2010, rather than originating summonses under O 54 of the Rules of Court. The High Court in *Karuppah Alagu v The Minister of Home Affairs, The Attorney-General of Singapore & Anor* [1992] SGHC 72 ("*Karuppah Alagu*") noted that in extradition proceedings, an application for a writ of *habeas corpus* to be issued should be made under the old CPC (or the CPC 2010 in this case) instead of O 54 of the Rules of Supreme Court 1970 (or O 54 of the Rules of Court in this case). The court in *Karuppah Alagu* regarded the procedural irregularity as technical and proceeded to hear the application. In this case, I directed the Applicants to file criminal motions under the CPC 2010 on 6 August 2012 after counsel stated that no changes to the affidavits or submissions were necessary.

3 The requirements for a warrant of commitment to be issued are set out in s 11(7) of the Extradition Act 2000:

(7) If the person was apprehended under a warrant issued in pursuance of an authority by the Minister in a notice under section 9(1)(a) or the Magistrate receives a notice from the Minister under section 9(1)(b) and —

(a) there is produced to the Magistrate a duly authenticated foreign warrant in respect of the person issued in the foreign State that made the requisition for the surrender of the person;

(b) there is produced to the Magistrate —

(i) in the case of a person who is accused of an extradition crime — such evidence as would, in the opinion of the Magistrate, according to the law in force in Singapore, justify the trial of the person if the act or omission constituting that crime had taken place in, or within the jurisdiction of Singapore; or

(ii) in the case of a person who is alleged to have been convicted of an extradition crime — sufficient evidence to satisfy the Magistrate that the person has been convicted of that crime; and

(c) the Magistrate is satisfied, after hearing any evidence tendered by the person, that the person is liable to be surrendered to the foreign State that made the requisition for the surrender,

the Magistrate shall, by warrant in accordance with Form 5 in the Second Schedule, commit the person to prison to await the warrant of the Minister for his surrender but otherwise shall order that the person be released.

The terms "extradition crime" and "fugitive" are also relevant to the requirements set out in s 11(7) of the Extradition Act 2000, and are defined under s 2 of the Extradition Act 2000:

"fugitive" means a person who is accused of an extradition crime that is alleged to have been committed, or convicted of an extradition crime that was committed at a place within the jurisdiction of a foreign State or a declared Commonwealth country or of a part of such State or country and is, or is suspected to be, in Singapore;

"extradition crime", in relation to a foreign State, means an offence against the law of, or of a part of, a foreign State and the act or omission constituting the offence or the equivalent act or omission would, if it took place in or within the jurisdiction of Singapore, constitute an offence against the law in force in Singapore that —

(*a*) is described in the First Schedule; or

(*b*) would be so described if the description concerned contained a reference to any intent or state of mind on the part of the person committing the offence, or to any circumstance of aggravation, necessary to constitute the offence;

4 The provisions of the Extradition Act 2000 are subject to any limitation or condition in the extradition treaty between the Singapore and the US ("The Singapore-US Treaty"). The US is recognised as a "foreign State" under the Extradition Act 2000, and unlike the case with a "declared Commonwealth country", a treaty for extradition must be in place between the two countries for the extradition of fugitives. The treaty determines the scope of the parties' mutual obligations for the extradition of fugitive criminals. The Singapore-US Treaty is derived from the extradition treaty of 22 December 1931 entered into between the United Kingdom ("UK") and the US ("the UK-US Treaty") given effect to by the US Order in Council. The "Extradition Acts 1870 to 1906" (which were further amended and consolidated into the Extradition Acts 1870 to 1935 – henceforth termed "the Extradition Act 1870") applied by Order in Council to the UK-US Treaty, and by s 17 of the Extradition Act 1870 (33 & 34 Vict c 52) (UK) extended to every "British possession" including colonies (see Sir Francis Piggott in *Extradition: A Treatise on the Law relating to Fugitive Offenders* (Kelly & Walsh Limited, 1910) at p 177). After Singapore's independence, Parliament repealed the Extradition Act 1870 and the Fugitive Offenders Act 1881 (44 & 45 Vict c 69) (UK). Nonetheless, the UK-US Treaty continued to apply between Singapore and the US, as can be seen in the Exchange of Letters Constituting An Agreement Between the United States of America and Singapore for the Continued Application to Singapore of the United States/United Kingdom Treaty of December 22, 1931 Concerning Extradition ("Exchange of Letters"). Section 3(1) of the Extradition Act 2000 also provides that Part II would apply to the extradition arrangement between Singapore and the US:

Application of this Part in relation to foreign States to which Extradition Acts 1870 to 1935 applied

3.–(1) Where, immediately before 1st August 1968 –

(*a*) under an Order in Council in force under the Imperial Acts known as the Extradition Acts 1870 to 1935, those Acts applied in the case of a foreign State specified in the Order; and

(*b*) those Acts, as they so applied, extended to Singapore,

[Part II of the Extradition Act 2000] applies in relation to that State.

The Extradition Act 2000 and its predecessor, the Extradition Act 1968 (Act 14 of 1968) were intended to govern the extradition arrangements with declared Commonwealth countries and foreign States, although in the case of foreign States, subject to the provisions in the treaty (see *Singapore Parliamentary Debates, Official Report* (22 May 1968) vol 27 at cols 426–427). In relation to foreign States including the US, Part II of the Extradition Act 2000 applies subject to "any limitations, conditions, exceptions or qualifications" in the US Order in Council (s 3(2), Extradition Act 2000). While the Extradition Act 2000 lays down the framework for extradition arrangements the Singapore-US Treaty determines the scope of the Extradition Act 2000 applicable to the arrangements with the US and may, for example, limit "the circumstances in which a fugitive offender can be arrested and surrendered" (*Regina v Governor of Ashford Remand Centre, Ex parte Beese and Another* [1973] 1 WLR 969 at 972–973).

5 The following conditions must be satisfied before the Applicants can be committed to await the Minister's warrant for surrender to the US:

(a) There must be a duly authenticated foreign warrant issued in the US in respect of the Applicants;

(b) The Applicants must be "fugitives" as defined under s 2 of the Extradition Act 2000 read with Article 1 of the Singapore-US Treaty ("Issue 1");

(c) The act or omission constituting the offence in Count One and Count Eight must constitute an offence in Singapore, had it taken place here (*ie*, the double criminality principle must be satisfied) (Issue 2"); and

(d) The offence made out by the Applicants' conduct must fall under one of the categories of offences listed in Article 3 of the Singapore-US Treaty ("Issue 3");

(e) The committing magistrate must be satisfied on the evidence adduced that the Applicants are liable to be surrendered to the US ("Issue 4").

6 As to Issue 1, the DJ proceeded on the basis that the Applicants were "fugitives". On Issue 3, the DJ found that the offence of conspiracy to defraud the US was an offence that fell within Article 3 the Singapore-US Treaty. The DJ found that the categories of offences enumerated under Article 3 of the Singapore-US Treaty were deliberately couched in broad terms to encompass both the "conduct test" (*ie*, that it is sufficient if the Applicants' acts comprise conduct described in the list in Article 3) and the "ingredients test" (*ie*, that it is sufficient if the ingredients of the offence charged are similar to the ingredients of the listed category in Article 3). The DJ accepted that the extradition treaty "must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The DJ was of the view that "if Article 3 [of the Singapore-US Treaty] was intended to attract a strict application of the "ingredients test", there would have been no reason for it to make reference to both '*crimes*' and '*offences*' [emphasis in original]". Further, The DJ reasoned that "[i]n ordinary language, 'crime'

denotes an action that constitutes an offence" and "some of the enumerated crimes or offences in Article 3 are couched in terms that are more descriptive of a course of conduct than any specific offence" (*In the Matter of Wong Yuh Lan, Lim Yong Nam, Lim Kow Seng & Hia Soo Gan Benson* [2012] SGDC 34 at [12]). Such a construction would give effect to the purpose of the Singapore-US Treaty to make adequate provision for the reciprocal extradition of criminals. Accordingly, the "conduct test" was adopted in interpreting the relevant provisions. The DJ was of the opinion that in any event, an actual fraud had been perpetuated on the US government and that the Applicants obtained the Company A modules and antennae from Company B through false pretences. Such conduct fell within paragraphs 17 and 18 of Article 3 of the Singapore-US Treaty, and Count One and Count Eight were thus extraditable offences.

7 The DJ then analysed the issue of whether the double criminality principle embodied in the definition of "extradition crime" in s 2 of the Extradition Act 2000 was met (*ie*, Issue 2). Applying s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) to this definition, the DJ held that the "conduct test" would promote the legislative purpose of the Extradition Act 2000, *viz*, to facilitate the extradition of fugitives. Thus, he found that the "conduct test" was to be preferred, and that the purposive approach to the construction of statutes took precedence over all other common law principles of interpretation (*Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 and *Ho Sheng Yu Garreth v Public Prosecutor* [2012] SGHC 19). The DJ found that the alleged acts of the fugitives constituted an offence of abetment by conspiracy to cheat under s 415 read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code") if they had taken place here. The DJ was of the view that this was an offence described in paragraph 18 of Part I read with Part II of the First Schedule to the Extradition Act 2000. On Issue 4, the DJ held that his duty was to enquire whether there was some evidence, not inherently incredible, which if he were to accept as accurate, would make out the elements of abetment by conspiracy to cheat (what the DJ termed a "*prima facie* case"). The DJ found that a "*prima facie* case" of abetment by conspiracy to cheat was made out for both Count One and Count Eight.

8 Mr Jayaratnam, for the State, submitted that this Court should not re-hear the case and should limit itself to consider whether there was sufficient evidence to give the DJ the jurisdiction to make the order of committal. A court hearing an application for an Order for Review of Detention has the duty to correct both errors of law and can intervene where no magistrate directing his mind to the evidence could have reasonably concluded that there was sufficient and credible evidence to support a committal on a charge. The House of Lords in *Regina v Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277 at 290 ("*ex parte Osman*"), after reviewing the authorities, laid down the principles regarding the role of the court hearing an application for a writ of *habeas corpus*. The following principles are particularly helpful (at 300–301):

> ... In *Ex parte Tarling* Lord Wilberforce said that the powers of the Divisional Court are limited to deciding whether the magistrate was right or wrong in finding on the evidence before him that there was sufficient evidence to warrant committal, and to ascertaining whether he had erred in law.
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> In *Ex parte Sotiriadis* [1975] A.C. 1, Lord Diplock said that the Divisional Court is only concerned to interfere with the decision of the magistrate where there is no evidence to justify committal. If there was some evidence, then the Divisional Court could not substitute its own view.
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> In *Ex parte Armah* Lord Reid and Lord Pearce adopted a straightforward *Wednesbury* test (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223), that is to say, whether there was evidence on which a reasonable magistrate, properly directing himself in law, could commit...

...

> As so often happens, the difference between the various approaches is, in our view, more apparent than real. Thus, if in a particular case, there was no credible evidence to support committal on a charge, no reasonable magistrate would commit on that charge unless he had made some error of law, e.g. by misunderstanding the nature of the offence. In such a case one could say that the court was justified in interfering either because there was no evidence to support the committal, or, because no reasonable magistrate would commit on that evidence, or, because the magistrate must have been guilty of an error of law. It all comes to the same thing in the end. But since the point has been raised for our decision, we would say that the correct approach is best defined in *Wednesbury* terms. ...

Thus, the Court may direct that an Order for Review of Detention be issued and order the person restrained to be released if it is satisfied that no magistrate would have committed the Applicants on the respective charges unless he made an error of law, such as applying the wrong principles of law in determining whether the requirements for extradition were satisfied (see also Tan Yock Lin & S Chandra Mohan, *Criminal Procedure* (LexisNexis, Looseleaf Ed, 2010) ("Tan and Mohan") at para 2304).

