INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SANUM INVESTMENTS LIMITED
Claimant

and

LAO PEOPLE'S DEMOCRATIC REPUBLIC
Respondent

ICSID Case No. ADHOC/17/1

DECISION ON JURISDICTION, ADMISSIBILITY AND LIABILITY

Members of the Tribunal
Ms. Jean E. Kalicki, President
Mr. Klaus Reichert, SC
Professor Laurence Boisson de Chazournes

Secretary of the Tribunal
Ms. Mercedes Cordido Freytes-de Kurowski

Date of dispatch to the Parties: 20 December 2024

REPRESENTATION OF THE PARTIES

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

BITs	The China-Lao BIT and the Lao-Netherlands BIT, as herein defined
BIT I Cases	The ICSID BIT I Case and the PCA BIT I Case, as herein defined
BIT I Tribunals	The arbitral tribunals in the BIT I Cases, as herein defined
C-[#]	Claimants' Exhibit
Case 48	Court case filed by ST on 3 May 2012 against Sanum and SVCC before the Commercial Court of Vientiane alleging breaches by Sanum of the Master Agreement, a Shareholders' Agreement dated 31 October 2007 between ST and Sanum, and SVCC's Articles of Association, along with the violation of laws and regulations of Lao PDR
Case 52	Court case filed by ST on 8 June 2012 against Sanum before the Commercial Court of Vientiane seeking an order affirming that the Thanaleng Participation Agreement had terminated by its terms on 11 October 2011
CFA Loans	Loans Sanum extended to SVCC between 2008 and 2009, reflected in two Credit Facility Agreements
China-Lao BIT	Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic concerning the Encouragement and Reciprocal Protection of Investments which entered into force on 1 June 1993
Claimants' Applications	Claimants' (a) Application to Strike Respondent's Argument and Exhibits submitted on the Respondent's Rejoinder, (b) Application for Leave to Supplement the expert report of Joseph Kalt, and (c) Application to strike from the record the witness statement of Sabh Phommarath
Claimants' Closing Presentation	Claimants' PowerPoint presentation at the Hearing, 14 June 2019
Claimants' Memorial	Claimants' Memorial on the Merits, 1 September 2017

Claimants' Opening Presentation	Claimants' PowerPoint presentation at the Hearing, 10 June 2019
Claimants' Renewed Request on Document Production	Claimants' Renewed Request on Document Production, 25 June 2018
Claimants' Reply	Claimants' Reply on Jurisdiction and Liability, 10 August 2018
Claimants' Response on the BIT I Awards	Claimants' Response to Respondent's Post-Hearing Submission on the BIT I Final Awards, 5 November 2020
CL-[#]	Claimants' Legal Authority
Decision on Bifurcation	Tribunal's Decision on the Respondent's Bifurcation Request, 24 April 2017
Deed of Settlement	The "Deed of Settlement" between Sanum Investments Limited, Lao Holdings N.V., and the Government of the Lao People's Democratic Republic, signed on 15 June 2014 (as amended by the Side Letter signed on 17 June 2014)
GOL	Government of Laos
Hearing	Hearing on jurisdiction and liability held 10-14 June 2019 in Singapore
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID BIT I Case	*Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), with a tribunal chaired by The Honourable Ian Binnie, C.C., K.C. and including Prof. Bernard Hanotiau and Prof. Brigitte Stern
ICSID BIT I Award	The award rendered on 6 August 2019 in the ICSID BIT I Case, as defined herein
ICSID Additional Facility Rules	ICSID Additional Facility Arbitration Rules, 10 April 2006
Lao-Netherlands BIT	Agreement on Encouragement and Reciprocal Protection of Investments between the Lao's People Democratic Republic and the Kingdom of the Netherlands which entered into force on 1 May 2005

Lao PDR or Respondent	Lao People's Democratic Republic or the Respondent
LHNV	Lao Holdings N.V.
LHNV's Opposition to Bifurcation	LHNV's Opposition to Respondent's Bifurcation Request, 21 March 2017
LHNV PO1	Tribunal's Procedural Order No. 1, 3 April 2017, concerning procedural matters in the *LHNV* case
LHNV's Rejoinder on Bifurcation	LHNV's Rejoinder to Respondent's Bifurcation Request, 11 April 2017
LHNV Request	Notice of Arbitration from LHNV against Lao PDR, 2 May 2016
LHNV's Response to Respondent's Application for Security for Costs	LHNV's Response to Respondent's Application for Security for Costs, 9 July 2018
Paksong Vegas	The Paksong Casino JV in Champasak Province
PCA BIT I Case	*Sanum Investments Limited v. Lao People's Democratic Republic* (PCA Case No. 2013-13), with a tribunal chaired by Dr. Andrés Rigo Sureda and including Prof. Bernard Hanotiau and Prof. Brigitte Stern
PCA BIT I Award	The award rendered on 6 August 2019 in the PCA BIT I Case, as defined herein
PO2	Tribunal's Procedural Order No. 2, 23 October 2017, concerning the Tribunal's Decisions on the Respondent's Applications of 18 September 2017
PO3	Tribunal's Procedural Order No. 3, 14 November 2017, concerning the Claimants' Request for Clarification of the Tribunal's PO2
PO5	Tribunal's Procedural Order No. 5, 18 May 2018, concerning the Parties' document production requests
PO6	Tribunal's Procedural Order No. 6, 26 July 2018, concerning the Respondent's Application for Security for Costs
PO7	Tribunal's Procedural Order No. 7, 14 November 2018, concerning the Claimants' Applications

PO8	Tribunal's Procedural Order No. 8, 16 November 2018, concerning the organization of the hearing
R-[#]	Respondent's Exhibit
Respondent's Applications	Respondent's Applications, 18 September 2017, requesting: (a) the Tribunal's reconsideration of its Decision on Bifurcation, (b) its Objection to the Claimants' Ancillary Claim, and (c) the suspension of the procedural calendar
Respondent's Bifurcation Request	Respondent's Notice of Objection to the Tribunal's Competence and a Request for Bifurcation, 20 February 2017
Respondent's Closing Presentation	Respondent's PowerPoint presentation at the Hearing, 14 June 2019
Respondent's Counter-Memorial	Respondent's Amended Memorial on Competence and Counter-Memorial on the Merits, 23 March 2018
Respondent's First Application for Security for Costs	Respondent's First Application for Security for Costs, 29 June 2018
Respondent's Memorial on Competence	Respondent's Memorial on Competence, 1 September 2017
Respondent's Opening Presentation	Respondent's PowerPoint presentation at the Hearing, 10 June 2019
Respondent's Rejoinder	Respondent's Rejoinder on Competence and the Merits, 1 November 2018
Respondent's Reply to its First Application for Security for Costs	Respondent's Reply to its Application for Security for Costs, 13 July 2018
Respondent's Reply on Bifurcation	Respondent's Reply on Bifurcation, 4 April 2017
Respondent's Second Application for Security for Costs	Respondent's Second Application for Security for Costs, 11 September 2019
Respondent's Submission on the BIT I Awards	Respondent's Post Hearing Submission on the ICSID and PCA Final Awards, 24 September 2019
RL-[#]	Respondent's Legal Authority
Revised PO1	Tribunal's revised PO1, 16 May 2017, concerning procedural matters

Sanum Request	Notice of Arbitration from Sanum against Lao PDR, 17 February 2017
Sanum	Sanum Investments Limited
Savan Vegas	The Savan Vegas Hotel and Casino in Savannahket
SIAC	Singapore International Arbitration Centre
SIAC Case	SIAC Case No. 143/14/MV between the Government of the Lao People's Democratic Republic (Claimant) v. Lao Holdings, N.V. and Sanum Investments Ltd. (Respondents)
SIAC Tribunal	The tribunal in the SIAC Case, chaired by Judge Rosemary Barkett and including William Laurence Craig and Carolyn B. Lamm
ST	ST Group Co. Ltd.
SVCC	Savan Vegas and Casino Co., Ltd.
SVLL	Savan Vegas Lao Ltd.
ST SIAC Case	SIAC ARB/184/15 between Sanum Investments Limited (Claimant) and ST Group Co. Ltd., et al. (Respondents)
ST SIAC Tribunal	The tribunal in the ST SIAC Case, chaired by Michael Lee and including David Kreider and Kevin Kim
2016 ST SIAC Award	Award No. 097 of 2016 rendered on 22 August 2016 in the ST SIAC Case, ARB No. 184 of 2015 between Sanum Investments Limited (Claimant) and (1) ST Group Co., Ltd., (2) Sithat Saysoulivong, (3) ST Vegas Co., Ltd., (4) S.T. Vegas Enterprise Ltd., (5) Xaya Construction Co., Ltd. and (6) Xaysana Xaysoulivong (Respondents)
2017 SIAC Award	Award No. 077 of 2017 rendered on 29 June 2017 in the SIAC Case, ARB No. 143 of 2014 between the Government of the Lao People's Democratic Republic (Claimant) and (1) Lao Holdings N.V. and (2) Sanum Investments Limited (Respondents)
2019 ST Appeal Decision	Decision of the Singapore Court of Appeal in the case *ST Group Co. Ltd v. Sanum Investments Ltd.* of 18 November 2019

Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 6 October 2016

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted *ad hoc* to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**"), involving claims under the Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic concerning the Encouragement and Reciprocal Protection of Investments which entered into force on 1 June 1993 (the "**China-Lao BIT**").

2. The claimant is Sanum Investments Limited ("**Sanum**" or "**Claimant**"), a company incorporated under the laws of the People's Republic of China. The respondent is Lao People's Democratic Republic ("**Lao PDR**" or the "**Respondent**").

3. By agreement of the Parties, the proceedings in this case were administered in tandem with those for another arbitration against the Respondent, which was brought by Sanum's parent company, Lao Holdings N.V. ("**LHNV**"), a company incorporated under the laws of Aruba, a Netherlands constituent country, on 28 January 2011. The "***LHNV* case**" was brought on the basis of the Agreement on Encouragement and Reciprocal Protection of Investments between the Lao People's Democratic Republic and the Kingdom of the Netherlands which entered into force on 1 May 2005 (the "**Lao-Netherlands BIT**"). The Parties agreed that both this case and the *LHNV* case would be administered under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID, as amended and effective as of 10 April 2006 (the "**ICSID Additional Facility Rules**").

4. The Decision on Jurisdiction, Admissibility and Liability in the *LHNV* case is being issued contemporaneously herewith.

5. For ease of reference, given the substantial overlap between the two cases – including the filing of composite memorials applicable to both cases – Sanum and LHNV are often referred to collectively as the "**Claimants**," except where it is necessary to distinguish them, when their individual names will be used. The Claimants and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

6. This dispute arises against the backdrop of several other proceedings between the Parties, commenced before this arbitration but to some extent proceeding concurrently with it, as will be explained further below. This has led to an exceedingly complicated procedural history, and

numerous arguments by both sides about the extent of any preclusive effect of various findings in the other proceedings.

7. In particular, this dispute relates to actions implemented by the Government of Lao PDR *after* the conclusion on 15 June 2014 of a "**Deed of Settlement**" between the Parties.[1] That Deed of Settlement had attempted to resolve – but in the end did not actually resolve – prior disputes between the Parties under the Lao-Netherlands BIT and the China-Lao BIT (together, the "**BITs**"). The prior disputes were heard in parallel by two other arbitral tribunals, one at ICSID[2] and the other at the PCA[3] (collectively, the "**BIT I Tribunals**" hearing the "**BIT I Cases**"), and were initially suspended upon conclusion of the Deed of Settlement.

8. Almost immediately thereafter, however, both Parties accused the other of material breach of the Deed of Settlement. The Claimants' claims of material breach by the Respondent were submitted to the BIT I Tribunals, pursuant to a provision in the Deed of Settlement which allowed those tribunals to adjudicate such claims and to revive the BIT I Cases in the event the Lao PDR were found to be in material breach. Meanwhile, the Respondent's claims of breach by Claimants were submitted (along with Claimants' counterclaims) to a tribunal under the auspices of the Singapore International Arbitration Centre (the "**SIAC Case**").[4] The SIAC Case resulted on 29 June 2017 in a majority award in favor of the Lao PDR (the "**2017 SIAC Award**"). Roughly six months later, however, the BIT I Tribunals found the Lao PDR to have been in material breach of certain settlement terms, and determined accordingly that the BIT I Cases should be revived. Upon revival, however, the BIT I Cases continued to focus on the actions of the Government of Lao PDR that had been challenged originally in those cases, each of which necessarily predated the Deed of Settlement. The awards were rendered in the BIT I Cases on 6 August 2019 (the "**ICSID BIT I Award**" and "**PCA BIT I Award**," or collectively, the "**BIT I Awards"**).

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[1] Amended Notice of Arbitration, 27 July 2016, ¶ 6.

[2] *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), with a tribunal chaired by The Honourable Ian Binnie, C.C., K.C. and also including Prof. Bernard Hanotiau and Prof. Brigitte Stern (the "**ICSID BIT I Case**").

[3] *Sanum Investments Limited v. Lao People's Democratic Republic* (PCA Case No. 2013-13), with a tribunal chaired by Dr. Andrés Rigo Sureda and also including Prof. Bernard Hanotiau and Prof. Brigitte Stern (the "**PCA BIT I Case**").

[4] *The Government of the Lao People's Democratic Republic v. Lao Holdings, N.V. and Sanum Investments Ltd.,* SIAC Case No. 143/14/MV, with a tribunal chaired by Judge Rosemary Barkett and including Mr. William Laurence Craig and Ms. Carolyn B. Lamm (the "**SIAC Case**").

9. As distinguished from the BIT I Cases (but overlapping to some extent with the various material breach proceedings), this arbitration focuses on actions by the Government of Lao PDR *after* the Deed of Settlement. The Claimants allege that these actions breached the Respondent's obligations under the BITs, depriving them of their investments for the development of gaming enterprises in Laotian territory.

II. PROCEDURAL HISTORY

10. The *LHNV* case commenced prior to this one, and certain aspects of its procedural history are relevant to recite. First, on 4 May 2016, ICSID received a Notice of Arbitration, dated 2 May 2016, from LHNV against the Lao PDR, together with Exhibits A to M (the "***LHNV* Request**"), which was supplemented by further communications of 18 and 19 May 2016.

11. On 27 May 2016, the Secretary-General of ICSID registered the *LHNV* Request in accordance with Articles 4 and 5 of the ICSID Additional Facility Rules and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Article 5(e) of the ICSID Additional Facility Rules.

12. On 27 July 2016, LHNV filed an Amended Notice of Arbitration. Additionally, LHNV requested the Secretary-General to follow the procedure established under Article 9 of the ICSID Additional Facility Rules for the constitution of the tribunal and informed the Centre that it appointed Mr. Klaus Reichert SC, a national of Germany and Ireland, as arbitrator.

13. On 17 August 2016, Mr. Reichert accepted his appointment as arbitrator.

14. On 19 August 2016, the Respondent appointed Prof. Laurence Boisson de Chazournes, a national of France and Switzerland, as arbitrator. On the same date, LHNV requested the Secretary-General to proceed with the appointment of the presiding arbitrator pursuant to Article 10 of the ICSID Additional Facility Rules.

15. On 22 August 2016, Prof. Boisson de Chazournes accepted her appointment as arbitrator.

16. On 19 September 2016, the Centre sent a ballot to the Parties, for them to consider five candidates to act as the presiding arbitrator. The Parties' ballots received on 27 September 2016, did not result in the selection of a mutually agreeable candidate.

17. On 3 October 2016, the Secretary-General proposed the appointment of Ms. Jean Kalicki, a national of the United States of America, as the presiding arbitrator.

18. On 6 October 2016, Ms. Kalicki accepted her appointment as the presiding arbitrator. On this same date, the Secretary-General, in accordance with Article 13(1) of the ICSID Additional Facility Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal in the *LHNV* case was therefore deemed to have been constituted on that date. Ms. Anneliese Fleckenstein, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

19. Accordingly, the Tribunal in the *LHNV* case is composed of Ms. Jean Kalicki, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 10 of the ICSID Additional Facility Rules; Mr. Klaus Reichert, appointed by LHNV; and Prof. Laurence Boisson de Chazournes, appointed by the Respondent.

20. On 20 February 2017, the Respondent filed in the *LHNV* case a Notice of Objection to the Tribunal's Competence and a Request for Bifurcation, together with Exhibits R-1 to R-10 ("**Respondent's Bifurcation Request**").

21. In accordance with Article 21 of the ICSID Additional Facility Rules, the Tribunal held a first session with the Parties in the *LHNV* case on 7 March 2017, in London, United Kingdom. During the first session, the Parties raised with the Tribunal the fact that Sanum, a subsidiary of LHNV since 17 February 2012, had sent the Lao PDR a separate Notice of Arbitration dated 17 February 2017, seeking arbitration of certain related claims under the China-Lao BIT (the "***Sanum*** Request"). The Claimants stated that they hoped to have the same Tribunal handle the *Sanum* case, and the Respondent indicated that it did not object in principle, subject to further discussion of certain parameters. The Tribunal encouraged the Parties to discuss the matter further.

22. On 21 March 2017, LHNV filed its Opposition to the Respondent's Bifurcation Request, together with Exhibits C-1 to C-14 and Legal Authorities CL-1 to CL-45 ("**LHNV's Opposition to Bifurcation**").

23. On 24 March 2017, the Respondent informed the Centre that it had agreed that *the Sanum* proceedings could be run as an *ad hoc* arbitration in tandem with those in the *LHNV* case, with both cases to be administered by ICSID and to be formally seated in New York, albeit with hearings to be held outside the United States. On 27 March 2017, the Claimants agreed to these terms.

24. On 28 March 2017, the Tribunal sought the Parties' confirmation as to whether the two parallel proceedings both would be governed by the ICSID Additional Facility Rules. Both Parties consented on the same day.