9 The first issue (*ie*, Issue 1) is whether the Applicants are "fugitives" under the Extradition Act 2000. The Applicants were in Singapore when the acts set out in Count One and Count Eight of the Superseding Indictment were alleged to have been committed and had not stepped foot in the US. Mr Haq, counsel for Seng, Hia and Nam, argued that it was a misnomer to label the three persons as "fugitives" given that Seng, Hia and Nam had never stepped foot in the US throughout the time that the offences were allegedly committed. Mr Haq submitted that this was not a typical case of extradition involving persons who had committed a crime overseas and fled to Singapore to seek refuge. While it may be that a lay person's understanding of "fugitive" would refer to persons who commit a crime in one country and flee to another, "fugitive" takes a different definition under the Extradition Act 2000 and the Singapore-US Treaty (as set out above at [3]). Article 1 of the Singapore-US Treaty is also pertinent:

> The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

10 The territory of the High Contracting Parties, which were the UK and the US at that time, is defined under Article 2 of the UK-US Treaty. Essentially, through Article 2, Article 1 applied to all territories under the parties' exclusive administration or control which, in the case of the UK, included all British colonies and dominions overseas. The Extradition Act 1870, which applied to the UK-US Treaty, defined "fugitive criminal" under s 26 as "any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions" and "fugitive criminal of a foreign state" as "a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state". It is not immediately apparent what the distinction between "fugitive criminal" and "fugitive criminal of a foreign state" is. However, it is likely that "fugitive criminal of a foreign state" refers to "fugitive criminals" who have been convicted or accused of committing an extradition crime while being physically present in the foreign state which is seeking extradition ("the requesting state"). "Fugitive criminals" would include persons who were not physically present in the requesting state but who were accused of committing criminal acts within the jurisdiction of the requesting state. In the explanatory notes to s 26 of the Extradition Act 1870, it was stated that:

> "fugitive criminal": A foreign criminal resident in this country, and while here committing by letter an extradition offence in his own country, is a fugitive criminal (*R. v. Millins* (1883) 53 LJMC 157). See also *R. v. Godfrey* [1923] 1 KB 24 (false pretences committed abroad by partner, on written instructions from prisoner in England).

In contrast, the view in Tan and Mohan (at para 652) is that the words "fugitive from that State", used for example in s 6(1) and s 20(1) of the Extradition Act 2000, "implies presence for a time in [the requesting state]". (Section 6(1) of the Extradition Act 2000 essentially provides that every fugitive from a foreign State to which Part II of the Extradition Act 2000 applies shall be liable to be apprehended and surrendered to that state as provided by Part II, subject to any limitations, conditions, exceptions or qualifications such as those provided for in the treaty, while s 20(1) of the Extradition Act 2000 provides for the same in relation to a declared Commonwealth country). This view is incongruous with the meaning of "fugitive" and "fugitive from a foreign State or declared Commonwealth country" in ss 2(1) and 2(2) of the Extradition Act 2000 respectively. The crucial part in the definition of "fugitive" in the Extradition Act 2000 is that the act or omission constituting the offence is committed within the jurisdiction of the requesting state as opposed to the physical presence of the "fugitive" within the requesting state. Thus insofar as Mr Haq is arguing that the Applicants are not "fugitives" because they had never been physically present in the US, that view must be incorrect.

11 The terms "fugitive" and "extradition crime" beg the meaning of "jurisdiction". The issue is whether "jurisdiction" is limited to the territorial jurisdiction of the requesting state, or whether it only requires that the requesting state has the power under its laws to try the offender for an alleged offence whether the act or omission constituting the offence was committed within or outside its territory (the House of Lords in *Regina (Al-Fawwaz) v Governor of Brixton prison and Another* [2002] 1 AC 556 ("*Al-Fawwaz*") took the latter view). This was considered in *Son Kaewsa and others v Superintendent of Changi Prison and another* [1991] 2 SLR(R) 180 ("*Son Kaewsa*"). The applicant, who was a Thai national, argued that he was not a "fugitive" given that he had never been to the US at any time. The court noted that the complaint did not allege that the applicant had been in the US at any time but that he had arranged for the heroin to be transported from Bangkok to the US. The criminal acts alleged against the applicant had taken place in Singapore, Hong Kong and Bangkok, and not in the US. The High Court was of the view that this argument had no merit by reason of s 2(2) of the Extradition Act 2000 which provided that "[a] reference in this Act to a fugitive from a foreign State or declared Commonwealth country shall be read as a reference to a fugitive accused of an extradition crime that is alleged to have been committed, or convicted of an extradition crime that was committed, at a place in that foreign State or declared Commonwealth country or within the jurisdiction of, or of a part of, that State or country" (at [36]). The High Court in *Son Kaewsa* then noted (at [37]) that:

> Section 2(2) [of the Extradition Act 2000] makes it clear that it is sufficient for the purposes of the [Extradition Act 2000] that the fugitive in question is alleged to have committed an extradition crime within the jurisdiction of the state seeking extradition. It is not necessary for such a crime to be committed at a place within the jurisdiction of that state. ...

12 Several interpretations are possible regarding the meaning of "jurisdiction" in the definition of "fugitive" under s 2(1) or s 2(2) of the Extradition Act 2000. The first is that only an "extradition crime" needs to have been made out against the person and that the "extradition crime" is committed within the requesting state's jurisdiction, in the sense that that the requesting state has the power to try the offender. The second is that the person must not only be accused of or convicted of an "extradition crime" but that the act or omission constituting the "extradition crime" must have been committed within the territorial jurisdiction of the requesting state. The second interpretation would

mean that "place within the jurisdiction of a foreign State or a declared Commonwealth country" (*eg*, in the definition of "fugitive") refers to the territorial jurisdiction of requesting state, in contrast to a possibly wider meaning that can be derived from "place in or within the jurisdiction" (*eg*, in the definition of "extradition crime") of the requesting state. The distinction would be less significant where jurisdiction over the criminal offence is to be exercised territorially in Singapore. Difficult issues could arise if jurisdiction over the offence can be exercised extraterritorially. An "extradition crime" would be made out even if the acts or omissions constituting the offence against the law of the requesting state were committed wholly outside the territorial jurisdiction of the requesting state. However, persons against whom an "extradition crime" have been made out would not be considered "fugitives" and are not liable to be surrendered to the requesting state under the Extradition Act 2000. For this reason, I am of the view that "place within the jurisdiction of [the requesting state]" should not be read as meaning "place in the territory of the requesting state". On the facts of this case, I find that Seng and Hia are "fugitives" under the Extradition Act 2000, whereas, for reasons that follow, I hold that the conduct of Wong and Nam in Count One would not give rise to a criminal offence in Singapore, and they would not strictly be considered "fugitives".

13 I turn now to Issue 2. The definition of "extradition crime" includes the essential feature that the conduct which is the subject of the charge in the extradition request must be punishable in both Singapore and the US. The principle of double criminality is captured in the definition of "extradition crime" under s 2(1) of the Extradition Act 2000:

> "extradition crime", in relation to a foreign State, means an offence against the law of, or of a part of, a foreign State and the act or omission constituting the offence or the equivalent act or omission would, if it took place in or within the jurisdiction of Singapore, constitute an offence against the law in force in Singapore...

Article 9 of the Singapore-US Treaty also has a double criminality requirement, couched in the following terms:

> The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in the case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

Double criminality in the context of extradition requires that a person be extradited if there is evidence that would justify his apprehension had the act or omission constituting the offence been committed in the state to which the extradition request has been made ("the requested state"). In order to do this, the allegations of fact must be transposed – for example, would a person residing in a foreign country (which is the status of the Applicants here *vis-à-vis* the US) who carried out the identical acts or omissions as alleged in Count One and Count Eight of the Superseding Indictment be guilty of a crime in Singapore, and be capable of facing extradition to Singapore? Lord Millett in *Al-Fawwaz* at [95] explained the purpose of the requirement of double criminality in extradition:

> In considering this question it is important to bear the objects of the double criminality rule in mind, for its two requirements serve different purposes. The first requirement, that the offence for which extradition is ordered should be within the jurisdiction of the requesting state, serves a purely practical purpose. There is no point in extraditing a person for an offence for which the requesting state cannot try him. The second requirement, that the offence should also be within

> our own criminal jurisdiction, serves to protect the accused from the exercise of an exorbitant foreign jurisdiction. Views as to what constitutes an exorbitant jurisdiction naturally differ; the test adopted by our own law has been to accord to other countries the jurisdiction which we claim ourselves but no more. As my noble and learned friend Lord Rodger of Earlsferry has observed, this is not the only means of protection given by our system of extradition, for the exercise of an exorbitant foreign jurisdiction may be forestalled by executive action. But it is the only measure of judicial control which the law provides for this purpose.

I agree entirely. The difficulty with the double criminality test lies in its application, which is controversial and varies in content from one jurisdiction to another. An overly technical approach is best avoided. Courts have affirmed that the double criminality principle does not require that both the requested state as well as the requesting state recognise the offence under identical labels. In *In re Arton (No 2)* 1 QB 509 ("*In re Arton*"), Lord Russell noted (at 517) that:

> Is extradition to be refused in respect of acts covered by the treaty, and gravely criminal according to the law of both countries, because in the particular case the falsification of accounts is not forgery according to English law, but falls under that head according to French law? I think not. To decide so would be to hinder the working and narrow the operation of most salutary international arrangements.

14 Double criminality is a doctrine applied by courts in various jurisdictions in different ways and with varying strictness. There is basically a choice between the "ingredients test" and the "conduct test". The "ingredients test" looks for correspondence (and at its strictest, identity) between the elements of the foreign offence for which the fugitive is alleged to have committed and the elements of the local offence. The "conduct test" on the other hand requires the court to look at the conduct alleged against the fugitive and to determine whether the conduct would have been criminal had it been committed within the jurisdiction of the requested state. The "ingredients test" in its strictest form was adopted by the 3-2 majority in *Government of Canada and another v Aronson* [1990] 1 AC 579 ("*Aronson*"). The House of Lords had to consider s 3(1) of the Fugitive Offenders Act 1967 (c 68) (UK) ("Fugitive Offenders Act 1967") of which s 3(1)(c) is *in pari materia* to the definition of "extradition crime" in s 2 of the Extradition Act 2000 and of particular relevance to the present case. Under the Fugitive Offenders Act 1967, a "relevant offence" for which extradition may be granted is one that falls within any of the descriptions set out in Schedule 1 to the Fugitive Offenders Act 1967 and is punishable for a term of 12 months or more (in the case of a Commonwealth country, under s 3(1)(a) of the Fugitive Offenders Act 1967), and for which "the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom ..." (s 3(1)(c) of the Fugitive Offenders Act 1967). The issue was whether the phrase "the act or omission constituting the offence" is more consistent with the "ingredients test" (*ie*, that the ingredients of the foreign offence disclosed in the charge must establish guilt of a corresponding local offence) or the "conduct test" (*ie*, that the totality of evidence relied upon to prove the charge would, if accepted, establish guilt of a corresponding local offence) (*Aronson* at 589). The majority preferred the "ingredients test". Lord Bridge of Harwich, who was in the majority, explained (at 589–590):

> The issue arises when the Commonwealth offence may be established by particularising and proving ingredients A, B and C, but the nearest corresponding United Kingdom offence requires that the prosecution prove ingredients A, B, C and D. It is submitted for the Government of Canada and the Governor of Her Majesty's Prison at Pentonville ("the appellants") that if, in a particular case, the evidence relied on to prove the Commonwealth offence would be sufficient, if accepted, to establish ingredient D in addition to ingredients A, B and C, this is sufficient to satisfy the requirements of section 3(1)(*c*). ... I do not think the language of the statute fairly

> admits of the wide construction. The short answer is that neither the additional ingredient nor the evidence which is said to establish that ingredient forms any part of the material "constituting" the Commonwealth offence. But, if the language is ambiguous, the narrow construction is to be preferred in a criminal statute as the construction more favourable to the liberty of the subject.

Lord Lowry took a similar view, commenting at 608–609 that:

> ... "the offence" in the phrase "the act or omission constituting the offence" must be the offence (in the case of a designated Commonwealth country) mentioned in [s 3(1)(a) of the Fugitive Offenders Act 1967], that is the offence of which the fugitive is accused in that country. ... The "act or omission constituting the offence" cannot in my opinion mean "the conduct, as proved by evidence, on which the charge is grounded," because the evidence of such conduct could prove something more than what has been charged. In such a case the conduct proved would not be the act or omission constituting the offence of which the fugitive is accused in the Commonwealth country; and that, if I may venture to remind your Lordships, is the "relevant offence," the offence described in section 3(1). ... One may paraphrase the effect of section 3(1)(*c*) by asking: "What is the essence of the Commonwealth offence? And would that be an offence against the law of the United Kingdom?" That is quite a different thing from looking at the course of conduct revealed by the evidence and asking whether that conduct (as distinct from the conduct of which the person is accused) would constitute an offence against the law of the United Kingdom.

The dissent took the view that s 3(1)(c) of the Fugitive Offenders Act 1967 was capable of supporting the "conduct test", and to adopt the "ingredients test" was "to look for exact correspondence between the definition of the crimes in the two countries and no scheme of extradition based on such a premise will ever be workable as has been recognised since the early days of the operation of extradition laws" (Lord Griffiths in *Aronson* at 593).

15 The broader "conduct test" was applied in *In re Nielsen* [1984] 1 AC 606 ("*In re Nielsen*") (affirmed in *Government of the United States of America and others v McCaffery* [1984] 1 WLR 867 at 869 ("*McCaffery*")) in the House of Lords' consideration of s 10 of the Extradition Act 1870. Section 10 of the Extradition Act 1870 provided that "[i]n the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged" and further defined "extradition crime" in s 26 as "a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule of this Act". Lord Diplock held that the committing magistrate's task was simply to decide whether the evidence produced by the requesting state would "justify the committal for trial of the accused for an offence that is described in the 1870 list (as added to or amended by subsequent Extradition Acts) provided that such offence is also included in the extraditable crimes listed in the English language version of the extradition treaty". The House of Lords held that in cases concerning the extradition of a person accused of an "extradition crime" (as opposed to a person convicted of an "extradition crime"), the magistrate did not have the jurisdiction under s 10 of the Extradition Act 1870 to receive evidence on foreign law as to determine whether the foreign offence was similar in concept to the English offence. Only English law should be applied to the evidence in deciding whether guilt would have been established had the conduct taken place in England (*In re Nielsen* at 623–625, doubting the comparative exercise taken in *In re Arton* in this respect). In Lord Diplock's view, whether it was proper to consider the criminal law of a foreign state would depend on

the wording of the provision relied upon. Foreign law would have to be considered in cases where extradition is limited to crimes of a particular kind or cases concerning extradition of convicted persons (*In re Nielsen* at 621).

16 It has been said that the s 3(1)(c) of the Fugitive Offenders Act 1967 (which is *in pari materia* to the definition of "extradition crime" in the Extradition Act 2000) requires a stricter standard of double criminality as compared to the Extradition Act 1870, and the "ingredients test" should thus be adopted. Lord Bridge of Harwich in *Aronson* held that the approach *In re Nielsen* only applied to the Extradition Act 1870 and should not be followed when considering provisions under the Fugitive Offenders Act 1967 (*Aronson* at 590):

> The basic fallacy in the appellants' argument, as set out in paragraphs 1 to 5 under the heading "Question 1" in their written case, lies in the attempt to assimilate the requirements of the Act of 1967 to the requirements of the Extradition Act 1870 (33 & 34 Vict. c. 52). The attempt fails because the structure and machinery of the two Acts are entirely disparate. An "extradition crime" under the Act of 1870 is one of the specific English crimes set out in the "List of Crimes" in Schedule 1. The introductory paragraph reads:
>
> > "The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act: . . ."
>
> Nowhere in the Act of 1870 is there any provision which has the effect of imposing a double-criminality rule, though such a rule may be introduced into the extradition machinery by the provisions of particular treaties. By contrast, Schedule 1 to the Act of 1967 sets out a list of returnable offences described in broad categories and reproducing in terms the list found in Annex 1 to the Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth (1966) (Cmnd. 3008) agreed between Commonwealth Law Ministers in 1966. Legislating to give effect to the Scheme, it was necessary to provide that a returnable offence should both fall within one of those broad categories and satisfy the "double-criminality rule" laid down in clause 10 of the Scheme.

The view that s 3(1)(c) of the Fugitive Offenders Act 1967 has a stricter meaning of double criminality than s 10 of the Extradition Act 1870 is not exceptional. In *Jones and Doobay on Extradition and Mutual Assistance* (Sweet & Maxwell, 3rd Ed, 2005) at para 1-033, the learned authors observed that the Fugitive Offenders Act 1967 adopted an "unusual and tight application of the double criminality rule" which focused on correspondence between the elements of the offence alleged to have been committed in the requesting state and the requested state. This was possibly due to the emphasis on reciprocity expressed in the Scheme for the Rendition of Fugitive Offenders within the Commonwealth (Cmnd 3008, 1966) (see also Lord Lowry's view in *Aronson* at 605), on which the Extradition Act 2000 and its predecessor was modelled after (see the Explanatory Statement to the Extradition Bill (Bill 16 of 1968)). I should however point out that Lord Bridge of Harwich's comment that the Extradition Act 1870 does not accommodate a double criminality principle may not be accurate. The approach in *In re Nielsen* is one form of the double criminality principle.

17 It seems to me that the distinction in the phraseology of the Extradition Act 1870 and the Fugitive Offenders Act 1967 alone does not favour one test over the other. The Law Lords in *Aronson* themselves differed in their views on the interpretation of the phrase "the act or omission constituting the offence". The Privy Council in *Werner Kurt Rey v Government of Switzerland and another* [1999] 1 AC 54 ("*Werner Kurt Rey*") in construing s 5(1) of the Extradition Act 1994 (No 8 of 1994) of The Bahamas ("The Bahamas Extradition Act 1994") preferred the view of the dissent in *Aronson*. While

the Privy Council accepted that s 5(1)(b)(ii) of The Bahamas Extradition Act 1994 was identical to s 3 of the Fugitive Offenders Act 1967, they emphasised that the search was for "the best contextual interpretation of the critical words" given that the words were contained in a differently worded statute (*Werner Kurt Rey* at 64). The wording of s 5(1)(b)(ii) could support the "ingredients test" as well as the "conduct test". However, in the Privy Council's view, the meaning in the light of the wording of the other provisions in The Bahamas Extradition Act 1994 leaned in favour of the latter. Among the reasons in favour of the "conduct test" was that "[t]he two supplementary subsections which follow upon section 5(1), viz. 5(2) and 5(3), respectively speak of an 'offence constituted by an *act*' and an 'offence…constituted by *acts*'." Section 8(2) of The Bahamas Extradition Act 1994 also required the particulars and facts supporting the extradition offence of which the fugitive was accused to be furnished. The Privy Council was of the view that there were features in the Fugitive Offenders Act 1967 that were material to the majority's decision in *Aronson*, and these features were not present in The Bahamas Extradition Act 1994 (*Werner Kurt Rey* at 65). The majority in *Aronson* had "attached importance to the provisions of s 3(2) of the Fugitive Offenders Act 1967", a provision *in pari materia* to limb (b) of the definition of "extradition crime" in the Extradition Act 2000. Section 3(2) of the Fugitive Offenders Act 1967 was not present in The Bahamas Extradition Act 1994. Section 3(2) of the Fugitive Offenders Act 1967 is, with respect, unclear on the issue of whether the "ingredients test" or "conduct test" should be adopted. Lord Griffiths in *Aronson* (at 593) in dissent found that s 3(2) of the Fugitive Offenders Act 1967 supported a reading of "broad similarity, not exact correspondence, of offence". Furthermore, even where the definition of "extradition crime" in relation to countries like the US expressly referred to "conduct which constitutes an extradition offence" in s 137 of the Extradition Act 2003 (c 41) (UK), the House of Lords in *Norris v Government of the United States of America* [2008] 1 AC 920 ("*Norris*") held that such language was on its face consistent with either approach ([87]–[88]):

> 87 The language of section 137 is in our opinion consistent with either test. Whether the conduct consists solely of those acts or omissions necessary to establish the foreign offence, or the accused's conduct as it may have been more widely described in the request, both the foreign offence and the corresponding English offence would still be "constituted" by it (as required respectively by section 137(1)(a) and 137(2)(b)). Which construction, therefore, should it be given?
>
> 88 As noted in para 70 above, [in contrast to what was observed by Lord Bridge of Harwich in *Aronson*] really nothing "startling" follows from adopting the wider construction. On the contrary, it accords entirely with the underlying rationale of the double criminality rule: that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state—the position of the notional co-accused [against whom ingredient D was made out on the evidence] contemplated in Lord Bridge's illustration and, indeed, the position of Mr Norris himself, as we would hold.

18 I am of the view that the definition of "extradition crime" in s 2 of the Extradition Act 2000 read with Article 9 of the Singapore-US Treaty is capable of being interpreted using either approach. The DJ adopted the "conduct test". The question ultimately is which approach would be more justifiable in balancing the interests of the individual without unduly frustrating the purpose of extradition treaties. Given that the content of double criminality has no fixed meaning, both the "ingredients test" and the "conduct test" can be adopted from a jurisprudential point of view. Nonetheless, policy and practical considerations lean in favour of the "conduct test". Courts in favour of the "conduct test" generally advance four reasons in support: (1) that the "ingredients test" leads to the unenviable problem of the committing magistrate having to hear and make findings on issues of foreign law since that the elements of the foreign offence have to be examined; (2) the "ingredients test" frustrates extradition because the definition of crimes in various jurisdictions differ and it is not possible in most cases to

find exact correspondence between the two; (3) the "conduct test" is becoming the preferred test in other jurisdictions; (4) the "conduct test" is consistent with the double criminality rule because the accused's conduct would still make out a recognised offence in the requested state on the evidence put forth by the requesting state (see *Norris* at [88]–[90] and *Werner Kurt Rey* at 64–65). For these reasons, I am also in favour of the "conduct test".

19 I now turn to examine whether the Applicants' conduct would, if it had taken place in Singapore, constitute an offence punishable in Singapore. The State has argued that the equivalent offence for which the Singapore court must determine has been made out on the evidence is abetment by conspiracy to cheat under s 415 read with s 109 of the Penal Code. Sections 107, 109 and 417 of the Penal Code provide as follows:

> **Abetment of the doing of a thing**
>
> **107.** A person abets the doing of a thing who –
>
> ...
>
> (*b*) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or...
>
> **Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment**
>
> **109**. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
>
> *Explanation*.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.
>
> ...
>
> **Cheating**
>
> **415**. Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to "cheat".
>
> *Explanation* 1.—A dishonest concealment of facts is a deception within the meaning of this section.
>
> *Explanation* 2.—Mere breach of contract is not of itself proof of an original fraudulent intent.
>
> *Explanation* 3.—Whoever makes a representation through any agent is to be treated as having made the representation himself.

...

As I mentioned (at [13]), the central issue in the application of the "conduct test" is whether the allegations of fact, as transposed, would make out an offence under Singapore law (see generally, *Regina v Governor of Pentonville Prison, ex parte Tarling* (1978) 70 Cr App R 77 at 136 affirmed in *ex parte Osman*). Transposition must be applied sensibly, as emphasised by Lord Millet in *Al-Fawwaz* at [109]:

> For my own part, and subject to one point which I will mention in a moment, I think that this is the correct way to effect the transposition. The principle at work is mutatis mutandis. Given that the court is concerned with an extradition case, the crime will not have been committed in England but (normally) in the requesting state. So the test is applied by substituting England for the requesting state wherever the name of the requesting state appears in the indictment. But no more should be changed than is necessary to give effect to the fact that the court is dealing with an extradition case and not a domestic one. The word 'mutandis' is an essential element in the concept; the court should not hypothesise more than necessary.