25. On 3 April 2017, the Tribunal issued Procedural Order No. 1 in the *LHNV* case ("*LHNV* **PO1**"), concerning procedural matters.

26. On 4 April 2017, the Respondent filed its Reply to Claimants' Opposition to Bifurcation, together with Exhibits R-11 to R-21 and Legal Authorities RL-1 to RL-26 ("**Respondent's Reply on Bifurcation**").

27. On 11 April 2017, LHNV filed its Rejoinder to Respondent's Reply on Bifurcation, together with Exhibits C-15 to C-25 and Legal Authorities CL-46 to CL-48 ("**LHNV's Rejoinder on Bifurcation**").

28. On 24 April 2017, the Tribunal denied the Respondent's Bifurcation Request. The Tribunal requested the Parties to keep it informed of any ruling rendered in various other proceedings which the Parties had addressed in their bifurcation submissions, "without prejudice to the parties making arguments in the future regarding the weight to be given to any such decision or the implication of any such decision for the breath of inquiry in this case."

29. On 27 April 2017, the Tribunal was constituted in this case, in accordance with Article 6(3) of the Additional Facility Rules. As in the *LHNV* case, its members are composed of Ms. Jean Kalicki, President, appointed by agreement of the parties; Mr. Klaus Reichert, appointed by Sanum; and Prof. Laurence Boisson de Chazournes, appointed by the Respondent.

30. On 16 May 2017, the Tribunal issued a revised Procedural Order No. 1 ("**Revised PO1**"), which among other things cross-referenced the Parties' agreement to run the *LHNV* proceedings in tandem with the parallel *ad hoc* arbitration in the *Sanum* case, although not formally consolidated.

31. On 1 September 2017, the Claimants filed their Memorial on the Merits ("**Claimants' Memorial**"), including two ancillary claims: (i) an "incidental" claim relevant only to the *LHNV* case in respect of "the application of Lao law received through Articles 3(4) and 3(5) of the Lao-Netherlands BIT, specific references to which were not explicitly included in the Request for Arbitration," and (ii) an "additional" claim in respect of "Respondent's refusal to recognize" a 2016 SIAC arbitration award in a case between Sanum Investments Limited and ST Group Co. Ltd., *et al*. ("**the 2016 ST SIAC Award**"). Claimants' Memorial was accompanied by the witness statements of John

Baldwin, John Clay Crawford, Philip James, Jordy Jordahl, and Jorge Menezes; the expert reports of Scott Fisher, Joseph Kalt, Joshua Kurlantzick, Andrew Black, Premjit Dass, William Bryson from Global Market Advisors (GMA), VPC, and Oanh Ho from CBRE; Exhibits C-1 to 1 and1; and Legal Authorities CL-18, CL-39, CL-40, CL-46, and CL-49 to CL-171.

32. On the same date, the Respondent filed its Memorial on Competence, together with Appendix A, Indexes of Exhibits and Legal Authorities, the expert report by Hervé Ascensio, Exhibits R-1 to R-31 and Legal Authorities RL-1 to RL-73 ("**Respondent's Memorial on Competence**").

33. On 18 September 2017, the Respondent filed a request for the Tribunal's reconsideration of its decision on the Respondent's Bifurcation Request, as well as an objection to the Claimants' ancillary claim concerning non-recognition of the 2016 ST SIAC Award. In this communication, the Respondent additionally requested the suspension of the procedural calendar set forth under the Revised PO1 (all together, the "**Respondent's Applications**").

34. On 22 September 2017, the Claimants filed their observations on the Respondent's Applications, accompanied by Legal Authorities CL-19, CL-34, CL-66, CL-68, CL-91, CL-153, and CL-172 to CL-182.

35. On 27 September 2017, the Tribunal sent instructions to the Parties to be accounted for in their further submissions on the Respondent's Applications, and it also informed them that the procedural calendar was maintained.

36. On 6 October 2017, the Respondent filed its Reply on its Applications, together with an Index of Legal Authorities, and Legal Authorities RL-74 to RL-82.

37. On 10 October 2017, the Claimants filed their Rejoinder on Respondent's Applications, together with Exhibits C-15, C-26, C-27, C-481 and Legal Authorities CL-183 to CL-193.

38. On 23 October 2017, the Tribunal issued Procedural Order No. 2 ("**PO2**"), concerning its Decisions on the Respondent's Applications. The Tribunal sustained the Respondent's objection to the Claimants' ancillary claim regarding the 2016 ST SIAC Award, and granted reconsideration in part of its decision on the Respondent's Bifurcation Request, in the sense that it (a) denied the request to consider and resolve Respondent's jurisdictional objections prior to the liability phase of this case, but (b) agreed to consider and resolve the combined jurisdictional/liability issues prior to further proceedings with respect to quantum, if needed. The Tribunal also provided a revised procedural timetable for the remainder of the proceeding.

39. On 24 October 2017, the Claimants filed a Request for Clarification of the Tribunal's PO2, specifically concerning to its decision on the Claimants' Ancillary Claims. The Claimants inquired, essentially, whether LHNV could pursue ancillary claims even if Sanum could not, because of certain differences in the treaty frameworks applicable to the two cases.

40. On 31 October 2017, the Respondent filed its observations on the Claimants' Request for Clarification, as well as its comments on the revised procedural timetable.

41. On 1 November 2017, the Claimants filed their observations to the Respondent's comments on the revised procedural timetable.

42. On 14 November 2017, the Tribunal issued Procedural Order No. 3 ("**PO3**") granting the Claimants' Request for Clarification of the Tribunal's PO2. The Tribunal acknowledged that PO2 had presumed that Sanum was the only party seeking to present the additional claim regarding non-recognition of the 2016 ST SIAC Award issued in Sanum's favor, and had not appreciated that LHNV was asserting independent standing to bring claims about this issue. Based on certain differences between the applicable treaty frameworks for the two cases, the Tribunal determined that LHNV could proceed with this additional claim, although "[i]t naturally will bear the burden of proof on those claims, which includes a burden of demonstrating legal standing to complain about non-recognition of an arbitral award issued in favor of its subsidiary rather than itself." Accordingly, the Tribunal stated that the ancillary claims "may go forward, with the understanding that they are being pursued only by Lao Holdings and not by Sanum."

43. On 27 November 2017, the Tribunal issued Procedural Order No. 4 with a revised procedural timetable.

44. On 23 March 2018, the Respondent filed an Amended Opening Memorial on Competence and a Counter-Memorial on the Merits, together with Appendix A, Indexes of Exhibits and Legal Authorities, the second expert report by Hervé Ascensio, BDO's expert report by Kenneth Yeo and its corresponding Appendices 1-28, the witness statement of Bouavone Sisavath, Exhibits R-1 to R-103 and Legal Authorities RL-1 to RL-126 ("**Respondent's Counter-Memorial**").

45. On 4 May 2018, the Respondent requested the Tribunal to decide on certain disputed document requests. The same day, the Claimants likewise requested the Tribunal's decision on disputed document requests, in a submission which was accompanied by Exhibits C-482 to C-515 and Legal Authorities CL-194 to CL-201.

46. On 18 May 2018, the Tribunal issued Procedural Order No. 5 ("**PO5**") concerning the Parties' document production requests. PO5 was accompanied by Annex A containing the Tribunal's decisions on the Respondent's requests and Annex B containing the Tribunal's decisions on the Claimants' requests.

47. On 12 June 2018, the Centre informed the Parties that Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, would serve as Secretary of the Tribunal, replacing Ms. Fleckenstein for a certain period of time.

48. On 25 June 2018, the Claimants filed a request for the Tribunal to assist in resolving certain alleged deficiencies in the Respondent's document production ("**Claimants' Renewed Request on Document Production**"). The Claimants' Renewed Request on Document Production was accompanied by Exhibits C-102, C-466, and C-519 to C-525.

49. On 29 June 2018, the Respondent filed its first Application for Security for Costs, accompanied by the witness statement of Sabh Phommarath, Exhibits R-104 and R-105, an Index of Legal Authorities and Legal Authorities RL-127 to RL-132 ("**Respondent's First Application for Security for Costs**").

50. On 2 July 2018, the Respondent filed its observations on the Claimants' Renewed Request on Document Production. The Tribunal issued its decision on this Request on 4 July 2018, making no additional orders regarding document production. The Tribunal stated that "the Parties remain free to present any arguments they wish, in the context of the remaining scheduled submissions, regarding the adequacy of evidence presented by either Party and the inferences or conclusions they believe the Tribunal should reach."

51. On 9 July 2018, LHNV filed its response to Respondent's First Application for Security for Costs, together with the second witness statement of Jorge Menezes and Exhibits C-68, C-373, C- 379, C-383 to C-385, C-422, C-432, and C-526 to C-539, Legal Authorities CL-18, CL-19, CL-49, and CL-202 to CL-209 ("**LHNV's Response to Respondent's First Application for Security for Costs**").

52. On 13 July 2018, the Respondent filed its Reply to LHNV's Response to Respondent's First Application for Security for Costs ("**Respondent's Reply to its First Application for Security for Costs**").

53. On 26 July 2018, the Tribunal issued Procedural Order No. 6 ("**PO6**") denying the Respondent's First Application for Security for Costs.

54. On 10 August 2018, the Claimants filed their Reply on Jurisdiction and Liability, accompanied by the second witness statements of John Baldwin and John Clay Crawford, the third witness statement of Jorge Menezes and the witness statement of Gerard Ngo, the second expert reports of Joshua Kurlantzick and Premjit Dass, the expert reports of Dennis Amerine together with its corresponding exhibits A1 to A10, Matt Isaacs together with its corresponding exhibits I-1 to I-67, Ricky Lee and its corresponding exhibits L-1 to L-30, Nardello & Co., and the expert report of Lok Vi Ming S.C. together with its Annexes A and B and exhibits M-1 to M-25, Exhibits C-546, C-548 to C-550, C-551A and C-551B, and C-552 to C-626, and Legal Authorities CL-210 to CL-216, CL-218, CL-220 to CL-237, CL-239 to CL-249, CL-251 to CL-270, CL-274 to CL-296, CL-298 to CL-310, CL-312 to CL-316, CL-318 to CL-323, CL-325 to CL-354, and CL-356 to CL-360 ("**Claimants' Reply**").

55. On 1 October 2018, the Respondent requested an extension of time to file its Rejoinder on Competence and the Merits. On 4 October 2018, the Claimants objected to this request and additionally requested leave from the Tribunal to file additional documentary evidence into the record. The Claimants' request was accompanied by Legal Authorities CL-367 to CL-370.

56. On 5 October 2018, the Tribunal issued a decision on the Respondent's request for an extension to file its Rejoinder and sent the Parties a revised procedural timetable.

57. On 10 October 2018, the Respondent opposed the Claimants' request to file additional documentary evidence into the record and requested an extension of one day to file its Rejoinder. On 11 October 2018, the Claimants opposed the one-day extension request. The Claimants further requested leave from the Tribunal to supplement their request of 4 October 2018, in order to add one additional piece of evidence.

58. On 11 October 2018, the Tribunal granted the Claimants' request to file additional documentary evidence into the record and the Respondent's one-day extension to file its Rejoinder. On this same date and pursuant to the Tribunal's instructions, the Claimants filed Exhibits C-627 to C-631 and Legal Authorities CL-361 to CL-366.

59. On 17 October 2018, the Tribunal instructed the Parties to jointly prepare two documents in advance of the hearing: (a) a short list of disputed issues, neutrally phrased, with annotated

references to the corresponding sections of the pleadings or key exhibits that each Party considered most important to review for each issue, and (b) a similar short list of the key chapters of the factual chronology, likewise neutrally phrased and with annotated references to the factual record.

60. On 1 November 2018, the Respondent filed a Rejoinder on Competence and the Merits together with Exhibits R-106 to R-253 and Legal Authorities RL-133 to RL-172 ("**Respondent's Rejoinder**").

61. On 6 November 2018, the Claimants filed an Application to Strike the Respondent's Argument and Exhibits submitted in the Respondent's Rejoinder, together with its Annex A.

62. On 7 November 2018, the Respondent informed the Tribunal of the list of Claimants' witnesses and experts it wished to cross-examine at the hearing.

63. On 8 November 2018, the Claimants provided a list of the Respondent's witnesses and experts they wished to cross-examine. The Claimants also requested the Tribunal strike from the record the witness statement of Sabh Phommarath due to his passing. Also on 8 November 2018, the Claimants filed an Application for Leave to Supplement the expert report of Joseph Kalt.

64. On 12 November 2018, the Respondent filed its responses to: the Claimants' Application to Strike the Respondent's Argument and Exhibits submitted in the Respondent's Rejoinder; the Claimants' Application for Leave to Supplement the expert report of Joseph Kalt; and the Claimants' request to strike from the record the witness statement of Sabh Phommarath (all together, the "**Claimants' Applications**").

65. On 13 November 2018, the Tribunal held a pre-hearing organizational meeting with the Parties by teleconference.

66. On 14 November 2018, the Tribunal issued Procedural Order No. 7 ("**PO7**") concerning the Claimants' Applications.

67. On 16 November 2018, the Tribunal issued Procedural Order No. 8 ("**PO8**") on the organization of the hearing.

68. On 20 November 2018, the Claimants filed an application to introduce into the record 13 additional exhibits. On this same date, the Respondent informed the Tribunal that it did not object to the admission of the Claimants' additional exhibits into the record.

69. Pursuant to the Tribunal's orders in PO7, on 28 November 2018, the Claimants submitted a supplemental expert report of Joseph Kalt.

70. On this same date, the Respondent requested a one-week extension to comply with the Tribunal's order to modify Exhibit R-253, which was granted by the Tribunal based on the Claimants' statement that it did not object to the Respondent's extension request.

71. On 5 December 2018, the Respondent filed a revised version of Exhibit R-253.

72. On 11 December 2018, the Respondent's counsel requested a postponement of the hearing due to Mr. Branson's unidentified health concerns that were making it impossible for him to participate personally as counsel. On this same date, the Tribunal requested further information from the Respondent on this matter.

73. On 12 December 2018, the Secretariat sent the Parties a further communication providing a schedule for the Respondent's submission of the further information requested by the Tribunal, and for the Claimants to indicate their position on the Respondent's request for postponement of the hearing.

74. On 13 December 2018, the Respondent submitted a communication regarding this matter. On 14 December 2018, the Claimants submitted their opposition to the Respondent's request to postpone the hearing. Their submission was accompanied by Exhibits A through K.

75. Later on 14 December 2018, the Tribunal informed the Parties that it "[is] willing to contemplate a one-time adjournment of the scheduled hearing on the understanding that the Parties will cooperate […] to achieve a rescheduled hearing date in the first half of 2019."

76. On 17 December 2018, the Tribunal invited the Parties to consider two blocks of time to hold the hearing and confirm their availability thereto by 20 December 2018.

77. On 20 December 2018, the Parties confirmed their availability to hold the hearing and indicated their respective preference on the two blocks of time proposed by the Tribunal. On this same date, the Tribunal confirmed that the hearing would be held in June 2019.

78. On 11 May 2019, the Tribunal invited the Parties to confirm, by 20 May 2019, its understanding that "the Award shall be deemed to be made at the place of arbitration [New York, in accordance to Section 11.1 of PO1], irrespective of where it is signed."

79. On 13 May 2019, the Tribunal invited the Parties to confirm whether the Hearing Schedule proposed by the Parties in December 2018 was still in effect and invited them to confirm the availability of their respective witnesses to testify in person at the June 2019 hearing.

80. On 15 May 2019, the Respondent confirmed its witnesses' availability to testify at the June 2019 hearing but requested an extension of time to confirm the hearing schedule. On this same date, the Claimants confirmed both the availability of their witnesses and the hearing schedule.

81. On 16 May 2019, the Claimants informed the Tribunal of the Parties' agreement to introduce new documents into the record. The agreement was confirmed by the Respondent on 17 May 2019. The Claimants introduced Exhibits C-442.1, C-540, C-547 and C-645 to C-653 and Legal Authorities CL-85-6, CL-112, CL-121, CL-217, CL-219, CL-238, CL-250, CL-271-3, CL-297 and CL-297A, CL-311, CL-317 and CL-324. The Respondent introduced Exhibits R-254 to R-263 and Legal Authority RL-173.

82. As requested in the Tribunal's communication of 11 May 2019, on 20 May 2019, the Respondent confirmed the Parties' agreement of New York as the place of arbitration and the fact that the award "shall be deemed to be made in New York, irrespective of where it is signed." The Claimants subsequently confirmed such agreement.

83. On 24 May 2019, the Claimants submitted a proposed revised hearing schedule. Subsequently, the Respondent confirmed its agreement with the revised schedule.

84. A hearing on jurisdiction and liability was held at Maxwell Chambers in Singapore, from 10 to 14 June 2019 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Ms. Jean Kalicki	President
Mr. Klaus Reichert	Arbitrator
Prof. Laurence Boisson de Chazournes	Arbitrator

ICSID Secretariat:

Ms. Mercedes Cordido-F. de Kurowski	Secretary of the Tribunal

For the Claimants:

Ms. Deborah Deitsch-Perez	Stinson LLP
Mr. Jeff Prudhomme	Stinson LLP
Mr. Alexander Hinckley	Stinson LLP
Mr. Fred Jones (non-attorney support staff)	Stinson LLP
Mr. Todd Weiler	

Mr. Ken Kroot	Sanum (in-house counsel)
Mr. John Baldwin	Sanum/LHNV
Mr. Shawn Scott	Sanum/LHNV
Mr. Tucker Baldwin	Sanum/LHNV
Ms. Benjawan Poomsan Terlecky	Sanum's Lao Interpreter

For the Respondent:

Mr. David Branson	
Mr. John Branson	Womble Bond Dickinson (US) LLP
Mr. Russ Ferguson	Womble Bond Dickinson (US) LLP
Ms. Emily Doll	Womble Bond Dickinson (US) LLP
Mr. John Dackson (staff)	Womble Bond Dickinson (US) LLP
Mr. Outakeo Keodouangsinh	
Mr. Phoukhong Sisoulath	
Mr. Phothilath Sikhotchounlamaly	
Mr. Phouvong Phaophongsavath	

Court Reporter:

Mr. David Kasdan	English Court Reporter

Interpreters:

Mr. John Johnston	Laotian/English Interpreter
Mr. Paul Littani	Laotian/English Interpreter

85. During the Hearing, the following persons were examined:

On behalf of the Claimants:

Mr. John Baldwin	Sanum/LHNV
Mr. John Clay Crawford	Sanum

On behalf of the Respondent:

Judge Bouavone Sisavath	
Mr. Kenneth Yeo	BDO
Prof. Hervé Ascensio	*École de droit de la Sorbonne* (Sorbonne Law School)

86. During the Hearing additional documents were introduced into the record. The Claimants introduced Legal Authorities CL-372 to CL-378 and the Respondent introduced Legal Authorities RL-174 to RL-177. The Parties also presented extensive arguments by counsel, supported by PowerPoint presentations that are referenced here as "**Claimants' Opening Presentation**," "**Respondent's Opening Presentation**, "**Claimants' Closing Presentation**," and **Respondent's Closing Presentation**."

87. On 24 June 2019, after an invitation made by the Tribunal during the Hearing, the Claimants provided a Claim Breakdown, organized to show which claims each Claimant was pursuing.

88. On this same date, the Secretariat reminded the Parties about the Tribunal's confirmation request of whether the Tribunal should render a single consolidated decision/award or whether it should render two separate decisions/awards.

89. On 26 June 2019, the Claimants confirmed their consent to the "issuance of a consolidated award."

90. On 1 July 2019, the Respondent filed an Application for Leave to Consider a Jurisdictional Objection, together with Legal Authorities RL-178 to RL-181.

91. On 3 July 2019, the Respondent in response to the Secretariat's communication of 24 June 2019, requested the Tribunal to "maintain the existing separation between ICSID Case No. ARB(AF)/16/2 and ICSID Case No. ADHOC/17/1 as it pertains to the issuance of Tribunal Awards and decisions."

92. On 15 July 2019, the Claimants filed their Response to the Respondent's Application for Leave to Consider a Jurisdictional Objection, together with Exhibits C-657-8 and Legal Authorities CL-380 to CL-392.

93. On 6 August 2019, the Respondent informed the Tribunal that Final Awards had been rendered on that date in the BIT I Cases (ICSID Case No. ARB(AF)/12/6 and PCA Case No. 2013-13), and attached such Awards as Exhibits R-264 and R-265, respectively. The Respondent further indicated that the "Parties should have the opportunity to submit brief submissions on the material implications of these Awards."

94. On this same date, the Tribunal invited the Parties to confer and agree on a potential schedule for supplemental submissions regarding "the implications of the [BIT I] Awards for the matters before the Tribunal."

95. On 13 August 2019, the Respondent transmitted to the Tribunal the Parties' agreed proposed schedule for the additional submissions regarding the implications of the BIT I Awards for the matters before this Tribunal. By subsequent communication, the Claimants confirmed their agreement. On this same date, the Tribunal confirmed the Parties' agreed proposed scheduled.

96. On 15 August 2019, the Respondent withdrew its Application for Leave to Consider a Jurisdictional Objection.

97. On 11 September 2019, the Respondent filed a Second Application for Security for Costs, together with Exhibits R-266 to R-270 and Legal Authorities RL-178 to RL-184 ("**Respondent's Second Application for Security for Costs**").

98. On 24 September 2019, the Respondent filed its Submission on the ICSID and PCA Final Awards, together with Exhibits R-271 to R-273 and Legal Authorities RL-185 to RL-191 ("**Respondent's Submission on the BIT I Awards**").

99. Also, on 24 September 2019, the Claimants filed their Response to the Respondent's Second Application for Security for Costs, together with the witness statement of Wendy Lin, and the submission's corresponding supporting documentation including: Exhibits C-659 to C-666 and Legal Authorities CL-393 to CL-402.

100. The Tribunal considered it inappropriate to rule at the time on the Respondent's Second Application for Security for Costs, which was filed roughly three months *after* the Hearing, and in consequence after the Tribunal had engaged in certain preliminary deliberations. In the Tribunal's view, it would not have been appropriate so late in the proceedings to consider shifting the *status quo* as to cost allocation between the Parties, or to issue any ruling that could complicate or potentially interfere with the disposition of the proceeding, even if *arguendo* the standards for doing so otherwise had been met (which the Tribunal did not decide). At the same time, the Tribunal was reluctant to articulate the reasons for not ruling contemporaneously on the Application, because this might lead the Parties to speculate about the content and direction of the Tribunal's preliminary deliberations. The Tribunal therefore determined to explain its reasoning as part of this Decision, as it hereby does.

101. On 5 November 2019, the Claimants filed their Response to the Respondent's Submission on the BIT I Final Awards of 24 September 2019, together with Appendices A and B, its corresponding supporting documentation, including: Exhibits C-672, C-675 to C-713 and Legal Authorities CL-403 to CL-451 ("**Claimants' Response on the BIT I Awards**").

102. On 20 November 2019, the Respondent submitted an 18 November 2019 decision of the Singapore Court of Appeal in the case *ST Group Co. Ltd v. Sanum Investments Ltd.* (the "**2019 ST Appeal Decision**") and requested the Tribunal to submit a brief on its view on "the significance of the

decision" in the current proceeding. On this same date, the Tribunal set a schedule for the Parties' comments thereto.

103. On 21 November 2019, the Claimants filed a request for the Tribunal to extend the deadline to submit their comments on the Respondent's submission on the 2019 ST Appeal Decision. The extension request was granted on 22 November 2019.

104. On 25 November 2019, the Respondent filed its comments on the 2019 ST Appeal Decision, and filed an additional copy of the decision which was introduced into the record as Exhibit R-266.

105. On 9 December 2019, the Claimants filed a Response to the Respondent's comments on the 2019 ST Appeal Decision.

106. On 27 February 2020, the Claimants requested leave from the Tribunal to introduce a new document into the record pursuant to Section 17.2 of PO1. On 28 February 2019, the Respondent sought leave to comment on the Claimants' request. The Tribunal granted such leave on the same date.

107. On 6 March 2020, the Respondent filed its comments on the Claimants' application to submit new evidence, indicating that it did not object and attaching, for the record, the document subject to the Claimants' application.

108. On 27 March 2020, the Tribunal noted the absence of objection, and therefore authorized Claimants to file the new document as requested. The Claimants did so the same day, with the document introduced into the record as Exhibit C-680.

109. On 20 April 2020, the Claimants filed a second application for leave to submit newly acquired evidence, this time concerning two additional documents. On the same date, the Respondent filed observations, followed by further observations on 28 April 2020. On 28 April 2020, the Claimants requested leave to submit a response.

110. On 29 April 2020, the Tribunal decided on the Claimants' second application of 20 April 2020. The Tribunal noted that the application had triggered a response from Respondent seeking to present new evidence and assertions of its own, a development which risked a broader resumption of submissions and counter-submissions at a late stage of the proceedings. The Tribunal accordingly denied the requests of both Parties for permission to submit new documents or make

additional arguments, and stated that it would decide the case on the basis of the record already established prior to the recent exchanges.

111. On 8 August 2020, the Claimants submitted a third application for leave to add new evidence to the record, to which the Respondent responded (as invited by the Tribunal) on 17 August 2020, objecting to the application. On 25 September 2020, the Tribunal denied the application "in light of the stage of these proceedings, without prejudice to the possibility of revisiting the issue should the Tribunal consider it appropriate."

112. On 13 August 2021, the Respondent submitted an application for leave to add new evidence to the record, to which the Claimants responded (as invited by the Tribunal) on 20 August 2021. On 30 August 2021, the Tribunal denied the application, on the basis that the Respondent had not shown the new evidence "to have sufficient materiality to justify reopening the record at this late date."

113. On 29 June 2023, the Respondent submitted another application for leave to introduce new evidence, to which the Claimants responded (as invited by the Tribunal) on 7 July 2023. On 11 September 2023, the Tribunal denied the application, on the basis that the proffered evidence was insufficiently material "to derail a proceeding which has been pending for some time."

114. Along the proceedings, the Tribunal kept the Parties informed on the status of its work (*i.e.*, by communications of 30 March 2023, 11 September 2023, 11 April 2024, and 10 September 2024).

III. FACTUAL BACKGROUND

115. The Tribunal provides below a detailed summary of facts, because that is necessary to make sense not only of the substantive issues disputed in this case but also of the Parties' respective arguments regarding doctrines of preclusion, based on the complicated history of prior arbitration proceedings. Certain of these facts are directly relevant only to claims in the *LHNV* case, but are included herein for context, given the close relationship between the two proceedings. At the same time, this is not intended as an exhaustive summary of the evidence in either case or the Tribunal's findings. Additional relevant facts are set forth in connection with the Tribunal's analysis of disputed issues. The absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered *all* evidence and argument submitted to it in the course of these proceedings.

A. SANUM'S "MASTER AGREEMENT" WITH ST

116. Sanum was established in the Macau Special Administrative Region, People's Republic of China, in 2005.[5]

117. On 30 May 2007, Sanum (which was not yet owned by LHNV[6]) entered into an agreement with ST Group Co. Ltd. ("**ST**"), a Lao company that operated several slot clubs and had been granted Government concessions to develop certain casino projects.[7] The Parties both refer to this agreement as the "**Master Agreement**,"[8] and the Tribunal adopts this terminology, although the term does not appear in the document itself.

118. The Master Agreement called for Sanum and ST to "negotiate and work towards entering into certain joint ventures," which would be established by subsequent agreements that collectively would convey to Sanum "60% of all [of ST's] gaming businesses" in the Lao PDR. The Preamble to the Master Agreement expressly provided that it "is not intended to be a definitive agreement but only provides the Parties' general understandings of their relationship," until they could finalize "all necessary agreements to fully implement the concepts and terms set forth in this Agreement."[9]

119. The Master Agreement anticipated the eventual creation of three joint ventures which would own and operate all of ST's "present and future gaming businesses in Lao PDR."[10] Two of the joint ventures anticipated in the Master Agreement would be dedicated to casino projects for which ST already had concessions: (a) the Savan Vegas casino in Savannahket (known as "**Savan Vegas**" or the "**Savan Vegas Casino**"), which was owned by an ST company called Savan Vegas and Casino Co., Ltd. ("**SVCC**"), and (b) a contemplated Paksong Vegas casino in Champasak Province ("**Paksong Vegas**"), which was owned by an ST company called Paksong Vegas and Casino Company, Ltd.[11] The Lao PDR already held a 20% ownership stake in the two casino projects, Savan Vegas and Paksong Vegas.[12] The Savan Vegas Casino was eventually built and operated successfully, while the Paksong Vegas casino was never built.

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[5] Claimants' Memorial, ¶ 22 (citing Witness Statement of John K. Baldwin, 31 August 2017 ("**Baldwin WS**"), ¶ 5).

[6] As noted above, LHNV acquired Sanum on 17 January 2012. Claimants' Memorial, ¶ 22.

[7] Claimants' Memorial, ¶ 24 (citing Baldwin WS, ¶¶ 10-11).

[8] Claimants' Memorial, ¶ 31 (citing C-26, Master Agreement between Sanum and ST Group, 30 May 2007, hereafter "**Master Agreement**"); Respondent's Counter-Memorial, ¶ 412 (adopting same terminology).

[9] C-26, Master Agreement, Preamble.

[10] C-26, Master Agreement, Art. 1.

[11] Claimants' Memorial, ¶ 32 (citing C-26, Master Agreement Art. 1).

[12] Claimants' Memorial, ¶ 33 (citing C-26, Master Agreement, Art. 1(4)); *see also* Respondent's Counter-Memorial,

120. The third anticipated joint venture described in the Master Agreement, the Slot Club JV, was to include three different slot clubs: (i) the "**Thanaleng Slot Club**" at the Friendship Bridge near Vientiane (sometimes referred to as the "Vientiane Friendship Bridge Slot Club"), (ii) the "**Lao Bao Slot Club**" at the border crossing with Vietnam in eastern Savannakhet Province, and (iii) the "**Ferry Terminal Slot Club**" in western Savannakhet/Daensaven at the ferry border checkpoint with Thailand.[13]

121. The Master Agreement provided that ST and Sanum would have an "exclusive gaming relationship," to be reflected in the three joint ventures and in possible additional joint ventures to be developed in future. In other words, ST "shall not be involved in any present or future gaming activity without the direct participation" of Sanum.[14] The Master Agreement further provided that while additional agreements would be needed to implement the parties' understandings, those "shall express the exact meaning of all terms of this Agreement," such that "this Agreement rules and is authoritative."[15]

B. SANUM'S INITIAL DISPUTES WITH ST

(1) Thanaleng Slot Club Dispute, Case 52, and Initiation of the ST SIAC Case

122. Between 2007 and 2009, Sanum and ST entered into certain agreements with respect to the three slot clubs ST owned. For the Ferry Terminal and Lao Bao Slot Clubs, this included a 6 August 2007 Participation Agreement (the "**Ferry Terminal/Lao Bao Participation Agreement**"), which provided *inter alia* that Sanum would supply and maintain certain gaming machines, and would manage the clubs, in exchange for receiving a 60% share of the clubs' revenues.[16]

123. With respect to the Thanaleng Slot Club, however, the 2007 Master Agreement had acknowledged that ST already had three existing slot machine contracts with other suppliers: one with RGB expiring "in less than 5 years," another "with approximately 2 years remaining," and a third "with approximately 1 year left."[17] The Master Agreement had provided that ST would not extend those existing contracts beyond their various expiration dates, although the other suppliers could submit

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¶ 353.

[13] Claimants' Memorial, ¶ 32 (citing C-26, Master Agreement, Art. 1); Respondent's Counter-Memorial, n.550, ¶ 412.

[14] C-26, Master Agreement, Art. 1.

[15] C-26, Master Agreement, Art. 1(5).

[16] C-27, Lao Bao/Ferry Terminal Participation Agreement; Claimants' Memorial, ¶ 64 (citing *inter alia* Baldwin Witness Statement, ¶ 21).

[17] C-26, Master Agreement, Art. 1.

proposals thereafter to continue a relationship with the new ST/Sanum joint venture.[18] In any event, the Master Agreement provided that as the other contracts expired, Sanum could step in and provide slot machines on a profit participation basis.[19] Once the last supplier contract expired (which the Claimants refer to as the "**Turnover Date**"), the Thanaleng Slot Club would be turned over to the new joint venture (which Sanum would manage and in which it would have a 60% interest), in exchange for Sanum's payment to ST of US$500,000.[20] ST also was to use its best efforts to acquire additional land for expansion of the Thanaleng Slot Club, and Sanum would pay up to US$1 million of the acquisition costs.[21]

124. On 4 October 2008, Sanum and ST entered into the first of several agreements specifically relating to the Thanaleng Slot Club (the "**Thanaleng Participation Agreement**"). This agreement provided that Sanum would supply slot machines exclusively to the Thanaleng Slot Club, "on a generated revenue sharing/participation basis," and ST agreed to operate the machines with Sanum.[22] The parties' revenue generated from the slot machines would be reduced by 30% (called the "**Costs Contribution**") and US$5,000 (called the "**Overhead Contribution**"), which would be provided to ST for costs, and the remaining amount would be split 60% for ST and 40% for Sanum.[23] Article 6 of the Thanaleng Participation Agreement stated that "[t]his Agreement shall terminate on October 11, 2011, which is the termination date of the Participation Agreement between" ST and RGB, the one remaining legacy slot machine supplier.[24]

125. On 23 February 2010, Sanum and ST entered into an agreement to expand the Thanaleng Slot Club (the "**First Thanaleng Expansion Agreement**").[25] This Agreement provided that ST had acquired a new land lease and would construct a new building extension; the land and facilities had an agreed value of US$500,000, and the construction also had an agreed value of US$500,000. In order for Sanum "to have rights, interests and benefits in this new expansion," Sanum eventually would make certain payments to ST. Those payments would entitle Sanum to maintain with respect to the extension project the same 40% interest in generated revenues (less certain renovation and investment expenses) that had been agreed in the Thanaleng Participation Agreement. The First

[18] C-26, Master Agreement, Art. 1.
[19] C-26, Master Agreement, Art. 1(3)(d).
[20] C-26, Master Agreement, Art. 1(3)(d).
[21] C-26, Master Agreement, Art. 1(3)(b).
[22] C-29 and R-35, Thanaleng Participation Agreement, preamble.
[23] C-29 and R-35, Thanaleng Participation Agreement, Art. 4.
[24] C-29 and R-35, Thanaleng Participation Agreement, preamble and Art. 6.
[25] C-30, First Thanaleng Expansion Agreement.