In *Al-Fawwaz*, the US requested the extradition of the applicant, an alleged member of an Islamic terrorist organisation, for conspiracy to murder American citizens, officials, diplomats and others to whom the Internationally Protected Persons Act 1978 applied in the US and abroad. Lord Millet was of the view that the appropriate transposition of the facts would require the English courts to consider whether a conspiracy to murder British subjects would be punishable in England (at [110]):

> The one point to which I would draw attention is that it is not sufficient to substitute England for the territory of the requesting state wherever that is mentioned in the indictment. It is necessary to effect an appropriate substitution for every circumstance connected with the requesting state on which the jurisdiction is founded. In the present case the applicants are accused, not merely of conspiring to murder persons abroad (who happen to be Americans), but of conspiring to murder persons unknown because they were Americans. In political terms, what is alleged is a conspiracy entered into abroad to wage war on the United States by killing its citizens, including its diplomats and other internationally protected persons, at home and abroad. Translating this into legal terms and transposing it for the purpose of seeing whether such conduct would constitute a crime 'in England or within English jurisdiction', the charges must be considered as if they alleged a conspiracy entered into abroad to kill British subjects, including internationally protected persons, at home or abroad.

Transposition requires that the Applicants' conduct as set out in the extradition request must be properly characterised and transposed before it can be determined whether the conduct would constitute an offence in Singapore. The House of Lords in *Norris* emphasized the importance of a proper transposition of the facts in determining whether the double criminality requirement is satisfied. In *Norris*, the US sought the extradition of the applicant, alleging that he and his co-conspirators organised meetings in which they agreed to charge prices for carbon products to certain levels or maintain or increase the prices of these products in the US and elsewhere. The applicant successfully argued on appeal to the House of Lords that he could not be extradited on the count of conspiracy to defraud buyers of carbon products by dishonestly entering into an agreement to fix, maintain and co-ordinate the price for the supply of carbon products in the US. The Divisional Court had accepted the argument that a price fixing arrangement could amount to common law conspiracy to defraud where the arrangement was kept secret to deceive customers into believing that they were paying a market price. The customers were misled into paying higher prices than they would have for the products. By ordinary standards of reasonable and honest people, this would be regarded as dishonesty (*Norris v Government of the United States of America and others (Goldshield Group plc and another*

intervening) [2007] 1 WLR 1730 at [64]–[68]). The Law Lords disagreed with the Divisional Court's view. The Law Lords found that there was no common law offence or statutory offence of price fixing in the UK during the relevant period where the acts were committed. The mere making or operating of a secret price fixing agreement did not, without more, amount to dishonesty and hence to a criminal offence. The House of Lords rejected the proposition that mere secret participation in a cartel could give rise to a conspiracy to defraud (at [63]):

> ... Mr Norris's appeal with regard to [count of conspiracy to defraud by entering into a price fixing arrangement] falls to be allowed on the elementary basis that the conduct of which he is accused — mere undeclared participation in a cartel — was not at the material time, in the absence of aggravating features, a criminal offence in this country either at common law or under statute. It was therefore wrong to have characterised his conduct as being party to a conspiracy to defraud although it would have been otherwise had the allegation been, for example, that he and his co-conspirators, having entered into a price fixing agreement, agreed in addition to deceive their customers by making false representations to the contrary. That certainly would have been an aggravating feature. But no such conduct is alleged here. It is true that Ms McClain has deposed that the conspirators "[i]n effect … defrauded their customers by requiring that they pay higher prices than they might otherwise have paid had there been no conspiracy". But that is no more than to assert an intrinsic unlawfulness and dishonesty merely in taking part in a secret cartel and under English law, until the enactment of section 188 of the Enterprise Act 2002, that was simply not so.

20 The Law Lords, however, came to a contrary conclusion on the other counts relating to forms of obstruction of justice in the criminal investigation into price fixing in the carbon products industry conducted by the grand jury in the Eastern District of Pennsylvania. The applicant argued that it was not an offence under English law to conspire in England to obstruct criminal investigation into price fixing by the grand jury in Pennsylvania. This argument was rejected. The House of Lords endorsed the approach by Duff J in the Canadian case of *In re Collins (No 3)* (1905) 10 CCC 80 ("*In re Collins*"). In that case, the extradition request was for a charge of perjury by wilfully making a false statement of fact in an affidavit used in Californian proceedings. It was argued that that was not an extradition crime because it was not a crime in Canada to make a false statement of fact before a Californian court. Duff J held that this was not the correct approach because one should not focus on "the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts" (at [50]), and it would be necessary to "transplant" the environment which "include[s], so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law providing the definition of the crime which is charged" (at [53]). The House of Lords in *Norris* thus held at [100] that:

> ... While price fixing in itself is not an offence under English law, Mr Norris accepts that, when combined with other elements such as deliberate misrepresentation, it can lead to various offences such as fraud or conspiracy to defraud. What the exact outcome of any investigation will be cannot be determined when it is in progress. Destroying documents to prevent them falling into the hands of the investigators may well affect the outcome of that investigation and is, indeed, intended to do so. So the mere fact that the result of the investigation in Mr Norris's case was a charge of simple price fixing, which does not constitute an offence under English law, is no reason to hold that it would not have been an offence under English law to obstruct the progress of an equivalent investigation by the appropriate body in this country.

The views expressed in *Norris* on the issue of transposition are pertinent to the present case. A correct characterisation and transposition of the facts, institutions, laws and circumstances are

crucial for determining whether there is double criminality. I turn now to the conduct set out in Count One and Count Eight of the Superseding Indictment. I will deal with Count Eight first as the facts are more straightforward and because the issue of extraterritoriality discussed with respect to Count Eight will be relevant to Count One as well.

21 The US has alleged that Seng and Hia were engaged in a conspiracy with US persons to cause antennae manufactured by Company B (specifically, "2010-1 antennae" and "3120 antennae", henceforth collectively termed as "antennae") to be exported out of the US without a licence. This violated export regulations in the US. The Arms Export Control Act 22 USC § 2778 ("AECA") in the US regulates and restricts the sale of arms, munitions, implements of war and "defense articles". The Defense Directorate of Trade Controls ("DDTC") of the US Department of State promulgates the International Traffic in Arms Regulations 22 CFR Parts 120-130 ("ITAR"), pursuant to authority granted under the AECA. The ITAR governs the export of "defense articles" and contains the United States Munitions List ("USML") under 22 CFR Part 121.1. A person who wants to export "defense articles" must obtain a licence or prior approval from the DDTC. The 2010-1 antennae and 3120 antennae are classified as "defense articles" under ITAR and can only be exported with a licence. As is the case with shipment of most goods out of the US, documents including a Shipper's Export Declaration ("SED") must also be filed. It is unlawful under US law to use any "export control document" (such as invoices, declarations of destinations, SEDs, bills of lading, and airway bills) containing a false statement or misrepresenting or omitting a material fact to export "defense articles".

22 Seng was a senior procurement executive in BBS Electronics Pte Ltd ("BBS") at the time the alleged acts were committed. BBS provided "distribution solutions for users of electronic components". Hia was the owner of one of BBS's main suppliers. Hia and Seng set up Corezing International Pte Ltd ("Corezing") to earn additional income on the side. According to Seng, at that time, Corezing already had offices in Hong Kong, China and Taiwan, and the sales persons in these offices would send him requests for quotations on behalf of their customers. To avoid getting into trouble for moonlighting, Seng and Hia used aliases when transacting on behalf of Corezing. Seng claimed that he was informed by a sales person in one of Corezing's overseas offices that a customer wanted quotations for the antennae. Seng sent an email to Company B on 22 September 2006 under the alias "James Wong" asking for quotes for antennae with model numbers "3120" and "3080". On the same day, Company B replied stating that the 3120 model would cost US$1750 per unit and 3080 model would cost US$4200 per unit, and that the export of these products would require an export licence and declaration of end-user information. Seng did not respond. In early November 2006, Seng, under another alias, "Eric Lim", contacted Company B for 2010-1 antennae and 3080 antennae (though I should point out that no evidence of such an email was exhibited in the supporting affidavits for Count Eight). Company B informed Seng that the antennae were "export controlled" and that an end-user statement was required for export. Seng again did not respond. In November 2005, one Individual B (an employee of Company B) allegedly told one Cooperator C (who was himself a former employee of Company B) that Company B "refused a sale" to an "Eric Lim" for failure to provide end-user information. Cooperator C was then operating Company C in Massachusetts in the US and saw this as a "sales lead". Cooperator C and Individual B "devised a plan to make the sale and evade export regulations". Cooperator C requested for a quote for the same items ordered by "Eric Lim" but changed the specifications to avoid alerting Company B that this was a repeat order from "Eric Lim". Cooperator C then contacted "Eric Lim" on 5 November 2006 and offered to broker a deal with Company B. The transaction was however not completed. On 15 February 2007, Seng sent an email as "James" to Cooperator C requesting for quotation for 50 units of 2010-1 antennae. The order was later changed to 50 units of 2010-1 antennae and 5 units of 3120 antennae. Cooperator C in turn requested a quote from Company B for antennae with the same specifications as a 2010-1 antenna except for a frequency range different from the 2010-1 antenna's stock frequency range. He also requested a quote from

Company B for antennae with the same specifications as a 3120 antenna except for a frequency range different from the 3120 antenna's stock frequency range. On 1 June 2007, Cooperator C sent an invoice to Corezing for the sale of the 2010-1 antennae and 3120 antennae amounting to a total of US$81,950.00. Corezing paid a 10% deposit to Cooperator C on 5 June 2007. The goods were then shipped to Corezing in five batches between 25 July 2007 and 24 September 2007, and eventually shipped to Hong Kong. Between the time of payment and shipment, Hia under the alias of "Thomas" sent an email dated 9 July 2007 to Cooperator C stating "[p]ls help me to put in yr Invoice for Export as USD 40" for the antennae. The airway bill for the shipment of 25 July 2012 stated that the value of the shipment was US$40. The US alleged that for all five shipments, the actual value of the goods was different from the value stated on the airway bills. Cooperator C claimed that Hia under the alias "Thomas" requested that Cooperator C undervalue the antennae to avoid the need to file an SED, and to prepare false airway bills and invoices for the shipments. Hia on the other hand claimed that Cooperator C had asked him to propose figures for the invoices for the antennae. He was not aware that licences were required to export the antennae and was not involved in negotiations for the transaction between Seng and Cooperator C. Cooperator C has been indicted and has pleaded guilty in the US to conspiring to violate the AECA and the ITAR, and he filed an affidavit in support of the allegations in Count Eight.

23 The Superseding Indictment stated that the "object" of the conspiracy in Count Eight was to make money and obtain property by procuring 2010-1 antennae and 3120 antennae from Company B in violation of United States export regulations. It was alleged that Seng knew that the 2010-1 antennae and 3120 antennae required a licence for export. The US accused Cooperator C, Seng and Hia of conspiring to order 2010-1 antennae and 3120 antennae at a frequency range different from the stock frequency range so that Company B would not recognise the orders as a repeat of Seng's previous orders and would not require an export licence and end-user declarations to be made. The US relies on companies to report violations and ensure compliance with US laws on trade in "defense articles". The US also alleged that Hia had instructed Cooperator C to undervalue the antennae to circumvent the requirement for the filing of SEDs, "thus functioning to prevent detection [that these were defense articles] by US customs and law enforcement". SEDs do not need to be filed for shipments of value below US$2,500. The essence of the conduct alleged to be unlawful is that of engaging in a conspiracy to breach regulations requiring a licence to be obtained for the export of controlled goods. The manner in which the antennae were ordered and obtained from Company B and the falsification of the shipment value on the airway bills took the form of overt acts done in furtherance of the object of the conspiracy. The complaint was that these overt acts prevented the US law enforcement agencies and Company B from detecting that the antennae were "defense articles" to be exported out of the US and requiring a licence to be obtained for export.