Thanaleng Expansion Agreement anticipated that after ST's supply contract with RGB expired in 2011, Sanum's share of generated revenues would be converted to 60%, as anticipated in the Master Agreement.[26]

126. On 16 November 2010, ST and Sanum agreed to amend the Thanaleng Participation Agreement to provide for a "second expansion" of the Thanaleng Slot Club (the "**Second Thanaleng Expansion Agreement**").[27] This Agreement provided that the total cost of construction, land and an operating license for the additional facility would be US$1,500,000, and that Sanum would pay US$900,000 to ST in three installments. The first two payments were tied respectively to the progress of a land assignment and to the opening of the additional facility, and the last payment was due on 11 October 2011.[28] The Agreement provided that once the additional facility was completed, it would be "operated by the parties as one slot club" in accordance with the provisions of the Thanaleng Participation Agreement and the Master Agreement.[29] As for ownership, Sanum's participation percentage in the Thanaleng Slot Club and the additional facility would be 40% from the date of the Second Thanaleng Expansion Agreement and 60% from 11 October 2011.[30]

127. Subsequent to these various agreements, there was a falling out between Sanum and ST. On 24 August 2011, ST notified Sanum that it had made a mistake regarding the expiration date of the final third-party supply contract, with RGB; it had previously understood this to be five years from the RGB contract date, or 11 October 2011, but after reviewing the contract and other evidence submitted by RGB, it now realized that it had committed to RGB for five years "starting first day of operation," or 12 April 2012.[31] On 10 October 2011, Sanum protested this change and suggested that it defer at least part of its payment due to ST, until such time as it could place its further slot machines in the club; it also asked to receive 75% of the income generated by RGB's machines.[32] The same day, ST responded that the "misunderstanding" about the date of the RGB contract expiration had been a mutual one, since the Master Agreement had not specified the exact Turnover Date (simply that it was pegged to expiry of pre-existing supply contracts), and ST had provided Sanum with the underlying contracts before negotiating the Thanaleng Participation Agreement.

[26] C-30, First Thanaleng Expansion Agreement Arts. 1, 2.
[27] C-31, Second Thanaleng Expansion Agreement, preamble.
[28] C-31, Second Thanaleng Expansion Agreement, Art. 1.
[29] C-31, Second Thanaleng Expansion Agreement, Art. 2.
[30] C-31, Second Thanaleng Expansion Agreement Art. 2.
[31] C-116, 24 August 2011 Email from ST to Sanum re: Thanaleng Slot Club Issue.
[32] C-117, 10 October 2011 Letter from Sanum to ST.

ST stated that it had "made assumption that [Sanum] did its own review and study and came up with draft participation agreement as was later signed by both parties," but in fact "there was a mistake caused by both parties … who agreed to put a wrong date of expiration" of the RGB contract in the Participation Agreement. ST proposed that Sanum "should not pay ST" until a further agreement was reached, and instructed Sanum that it "should not bring the machines to the slot club since there is no places for installation of such machines."[33]

128. The Parties to this arbitration both put their own spin on what happened next. Claimants' witness Mr. Baldwin contends that "[w]hile I believed that we had negotiated a compromise …, on 12 April 2012, ST locked Sanum out of the Thanaleng Slot Club and contended that the parties' agreement with respect to Thanaleng had terminated on 10 October 2011."[34] The Respondent contends that Sanum defaulted on its payment obligations under the Second Thanaleng Expansion Agreement – making none of the installment payments totaling US$900,000 – and "[t]hus, the conditions of [that] agreement were never met. … Therefore, all that remained was the 2008 Participation Agreement which expired by its express terms on October 11, 2011." The Respondent claims that ST thereafter refused to accept payment from Sanum on the grounds that it was untimely, and refused to accept Sanum's further machines. According to the Respondent, Sanum nonetheless took the position that the Master Agreement had "unlimited duration."[35]

129. In any event, it is undisputed that all cooperation between Sanum and ST came to a halt, and that Sanum and ST ultimately engaged in extensive litigation before the Lao PDR courts. Some of the Claimants' later treaty claims in the BIT I Cases against the Lao PDR relate to the way in which the Lao PDR courts handled that Sanum-ST litigation, as discussed in Section III.B below. For purposes of this Section, the Tribunal simply identifies the key events and court findings.

130. First, on 1 March 2012, Sanum petitioned for arbitration with the Ministry of Justice Office of Economic Dispute Resolution ("**OEDR**"), invoking the first paragraph in the Master Agreement's tiered dispute resolution clause.[36] ST challenged Sanum's invocation of this mechanism, arguing

[33] C-410, 10 October 2011 Letter from ST to Sanum.

[34] Baldwin Witness Statement, ¶ 110.

[35] Respondent's Counter-Memorial, ¶ 416.

[36] C-26, Master Agreement, Art. 2(10) provided as follows:

> "If any dispute shall arise, the Parties agree to conduct an amicable negotiation. If such dispute cannot be settled by mediation, the Parties may submit such disputes to the [OEDR] or Courts of the Lao PDR according to the provision and law of Lao PDR in accordance with this Agreement. …
>
> Before settlement by the arbitrator under the rules of the [OEDR], the Parties shall use all efforts to assist

that there was "no legal basis" for bringing such disputes to the OEDR.[37] On 12 April 2012, Sanum sought an injunction from the OEDR to block ST from moving any of Sanum's slot machines out of the Thanaleng Slot Club,[38] and the OEDR referred the matter to the Vientiane People's Court; on 20 April 2012, that Court issued a "Sequestering Order" requiring maintenance of the *status quo*.[39] ST appealed the Sequestering Order, and demanded in the meantime that Sanum be required to remove its machines from the Thanaleng Slot Club, failing which ST would be forced to store them in a warehouse "in the presence of governmental representatives as witnesses."[40] The OEDR accepted this proposal on 26 April 2012 and instructed ST and Sanum to "implement it accordingly."[41] On 29 April 2012, the machines were transported to a Government-owned warehouse.[42] The Commercial Court of Vientiane thereafter accepted ST's appeal and rescinded the Sequestering Order.[43]

131. On 8 June 2012, ST filed a court case against Sanum, beginning proceedings that the Parties in this arbitration refer to as "**Case 52**." ST sought an order affirming that the Thanaleng Participation Agreement had terminated by its terms on 11 October 2011, even though ST had permitted Sanum "to jointly continue running the business" until 12 April 2012, in the hope that a new Participation Agreement might be signed. ST claimed that a further agreement was not possible "due to a bad faith of Sanum in sharing operation of such business," with the result that ST "no longer had more obligations to abide by towards Sanum."[44] On 25 June 2012, Sanum filed its defense and counterclaims, contending that "[o]nly the Participation Agreement which was meant to cover the transition period from the old machine suppliers to the slot machines provided by Sanum, expired," but the Master Agreement and First and Second Thanaleng Expansion Agreements "remain valid

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the dispute resolution in accordance with the laws of Lao PDR.

If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC."

[37] C-411, Defense filed by ST before OEDR, 23 March 2012.

[38] C-126, Sanum Petition to OEDR for Injunction, 12 April 2012.

[39] C-127, Sequestering Order No. 07/PC.VTE, 20 April 2012.

[40] C-128, ST Notice to Remove Machines from Thanaleng, 25 April 2012.

[41] C-129, OEDR Notice No. 38/MoJ, 26 April 2012. Claimants contend that this was an "abrupt[]" reversal of course due to ST's political connections with the Lao PDR Government. Claimants' Memorial, ¶ 88.

[42] Baldwin Witness Statement, ¶ 110.

[43] C-130, Appeal Decision No. 06/AC.CR, 30 May 2012. Claimants contend that this ruling was actually issued on 30 April 2012-not 30 May 2012 as reflected on the document-and that Sanum was not provided an opportunity to be heard. Claimants' Memorial, ¶ 90.

[44] C-470, ST Petition in Case 52, 8 June 2012.

and in full force and effect."[45] Sanum contended that it therefore was entitled to a majority interest in and management control over the Thanaleng Slot Club, and sought damages estimated in the "tens of millions US$" because of its eviction from the Club, the removal of its machines, and alleged other wrongs.[46]

132. On 25 July 2012, the Commercial Court of Vientiane issued a Seizure Order which froze a number of Sanum's bank accounts as security for certain court fees associated with its counterclaim against ST.[47] The total sums in these accounts was US$135,375.76, which was considerably less than the court fees at issue.[48]

133. Following a trial on 26 July 2012 (which Sanum contends lacked due process),[49] the Commercial Court of Vientiane (the court of first instance) ruled the same day in ST's favor (the "**Case 52 First Instance Decision**"). The Court determined that ST had sent Sanum three notices of the termination of the Participation Agreement, the last one dated 11 April 2012, to which Sanum had failed to respond; that Sanum's refusal to recognize the termination was a breach of the Participation Agreement; that Sanum's invocation of the Master Agreement did not change these facts, because "[t]he contents of MA [don't] cover the contents of PA"; that Sanum's invocation of the later Thanaleng Expansion Agreements did not modify the expiration of the Participation Agreement; and accordingly that all obligations between ST and Sanum under the Participation Agreement had ended, with ST therefore free to resume operations on its own at the Thanaleng Slot Club. The Court rejected Sanum's counterclaim for more than US$240 million on the basis that ST had not breached the Participation Agreement.[50]

134. Sanum filed an appeal, and on 11 December 2013, the Court of Appeal affirmed the Decision of the Commercial Court in Case 52 (the "**Case 52 Appeal Decision**").[51] *Inter alia,* the Court of Appeal rejected Sanum's contention that termination of the Thanaleng Participation Agreement related only to a particular temporary allocation of shares and profit sharing, noting that the Section

[45] C-121, Sanum Defense and Counterclaim, 25 June 2012, p. 5; *see also id*., p. 3.

[46] C-121, Sanum Defense and Counterclaim, 25 June 2012, pp. 8-9. According to the eventual Court judgment, Sanum's damages demand was later quantified as in excess of US$ 240 million. C-123, Case 52 First Instance Decision, p. 4.

[47] C-169, Commercial Chamber, the People's Court, No. 11/PC.VTC, Order to Seize Sanum Assets, 25 July 2012.

[48] Claimants' Memorial, ¶¶ 279-280.

[49] Claimants' Memorial, ¶¶ 92-94.

[50] C-123 and R-118, Case 52 First Instance Decision, pp. 4-6.

[51] C-124 and R-129, Case 52 Appeal Decision, 11 December 2013.

6 of the Participation Agreement referred generally to termination of the companies' business participation.[52] As for Sanum's argument that "the Master Agreement will take precedence," the Court of Appeal considered as follows:

> After considering these assertions, the Court deems that they are not justified because the content of the Master Agreement … does not define clearly the rights and obligations of the two parties concerning business operations [at the Thanaleng Slot Club]. To ensure fairness to both parties …, the two parties agreed to make the October 4, 2008 Participation Agreement, which was to terminate on October 4, 2011…. [Sanum] should not consider that because there is a Master Agreement, [it] has the automatic right to continue joint business operations …. If the intent was to operate the business … based on the Master Agreement, as claimed by Sanum …, both Sanum … and ST … really should not have made the [Participation Agreement]."[53]

135. The Court of Appeal added that upon expiration of the Participation Agreement, ST and Sanum would have to take affirmative steps to agree on a new Participation Agreement if they wished to continue a business partnership. It accepted ST's evidence that despite three notices of termination over more than six months which requested a meeting to discuss possible future arrangements, Sanum "gave no response to inform ST… of its intent to continue joint business operations …."[54] The Court of Appeal concluded that "[t]herefore, ST … and Sanum … no longer have the status of being business partners in the Slot Machine Club …"[55]

136. The Lao Supreme Court affirmed the Court of Appeal's decision on 4 April 2014 (the "**Case 52 Supreme Court Decision**").[56] *Inter alia,* the Supreme Court rejected Sanum's argument that once the Participation Agreement expired, the Master Agreement "should be effective immediately to cover the obligations" between Sanum and ST, since the Master Agreement itself provided that it "has no intent to be a strict contract, as it is only to support the parties toward having an overall understanding of their own relationship," which would be implemented in subsequent necessary contracts. "This shows that the parties cannot consider the [Master Agreement] as a completed business joint venture agreement …. Therefore, the parties need to renew the contract to be in compliance with the [Master Agreement]." They ultimately did not do so.[57]

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[52] C-124 and R-129, Case 52 Appeal Decision, 11 December 2013, p. 8.

[53] C-124 and R-129, Case 52 Appeal Decision, 11 December 2013, p. 9.

[54] C-124, and R-129, Case 52 Appeal Decision, 11 December 2013, pp. 8, 9-10.

[55] C-124 and R-129, Case 52 Appeal Decision, 11 December 2013, p 9.

[56] C-125 and R-135, Case 52 Supreme Court Decision, 4 April 2014.

[57] C-125 and R-135, Case 52 Supreme Court Decision, 4 April 2014, p. 7.

137. Almost eighteen months later, in September 2015, Sanum initiated a SIAC arbitration against ST (the "**ST SIAC Case**"), invoking the third paragraph of the Master Agreement's tiered dispute resolution clause and raising various claims related to the Thanaleng Slot Club. Sanum's initial Notice of Arbitration proposed a SIAC arbitration seated in Macau; ST objected to SIAC arbitration on several grounds.[58] The SIAC noted ST's objections but declared itself satisfied *prima facie* that there was a valid SIAC arbitration clause, following which ST did not proceed further in the arbitration; SIAC appointed all three tribunal members.[59] The tribunal in that case (the "**ST SIAC Tribunal**") later determined, following consultation with Sanum's counsel, that the seat of the arbitration should be Singapore rather than Macau, since the dispute resolution clause in the Lao Bao/Ferry Terminal Participation Agreement – which specifically provided for a SIAC Rules arbitration seated in Singapore – "amplifie[d] and supplement[ed] the dispute resolution clause in the Master Agreement."[60]

138. On 22 August 2016, the ST SIAC Tribunal issued the 2016 ST SIAC Award, finding breach of contract by ST and awarding Sanum some US$200 million for deprivation of a 60% interest in the Thanaleng Slot Club.[61] This development was at the root of LHNV's ancillary claim in the parallel arbitration for the Respondent's non-recognition of the 2016 ST SIAC Award. Pursuant to PO3, the ancillary claim is not a part of these proceedings by Sanum under the China-Laos BIT.

(2) Savan Vegas Dispute and Initiation of Case 48

139. Meanwhile, and separate from the Sanum-ST dealings regarding the Thanaleng Slot Club, a separate dispute arose between Sanum and ST regarding the Savan Vegas Casino in Savannahket.

140. As discussed above, the Master Agreement had envisioned a joint venture between Sanum and ST with respect to the Savan Vegas Casino for which ST already had a concession. The casino was owned by SVCC, an ST company, in which the Lao PDR had a 20% ownership stake. On 27 July 2007, Sanum and ST (and certain ST affiliates) executed a Share Transfer Agreement by which

[58] R-266, 2019 ST Appeal Decision, ¶¶ 20-21.

[59] R-266, 2019 ST Appeal Decision, ¶¶ 22-23.

[60] R-266, 2019 ST Appeal Decision, ¶ 24.

[61] C-122 and R-76, ST SIAC Award No. 097/16 re ARB/184/15/JJ, *Sanum v. ST Group et al.,* 22 August 2016 ("**2016 ST SIAC Award**").

Sanum acquired sufficient shares to give it a 60% stake in SVCC, leaving ST with a remaining 20% interest.[62]

141. On 10 August 2007, Sanum, ST, SVCC and the Lao PDR entered into a Project Development Agreement (the "**Savan Vegas PDA**"), which confirmed the ownership structure of the joint venture (Sanum 60%, ST 20% and the Lao PDR 20%),[63] and established certain parameters for the development of the casino. The same day, a similar Project Development Agreement was executed for the Paksong Vegas casino (the "**Paksong Vegas PDA**").[64] Claimants contend that Sanum subsequently (in June 2012) acquired ST's remaining 20% interest in SVCC, after ST failed to make a capital contribution, bringing its ownership stake in the Savan Vegas project to 80%.[65]

142. The Savan Vegas Casino opened on 20 December 2008. The Paksong Vegas casino was never built.

143. By 2012, the relationship between Sanum and ST had seriously deteriorated, and on 3 May 2012, ST filed suit against Sanum and SVCC in the Commercial Court of Vientiane.[66] The Parties in this arbitration refer to those proceedings as "**Case 48**." ST's 2012 petition alleged breaches by Sanum of the Master Agreement, a Shareholders' Agreement dated 31 October 2007 between ST and Sanum, and SVCC's Articles of Association, "along with the violation of laws and regulations of Lao PDR."[67] Among other things, ST alleged that:

a. Sanum had breached the Master Agreement by entering into business agreements with others for gaming in Laos;[68]

b. Sanum and SVCC had breached their obligation to provide ST with full access to SVCC's financial records, which was particularly concerning given SVCC's unexplained disbursement of US$26 million as "other expenditures", while failing to report profits in any year;[69]

[62] C-32, Share Transfer Agreement, 27 July 2007.
[63] C-7, Savan Vegas PDA, 10 August 2007, Art. 6(3).
[64] C-406, Paksong Vegas PDA, 10 August 2007.
[65] Claimants' Memorial, ¶ 37 & n. 39.
[66] C-325, ST Petition in Case 48, 3 May 2012.
[67] C-325, ST Petition in Case 48, 3 May 2012, p. 2.
[68] C-325, ST Petition in Case 48, 3 May 2012, Section 8.
[69] C-325, ST Petition in Case 48, 3 May 2012, Section 9.

c. Sanum had failed to construct the Paksong Vegas casino within the allotted timeframe, leading to the loss of the concession the Lao PDR had previously granted;[70]

d. Sanum violated its agreement that ST would take the lead in seeking necessary government approvals and licenses, by sending unilateral notices to the Lao PDR (including a threat of litigation) regarding the joint Paksong Vegas project;[71]

e. Sanum and SVCC violated their contractual and legal obligations of good faith towards ST as its partner;[72]

f. Sanum and SVCC breached their contractual obligation to distribute profits and/or dividends to ST, while making unexplained expenditures to their own benefit;[73]

g. Sanum wrongfully interfered with ST's gaming operations in the Thanaleng Slot Club, by asking the OEDR to seize slot club assets and prevent ST from operating the club as was its right;[74]

h. Sanum sought to avoid resolution of disputes by the Lao PDR courts, and unfairly threatened ST in letters to Lao and U.S. officials;[75] and

i. The dispute resolution clauses in the Master Agreement conflicted with Lao law.[76]

144. Based on these claims, ST asked the Court to terminate all agreements between Sanum and ST (including the Master Agreement, the Savan Vegas and Paksong Vegas PDAs, and the Thanaleng Participation Agreement), in accordance with ST's notification of termination sent on 11 April 2012, and declare that the companies are no longer obliged to maintain any exclusive relationships in casino businesses and slot clubs.[77] ST also sought, *inter alia*, (a) compensation from Sanum for losses incurred in the failure of Paksong Vegas; (b) an order of liquidation or calculation of SVCC's assets and liabilities, followed by distribution to ST of any profits that were illegally retained; (c)

[70] C-325, ST Petition in Case 48, 3 May 2012, Section 10.
[71] C-325, ST Petition in Case 48, 3 May 2012, Section 11.
[72] C-325, ST Petition in Case 48, 3 May 2012, Section 12.
[73] C-325, ST Petition in Case 48, 3 May 2012, Section 13.
[74] C-325, ST Petition in Case 48, 3 May 2012, Section 14.
[75] C-325, ST Petition in Case 48, 3 May 2012, Section 15.
[76] C-325, ST Petition in Case 48, 3 May 2012, Section 16.
[77] C-325, ST Petition in Case 48, 3 May 2012, p. 17 ("Suggestions for Consideration," point 1).

an order that Sanum should remove its slot machines from the Thanaleng warehouse, based on the termination of the Thanaleng Participation Agreement; and (d) other relief, including regarding the Lao Bao and Ferry Terminal Slot Club.[78]

145. On 8 June 2012, Sanum filed a short Defense in Case 48, claiming that the Petition was "indistinct and complicated" because its scope overlapped with Case 52 (the Thanaleng dispute) and a separate records access proceeding (Case 15) pending between the parties. Sanum asked the Court to order ST to separate its claims, and to allow it to respond further after the Petition had been rectified.[79]

146. Claimants contend that after filing that Defense, Sanum "heard nothing about Case 48 until nearly 4 years later," until March 2016.[80]

147. In the interim, ST purportedly filed an Additional Statement of Claim dated 28 November 2014, asserting numerous additional claims against Sanum and SVCC and again requesting termination of the Savan Vegas PDA.[81] These included claims not only about Sanum's alleged failure to perform obligations under the PDA, but also claims about unregistered transfers of cash into the Lao PDR and SVCC's non-payment of outstanding taxes.[82] ST sought additional relief, including an order that Sanum should be solely liable for SVCC's outstanding tax liability and that any undistributed SVCC profits should be distributed as dividends based on the "proportion that … should be deserved."[83] Claimants say Sanum never received this additional pleading until the case was concluded, and assert that it was backdated from 2016.[84]

148. Be that as it may, Case 48 remained quiet until early 2016. Further developments at that time are discussed in Section III.H.(12) below.

C. SANUM'S INITIAL DISPUTES WITH THE LAO PDR

149. As is apparent from the above summary of Sanum's disputes with ST, these unfolded against the backdrop of separate (but closely connected) disputes between Claimants and the Lao PDR, which eventually ripened into investment treaty claims asserted in the BIT I Cases. This Section describes

[78] C-325, ST Petition in Case 48, 3 May 2012, pp. 17-18 ("Suggestions for Consideration," points 2-7).
[79] C-326, Defense by Sanum and SVCC in Case 48, 8 June 2012.
[80] Claimants' Memorial, ¶ 223.
[81] C-331, ST Statement of Additional Claims, 28 November 2014, pp. 3-4 (stating fourteen new claims).
[82] C-331, ST Statement of Additional Claims, 28 November 2014, pp. 3-4.
[83] C-331, ST Statement of Additional Claims, 28 November 2014, pp. 4-5.
[84] Claimants' Memorial, ¶¶ 243-244, 251.

certain key aspects of these initial Sanum-Lao PDR disputes, although other issues also arose that featured in various proceedings.

(1) The Tax Rate Dispute

150. One of the key disputes between Claimants and the Lao PDR concerns the Respondent's alleged abrogation of a 1 September 2009 agreement between its Ministry of Finance and SVCC to implement a beneficial "flat tax" arrangement for an "experimental period" of 5 years (the "**Savan Vegas FTA**").[85] The Savan Vegas FTA provides that for the years 2009-2013, SVCC would pay a flat sum of US$745,000 per year, in quarterly installments,[86] rather than the taxes otherwise applicable based on general tax laws then in effect. After the first five years, the Parties would discuss whether to continue with such an arrangement, with the extent of future tax obligations pegged to SVCC's revenue performance.[87]

151. During 2011, Sanum sought to begin negotiations with the Lao Ministry of Finance to extend the 2009 Savan Vegas FTA, which was set to expire at the end of 2013. Claimants say that while certain progress initially was made in the negotiations, in the end all of Sanum's proposals were rejected.[88]

152. In December 2011, the Lao National Assembly passed a new tax law (the "**2011 Tax Law**") that dramatically increased the tax rate on casinos from the previous 25% of "Gross Gaming Revenues" plus 10% VAT (applicable under the prior "**2005 Tax Law**") to a new 80% of Gross Gaming Revenues plus 10% VAT.[89] Claimants complain that other gaming companies were protected from the 2011 Tax Law because they already had long-term flat tax agreements in effect, whereas the Savan Vegas FTA was only for an initial short-term, with any extension subject to further negotiation. Claimants allege that the "new law certainly looked like a strategic move by the Government designed to shut down Savan Vegas, seize the asses, and reclaim its valuable gaming monopoly."[90] Respondent denies any such intent, and notes that well before the 2009 Savan Vegas FTA, Sanum had agreed in the 2007 Savan Vegas PDA to abide by tax obligations in Lao PDR law, and also agreed that non-payment of taxes would be a basis for the Government's termination

[85] C-17, Savan Vegas FTA, 1 September 2009, Preamble.

[86] C-17, Savan Vegas FTA, 1 September 2009, Art. 1.

[87] C-17, Savan Vegas FTA, 1 September 2009, Art. 5.

[88] Claimants' Memorial, ¶ 107.

[89] C-74, Presidential Decree 058/NA on the Promulgation of the Tax Law, 16 January 2012; Claimants' Memorial, ¶ 108.

[90] Claimants' Memorial, ¶ 110.

of the PDA.[91] Respondent adds that "the Claimants' objective expectations must have been to pay tax according to Lao law; that is the contract they signed."[92]

153. The Savan Vegas FTA was to expire by its terms on 31 December 2013. Well before that time, as discussed further below, Claimants initiated the BIT I Cases, alleging *inter alia* that discriminatory tax levies were set to take place at the end of 2013.

(2) The Tax Audit Dispute

154. A second early dispute between Claimants and the Lao PDR concerned a tax audit of SVCC's books and records from 2009 to 2012, which the Ministry of Finance launched on 21 May 2012, naming an audit committee that included Ernst & Young.[93]

155. On 7 June 2012, the Ministry of Finance issued a "Report on information collection and Inspection of Business Operation and Accounts of SVC."[94] The report identified preliminary findings, which included several alleged breaches of the Savan Vegas PDA, including a failure to submit operation reports to the Government as required, a failure to "fully implement" a required construction tax, a failure to use Lao PDR accounting rules, and "[l]ack of consultation between the parties regarding financial status or other provisions in this Agreement."[95] In addition, the report suggested that SVCC had violated several Lao PDR laws, including (a) the Law on Investment Promotion (failure to use Lao PDR accounting rules, use of a foreign auditor that was not registered in the Lao PDR, and failure to pay construction and immigration taxes in full and on time); (b) the Law on Enterprise (failure to issue share certificates within the applicable time period); (c) the Law on Accounting (not keeping books and accounts in Lao language and currency, but using international standard accounting systems which were not approved by Lao authorities); (d) the Law on Tax and Law on Value Added Tax (failure to collect turnover tax or VAT from contractors and suppliers and to pay such taxes forward to the government); (e) the Law on Audit (use of a foreign auditor which was unregistered in the Lao PDR); and (f) the Presidential Decree on Fees and Service Fees (failure to

[91] Respondent's Counter-Memorial, ¶¶ 261-263.
[92] Respondent's Counter-Memorial, ¶ 263.
[93] C-152, Notice No. 1157/MoF, 14 May 2012.
[94] C-155, Report 1586/MoF, 7 June 2012.
[95] C-155, Report 1586/MoF, 7 June 2012, ¶ 2.1.

pay overtime fees).[96] The report concluded that SVCC had outstanding tax obligations of 100,132,025,719 kip for 2008-2011.[97]

156. The 7 June 2012 report recommended that the inspection be continued for another 30 days. In the meantime, it recommended that the government issue a notice requiring SVCC to "temporar[il]y stop any movement of its asset including financial asset … during the inspection," and that SVCC pay its tax obligations within three months. Finally, it suggested that "[u]pon completion of the Inspection, if there are comprehensive and sufficient evidence," then the Lao PDR should consider filing criminal claims against the responsible directors, management or employees of SVCC.[98]

157. Claimants contend that this 7 June 2012 report was issued even before the audit committee had commenced the onsite fieldwork portion of its work, and therefore was based on preordained conclusions.[99] Claimants also contend that that Ernst & Young's audit fieldwork was abruptly terminated on 10 July 2012.[100] On 25 September 2012, Ernst & Young reported its suspicion that the head of the inspection team was unhappy with Ernst & Young's work because did "not support MoF on the law [is]sue."[101]

158. Respondent offers a different view of why the audit fieldwork was stopped in mid-July 2012. In its view, Ernst & Young had come to "quickly question[]" the structure of two loans Sanum extended to SVCC between 2008 and 2009, reflected in two Credit Facility Agreements (the "**CFA Loans**").[102] According to Respondent, Sanum had "created [the CFA Loans] as a way of (1) never making an equity investment in Savan Vegas (despite an 80% ownership stake) and (2) to avoid paying taxes and minority shareholders while still extracting money out of the casino."[103] Respondent contends that in July 2012, after beginning the onsite inspection, Ernst & Young submitted a request to SVCC for additional documents about "the loan structure, certain "VIP payments, and other irregularities."[104] Shortly thereafter, the head of the inspection committee instructed Ernst & Young to produce a "first progress report" in two days and to complete its work

[96] C-155, Report 1586/MoF, 7 June 2012, ¶ 2.1(1)-(6).
[97] C-155, Report 1586/MoF, 7 June 2012, ¶ 2.2.
[98] C-155, Report 1586/MoF, 7 June 2012, ¶ III.
[99] Claimants' Memorial, ¶ 112.
[100] Claimants' Memorial, ¶ 114.
[101] C-156, 25 September 2012 Ernst & Young email, 25 September 2012.
[102] Respondent's Counter-Memorial, ¶ 363.
[103] Respondent's Counter-Memorial, ¶ 362; *see also id*., ¶¶ 368-370.
[104] Respondent's Counter-Memorial, ¶¶ 363-364.

within a week, so the committee in turn could make a final report to the Ministry of Finance on 24 July 2012.[105] This effectively meant Ernst & Young would not be able to review the documents it had sought to collect from SVCC's files. Respondent contends that Claimants were behind these developments, specifically that they "paid a bri[b]e to stop the E&Y Audit,"[106] in the form of a cash payment that was channeled through the bank account of a Mme. Sengkeo.[107] Respondent adds that Ernst & Young's initial suspicions of the CFA Loans were later borne out a forensic audit BDO conducted after SVCC was removed from Sanum's control in April 2015.[108]

159. Claimants in turn deny the bribery allegations, admitting that a payment was made to Mme. Sengkeo but insisting this was "a personal loan, granted to a long-time business colleague who did not hold a position in the Government, and not a bribe of any kind," much less one connected to the Ernst & Young audit.[109] Claimants contend that they "wanted the E&Y audit to proceed to completion because they were confident that the result would be favourable."[110]

160. In any event, Ernst & Young promised to deliver a report with its "preliminary findings and/or observations" based on its work to date,[111] and did so on 20 July 2012.[112] On 3 August 2012, the audit committee then issued its final audit report, which Claimants describe as "largely a verbatim copy" of the preliminary findings from early June 2012.[113]

161. These events also featured prominently in the BIT I Cases.

(3) The Thakhek Dispute

162. On 20 October 2010, Sanum entered into a Memorandum of Understanding with a Government Committee for the Laos-Thailand Friendship Bridge III Economic Zone Development (the

[105] R-42, Letter from the Head of the Inspection Committee, Ministry of Finance, to Ernst & Young, 11 July 2012.

[106] Respondent's Counter-Memorial, ¶ 364.

[107] Respondent's Counter-Memorial, ¶¶ 302, 304; Respondent's Rejoinder, ¶ 159.

[108] Respondent's Counter-Memorial, ¶¶ 366-367 (stating that BDO concluded Sanum had "grossly overstated the amount actually loaned to Savan Vegas; … applied unconscionable terms for what the law considers a 'shareholder loan';… doctored and falsified financial records and, … used the loan as a mechanism for self-dealing and to pay unrelated parties huge sums under bogus consulting agreements at the expense of the minority shareholders").

[109] Claimants' Reply, ¶¶ 384-385, 388.

[110] Claimants' Reply, ¶ 389.

[111] R-43, Letter from Ernst & Young to the Ministry of Finance, 12 July 2012.

[112] R-46, First Interim Report to Inspection Committee by Ernst & Young, 20 July 2012.

[113] Claimants' Memorial, ¶ 115.

"**Thakhek MOU**"),[114] for a land concession for a potential development in the Thakhek Special Enterprise Zone (the "**SEZ**"), an area some distance from the Savan Vegas hotel and casino complex. The Thakhek MOU provided that Sanum would complete and submit within 180 days a feasibility study, master plan, and social-economic and environmental impact study for the "Concession Land" (as defined), and that a land concession agreement covering that land would be signed within 30 days after those "required documents" were approved by the Government. Sanum would then complete the clearing of the land and start construction of the project within 6 months after signing of the land construction agreement.[115]

163. The "Concession Land" which the Government agreed to allocate was described in the MOU as "one (1) plot of land … located on the South of the Bridge and on the West of Road No. 13 South, with the land area of about 90 hectares more or less (see the land area drawing surveyed in May-August 2009 for the detail)."[116] The drawing attached showed the entire Special Enterprise Zone as approximately 1000 hectares, divided into various plots, one of which was labelled as "E-1" and intended for "Entertainment: Five Star Hotel, Casino, Night Club, Spa."[117] Notwithstanding this drawing, the Thakhek MOU also suggested that further work was required to confirm precise contours: "Once the exact location of the Concession Land has been agreed upon, [Sanum] will confirm its acceptance of the Concession land" to the Government.[118] It was also understood that at least some of the Concession Land was under private ownership, and Sanum agreed to pay US$900,000 – US$400,000 upfront and US$500,000 later – for the Government to "compensate the people for the Concession Land; resolve the problems; and spend on the survey, measurement, and allocation of the Concession Land in order for the Government to take ownership of the Concession Land so that the Government will be able to grant the Concession Land" to Sanum. This amount was to be adjusted if the actual land area granted to Sanum turned out to be "more or less than 90 hectares."[119]

[114] C-100 and R-107, Memorandum of Understanding between Sanum and the Committee for the Laos-Thailand Friendship Bridge III, 20 October 2010 ("**Thakhek MOU**"). The submissions and documents in this case variously use the translation Thakhek, Thakhaek and Thakhet, but all refer to the same MOU and underlying issue. The Parties' joint index to the record adopts the spelling "Thakhek."

[115] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.

[116] C-100 and R-107, Thakhek MOU, Art. 2.1.

[117] C-100 and R-107, Thakhek MOU, p. 7.

[118] C-100 and R-107, Thakhek MOU, Art. 3.1.

[119] C-100 and R-107, Thakhek MOU, Arts. 2.2, 2.3.

164. On 4 February 2011, SVCC filed a one-page application with the Ministry of Information and Culture ("**MIC**") to build and operate a welcome center and slot club license in the Thakhek area.[120] On 21 February 2011, the MIC issued an authorization.[121] The Respondent contends that this was procured by a bribe, with Sanum recording a US$25,000 expense allowance in its general ledger related to obtaining the license,[122] and in any event that the MIC did not have authority to grant slot club licenses without the Prime Minister's approval.[123] In any event, on 2 March 2011 – ten days after the MIC approved the application – the Prime Minister's Office directed MIC to cancel it, claiming sole authority to issue slot club licenses.[124] On 29 March 2011, Sanum and SVCC petitioned the Prime Minister's Office for permission to proceed with a slot club in the SEZ, which was rejected in October 2011.[125]

165. Subsequently, a dispute arose regarding the precise contours of the Thakhek land concession, and specifically whether it included a 16 hectares portion of land fronting National Road 13, which the Claimants contended were critical to the success of the contemplated development. Claimants contend that they had been promised this portion in the Thakhek MOU, and the Government "reneged on its prior agreement."[126] The Lao PDR contends that these 16 hectares were never conclusively included in the Concession Land, and were privately owned and the owners had not agreed to yield it.[127] The Claimants further contend that in late 2015 they proposed an alternative plan with a different plot of land, but the Lao PDR rejected that proposal in early 2016 and refused to negotiate further.[128] The Lao PDR contended that the Claimants' alternate proposal contained improper conditions that were not reflected in the original MOU, and that it acted reasonably in its approach to negotiations.[129]

[120] R-109, Letter of Intent No. 01/2011, 4 February 2011.

[121] R-111, Authorization No. 63 from the Ministry of Information and Culture to Savan Vegas Casino Co., Ltd., 21 February 2021.

[122] Respondent's Rejoinder, ¶¶ 228-229, citing R-108, General Ledger, 3-10 February 2011.

[123] Respondent's Rejoinder, ¶ 230.

[124] R-112 and C-104, Notice Letter No. 415 from the Prime Minister's Office, 2 March 2011.

[125] R-264, ICSID BIT I Award, ¶ 217.

[126] Claimants' Memorial, ¶¶ 124-127, 206.

[127] Respondent's Counter-Memorial, ¶ 117 (referring to SIAC Award findings).

[128] Claimants' Memorial, ¶¶ 209-211.