24 It was not disputed that an abetment by conspiracy to have controlled goods exported without a licence would be punishable in Singapore. There are regulations in Singapore governing the export of goods that can be used for military purposes including the Strategic Goods (Control) Act (Cap 300, 2003 Rev Ed) ("Strategic Goods (Control) Act") (see for example, ss 5 and 7). The main argument advanced by Mr Haq was based on extraterritoriality, namely, that the acts allegedly committed by Seng and Hia took place entirely outside the US and the Singapore courts would not have jurisdiction to try acts of abetment occurring outside Singapore. Section 109 of the Penal Code did not have extraterritorial application until s 108B of the Penal Code came into force with effect from 1 February 2008. Criminal jurisdiction has traditionally been confined to the territory of the state. The Court of Appeal in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 ("*Taw Cheng Kong*") held that there was a presumption against the extraterritorial application of legislation (in absence of express words to the contrary) as a matter of comity and in observance of the sovereignty of other nations (at [66]–[69]). A strict application of the territorial principle would exclude jurisdiction over acts that occur partly or entirely outside the territory, notwithstanding that the effect of those acts

was felt in the territory. Modern conceptions of the territorial principle have been adopted in other jurisdictions to deal with the difficulties that arise from adopting a strict territorial approach, such as problems identifying the place where the act or offence was committed (see generally, M Sornarajah, "Extraterritorial Jurisdiction Over crimes in Singapore, Malaysia and The Commonwealth" (1987) 29 Mal Law Rev 201 at 208; Sir Robert Jennings QC and Sir Arthur Watts QC (gen eds), *Oppenheim's International Law: Volume 1, PEACE, Introduction and Part 1* (Longman Group UK Limited, 9th Ed, 1992). For example, the English courts have recognised the applicability of both the subjective territorial principle (*ie* that jurisdiction can be assumed if an offence had been initiated in the territory but was completed outside the territory) and the objective territorial principle (*ie* that jurisdiction can be assumed if an offence had been initiated outside the territory but was completed within the territory). Another way courts have dealt with the problem of double criminality is by deeming that an act that begins or occurs outside the territory of the requested state but which is completed within the territory of the requested state is justiciable by the courts in the requested state (*ie*, "the continuing act" doctrine). The English courts have extended the territorial principle in order to assume jurisdiction, even if every element of the crime was committed abroad, if the "effects" of the crime were felt in England – such as in the case of a conspiracy entered into wholly abroad but the object of which was to commit an offence in England (see *Somchai Liangsiriprasert v Government of the United States of America and Another* [1991] 1 AC 225 ("*Somchai Liangsiriprasert*")). Whatever the approach, it is clear that in jurisdictions like the UK and Canada, the territorial principle is increasingly being abandoned. Singapore on the other hand continues to adopt a strict territorial approach for the exercise of criminal jurisdiction. The Court of Appeal in *Taw Cheng Kong* emphasised that any recognition of the "effects" doctrine, for example, must be left in Parliament's hands (at [85]–[88]):

> 85 ... [We] appreciated the learned judge's adoption of "connection" as the basis for his suggestion, in so far as an exclusively territorial approach to penal provisions is not always desirable. Indeed, it has been said to be settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has *consequences within its borders* which the State reprehends: see *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10 at 38-39 and *United States v Aluminum Co of America* (1945) 148 Fed Rep 2d 416.
>
> ...
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> 87 The comments of the Privy Council in *Somchai Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 are also useful here. The board, at 251, stated:
>
> > [I]n this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.
>
> 88 As Singapore becomes increasingly cosmopolitan in the modern age of technology, electronics and communications, it may well be more compelling and effective for Parliament to adopt the effects doctrine as the foundation of our extraterritorial laws in addressing potential mischief. But we must not lose sight that Parliament, in enacting such laws, may be confronted with other practical constraints or considerations which the courts are in no position to deal with. The matter, ultimately, must remain in the hands of Parliament to legislate according to what it

perceives as practicable to meet the needs of our society.

25 Mr Jayaratnam urged me to adopt the position in England where a conspiracy made outside the territory, the object of which was to commit an offence in the territory, is justiciable even if no overt act pursuant to the conspiracy had yet occurred in England. The Privy Council in *Somchai Liangsiriprasert* considered this issue fully for the first time. The accused argued that such a conspiracy was not a common law crime unless either some overt act pursuant to the conspiracy took place in England, or alternatively, unless the impact of the conspiracy was felt in England. The Privy Council rejected this view. Lord Griffiths stated at 251:

> But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.
>
> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.

The Court of Appeal in *Taw Cheng Kong* (at [87]) cited the passage above from *Somchai Liangsiriprasert* but was of the view that such change could only be effected by Parliament. Parliament has chosen to address the lacuna by introducing s 108B into the Penal Code to capture acts of abetment committed overseas of an offence committed in Singapore, and for the abetment provisions to extend to persons "who perpetuate their criminal intentions from afar" (*Singapore Parliamentary Debates*, *Official Report* (22 October 2007) vol 83 at col 2184). Section 108B of the Penal Code would apply to acts of abetment committed on or after 1 February 2008, and states that:

> **Abetment outside Singapore of an offence in Singapore**
>
> **108B**. A person abets an offence within the meaning of this Code who abets an offence committed in Singapore notwithstanding that any or all of the acts constituting the abetment were done outside Singapore.

26 Prior to 1 February 2008, the court would assume jurisdiction only if the acts of abetment by conspiracy had taken place in Singapore. This approach is supported by *Somchai Liangsiriprasert*. The Privy Council's view in *Somchai Liangsiriprasert* that an overt act in pursuance of the conspiracy need not occur in England for the conspiracy to be justiciable in England was made in the context of common law conspiracy, which is not part of our Penal Code. In relation to the charge of doing acts preparatory to trafficking a dangerous drug under s 4(1)(c) of the Dangerous Drugs Ordinance in Hong Kong, the Privy Council in *Somchai Liangsiriprasert* found (at 252) that this provision could not capture the accused person's conduct as it did not have extraterritorial effect. The Privy Council held

that in relation to a criminal statute, there is a strong presumption that it is not intended to have extraterritorial effect in the absence of clear and specific words. Similarly, the law on abetment by conspiracy in Singapore has been codified and it remains that in absence of words to the contrary, the Penal Code provisions are presumed to apply territorially only. Thus, in *Yong Vui Kong v Public Prosecutor* [2012] SGCA 23 ("*Yong Vui Kong*"), the Court of Appeal observed that s 109 of the Penal Code was only intended to criminalise acts of abetment, including abetment by instigation, which had taken place within the jurisdiction of Singapore (and by "jurisdiction", the Court of Appeal presumably meant the "territorial jurisdiction" of Singapore). Yong Vui Kong ("Yong") was convicted of trafficking in 47.27g of diamorphine and was sentenced to suffer death. Chia Choon Leng ("Chia"), Yong's boss and supplier, had allegedly instructed him to deliver some "gifts" to Singapore in return for RM 2,000. This conversation took place in Johor Baru, Malaysia. Yong then brought the drugs into Singapore and was arrested. Chia was later arrested by Malaysian police and handed over to the Central Narcotics Bureau in Singapore. Chia was charged with, *inter alia*, instigating Yong in Johor Baru to transport approximately 1,227.02g (later reduced to 61.36g) of diamorphine from Johor Baru to Singapore. Chia was later given a discharge not amounting to an acquittal. Yong argued that the selective prosecution between him and Chia amounted to a breach of Art 12(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint). The issue was whether Chia by instigating Yong in Johor Baru to transport to drugs to Singapore had committed the offence of abetment under s 12 and 13 of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA"). The court held that, in absence of clear words, a domestic statute has no extraterritorial effect and acts committed outside the jurisdiction are presumed not to constitute an offence under the relevant domestic statute even if they would have amounted to an offence had they been committed in Singapore. Thus s 12 and s 13 of the MDA (which provided for the abetment of MDA offences) would not extend to an abetment that had taken place outside Singapore of an MDA offence to be committed in Singapore. Section 12 of the MDA applied to an abetment within Singapore of an offence committed in Singapore. Section 13(a) of the MDA applied to an abetment within Singapore of an offence to be committed outside Singapore which was punishable under a corresponding law in force in that place", and s 13(b) of the MDA applied only to preparatory acts done within Singapore. Most significantly, the court also observed that s 108B of the Penal Code (which came into force on 1 February 2008) could have applied to Chia's abetment by instigation but for the fact that Chia's instigation of Yong took place before 1 February 2008 (*Yong Vui Kong* at [46]). Chia could not be prosecuted because all the alleged acts of instigation had taken place outside Singapore before 1 February 2008. Mr Jayaratnam argued that *Yong Vui Kong* could be distinguished because the Court of Appeal was only considering abetment by instigation and not abetment by conspiracy. Although the comments were made in the context of abetment by instigation rather than abetment by conspiracy, the Court of Appeal did not confine its observations to abetment by instigation. In addition, s 108B of the Penal Code is framed in broad terms and is clearly intended to address the lacuna for all acts of abetment occurring outside Singapore, including abetment by conspiracy. This view is also supported by the Parliamentary debates pertaining to the inclusion of s 108B into the Penal Code in which no distinction was drawn between abetment by conspiracy and other types of abetment (*Singapore Parliamentary Debates, Official Report (22 October 2007) vol 83 at col 2184 (Assoc Prof Ho Peng Kee, Senior Minister of State for Home Affairs)):*

> ***New section 108B (Abetment outside Singapore of an offence in Singapore)***
>
> Currently, our laws provide for the punishment of a person who, whilst in Singapore, abets the commission of an offence overseas. However, the reverse situation is not provided for in the Code. Thus a person who abets, whilst overseas, an offence which is committed in Singapore is not liable as an abettor. This does not make sense as harm is done to Singapore when the offence is committed here! Also with advances in modern technology, it has become easier to abet offences in Singapore, whilst physically overseas.

> This amendment will make it easier for our law enforcers to tackle crime more holistically by also targeting those who perpetuate their criminal intentions from afar. In this way, those who plan robberies or murders here, or send drugs from overseas to Singapore, or plan terrorist attacks here will be subject to this provision. ...

27 I will deal briefly with a few other arguments made by Mr Jayaratnam regarding jurisdiction over acts of abetment by conspiracy that occur outside Singapore. Counsel relied on *Son Kaewsa* to argue that Seng and Hia's acts would be captured by s 109 of the Penal Code. Two of the applicants in *Son Kaewsa* were charged with, *inter alia*, conspiracy to import heroin into the US, while the third, for knowingly and intentionally distributing more than 1kg of heroin in the US. The acts alleged against them had taken place in Singapore, Hong Kong and Bangkok and did not occur within the territory of the US. The applicants argued that their acts were not capable of constituting an extraditable crime. The High Court rejected the argument, and held that "[e]ven conspiracies to commit offences under [the Misuse of Drugs Act] Cap 185 which take place outside Singapore are within the jurisdiction of Singapore: see s 13". The High Court in *Public Prosecutor v Abdul Rashid and others* [1993] 2 SLR(R) 848 ("*Abdul Rashid*") cited the "continuing act" doctrine in response to the argument that the Singapore courts had no jurisdiction over an abetment that occurred in Malaysia. In *Abdul Rashid* however, the court was of the view that the accused's physical presence when he subsequently travelled to Singapore after abetting his co-accused in Malaysia to "smuggle" the goods into Singapore "neutralised counsel's submission on the issue of jurisdiction". It would suffice to state that *Son Kaewsa* and *Abdul Rashid* must be read in the light of the observations in *Yong Vui Kong* on the construction of s 13 of the MDA and the issue of extraterritoriality. Mr Jayaratnam also argued that since the acts done by Cooperator C had taken place within US territory, this was sufficient to render Seng and Hia triable for abetment by conspiracy in Singapore had the facts been transposed. Counsel's argument cannot be correct in view of *Yong Vui Kong*. Chia's acts were not deemed to be criminally punishable in Singapore, notwithstanding that the offence was carried out by Yong in Singapore.