[129] Respondent's Counter-Memorial, ¶¶ 118-119 (referring to SIAC Award findings).

D. THE BIT I CASES (INITIAL STAGES)

166. Claimants commenced the BIT I Cases in August 2012, with LHNV seeking arbitration under the Lao PDR-Netherlands BIT and Sanum seeking arbitration under the China-Lao PDR BIT. The BIT I Cases alleged that Claimants had invested in the Lao PDR based on various government assurances, including of a favorable and certain tax regime and of protection for its investment in partnership with ST. Claimants alleged numerous treaty breaches by the Lao PDR which, together with other actions Claimants alleged to be impending, threatened to culminate in the total loss in value of Claimants' investments. Among the acts Claimants challenged were the 80% tax on casino revenues which would apply to Savan Vegas after 2013, under the 2011 Tax Law and in the absence of a new flat tax agreement;[130] the tax audits of SVCC, which Claimants described as unfair and oppressive;[131] and various tax debts alleged by Lao tax authorities, including the construction tax, brokerage tax and overtime charge demands at issue in the audit.[132] Claimants expressed concern that the Lao PDR would take enforcement actions based on various taxes said to be due, which could result in the seizure of all of Sanum's assets.[133]

167. In addition, as the ICSID BIT I Award later noted, Claimants alleged that the Government "abused its sovereign authority to assist ST Holdings to acquire other assets which belonged in whole or in part, to the Claimants."[134] For example, Claimants challenged the conduct of the Lao courts in Case 52 related to the Thanaleng Slot Club, including their cancellation of all contracts between Sanum and ST regarding that club.[135] The BIT I Cases also alleged treaty breaches in connection with the Thakhek land concession,[136] and in connection with several other events not discussed in detail

[130] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶¶ 105-109; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(7), 88-92, 96.

[131] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶¶ 79-84; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 62-67.

[132] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶¶ 85-98; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(1), 68-81.

[133] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶ 110; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(2), 94.

[134] R-264, ICSID BIT I Award, ¶ 69.

[135] *See, e.g.,* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶ 66 (alleging "behind the scenes manipulation of the legal process by senior Government officials in order to favor ST over Sanum"), ¶¶ 67-76; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(3)-(6), 51-61.

[136] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶ 58; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(10)-(11), 36-39.

above, concerning the collapse of the Paksong Vegas casino project[137] and the Paksan Slot Club Project,[138] and the Lao Bao and Ferry Terminal Slot Clubs.[139]

168. On 17 September 2013, the ICSID BIT I Tribunal issued a provisional measures decision which, based in part on a suggestion by the Respondent, ordered that in return for LHNV depositing into escrow certain further tax payments that allegedly would become due beginning January 2014, the Respondent would refrain from demanding payment of taxes allegedly due under the 2011 Tax Law; from seeking to seize or interfere in the operations of the Lao Bao and Ferry Terminal Slot Clubs based on disputed tax amounts; and from taking any action to freeze or seize funds in Claimants' bank accounts.[140]

169. On 13 December 2013, the PCA BIT I Tribunal issued a decision on jurisdiction, rejecting Respondent's objections that the China-Lao BIT did not apply to Macao where Sanum was incorporated, that Sanum was not a protected investor with investment-related claims under that BIT, and that Sanum's claims were barred by *lis pendens* or were an abuse of process based on the overlap with LHNV's claims in the ICSID BIT I Case. The decision upheld Respondent's objection to Sanum's attempted invocation of the most-favored-nation ("**MFN**") clause of the China-Lao BIT to bring treaty claims other than for expropriation.[141]

170. On 21 February 2014, the ICSID BIT I Tribunal issued a decision on jurisdiction, rejecting Respondent's *ratione temporis* objection to LHNV's claims about the imposition of the 2011 Tax Law, following the failure of negotiations to renew the Savan Vegas FTA.[142]

171. Following further proceedings in the BIT I Cases, a combined hearing on the merits in both cases was scheduled to begin on 16 June 2014. Shortly before then, the Parties reached an agreement intended to result in the sale of Claimants' remaining gaming assets in the Lao PDR (*i.e.,* Savan

[137] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶¶ 38, 41-47; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(9), 33 (stating that the "Paksong Project ... is the subject of a separate arbitral proceeding").

[138] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶¶ 51-55; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(9), 34-35 (stating that the "Paksan Slot Club Project is also a subject of the other arbitral proceeding").

[139] *See* C-61, Sanum Amended Notice of Arbitration in PCA BIT I Case, 7 June 2013, ¶¶ 101-104; C-62, LHNV Amended Notice of Arbitration in ICSID BIT I Case, 23 May 2012, ¶¶ 8(8), 40, 84-87.

[140] R-49; ICSID BIT I Decision on Claimant's Amended Application for Provisional Measures, 17 September 2013.

[141] C-399, PCA BIT I Award on Jurisdiction, 13 December 2013. Respondent challenged the PCA BIT I Award on Jurisdiction in the courts of Singapore and initially prevailed with respect to the China-Lao BIT's applicability to Macao, but jurisdiction ultimately was upheld by the Singapore Court of Appeal.

[142] C-398, ICSID BIT I Decision on Jurisdiction, 21 February 2014.

Vegas and the Ferry Terminal and Lao Bao Slot Clubs) and to resolve the BIT I Cases. The agreement was set forth in a Deed of Settlement signed on 15 June 2014 and in a Side Letter signed on 17 June 2014.[143] On 19 June 2014, the BIT I Tribunals suspended the BIT I Cases pending completion of the steps outlined in the settlement documents.[144]

E. THE DEED OF SETTLEMENT AND SIDE LETTER

172. The Deed of Settlement provided a plan for the sale of Claimants' "Gaming Assets" to an unrelated third party.[145] As clarified in the Side Letter, the Gaming Assets were defined to include the Savan Vegas PDA and the various licenses and land concessions issued in connection with the Savan Vegas Casino and the Lao Bao and Ferry Terminal Slot Clubs.[146] The sale would take place "on a basis that will maximize Sale proceeds,"[147] and the sale proceeds (less sales costs which the Claimants would bear) to be shared in accordance with the equity ownership of the various assets. For SVCC this was confirmed to be 80% by the Claimants and 20% by the Lao PDR, while for the Lao Bao and Ferry Terminal Slot Clubs, ST still owned 40%.[148]

173. In order to maximize the sale value of the assets, the Parties agreed that:

a. the Savan Vegas PDA and the various licenses and land concessions would be considered reinstated as of the effective date of the Deed of Settlement, for a further term of 50 years;[149]

b. the Lao PDR would "forgive and waive" any taxes due in connection with the Gaming Assets up to 1 July 2014, provided that taxes would become due from 1 July 2014 onward;[150]

[143] C-4, Deed of Settlement, 15 June 2014, and Side Letter, 18 June 2014; R-5, Deed of Settlement, 15 June 2014; R-6, Side Letter to the Deed of Settlement, 18 June 2014.

[144] C-415, ICSID BIT I Case Order on Consent, 19 June 2014; C-416, PCA BIT I Case Order on Consent, 19 June 2014.

[145] R-5, Deed of Settlement, 15 June 2014, Sections 10, 14.

[146] R-5, Deed of Settlement, 15 June 2014, Section 5.

[147] R-5, Deed of Settlement, 15 June 2014, Section 13.

[148] R-5, Deed of Settlement, 15 June 2014, Section 16, as clarified by Side Letter to the Deed of Settlement, 18 June 2014, p. 1.

[149] R-5, Deed of Settlement, 15 June 2014, Section 6.

[150] R-5, Deed of Settlement, 15 June 2014, Section 7. Funds already paid into escrow pursuant to the provisional measures decision in the ICSID BIT I Case would be released to the Lao PDR. *Id.*, Section 17.

c. the future taxes would be calculated on the basis of a "new flat tax" to be established through a three-member "Flat Tax Committee" to which both Claimants and the Lao PDR could appoint a member, and the tax rate set by the committee would be applied retroactive to 1 July 2014 and for the next 50 years with a defined escalation mechanism;[151]

d. the sale of the Gaming Assets would occur expeditiously after the new flat tax was established, and generally within ten months of the Deed of Settlement;[152]

e. until the sale was completed, Claimants could continue to manage and operate the Gaming Assets in compliance with applicable laws, subject to monitoring and oversight by the Lao PDR's agent, RMC Gaming Management LLC ("**RMC**"), but if no sale had materialized at the end of ten months, then Claimants and the Lao PDR could appoint RMC or "any other qualified operator" to take over management until the sale was completed;[153] and

f. "[t]ime shall be of the essence of this Deed,"[154] given the Parties' mutual interest in expeditiously concluding a sale of the Gaming Assets and bringing to an end the Claimants' involvement in the gaming sector of the Lao PDR.

174. The Deed of Settlement provided that following the sale of the Gaming Assets, Claimants thereafter would not engage in any further gaming investments in the Lao PDR, although they could engage in certain specified non-gaming activities. Specifically, and subject to Claimants' payment of US$500,000 to the Lao PDR, "the Parties will negotiate in good faith and conclude" a land concession and project development agreement with respect to the 90 hectares of land at Thakhek that had previously been discussed in the Thakhek MOU of 20 October 2010, "on the basis that no gaming activities whatsoever will be allowed at or in connection with" that site.[155]

175. The Parties also agreed that the Lao PDR would discontinue certain criminal investigations then pending against Sanum, SVCC and their personnel, and would not reinstate such investigations provided the Claimants duly implemented the agreed terms and conditions.[156]

[151] R-5, Deed of Settlement, 15 June 2014, Sections 8, 9.
[152] R-5, Deed of Settlement, 15 June 2014, Sections 10, 11.
[153] R-5, Deed of Settlement, 15 June 2014, Sections 11, 12.
[154] R-5, Deed of Settlement, 15 June 2014, Section 48.
[155] R-5, Deed of Settlement, 15 June 2014, Section 22.
[156] R-5, Deed of Settlement, 15 June 2014, Section 23.

176. With respect to dispute resolution, the Deed of Settlement provided for two different potential procedures, depending on which party was alleged to have violated it and which provisions were involved:

a. First, if the Lao PDR was in material breach of *certain* sections of the agreement,[157] then Claimants could revive the suspended BIT I arbitrations, after notice and expiration of a cure period. The BIT I Tribunals themselves would determine whether a material breach had occurred which could justify revival of the original treaty claims.[158] If those claims were revived, then they would go forward on the existing record; the Parties were not permitted to add any new claims or evidence nor seek any additional relief.[159] As a result, the BIT I Cases would only decide *treaty claims about events that predated the Deed of Settlement*, even though as a predicate to reviving those proceedings, the same tribunal members would have to make *contract determinations about subsequent events*, namely deciding whether a material breach of the specified sections had occurred.

b. Second, if Claimants failed to comply with their obligations under the Deed of Settlement, then the Lao PDR could commence a new contract-based arbitration to enforce the terms of the Deed. That commercial arbitration would proceed under the SIAC Rules, with the Settlement Deed governed by New York law.[160]

177. As will become apparent below, these dispute resolution provisions ultimately resulted in a multiplicity of further proceedings, further complicating the already complicated history of two separate but significantly overlapping BIT I Cases.

F. CLAIMANTS' FIRST MATERIAL BREACH APPLICATIONS TO THE BIT I TRIBUNALS

178. On 27 June 2014 – just twelve days after the Deed of Settlement was signed, ten days after the Side Letter was executed, and eight days after the BIT I Tribunals suspended their proceedings – Claimants served a notice on the Lao PDR, alleging that it had committed a material breach which would entitle Claimants to revive the BIT I Arbitrations. The claim concerned reports that Lao officials had approved construction for an "integrated entertainment resort" in "Site A" located

[157] As clarified in the Side Letter, this included Sections 5-8, 15, 21-23, 25, 27, 28 and the obligation in Section 30 to grant any necessary approvals with regard to the Sale. R-5, Deed of Settlement, 15 June 2014, Section 23; Side Letter to the Deed of Settlement, 18 June 2014, p. 1.

[158] R-5, Deed of Settlement, 15 June 2014, Section 32.

[159] R-5, Deed of Settlement, 15 June 2014, Section 34.

[160] R-5, Deed of Settlement, 15 June 2014, Section 35, 42.

across the street from Savan Vegas, which Claimants asserted would breach its monopoly rights under the Savan Vegas PDA and also would breach Section 6 of the Deed of Settlement, which required the Government to treat the Savan Vegas PDA as reinstated.[161] On 4 July 2014, Claimants applied to the BIT I Tribunals (the "**First Material Breach Application**") (i) to determine whether the Government was in material breach of Section 6 of the Deed, and (ii) upon finding a material breach, to revive the underlying arbitration proceedings.[162]

179. Pending resolution of this claim, Claimants (by their own description) suspended performance under the Deed of Settlement,[163] taking the position that all deadlines in that document were extended by the length of time required to cure the Lao PDR's alleged breach.[164] On account of this position, Claimants declined to participate in the selection of a chair of the Flat Tax Committee envisioned by the Deed of Settlement, and it also declined to pay taxes as calculated under the otherwise applicable tax laws of the Lao PDR.[165]

180. The Lao PDR contested jurisdiction by the BIT I Tribunals, and on 11 August 2014, it commenced the separate SIAC Case, alleging that Claimants had breached their own obligations under the Deed of Settlement (see Section III.G below).

181. On 10 June 2015, the ICSID BIT I Tribunal denied LHNV's First Material Breach Application, finding that LHNV had not established that the Lao PDR had granted or approved the construction of a casino in Site A.[166]

G. RESPONDENT'S SIAC CASE AGAINST SANUM

182. As discussed above, while Claimants' First Material Breach Application was pending before the BIT I Tribunals, the Lao PDR commenced the SIAC Case against Claimants,[167] contending that they were the ones who had breached the Deed of Settlement. Specifically, the Lao PDR:

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[161] C-417, Claimants' Material Breach Notice, 27 June 2014.

[162] C-419, Application for Finding of Material Breach of Deed of Settlement and for Reinstatement of Arbitration, ICSID BIT I Case, 4 July 2014, ¶¶ 1, 26; *see also* C-420, Application for Finding of Material Breach of Deed of Settlement and for Reinstatement of Arbitration, PCA BIT I Case, 4 July 2014, ¶¶ 1, 26.

[163] Claimants' Memorial, ¶ 148.

[164] C-417, Claimants' Material Breach Notice, 27 June 2014.

[165] *See, e.g.,* R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶¶ 31-32; R-27, SIAC Award, ¶ 79.

[166] C-421, Decision on the Merits, ICSID BIT I Case, 10 June 2015, ¶ 10.

[167] The Lao PDR's SIAC Case against Claimants (which was initiated on 11 August 2014 and concluded with the SIAC Award of 29 June 2017) must be distinguished from Sanum's SIAC arbitration against ST, which-as discussed

> sought an order directing Sanum to comply with their obligations under the Deed; a declaration that Sanum breached the Deed by refusing to perform its obligations; a declaration that the waiver of overdue taxes contained in Paragraph 7 of the Deed was no longer binding because Sanum refused to comply with the requirements of Paragraphs 8 and 9 (to proceed with the setting of a flat tax committee and cooperating with RMC's monitoring of the sale of the Casino); and an order requiring payment of certain money damages, fees, costs and interest on all moneys due.[168]

183. On 16 September 2014, Claimants presented counterclaims in the SIAC Case, alleging that the Lao PDR had breached the Deed of Settlement by granting a license to another casino in violation of Sanum's monopoly rights. Claimants contended that if the BIT Arbitrations were revived based on a finding of material breach, the Deed of Settlement would be "of no further force and effect, eliminating the basis for proceeding" with the SIAC Case. Alternatively, Claimants sought a declaration that the Deed of Settlement was void *ab initio* as a result of fraudulent inducement, or in the alternative rescission of the Deed in light of the Government's material breach, or an award of monetary damages.[169]

184. Following additional events described further in Section III.H below, the claims and counterclaims in the SIAC Case were amended, and ultimately "spann[ed] the period starting from the execution of the Deed to the conclusion of the sale of Savan Vegas" to Macau Legend Development Ltd. ("**Macau Legend**").[170] The ultimate scope of the SIAC Case, as well as its outcome, is described further in Section III.H(13) below.

H. FURTHER DEVELOPMENTS FOLLOWING THE DEED OF SETTLEMENT

185. Events on the ground did not remain static while the First Material Breach Application was pending before the BIT I Tribunals, and the SIAC Case was getting under way. Unfortunately, numerous other developments ensued, which gave rise to further proceedings in the BIT I Cases, the SIAC Case, and eventually before this Tribunal. These included the following.

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above-Sanum initiated on 23 September 2015, and which was resolved with the 2016 ST SIAC Award against ST. *Compare* C-481 and R-27, SIAC Award, 29 June 2017, *with* C-122 and R-76, 2016 ST SIAC Award.

[168] C-481 and R-27, SIAC Award, SIAC Award No. 077 of 2017, 29 June 2017 ("**2017 SIAC Award**", ¶ 91.

[169] C-481 and R-27, 2017 SIAC Award, ¶¶ 92-93.

[170] C-481 and R-27, 2017 SIAC Award, ¶ 142. In general, the Claimants alleged the Lao PDR had breached the Deed of Settlement by the actions it took to operate, tax and sell Savan Vegas; by refusing to negotiate in good faith to conclude a land concession at Thakhek; and by failing to terminate certain criminal investigations against Sanum and its affiliates. C-481 and R-27, 2017 SIAC Award, ¶¶ 212-215.

(1) The 2014 Tax Law Amendments

186. First, in October 2014, the Lao PDR enacted amendments to the 2011 Tax Law (the "**2014 Tax Law Amendments**") which lowered the statutory excise tax rates for entertainment and casino activities. In the absence of a direct agreement with the Government on an alternate rate, the 2014 Tax Law Amendments would have resulted for casinos a 35% tax on gross gaming revenues plus 10% VAT.[171] This was a reduction from the 2011 Tax Law rate of 80% of gross gaming revenues plus 10% VAT,[172] which had figured prominently in Claimants' initial filings in the BIT I Cases.

(2) The Dispute Over Whether Deed of Settlement Obligations Were Suspended

187. Second, on 24 December 2014, the Lao PDR notified Claimants that in its view – and contrary to the view Claimants had taken since June 2014 – the Parties' dispute over alleged breaches of the Deed of Settlement did not suspend Claimants' obligation under the Deed to sell SVCC within 10 months, or to assign control to operators agreeable to the Government so that the property and sale process could be managed by them. The Lao PDR insisted that Claimants cooperate in an "orderly process of the exchange of control due on 15 April 2015."[173]

(3) The Dispute Over SVCC's Tax Obligations

188. Five days later, on 29 December 2014, the Lao PDR informed Claimants that it viewed them to be in breach of its tax-related obligations under the Deed of Settlement, the PDA and Lao law, by refusing to participate in the establishment of a new Flat Tax Committee and also refusing to pay taxes in the interim. It took the position that "[i]t is not acceptable to the Government of the Lao PDR that a large gaming establishment operating under the good licenses of the Government simply refuses to pay taxes to the Government." The Lao PDR demanded that SVCC file its final 2013 audited financial statements (which were due in March 2014) and working financial reports for the first three quarters of 2014, to determine the appropriate tax due. The Government advised that in the absence of a new Flat Tax Agreement, taxes would be assessed under the 2014 Tax Law

[171] C-73, Presidential Decree #001 on Amendment of Lao Casino Tax Law, Art. 1, 24 October 2014; C-72, Presidential Decree 46/OP on Lao Tax Law, Art. 17.

[172] C-74, Presidential Decree 058/NA on the Promulgation of the Tax Law, 16 January 2012, Art. 20.2, 16 January 2012.

[173] R-12, Letter from Dr. Bounthavy Sisouphanthong, Vice Minister Ministry of Planning and Investment, to John Baldwin and Christopher Tahbaz, 24 December 2014.

Amendments (at a rate of 35% of gross gaming revenues plus 10% VAT) for all revenues since 1 July 2014, pursuant to the Deed of Settlement.[174]

189. The Lao PDR subsequently sent SVCC three notices of delinquency regarding tax obligations, dated respectively 27 January 2015, 27 March 2015, and 20 April 2015.[175]

(4) The Provisional Measures Applications

190. On 19 January 2015, LHNV applied for provisional measures from the ICSID BIT I Tribunal, to preserve what it considered to be the *status quo ante* pending the Tribunal's consideration of the merits of the First Material Breach Application. Specifically, LHNV sought to enjoin the Lao PDR from (a) taking any steps towards control or sale of its gaming assets, (b) applying the 2014 Tax Law Amendments to Savan Vegas' gross gaming revenues; and (c) declaring that it would treat LHNV's rights to obtain a land concession and project development agreement for Thakhek as forfeited and void.[176]

191. On 18 March 2015, the ICSID BIT I Tribunal denied the provisional measures request. Among other things,[177] the ICSID BIT I Tribunal found that LHNV had "not established a case for relief from the collection of the 45% tax on gross gaming revenues enacted in October 2014," particularly in circumstances where "the Government was quite prepared to proceed with the renegotiation of a Flat Tax Agreement under the Terms of the Settlement," but Claimants "refused to participate as part of [their] broader disagreement with the Government of Laos over the status of the Deed of Settlement."[178] The ICSID BIT I Tribunal noted that when the prior Savan Vegas FTA expired by its terms, Savan Vegas "became subject to the applicable tax laws of Laos," but it "is common ground that although Savan Vegas has continued to do business in Laos, it has not paid taxes either

[174] R-54, Letter from Director General, Ministry of Finance, Sithisone Thepphasy, to John Baldwin and Christopher Tahbaz, 29 December 2014.

[175] R-55, Tax Notice to SVCC, 27 January 2015; R-57, Tax Notice to SVCC, 27 March 2015; R-59, Tax Notice to SVCC, 20 April 2015.

[176] R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶ 12.

[177] With respect to the Thakhek issue, the ICSID BIT I Tribunal found the application to be moot, as the Respondent "is not now proposing to take any unilateral action concerning the Thakhaek property," but rather to await the SIAC Tribunal's decision on the Respondent's claim that Claimants had waived any rights to the property. R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶ 14. *Id.*, ¶¶ 42-44, 49.

[178] R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶¶ 27, 31.

directly or in escrow since 1 January 2015."[179] Yet "for so long as the Claimant continues to do business in Laos, it can reasonably expect to be bound by the Laotian income tax laws applicable to gaming casinos unless and until a new Flat Tax Agreement is negotiated."[180]

192. With respect to control of the gaming assets, the ICSID BIT I Tribunal in March 2015 found no urgency to decide this issue prior to its upcoming hearing on the First Material Breach Application, given that the Respondent intended to have a new gaming operator take over control only after that hearing. Following the hearing, on 14 April 2015 the ICSID BIT I Tribunal denied Claimants' additional provisional measures application with regard to control of the gaming assets.[181]

193. On 16 April 2015, Sanum filed a provisional measures application before the SIAC Tribunal, "that essentially mirrored the Application filed before the BIT tribunal."[182] Given intervening developments that are discussed in the next section, Sanum subsequently amended the application to seek *inter alia* an order that the Lao PDR return Savan Vegas to Sanum's control.[183] As discussed below, the SIAC Tribunal denied this application on 30 June 2015.[184]

(5) The Change in Control of Savan Vegas and Various Gaming Assets

194. Meanwhile, on 6 January 2015, RMC – which had declined to act as the "qualified gaming operator" of Savan Vegas were Sanum to fail to sell the casino by the Deed of Settlement's deadline of 15 April 2015 – recommended that the Government appoint San Marco Capital Partners LLC ("**San Marco**") in its place to manage and sell the Savan Vegas gaming assets.[185]

195. On 30 March 2015, the Government reiterated to Claimants that it intended to take control of Savan Vegas on 15 April 2015, as per the Deed of Settlement, in the absence of any sale or binding MOU with a purchaser of Savan Vegas.[186]

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[179] R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶¶ 32.

[180] R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶¶ 34.

[181] R-14, Email from Judge Ian Binnie to Christopher Tahbaz, 14 April 2015.

[182] R-17, Order on Respondents' Amended Application for Provisional Measures, SIAC Case, 30 June 2015, ¶ 15.

[183] R-17, Order on Respondents' Amended Application for Provisional Measures, SIAC Case, 30 June 2015, ¶ 22.

[184] R-17, Order on Respondents' Amended Application for Provisional Measures, SIAC Case, 30 June 2015.

[185] *See* C-509, Decision on the Merits of the Claimants' Second Material Breach Application, ICSID BIT I Case, 15 December 2017 ("**ICSID 2MBA Decision**"), ¶ 49.

[186] R-152, Letter from Dr. Bounthavy Sisouphanthong to John Baldwin and Christopher Tahbaz, 30 March 2015.

196. On the evening of 14 April 2015 – shortly after the ICSID BIT I Tribunal denied Claimants' additional provisional measures request to prohibit the Lao PDR from proceeding with the take-over of the Savan Vegas Casino, and less than an hour before the expiry of the deadline to sell the casino, Sanum provided the Government a MOU signed with a Mr. Angus Noble (the "**Noble MOU**"), for his company MaxGaming Consulting Services, Ltd. ("**MaxGaming**") to purchase the Casino. The Government did not consider this a real agreement, and the tribunal in the SIAC Case (the "**SIAC Tribunal**") later vindicated that view, finding that the Noble MOU was a sham designed simply to extend the time of Sanum's operation of the Casino.[187]

197. On 16 April 2015, the Lao PDR took control of the Casino and appointed San Marco to manage and operate the gaming assets pending a sale, in accordance with RMC's recommendation of January 2015.[188] Claimants describe this as a seizure, alleging that government officials entered the premises on 22 April 2015; that the Lao PDR seized money in SVCC's operating bank account (US$100,000) and the cash in the Casino cage and vault (US$1.95 million), of which Sanum's proper share was 80%; and that soon after the Lao PDR terminated SVCC's CFO and other employees.[189] Claimants contend that the Lao PDR made further impermissible management changes and mismanaged Claimants' gaming assets.[190] Respondent by contrast describes these events as implementation of the process reflected in the Deed of Settlement.

198. On 16 April 2015, the same day the Lao PDR took control of the Savan Vegas Casino, it also took control of the Ferry Terminal and Lao Bao Slot Clubs.[191] Claimants complain that the Lao PDR subsequently refused to return the slot machines and other equipment in these clubs, which they value at more than US$390,000.[192]

199. On 5 May 2015, the Claimants changed direction and proposed to try to work together with the Government to sell the assets; the Government declined the offer.[193]

200. On 30 June 2015, the SIAC Tribunal denied another provisional measures application by Sanum, which had sought *inter alia* a reversion of the operation of the Savan Vegas Casino to Sanum, a

[187] R-27, 2017 SIAC Award, ¶¶ 189-191.
[188] R-27, 2017 SIAC Award ¶ 124; C-509, ICSID 2MBA Decision, ¶ 59.
[189] Claimants' Memorial, ¶¶ 18, 151, 157, 286; Claimants' Reply, ¶ 24
[190] Claimants' Memorial, ¶¶ 152, 158-162.
[191] C-147, Letter from Vice Minister Bounthav Sisouphanthong, 16 April 2015.
[192] Claimants' Memorial, ¶¶ 282, 409.
[193] C-509, ICSID 2MBA Decision, ¶ 60.

prohibition of the termination of the 2007 Savan Vegas PDA, and a ban on assessment of taxes under the 2014 Tax Law Amendments.[194] The SIAC Tribunal did order the Government to provide Sanum with regular information about the sale process, and observed that both it and San Marco had fiduciary duties to Sanum in managing the casino and making efforts to obtain the maximum sale price.[195]

(6) The *Ad Valorem* Tax Rate of Mr. Va

201. Meanwhile, in the absence of the Claimants' initial cooperation in constituting the Flat Tax Committee, the Government asked the President of the Macau Society of Registered Accountants for assistance with an appointment. On his recommendation, the Government formally retained Mr. Quin Va, a Macau registered accountant and qualified auditor, on 15 May 2015, to be the sole member of the Flat Tax Committee and to determine the tax to be paid by Savan Vegas.[196] The Government provided Mr. Va with certain documents for consideration, but the Claimants – who were unaware at the time of his appointment – did not provide any additional materials.[197]

202. On 29 May 2015, the Government informed the SIAC Tribunal that in connection with its plan to proceed unilaterally with the sale of the Savan Vegas Gaming Assets it would have an independent expert set a flat tax, which would be enshrined in a new 50 year concession agreement with a "Newco," to be signed upon termination of the Savan Vegas PDA. The Government also explained that upon completion of the audit of Savan Vegas, it would put Newco on the market for sale by auction, and having selected the highest bid and completed the sale, the Government would pay Sanum its share of the proceeds.[198]

203. On 9 June 2015, Mr. Va recommended that Savan Vegas be taxed on an *ad valorem* basis at the rate of 28% of gross gaming revenue.[199] It appears that this recommendation was made without giving weight (or perhaps without awareness of) the 2009 Savan Vegas FTA which had provided for a flat tax in the fixed amount of US$745,000 per year for five years, ending 31 December

[194] R-17, Order on Respondents' Amended Application for Provisional Measures, SIAC Case, 30 June 2015; Respondent's Counter-Memorial, ¶¶ 22, 33.

[195] R-17, Order on Respondents' Amended Application for Provisional Measures, SIAC Case, 30 June 2015; Respondent's Counter-Memorial, ¶ 34.

[196] C-509, ICSID 2MBA Decision, ¶ 51 (citing exhibit).

[197] C-509, ICSID 2MBA Decision, ¶¶ 62-63 (citing exhibits).

[198] C-509, ICSID 2MBA Decision, ¶ 66 (citing exhibit).

[199] C-509, ICSID 2MBA Decision, ¶ 68.

2013.[200]

204. As discussed in para. 218 below, the Government ultimately applied the 28% tax on Savan Vegas' gross gaming revenue between 1 July 2014 and 31 August 2016, when it eventually sold Savan Vegas to Macau Legend.

(7) The Termination of the Savan Vegas PDA

205. On 18 June 2015, the Lao PDR notified Sanum of its decision to terminate the Savan Vegas PDA, and "all permits, licenses, concessions, certificates, leases, approvals and registrations" issued in connection with the PDA, for the following stated reasons:

> This termination results from (i) your failure to comply with applicable tax obligations, (ii) your and your affiliates', officers' and agents' engagement in illegal and prohibited acts under the laws of the Lao PDR, including but not limited to bribery and attempted corruption of public officials of the Lao PDR in connection with the matters and activities that are the subject of the PDA and (iii) your and your affiliates' officers; and agents' demonstrated unsuitability to own, operate or in any way participate in gaming operations in the Lao PDR, including in respect of the actions referred to in items (i) and (ii) above as well as actions undertaken in other jurisdictions.[201]

206. On 1 July 2015 – the day after the SIAC Tribunal denied the Sanum's provisional measures application which had sought *inter alia* an order enjoining termination of the 2007 Savan Vegas PDA[202] – the Lao PDR sent a second notification, effective from 18 June 2015, confirming the termination pursuant to the Government's rights under "the terms of the PDA, the provisions of Law on Investment Promotion (2009) and other applicable laws of the Lao PDR."[203]

(8) The Cessation of CFA Loan Repayments

207. Following the change in control of Savan Vegas, SVCC made no further payments to Sanum under the CFA Loans. In July 2015, Sanum sent a default notice to SVCC, to which the Lao PDR's counsel responded by stating that "no further payments will be made."[204]

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[200] C-509, ICSID 2MBA Decision, ¶ 70; C-17, Savan Vegas FTA, 1 September 2009.

[201] R-64, PDA Termination Notice, 18 June 2015.

[202] R-17, Order on Respondents' Amended Application for Provisional Measures, SIAC Case, 30 June 2015; Respondent's Counter-Memorial, ¶¶ 22, 33.

[203] R-65, Letter regarding PDA Termination, 1 July 2015.

[204] Claimants' Memorial, ¶¶ 170-171; C-56, Letter from David Branson to Sanum, 15 July 2015, p. 5.

208. To recall, the CFA Loans had been extended under two Credit Facility Agreements between Sanum and SVCC, concluded in 2008 and 2009.[205] Under both Credit Facility Agreements, the CFA Loans were secured only by SVCC's rights in two contracts (the Savan Vegas PDA and a 2006 land lease agreement), not by a mortgage on any physical assets.[206] The first Credit Facility Agreement was approved by SVCC's Board, and the second by its shareholders, including a representative of the Lao PDR participating in recognition of the State's 20% shareholding in SVCC.[207] Several months after this shareholders' meeting, Sanum and SVCC concluded a Mortgage Agreement under which SVCC also granted Sanum security in the Savan Vegas buildings and equipment, which had not been pledged as collateral in the original Credit Facility Agreements.[208]

209. Under the terms of the Credit Facility Agreements, interest would accrue at 10% annually on any amounts disbursed as loan principal; there was no fixed repayment schedule but interest payments were due monthly.[209] In addition, SVCC was obligated to pay Sanum an ongoing "Maintenance Fee" of another 10% of the outstanding principal, in addition to a fixed monthly "Administrative Fee."[210] Further, SVCC was obligated to pay Sanum a separate "Disbursement Fee" each time SVCC drew on funds, in an amount equal to 10% of each drawdown. If SVCC was late in making any payments due on either principal or accrued interest, it would incur a separate obligation to pay "Overdue Interest" at an additional 3%, as well as a "Late Fee" equal to 10% of the value of the late payment.[211]

210. As discussed in Section VI.C below, the Parties dispute how much money actually was disbursed to SVCC under the CFA Loans. Claimants contend it was approximately US$50 million, while Respondent observes that this includes various sums charged to the CFA Loans for services that

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[205] R-34, Credit Facility Agreement between Sanum Investments Limited and Savan Vegas & Casino Co., Ltd., 1 January 2008 ("**CFA I**"); R-36, 2nd Credit Facility Agreement between Sanum Investments Limited and Savan Vegas & Casino Co., Ltd., 4 March 2009 ("**CFA II**").

[206] R-34, CFA I, Art. 10; R-36, CFA II, Art. 10; *see also* C-460, Agreement for Pledge of Rights under the Project Development Agreement and the Land Lease Agreement between SVCC and Sanum, 22 May 2008. The CFA Loans were also initially secured by a pledge of ST's 20% shares in SVCC, which Claimants say Sanum later acquired in June 2012. Claimants' Memorial, ¶ 37 & n. 39.

[207] C-41, SVCC Board of Directors Meeting Minutes, 7 December 2007, pp. 1, 3; C-42, SVCC and Paksong Vegas Shareholders Meeting Minutes, 18 March 2009, pp. 1, 3.

[208] C-141, Mortgage Agreement between Sanum and Savan Vegas, 2 June 2009. It is not clear if the addition of this collateral was separately approved by SVCC's shareholders, including the State as minority shareholder.

[209] R-34, CFA I, Art. 3.1; R-36, CFA II, Art. 3.1; Claimants' Opening Presentation, slide 150.

[210] R-34, CFA I, Arts. 3.3(a), 3.3(b), 21.1; R-36, CFA II, Arts. 3.3(a), 3.3(b), 21.1; Claimants' Opening Presentation, slide 149.