28 A pertinent question that arises on the facts is whether Seng and Hia's acts of abetment were indeed committed outside Singapore. The communications between Seng, Hia and Cooperator C in relation to the purchase of the antennae took place largely by email. These emails are presumably relied upon to show that Seng and Hia engaged Cooperator C in a conspiracy to have the antennae exported without a licence and were the "acts" of abetment. An email from Cooperator C dated 5 November 2006 to "Eric Lim" (*ie* Seng) stated that:

> ... I heard that you have a need for some [Company B] antenna products, P/N 3080 and 2010-1. I can help you get these parts from [Company B], by buying from them and selling to you. I currently buy several antennas and filters from [Company B], they know me, like dealing with me, and trust me.
>
> Please let me know if you would be interested in doing business with me and would like me to quote you these items. If so, please advise the quantity you need at this time.

Negotiations between "Eric Lim" and Cooperator C were not conclusive. Subsequently, Seng under the alias of "James" sent an email dated 15 February 2007 to Cooperator C stating that:

> ... We got your contact from our supplier pertaining to Antennas offer. Could you update us the your (sic) latest price and delivery information for the 2010-1 Antennas of 50 pcs. We can accept 10% cash in advance and payment balance before shipment.

"James" then sent an email to Cooperator C on 16 February 2007 requesting that a "proforma invoice

for 2010-1 [antennae] for 50 pcs" be issued and:

> Not to worried, we know [Company B] and we have been communicated them before. We know them for many years. Due to export regulation, we are unable to purchase those parts from them.

The issue is whether email sent from a person located outside Singapore to a person in Singapore as a means to engage the latter in a conspiracy can be said to be acts of abetment by conspiracy that took place in Singapore. The English courts incline to the view that such acts would have been committed within the jurisdiction of England. In *Regina v Baxter* [1972] 1 QB 1, the defendant had been charged with three offences of attempting to obtain property by deception. He had sent a letter posted in Northern Ireland to Liverpool football pools promoters, falsely representing that he had made accurate forecasts and was entitled to receive a winning dividend. The defendant argued that the English court had no jurisdiction to try him as the attempt was complete when the letters were posted in Northern Ireland and no criminal act had been committed in England. While the English Court of Appeal discussed and rejected this argument in the context of the offence of attempt, the following pronouncements are helpful (at 12):

> ... It matters not whether on any particular set of facts the attempt is best described as a continuing offence (as where a time bomb set to explode at a given hour in this country is being sent by rail) or as a series of offences (as where there are series of blows on a cold chisel to force a door open). ... The position is no different if what is being transmitted is a letter and the moment when its contents come to light occurs on the premises where it is meant to produce the intended result, an obtaining by deception of money from someone within the jurisdiction. The attempt has occurred within the jurisdiction. ...
>
> ...
>
> Thus in *Reg. v. Rogers* [1877] 3 Q.B.D. 28 , a venue case where the charge was embezzlement, Field J. said, at p. 34:
>
> > "A letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of the firing of a shot, or the throwing of a spear. If a shot is fired, or a spear thrown, from a place outside the boundary of a county into another county with intent to injure a person in that county, the offence is committed in the county within which the blow is given."
>
> Again in *Rex v. Oliphant* [1905] 2 K.B. 67, 72 there occurs in the judgment of Lord Alverstone C.J. a relevant passage:
>
> > "I am unable to draw any distinction between sending information by post or by telephone and giving the same information by direct personal communication in London."

The cases of *Rex v Rogers* [1877] 3 QBD and *Rex v Oliphant* [1905] 2 KB 67 were cited with approval in the context of abetment by conspiracy under the Penal Code (Act No 45 of 1860) (India) in *Emperor v Chhotalal Babar* (1912) 14 BOMLR 147. I would prefer not to draw esoteric distinctions between different modes of communication. It seems artificial to regard an act of abetment as having been committed in Singapore only if the communications had taken place during a physical meeting in Singapore, as opposed to a phone call, email or letter from an abettor overseas to a person in Singapore. I am of the view that acts of abetment in the form of email correspondence sent to and received by a person in Singapore can be construed as having been committed within the territorial jurisdiction of Singapore. The position may be different if the email was not received by Cooperator C

due to some technical default, for example. Cooperator C would not have been aware of the request for quotations for the antennae and Seng and Hia could not have engaged him in a conspiracy. Communication would have to be made to Cooperator C for there to be a "meeting of minds" on the facts of this case. In my view, if the allegations of fact were transposed, Seng and Hia's acts of abetment would be justiciable in Singapore.

29 In respect of Count One, the US has accused Wong and Nam of conspiring with Larijani, Paya Electronics Complex ("Paya Electronics"), Opto Electronics Pte Ltd ("Opto Electronics"), NEL Electronics Pte Ltd ("NEL"), Corezing, Seng and Hia to defraud the US "by impeding, impairing, obstructing, and defeating the lawful function of [the US] in administering its export laws and regulations by exporting approximately 6,000 modules from Company A in the State of Minnesota by dishonest means". The Company A modules were shipped from US to Singapore, and then to Iran. The US has imposed sanctions against the export of goods, technology and services from the US or by a US person (wherever located) to Iran since 15 March 1995. The International Emergency Economic Powers Act 50 USC §§ 1701–1706 authorises the President of the US to impose economic restrictions on a foreign country in response to an unusual or extraordinary threat to the national security, foreign policy, or economy of the United States. On 15 March 1995, President William Jefferson Clinton issued Executive Order No 12957 which stated that "the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" and declared it "a national emergency to deal with that threat". Executive Order No 12957 was expanded and continued by Executive Order Nos 12959 and 13059) ("the Executive Orders"). The Executive Orders were given effect to by the Iranian Transaction Regulations 31 CFR Part 560 ("ITR"). The export of goods from the US or by a US person (wherever located) to Iran is prohibited without prior authorisation or licence from the US Department of the Treasury. The ITR also prohibits transactions by any US person or person within the US that evades or avoids or has the purpose of evading or avoiding these prohibitions. SEDs must also be filed for the export of US goods and technology. Exporters, shippers and freight forwarders are also required to complete Bureau of Industry and Security Form 711 ("BIS Form 711") setting out the identity of end-users and intended end-use of US-origin goods that are exported to other countries. The identity of the end-user may determine whether the goods may be exported at all, and whether specific authorisation from the US government is required for export. Exporters are required to declare on the BIS Form 711 that the "facts contained in this statement are true and correct" and are warned that "the making of any false statement or concealment of any material fact... may result in imprisonment or fine, or both".

30 I now turn to the acts and relationships of the persons involved in Count One. Opto is a Singapore company in the business of importing, exporting and distributing electronic parts. Wong has been working as a secretary in Opto since 1996. Her duties involve processing orders for goods from Larijani. Larijani is the owner and the director of Opto and also Paya, a company operating in Iran. On 20 June 2007, presumably on Larijani's request to source for components, Wong asked for a quotation for 6,000 XT09-SI-NA modules from Company A by email. Wong's request was handled by Individual X and Individual Y from Company A's Hong Kong office. Individual Y responded on the same day with a quote of US$98.45 per module. Wong tried to get a better price. She sent an email on the same day to Individual X stating that "we have a target price of $60" and that her "[c]ustomer advised currently he is using another Brand and... at much cheaper costing". Individual Y informed Wong that "in order to request further discount, we will need your help to have a better understanding on this project" and listed information required including the end-user of the Company A modules, the specifications, the deadline for submitting the quotation and production schedule. Wong replied in an email on 21 June 2007 that the Company A modules were meant for "a local customer in Singapore". On 4 July 2007, Individual Y advised that the best price it could offer was US$93.50, unless Wong provided more details in response to the questions. On 11 July 2007, Wong sent an email to NEL

requesting that they "take over this order" for "[c]onfirmed per USD85/- for 6,000 units of XT09-SI-NA". She also sent NEL Individual X's and Individual Y's contact details. Nam was NEL's operations and sales manager. According to Nam, he was unable to get a good price for the Company A modules after sourcing for prices over the Internet. Nam told Seng about this order, and a few days later, Seng showed him a quotation from Company A's Hong Kong office to BBS for the same modules at US$75 per module. Nam thus requested that Corezing contact Company A for the purchase. Seng, under the alias "James", contacted Company A on 16 July 2007. Seng then formally requested for a quotation for 6,000 XT09-SI-NA modules from Company A through email on 18 July 2007, stating that "[w]e are currently working on RF Digital Radio application that used in a Telecommunication Wirless (sic) LAN network". Seng claimed that these details were provided to him by Nam. Seng and Company A agreed on a price of US$69.30 per module sometime before 9 August 2007. Hia, under the alias of "Thomas", issued a purchase order on behalf of Corezing to Company A's Hong Kong office. On 16 August 2007, Corezing wired about US$14,000 as a deposit to Company A's bank account in the US. The Company A modules, *ie* the 6,000 XT09-SI-NA modules, were exported from the US to Singapore in five shipments from August 2007 to February 2008.

31 The US alleged that there were several "commonalities" in the five shipments that furthered the conspiracy. It alleged that Corezing, NEL and Opto Electronics entered into the series of "business agreements" in which Corezing would sell the Company A modules to NEL at a profit, and NEL would then sell the Company A modules to Opto Electronics at a profit. A representative from NEL would inform Wong of the arrival of the Company A modules in Singapore, and the goods would be sent "port to port" to Opto's freight forwarder. Wong would then arrange for the goods to be flown to Larijani in Iran. The US claimed that Corezing's purchase of the Company A modules was actually "a carefully crafted and structured transaction meant to shelter the true end-user from the knowledge of Company A". The US also alleged that Corezing caused Company A to make false representations to the US government. For each of these shipments, Company A used information provided by Corezing to prepare SEDs for the shipments. The "ultimate consignee" was stated to be "Corezing International", and the "country of ultimate destination", "Singapore". For the final three shipments made between October 2007 to February 2008, Corezing had also completed a BIS Form 711 (known as an end-user statement) stating that the "ultimate consignee" was NEL and that the items would be used for "Telecom Project" which Company A submitted to the US authorities. Company A had requested for the BIS Form 711 after the third shipment was held up in the US for what Company A advised to be "a discrepancy in the reporting of ECCN numbers". Seng informed Company A on 19 November 2007 by email that Corezing was not able to reveal the name of the customer due to a non-disclosure agreement. However, he stated that the issue could be resolved if Company A signed a n undertaking not to approach Corezing's customer. Company A executed the agreement accordingly. The BIS Form 711 were signed under Nam and Seng's names. The US claimed that the Applicants were aware that Company A's modules were US-origin goods, through their correspondence with Company A's representatives and the sales agreements, and that Larijani, Wong and Nam were directly aware of the restrictions on the export of US-origin goods to Iran. The Superseding Indictment referred to two email dated 25 October 2007 and 4 February 2008 in which Nam sent news articles to Larijani on pressure put on the United Arab Emirates by the US government to "crack down on companies believed to be smuggling equipment to Iran to build explosive devices killing American soldiers in Iraq and Afghanistan", and that a Singapore permanent resident had been arrested in the US for exporting US-origin goods to Iran. Special Agent Dean A Scheidler in his affidavit dated 28 September 2010 stated that:

> 42. At no point during any of the transactions described did any of the named defendants inform Company A that these modules were destined for Iran. ...
>
> ...

> 45. At no point... did any of the indicted parties apply for or receive a license or other authorisation from the... United States Department of the Treasury... to export indirectly or direct U.S.-origin commodities from the United States to Iran.

Mr Jayaratnam submitted that the allegations in the Superseding Indictment made out a "*prima facie* case" of abetment by conspiracy to cheat. I am of the view that this characterisation of Count One is far too broad and puts a gloss on the nature of the conduct that the US is seeking to prosecute. The US is seeking Wong and Nam's extradition for their part in a conspiracy to breach US trade sanctions against the export of goods from the US or provided by a US person to Iran via Singapore. The affidavits filed in support of Count One confirmed that Wong and Nam are sought to be extradited for their involvement in the "illegal export of items from the US, through Singapore, with an ultimate destination of the Islamic Republic of Iran". The complaints of the "back-to-back" agreements, declarations on the SEDs that the "ultimate consignee" was NEL and for a telecommunications project in Singapore, and the failure to apply for a licence as required under the ITR were all merely acts in furtherance of what the US was complaining was the illegality – the agreement to violate US trade sanctions on the export of all goods from the US or US persons to Iran.

32 The essence of the criminality in Count One would not give rise to an offence in Singapore. Singapore does not have absolute prohibitions against trade with Iran at the time the acts in Count One were committed. The restrictions adopted in Singapore against the import, export, and re-export of goods to Iran at that time took the form of prohibitions against specified classes of goods, consistent with Singapore's obligations as a member of the United Nations ("UN"). Singapore took steps to implement the UN Security Council Resolution 1737 (2006) (as expanded by Resolution 1747 (adopted on 4 March 2007) and Resolution 1803 (adopted on 3 March 2008)) which imposed sanctions on Iran in relation to the development of its nuclear and missile programme (see also *The "Sahand" and other applications* [2011] 2 SLR 1093 at [25] ("*The "Sahand""*") and United Nations (Sanctions – Iran) Regulations 2007 (S 105/2007)). These resolutions were effected through primary and subsidiary legislation enacted by Parliament, and other orders and circulars adopted by the Singapore Customs (see also *The "Sahand"* at [33]). Regulation 6(2)(d) and the Seventh Schedule of the Regulation of Imports and Exports Regulation (Cap 272A, RG 1), a subsidiary legislation to the Regulation of Imports and Exports Act (Cap 272A, 1996 Rev Ed) ("Regulation of Imports and Exports Act") provided that with effect from 9 February 2007:

> [a]ny item, material, equipment, goods and technology which could contribute to enrichment-related reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems, set out in the following United Nations Security Council documents or parts thereof, which documents are updated from time to time and made available on the Internet through the official United Nations website at http://www.un.org/:
>
> (a) Annex B sections 2, 3, 4, 5, 6 and 7 of INFCIRC/ 254/Rev.8/Part 1 in the documents S/2006/814;
>
> (b) Annex A section 1 and Annex B section 1 of INFCIRC/ 254/Rev.8/Part 1 in documents S/2006/814, except –
>
> (i) equipment covered by Annex B section 1 when such equipment is for light water reactors; and
>
> (ii) low-enriched uranium covered by Annex A section 1.2 when it is incorporated in assembled nuclear fuel elements for such reactors; and

(c) S/2006/815, except the items specified in Category II; 19.A.3.

Resolution 1929 was adopted on 9 June 2010 to add further categories to the goods listed above, but this was introduced after the alleged acts of Wong and Nam were committed. It was not argued that Wong and Nam had violated any of these sanctions adopted in Singapore in re-exporting the Company A modules to Iran. Insofar as the US was seeking to enforce its sanctions against all trade with Iran relating to goods originating from the US or US persons, such sanctions were not adopted in Singapore, and Wong and Nam's acts of abetting the re-export of goods to Iran are not criminally punishable here.

33 For completeness, I should explain why I did not characterise the conduct in Count One as the abetment by conspiracy to make false declarations of the end-user and end-use of the goods. The declarations that Corezing and Singapore were the ultimate consignee and destination respectively (and not Iran) were not the criminal object. The criminal object in Count One was the breach of US trade sanctions. Had the object of the conspiracy been the mere false declarations of ultimate consignee or destination on the SEDs, the allegations concerning the back-to-back transactions and the failure to obtain authorisation to export the goods would become irrelevant to the object of the conspiracy. The allegations must be seen as a whole. The US is complaining about the declarations of ultimate consignee and ultimate destination on the SEDs because had the destination been "Iran" as opposed to other countries against which such sanctions do not apply, the US would not have allowed Company A modules to leave without authorisation from the US Department of the Treasury. Furthermore, at the time Wong and Nam's acts were allegedly committed, the Singapore Customs did not require prior authorisation in the form of permits to be obtained to export or re-export of non-prohibited goods to Iran (Customs Circular No 15/2007 that applied with effect from 15 June 2007). A permit was needed only if the goods required approval for export, for example, under the Regulation of Imports and Exports Act and the Strategic Goods (Control) Act. While an export declaration was required for non-controlled and non-dutiable goods, an administrative exemption was granted in 1976 to allow export declarations to be submitted within three days after export of such goods by sea and air (IE Notice No 2/76, which is now under review: see Customs Circular No 01/2012). Singapore has no comparative legislation that prohibits export (and re-export from third countries) of all goods originating from Singapore or Singapore citizens or companies to Iran without prior authorisation. Mr Haq and Mr Singh pointed out that prior authorisation in the form of a "TradeNet® permit" to be declared at least three working days before the date of import, export or re-export of any goods to Iran was only required with effect 1 November 2010 (in Singapore Customs Circular No 18/2010). This was after the period that Wong and Nam's acts were committed. I agree with Mr Haq and Mr Singh that there is no reciprocal offence in Singapore to the US charges faced by Wong and Nam. Neither would the conduct alleged in Count One amount to abetment by conspiracy to cheat. Even if I accept that the declarations of the end-use and end-user were false, the Singapore Government would not have been induced to act or omit to do anything that it would not have done or omit to do if it were not so deceived (which is an element of intentional inducement to cheat under s 415 of the Penal Code). Singapore has no regulations against the export of goods (other than controlled goods and other specified classes of goods) to Iran without permit or prior authorization and non-controlled goods would not have been prevented from leaving Singapore whether the ultimate destination was Iran or another country like Thailand. To regard Wong and Nam's acts as criminal would be tantamount to extending the trade obligations that Parliament accepted as binding on Singapore, and would amount to the enforcement of another country's trade policies which differed from ours.

34 I am also not inclined to regard the conduct in Count One as abetment by conspiracy to export or re-export controlled goods from Singapore. There was no averment in the Superseding Indictment or the supporting affidavits stating that Company A modules were by nature classified as goods that required a permit or licence for export, irrespective of the shipment destination. The conduct in Count

One was different from that in Count Eight. In Count One, the US claimed that it was the ITR (and not the regulations on the export of "defense articles" that were breached. I note the allegations that some of the Company A modules that were sent to Larijani, particularly in the third and fourth shipments, were found in improvised explosive devices in Iraq. However these allegations alone do not detract from the essence of the conduct that the US is seeking to prosecute, being the breach of US trade sanctions against Iran. The Superseding Indictment did not refer to violations on the export of "defense articles" or the like. It was also not argued that Wong and Nam had engaged in a conspiracy to export controlled goods from Singapore without prior authorisation. None of the other counts of offences against Wong and Nam referred to the breach of regulations on the export of "defense articles". For example, in relation to Count Two (*ie*, smuggling) and Count Three (*ie*, illegal exports to Iran and attempted illegal exports to Iran) of the Superseding Indictment for which the State is not proceeding against Wong and Nam, the legislative provisions cited related to US sanctions against the supply of US-origin goods to Iran. The allegations against Wong and Nam, read as a whole, relate to breach of trade sanctions adopted by the US against Iran which do not apply in Singapore. I will also deal briefly with Mr Haq's argument that the Wong and Nam's acts would not be punishable in Singapore on grounds of extraterritoriality. The conduct in Count One took place from 20 June 2007 to 26 February 2008. As such, it is not clear that the acts of abetment could be confined to the period before 1 February 2008 when s 108B of the Penal Code came into force. However, given that I have found that Wong and Nam's conduct would not be criminally punishable in Singapore, this would be sufficient to dispose of the applications of Wong and Nam.

35 I now turn to the question of whether the conduct in Count Eight, *ie*, abetment by conspiracy to export controlled goods without obtaining a licence, fell under Article 3 of the Singapore-US Treaty. The Singapore-US Treaty uses an enumerative approach in which all the categories of offences for which the treaty parties agree are extraditable crimes are listed in the treaty. This is in contrast to an "eliminative" or "no list" system, which specifies extradition crimes by reference to an "agreed degree of severity" (*eg* punishable by an imprisonment term of at least 12 months) (see Ivor Stanbrook and Clive Stanbrook QC, *Extradition: Law and Practice* (Oxford University Press, 2nd Ed, 2000) at p 386). The enumerative approach suffers from several limitations in that the list of extraditable offences can become outdated, can only be expanded by supplementary treaty, and may not adequately provide for new crimes that emerge (see Satyadeva Bedi, *Extradition: A Treaties on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries* (William S Hein & Co, Inc, 2002) at p 485). The guidelines laid down by the House of Lords in *In re Nielsen* (at 614–615) are particularly instructive on the question of whether the offence punishable in Singapore falls within one of the categories in Article 3. Lord Diplock explained that "when one is describing crimes committed in a foreign state that are regarded in the United Kingdom as serious enough to warrant extradition of an offender by whom they have been committed, one is describing the way in which human beings have conducted themselves and their state of mind at the time of such conduct". It is possible to describe such conduct "either in broad generic terms and using popular language, or in varying degrees of specificity [and]... minute detail". The former method is used in the Extradition Act 1870. Lord Diplock held at 615 that:

> [The Extradition Act 1870 list] describes each of the list of 19 "extradition crimes" in general terms and popular language, irrespective of whether (as the introductory words of Schedule 1 to the Act of 1870 make clear) the conduct described is rendered criminal by common law or by statute *made before or after the passing of the Act of 1870*. So the 1870 list covered all offences under the five consolidating and amending Acts of 1861 that fell within any of the 19 genera of conduct described in the list; and also any criminal offence created by any subsequent statute but only if it fell within a described genus. The 1870 list would not extend to offences created by any of the Acts of 1861 which did not fall within any of those generic descriptions. ...

...

... So in order to determine whether conduct constitutes an "extradition crime" within the meaning of the Acts of 1870 to 1932, and thus a *potential* ground for extradition if that conduct had taken place in a foreign state, one can start by inquiring whether the conduct if it had taken place in England would have fallen within one of the 19 generic descriptions of crimes in the 1870 list. If it would have so fallen the inquiry need proceed no further where, as in the case of the principal treaty with Denmark, the extradition treaty with the foreign state demanding the surrender of a person as a fugitive criminal incorporates the whole of the 1870 list in the descriptions of crimes for which surrender may be required and makes no modification to those descriptions.

[emphasis in original]

36 Before turning to whether the DJ was right in finding that the conduct in Count Eight would fall under paragraphs 17 and 18 of Article 3 of the Singapore-US Treaty, I should clarify one point in relation the DJ's analysis of Issue 3. In analysing this issue, the DJ discussed whether the "conduct test" or "ingredients test" should apply. The choice between the "conduct test" and the "ingredients test" comes in more appropriately when the court has to assess double criminality rather than whether the offence made out in Singapore (had the allegations of fact been transposed) falls under the list of extraditable crimes. The DJ also referred to Part II of the First Schedule to the Extradition Act 2000 in his analysis of whether an extraditable crime was made out. With respect, reference should have been made to Article 3 of the Singapore-US Treaty instead of the First Schedule to the Extradition Act 2000. As I have explained, (above at [4]), the treaty determines the categories of crimes for which the parties have agreed are extraditable. I should also add that both parties urged me to determine whether the US offence of conspiracy to defraud fell under the list of offences in Article 3. I am of the view that this is not the right approach, as can be seen in *In re Nielsen*, where Lord Diplock noted that it was not necessary to refer to the elements of the foreign offence. The committing magistrate only had the jurisdiction under the Extradition Act 1870 to decide whether there was such evidence that would, according to the law of the requested state (and not the requesting state), justify committal of the fugitive for an offence that fell under one of the categories of extraditable offences (*In re Nielsen* at 618 and 624–625). The test in *In re Nielsen* is not "whether the offence specified in the foreign warrant of arrest... was substantially similar to a crime under English law falling within the list of offences described in Schedule 1 to the Extradition Act 1870, as currently amended (i.e., the so-called "double criminality" test)" but "whether the *conduct* of the accused, if it had been committed in England would have constituted a crime falling within one or more of the descriptions included in that list [emphasis in original]" (*McCaffery* at 869). I agree with the views in *In re Nielsen*. The DJ concluded that Seng and Hia's conduct fell within paragraphs 17 and 18 of Article 3 of the Singapore-US Treaty, which read:

17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, other property, knowing the same to have been stolen or unlawfully obtained.

I am of the view that the conduct in Count Eight gives rise to an offence in Singapore that falls within Article 3 of the Singapore-US Treaty. The issue is whether an abetment by conspiracy to export controlled goods without obtaining a license falls under Article 3 of the Singapore-US Treaty. Mr Jayaratnam urged me to find that Seng and Hia's conduct amounted to an abetment by conspiracy to cheat under s 109 read with s 415 of the Penal Code, and that the DJ was correct in finding that

their conduct fell under paragraphs 17 and 18 of Article 3 of the Singapore-US Treaty. As the DJ held, it must be shown that:

(a) Seng and Hia engaged with one or more persons in a conspiracy to commit cheating;

(b) an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing;

(c) deceiving any person;

(d) intentionally induces the person;

(e) to do or omit to do anything that which he would not do or omit to do if he were not so deceived; and

(f) which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property.

37 I will first discuss whether abetment by conspiracy as a mode of liability to commit an offence that falls within paragraphs 17 and 18 is within Article 3 of the Singapore-US Treaty. Mr Haq relied on *Government of the United States of America v Bowe* [1990] 1 AC 500 ("*Bowe*"), in which the Privy Council found that a common law conspiracy to commit an extraditable offence cannot be implied for specific offences in the list of offences in the UK-US Treaty, but may be implied for generally described offences. In *Bowe*, the US sought the extradition of the fugitive for conspiring to import cocaine and distribute it in the Bahamas with the intent that it subsequently be distributed in the US. The fugitive argued that conspiracy to import dangerous drugs did not fall within paragraph 24 of Article 3 of the UK-US Treaty because the word "conspiracy" was only found in the other categories of offences but not paragraph 24. This was in the context of the US (Extradition) Order in Council 1935 which applied the UK-US Treaty to The Bahamas, and which was similarly based on the Extradition Act 1870. The Privy Council held that:

> … The words of article 3, paragraph 24, in their ordinary and natural meaning include a conspiracy (which is itself an offence) to commit an offence in connection with the traffic in dangerous drugs. …
>
> … Where the description of the listed offence is specific, as with rape, perjury, arson, burglary or murder, the offence of a conspiracy or an attempt to commit those specific offences cannot be included in the list by implication, but where the description of the offence is general, as with "crimes or offences … in connection with the traffic in dangerous drugs," then conspiracy to commit one of those offences is a specific offence coming within the general description…

This view was followed by the Queen's Bench in *Regina v Secretary of State for the Home Department, Ex parte Gilmore; Regina v Secretary of State for the Home Department, Ex parte Ogun* [1998] 2 WLR 618 ("*Ex parte Gilmore*") in relation to an extradition request by the US for charges of conspiracy to defraud and conspiracy to obtain property by deception. The state argued that a purposive construction should be given to Schedule 1 to the Extradition Act 1870 (which contained the offences listed for the purposes of the treaty), and applying the approach in *In re Nielsen*, the list was broad enough to include conspiracy to defraud. Lord Justice Pill rejected the state's argument, affirming *Bowe* instead (at 623):

> I have considered the history of the list and am not able to conclude that where the description

> of the listed offence was what Lord Lowry in *Bowe's* case [1990] 1 AC 500 described as specific, for example embezzlement and larceny, the offence of a conspiracy to commit the offence can be included in the list by implication. ... I see no reason to conclude that Parliament, by introducing into the list references to the Larceny Act 1861 and to the Theft Act 1968, intended to include either statutory or common law conspiracies. ... A more general expression could have been used, as in the case of drugs [in *Bowe's* case], but was not. The expression "an offence under the Act" cannot in my judgment be construed so as to include a conspiracy to commit an offence under the Act.

There are a few difficulties with Mr Haq's argument. Article 3 of the Singapore-US Treaty has a "participation" limb that provides that "[e]xtradition is also to be granted for participation in any of the aforesaid crimes or offences [listed] provided that such participation be punishable by the laws of both High Contracting Parties". Mr Jayaratnam argued that the "participation" limb was wide enough to cover abetment by conspiracy, aiding, or instigation. Mr Haq did not dispute this argument. In fact, he argued that the "participation" limb extended to "aiders and abettors for specified Article 3 crimes... but not to mere co-conspirators", the latter of which attracts primary rather than secondary liability in England. I agree with Mr Jayaratnam. Section 3 of the Extradition Act 1873 (which operated as an amendment to the Extradition Act 1870) also provided that accessories, including persons who abetted, procured, counselled, commanded, or aided the commission of any "extradition crime" would be liable to be surrendered for extradition. The decision in *Bowe* does not assist Mr Haq because our Penal Code abetment by conspiracy provision differs from the common law offence of conspiracy. Abetment as a mode of liability would fall under the "participation" limb in Article 3 of the Singapore-US Treaty. The Applicants' counterargument was that the concept of "abetment by conspiracy" was alien to UK law at the time the UK-US Treaty was concluded. It followed that "abetment by conspiracy" would not be considered to be "participation" punishable by the High Contracting State, which was the UK at that time. I do not agree with this argument either. The UK-US Treaty was given effect in Singapore by the US Order in Council, and continued to apply even after Singapore's independence as affirmed in the Exchange of Letters. "Participation" that is punishable by the High Contracting States would now have to be read as including all punishable forms of abetment in Singapore. Abetment by conspiracy as a mode of liability has been recognised in Singapore since the Penal Code's inception in 1871. Abetment by conspiracy to commit a paragraph 17 or paragraph 18 offence would be an extraditable offence.

38 I turn now to consider whether the substantive offence for Count Eight, *ie* exporting controlled goods without a licence, falls under one of the categories of offences in Article 3 of the Singapore-US Treaty. Cooperator C has pleaded guilty in the US to conspiring to violate the AECA and ITAR (specifically, 22 CFR Parts 121.1, 123.1 and 127.1). 22 CFR Part 123.1 requires a person who intends to export "defense articles" to obtain the approval of the DDTC before export, unless an exemption applies. Failure to do so is an offence punishable under 22 CFR Part 127.1. The DJ accepted the State's argument that Seng and Hia's conduct amounted to an abetment by conspiracy to intentionally induce the person deceived (*ie*, the US government) to do or omit to do anything which it would not have done or omitted to do if it were not so deceived, and which act or omission caused or was likely to cause damage or harm to any person in body, mind, reputation or property ("the third limb of s 415 of the Penal Code"). Only paragraph 18 of Article 3 arises for consideration because it was not shown that Cooperator C acted as "bailee, banker, agent, factor, trustee, director, member or public officer of any company" *vis-à-vis* the US government. I am of the view that conduct designed to circumvent the licensing regime for controlled goods could amount to an offence of cheating by intentional inducement in s 415 of the Penal Code, and I would not thus interfere with the DJ's finding. Mr Haq sought to argue however that cheating by intentional inducement was not a property-based offence unlike the "other limbs" of s 415 of the Penal Code which required the delivery of property or consent to another person retaining property. Mr Haq argued that since the US was

not induced to part with any property, the type of cheating alleged against Seng and Hia did not fall under "obtaining… goods, by false pretences" under paragraph 18. This argument is technical and was not persuasive. It may be that in some cases, the "gain" derived or "harm" caused by deception amounting to cheating under the third limb would not be in the form of money, property or valuable security, and the offence would not fall under paragraph 18 of Article 3 of the Singapore-US Treaty (see also Stanley Yeo, Neil Morgan and W C Cheong in *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2007) at paras 14.80 and 14.82). However in this case, property was allowed to leave the US through Cooperator C's actions which prevented Company B and the US customs authorities from detecting that "defense articles" were being exported out of the US without a licence. A dishonest concealment of the fact that these were "defense articles" intended for export can amount to a deception (see Explanation 1 to s 415 of the Penal Code). The US customs authorities were deceived and allowed the antenna to be exported without a licence. It may be that the loss suffered by the US government was in the form of a loss of opportunity to detect and require that a licence be obtained for export, rather than property loss *per se*. As stated in the supplemental affidavit of Special Agent John L Dumas dated 19 August 2011:

> 13. The export of the 2010-1 antennas… clearly damaged the US Government. The antennas which were illegally exported are components that could be used in military aircraft and thus could be used in combat missions. If these items were used for one of the purposes for which they were built, that is to enable aircraft to fight against other combatants, the United States' reputation would clearly be injured by having enabled adversaries to fly with enhanced capabilities that the United States was trying to protect. These items could even be used against countries friendly to the United States, including Singapore. The deception of the United States in this case can thus be said to likely cause damage to the United States and the reputation of the United States. …
>
> 14. The export of the 2010- antennas also caused significant damage to the reputation of the United States by evasion of our export laws. The intentional violation of United States export laws, including the deliberate avoidance of detection by United States customs and law enforcement officials responsible for finding and seizing prohibited items, both undermines United States measures to foster international trade and results in the spread of restricted items around the globe. There is harm to the United States' reputation as a whole when its export enforcement efforts are purposely evaded by individuals intent on obtaining U.S.-origin items for which they could not have legally acquired licenses.

Notwithstanding this, it is not disputed that goods were permitted to leave the US because of Cooperator C's actions which were aimed at avoiding the need to obtain a licence for the export of "defense articles". Another argument by Mr Singh, counsel for Wong, was that s 415 of the Penal Code only criminalized fraud on any "person", and given that "Government" was defined separately from "person" under the Penal Code, s 415 of the Penal Code only captures private fraud. This argument can be easily disposed of insofar as it is argued to apply to Seng and Hia as well. It has been recognised that the "person" who suffered harm as a result of the deception can include the Government and arms of the Executive (see *Loo Weng Fatt v Public Prosecutor* [2001] 2 SLR(R) 539 and *Dong Guitian v Public Prosecutor* [2004] 3 SLR(R) 34). I am thus satisfied that Seng and Hia committed an extraditable crime under the Singapore-US Treaty.

39 Counsel for the Applicants urged me to find that there was insufficient evidence to justify trial of the Applicants if the act or omission constituting Count One and Count Eight had taken place in or within the jurisdiction of Singapore. As I have found that the conduct in Count One would not be criminally punishable in Singapore, I will only consider this argument in relation to Seng and Hia. The DJ found that the State had made out a "*prima facie* case" that Seng and Hia were part of a

conspiracy to have the antenna exported without a licence from the US government. Seng and Hia claimed that they believed that they were conducting a typical commercial transaction, and were not aware of the conspiracy between Cooperator C and Individual B. Seng also did not know that Cooperator C "altered" the specifications of the antenna or that the antenna was undervalued. Since the learned DJ has ably summarised the evidence of Seng and Hia in his judgment, I will not repeat the evidence save to mention that I would not disturb the DJ's findings. There was sufficient evidence for the DJ to make the findings he made. Seng and Hia's defences and questions of the weight or quality of the evidence should be left to the trial judge to determine.

40 Accordingly, I allow the applications of Wong and Nam in Criminal Motion No 63 of 2012 and Criminal Motion No 66 of 2012 respectively, and order that the two applicants are to be released forthwith. The applications of Seng and Hia in Criminal Motion No 65 of 2012 and Criminal Motion No 67 of 2012 respectively are dismissed.