[211] R-34, CFA I, Arts. 3.3(c), 8.6(a), 8.7, 21.1; R-36, CFA II, Arts. 3.3(c), 8.6(a), 8.7, 21.1; Claimants' Opening Presentation, slide 149.

were not truly performed on SVCC's behalf or were not properly documented. The Parties agree, however, that (a) SVCC ultimately paid more than US$85 million back to Sanum over a period of years, but (b) all of this was attributed by Sanum to accumulated interest and fees, with not a single dollar treated as reducing the outstanding principal.[212] According to Claimants' expert, Sanum charged roughly US$50 million in fees against the CFA Loans, and also calculated interest accrual of roughly US$40 million more. The result was that, notwithstanding SVCC's payment of more than US$85 million to Sanum, the principal debt remained entirely due and owing as of April 2015.[213] In criticizing this outcome, the Respondent's expert observes *inter alia* that the 10% "Late Fee" was applied on almost all of the loan repayments, despite these being shareholder loans on which Sanum (through Mr. Baldwin) effectively controlled the timing of repayments.[214]

211. The Lao PDR's suspicions about Sanum's handling of the CFA Loans began to percolate as early as the aborted Ernst & Young audit in 2012 (see Section III.C.(2) above). These suspicions accelerated after the Lao PDR took control of Savan Vegas in 2015 and instructed BDO to begin a more detailed audit.

(9) The Transfer of SVCC's Gaming Assets and Properties to SVLL

212. On 28 September 2015, the Government issued a declaration transferring all assets owned by SVCC (but not its corporate liabilities) to Savan Vegas Lao Ltd. ("**SVLL**"), a new entity that was solely owned by the Government, in order to accomplish the sale – essentially, the "Newco" described in prior dealings.[215] Claimants contend that this transfer was also an attempt to prevent SVLL or any future purchaser of the gaming assets from being required to repay the CFA Loans.[216]

213. After reviewing draft marketing materials prepared by San Marco for purposes of the sale, Sanum objected to the SIAC Tribunal that the potential sale price was being reduced in at least two respects, namely that (a) the assets on offer to potential purchasers did not include the Ferry Terminal and Lao Bao Slot Clubs, and (b) the draft of the new PDA to be executed with the eventual purchaser contained less favorable terms than the 2007 Savan Vegas PDA. The SIAC Tribunal however declined to intervene with the sale process, considering that any harm later proven to be

[212] Claimants' Opening Presentation, slides 166-167 (citing Second Dass Report, Table 5); Respondent's Opening Presentation, slide 115 (citing BDO Expert Report, ¶¶ 40, 42, 46).

[213] Claimants' Opening Presentation, slide 167 (citing Second Dass Report, Table 5).

[214] BDO Expert Report of Kenneth Yeo, ¶ 53.

[215] C-509, ICSID 2MBA Decision, ¶ 75; C-58, Declaration of the Ministry of Planning and Investment 2324/2325 regarding putting SVCC assets into SVLL, 28 September 2015.

[216] Claimants' Memorial, ¶ 173.

actionable could be satisfied by financial compensation.[217] As discussed in para. 242(a) below, the SIAC Tribunal later found that the exclusion of the Ferry Terminal and Lao Bao Slot Clubs from the sale of Savan Vegas was justified,[218] and also rejected Claimants' claim based on differences between the 2007 Savan Vegas PDA and the new PDA with Savan Vegas' buyer.[219]

214. In January and February 2016, the deeds to certain properties – two shophouses near Thakhek and two houses near Savan Vegas, referred to as the Guard House and the River House – were transferred from SVCC to SVLL. The Parties dispute whether the properties were later included in the sale to the ultimate buyer (Macau Legend, as described below),[220] or whether they were excluded from the sale and retained by the Government for its own use.[221]

(10) The Failed Auction Process and the Sale to Macau Legend

215. In March 2016, six prospective buyers were approved to bid on Savan Vegas, including the eventual purchaser, Macau Legend. However, Macau Legend proposed to develop not only the Savan Vegas Casino, but also an adjacent 300-hectare land parcel, known as "Site A," and linked its development of Site A to the purchase of the casino. Specifically, it offered to purchase Savan Vegas for US$40 million, provided the auction was cancelled and Macau Legend was given development rights in Site A.[222] Claimants argued in the various proceedings that the proposed development of Site A diluted the market value of the Savan Vegas Casino itself, by creating the prospect of additional facilities in competition with it.[223]

216. As the SIAC and BIT I Tribunals later accepted, some potential bidders pulled out of the auction process, and the Lao PDR Government became alarmed that Macau Legend might be left as the only bidder at the auction, and in consequence be in a position to offer a low bid. The Government decided to accept Macau Legend's offer to cancel the auction and close a deal directly with it, provided the sale price was increased by US$2 million, to a total US$42 million. On 6 May 2016, Macau Legend accepted this counter-offer, and Macau Legend and Laos executed certain initial

[217] C-509, ICSID 2MBA Decision, ¶ 76.
[218] C-481 and R-27, 2017 SIAC Award, ¶¶ 220-228.
[219] C-481 and R-27, 2017 SIAC Award, ¶¶ 229-232.
[220] Respondent's Rejoinder, ¶¶ 223-224.
[221] Claimants' Memorial, ¶¶ 82, 283-285.
[222] C-509, ICSID 2MBA Decision, ¶¶ 77, 79-80 (citing exhibits).
[223] *See, e.g.,* C-509, ICSID 2MBA Decision, ¶ 79.

deal documentation on or about 13 May 2016.[224]

217. On 19 August 2016, Macau Legend and the Lao PDR Government executed a final Project Development Agreement ("**Macau Legend PDA**"),[225] along with a new tax agreement (see Section III.H.(11) below) and a land concession. On 31 August 2016, Macau Legend funded the agreements and took possession of the Savan Vegas Casino under a new legal entity, "**Savan Legend Casino**."[226] Macau Legend did not take possession of the Ferry Terminal and Lao Bao Slot Clubs, which as discussed above had been excluded from the sale of Savan Vegas assets.[227]

218. Of the US$42 million sale proceeds, the Lao PDR designated and collected US$26,659,000 as Savan Vegas' unpaid tax liability, which was equivalent to 28% of Savan Vegas' gross gaming revenue between 1 July 2014 and 31 August 2016, the date of the sale. The Lao PDR designated the remaining US$15,341,000 as the purchase price, and placed it an escrow account to be released and divided between the Parties as per the instructions of the SIAC Case tribunal.[228]

(11) The Macau Legend Flat Tax Agreement

219. On 19 August 2016, before closing the sale to Macau Legend, the Lao PDR Government and Macau Legend concluded a flat tax agreement, providing that Macau Legend would pay a flat tax of US$10 million per year for three years following the closing of the purchase, with increases for two extensions of one year each. Macau Legend also committed to invest in certain infrastructure projects in Laos.[229]

220. Claimants argued in the various proceedings that the agreed tax payments of US$10 million were in fact part of a plan to defer and disguise additional consideration for the purchase of Savan Vegas. According to Claimants, the purpose of deferring part of the purchase price was to ensure that the deferred portion would go entirely to the Government, instead of being split 80/20 in Sanum's favor as per the terms of the Deed of Settlement.[230]

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[224] C-509, ICSID 2MBA Decision, ¶¶ 81-82 (citing exhibits).

[225] R-75, Macau Legend PDA, 19 August 2016.

[226] C-509, ICSID 2MBA Decision, ¶ 86.

[227] SVLL stopped operating these clubs in 2016. On 16 July 2016, SVLL informed ST that while ST properly owned the slot clubs and licenses, the slot machines in these clubs had been purchased and paid for by SVCC, but would be safely stored by SVLL. C-148, SVLL letter to ST Group, 19 July 2016.

[228] C-481 and R-27, 2017 SIAC Award ¶ 296.

[229] C-509, ICSID 2MBA Decision, ¶¶ 81-82 (citing exhibits).

[230] *See, e.g.,* C-509, ICSID 2MBA Decision, ¶ 84.

(12) The Case 48 Decision in the Sanum-ST Dispute

221. Meanwhile, while these various disputes between Claimants and the Lao PDR were unfolding, developments also occurred – beginning in early 2016 – in the Case 48 litigation between Sanum and ST.

222. On 1 February 2016, the Commercial Court of Vientiane issued an order appointing a committee to inspect SVCC facilities and accounts,[231] and the inspection apparently was carried out on or around 8 February 2016.[232] On 9 March 2016, Sanum received a Summons calling for it to appear shortly to provide testimony.[233] Claimants contend that while Sanum did submit evidence as requested, and thereafter attended a trial on 4 May 2016,[234] the legal proceedings were badly flawed in a number of respects, including *inter alia* that (a) Sanum was not provided access to the full case file and was never served with numerous documents apparently filed by ST, (b) the trial itself was rushed and did not permit Sanum to submit additional evidence, and (c) the result was pre-ordained and in fact decided the day of the trial.[235]

223. The Commercial Court's Decision dated 4 May 2016 (the "**Case 48 Decision**") rendered the following relief: (a) cancelled the Master Agreement, the Savan Vegas PDA, and the Shareholders' Agreement between Sanum and ST; (b) cancelled Sanum's foreign investment license as well as its enterprise registration certificates; (c) recognized land ownership and concession rights in the name of ST's principals; (d) ordered the seizure of "all property (building, premise, money and equipment)" of SVCC, "to become the property of the State"; (e) found Sanum liable for certain outstanding taxes; and (f) ordered Sanum to reimburse ST for court costs.[236]

224. On 23 May 2016, Sanum and SVCC appealed the Case 48 Decision, raising numerous legal and due process objections to the conduct of the trial.[237] In addition to these process issues, Sanum and SVCC argued that the relief granted was improper, because it awarded benefits to third parties

[231] C-327, Inspection Order No. 645/PC.VTE, 1 February 2016.

[232] Claimants' Memorial, ¶ 223.

[233] Claimants' Memorial, ¶ 224.

[234] *See* C-329, Record of the Trial of First Instance in Case 48, 4 May 2016.

[235] Claimants' Memorial, ¶¶ 224-240, 251-260, 275.

[236] C-330, "Case 48" Decision No. 10/FI.C, 4 May 2016.

[237] C-334, Sanum and SVCC Petition of Appeal, 23 May 2016; Claimants' Memorial, ¶ 258 (summarizing grounds for appeal).

(ST's individual principals) and to the Lao PDR Government, even though they had not participated in the case and made claims of their own.[238]

225. On 1 August 2016, the Public Prosecutor submitted a Statement to the Court of Appeal, recommending that the Case 48 Decision be affirmed as valid and in accordance with Lao PDR law, and that the appeal accordingly should be dismissed.[239]

226. On 16 September 2016, while the appeal was pending, the Lao PDR's Ministry of Planning and Investment (the "**MPI**") wrote to the Court of Appeal, noting that there were certain inconsistencies between the Commercial Court's Decision in Case 48 (as between Sanum and ST) and the Deed of Settlement by which the Lao PDR had agreed to resolve the BIT I Cases with the Claimants.[240] The MPI expressed concern about three issues of which the Commercial Court evidently had not been aware:

a. First, the Government already had terminated the Savan Vegas PDA (on 1 July 2015) on account of non-payment of taxes, but had not withdrawn foreign investment licenses and enterprise registration certificates, because "it needed to maintain the legal status of [SVCC] in order to levy the outstanding tax"; if these were now cancelled as the Case 48 Decision announced, then "[t]his will create an obstacle for the Government to levy the outstanding tax and file the lawsuits in accordance with the laws."[241]

b. Second, the Deed of Settlement provided for the sale of SVCC assets, including land and concession rights, as part of the consideration for resolving the BIT I Cases; this sale had now been completed to Macau Legend Development. The Case 48 Decision, which provided that land and concession rights would be returned to the ST Group, was inconsistent with these facts, and if the Case 48 Decision were enforced, the sale to Macau Legend Development could unravel, which in turn would unravel one of the conditions of the Deed of Settlement, causing a potential reopening of the BIT I Cases.[242]

c. Third, the Case 48 Decision had provided for seizure of all SVCC property "to become the property of the State." The MPI warned that this relief would adversely affect the Lao

[238] Claimants' Memorial, ¶¶ 258-260.
[239] C-341, Statement of Public Prosecutor, 1 August 2016.
[240] C-336, MPI Letter No. 2270/MPI.IPD, 16 September 2016.
[241] C-336, MPI Letter No. 2270/MPI.IPD, 16 September 2016, p. 4.
[242] C-336, MPI Letter No. 2270/MPI.IPD, 16 September 2016, pp. 4-5.

PDR's reputation and investment promotion climate, would place the Lao PDR into breach of the Deed of Settlement, and could create further exposure under the applicable investment treaty.[243]

The MPI's letter closed by reminding the Court of Appeal that the Government had not been a disputing party in the case between ST and Sanum, and asked the Court of Appeals to adjudicate the case so as not to adversely affect the Government.[244]

227. The Court of Appeal held hearings on 12 and 19 September 2016, which the Claimants contend were also riddled with process errors.[245] On 19 September 2016, the Court of Appeals rendered its Judgment (the "**Case 48 Appeal Judgment**"), upholding the Case 48 Decision.[246] On 18 October 2016, Sanum filed a Petition of Cassation with the Supreme Court.[247]

228. Shortly thereafter, on 24 October 2016, the MPI sent a letter to the Public Prosecutor, expressing further concerns about the Case 48 Decision that was upheld by the Case 48 Appeal Judgment.[248] In particular, the MPI expressed concern about the following:

a. The Case 48 Decision had purported to terminate not only the Master Agreement, which was signed between Sanum and ST (the private parties who participated in the litigation), but also to terminate the Savan Vegas PDA, which impacted the rights and duties of the Government without the Government's having participated in the case;[249]

b. The Case 48 Decision had purported to cancel investment licenses and enterprise registration certificates, in connection with the termination of the Savan Vegas PDA, but such licenses and certificates were subject to the authority of the Government;[250]

c. The Case 48 Decision had purported to grant rights over concession land to an ST principal, but the land belongs to the State and had been assigned to SVCC for a concession term; if the Savan Vegas PDA were terminated, the land should be returned to the State, not

[243] C-336, MPI Letter No. 2270/MPI.IPD, 16 September 2016, p. 5.
[244] C-336, MPI Letter No. 2270/MPI.IPD, 16 September 2016, p. 6.
[245] Claimants' Memorial, ¶¶ 266-270.
[246] C-338, 19 September 2016, Court of Appeal Judgment No. 19/CC.A.
[247] C-339, Sanum and SVCC Petition of Cassation, 18 October 2016.
[248] C-337, MPI Letter No. 2585/MPI.IPD, 24 October 2016.
[249] C-337, MPI Letter No. 2585/MPI.IPD, 24 October 2016, p. 2.
[250] C-337, MPI Letter No. 2585/MPI.IPD, 24 October 2016, p. 2.

reassigned to one of the three SVCC shareholders (or an individual associated with one of them);[251] and

d. The Case 48 Decision had purported to garnish all assets of SVCC to be the property of the State, but "[t]his decision is very sensitive because [a] criminal action" had not proceeded yet, and the garnishment of assets could violate the Lao PDR's obligations under its foreign investment law and the BIT.[252]

The MPI also cautioned that a final affirmance of the Case 48 Decision could imperil the Deed of Settlement and risk further BIT claims against the Lao PDR.[253]

229. On 10 January 2017, the Public Prosecutor submitted a Statement to the Supreme Court, opining that the MPI's letter of 24 October 2016 had not been timely submitted and therefore could not properly be considered. The Public Prosecutor also expressed the view that Sanum's appeal was not well founded, because the Case 48 Decision was valid and in accordance with law and the Case 48 Appeal Judgment was reasonable.[254]

230. On 13 March 2017, the Supreme Court rendered its Judgment (the "**Case 48 Supreme Court Judgment**").[255] The Supreme Court generally affirmed the Case 48 Appeal Judgment (and in turn the Case 48 Decision), including regarding termination of the Master Agreement and the Shareholder Agreement between Sanum and ST.[256] It rejected however the lower court ruling that purported to transfer a land concession to an ST principal, on the basis that the Lao PDR Government was not a participant in the case and the distribution of concessions was not properly part of the case.[257] The Supreme Court also rejected the lower court's garnishment of all SVCC assets "to become the property of the state" as inconsistent with the Deed of Settlement agreed between Sanum and the Lao PDR, and ordered instead that the SVCC assets be "possessed by the State," presumably for purposes of disposal in accordance with the Deed of Settlement.[258]

[251] C-337, MPI Letter No. 2585/MPI.IPD, 24 October 2016, p. 2.
[252] C-337, MPI Letter No. 2585/MPI.IPD, 24 October 2016, pp. 2-3.
[253] C-337, MPI Letter No. 2585/MPI.IPD, 24 October 2016, p. 3.
[254] C-342, Statement of Public Prosecutor to Supreme Court, 10 January 2017.
[255] C-340, Case 48 Supreme Court Judgment, 13 March 2017.
[256] C-340, Case 48 Supreme Court Judgment, 13 March 2017, pp. 7-8.
[257] C-340, Case 48 Supreme Court Judgment, 13 March 2017, p 8.
[258] C-340, Case 48 Supreme Court Judgment, 13 March 2017, p 8.

(13) The 2016 ST SIAC Award in Sanum's Favor

231. The year 2016 also brought a major development in the SIAC arbitration that Sanum had brought against ST in September 2015 regarding the Thanaleng Slot Club. On 22 August 2016, the arbitral tribunal issued the 2016 ST SIAC Award in Sanum's favor.[259] To recall, ST did not participate in the ST SIAC Case, after initially protesting that SIAC was without jurisdiction.[260]

232. The 2016 ST SIAC Award found breach of contract by ST and awarded Sanum US$200 million for deprivation of its joint venture interest in the Thanaleng Slot Club. Specifically, the 2016 ST SIAC Award found that the contractual arrangements between Sanum and ST did not come to an end on 11 October 2011, as ST had contended based on the Thanaleng Participation Agreement, but rather continued to operate beyond that date, governed by the Master Agreement and the Slot Club JV Agreement.[261] By insisting otherwise, ST breached its contractual obligations as they concerned the Thanaleng Slot Club, which obligations entitled Sanum to a 40% revenue share until 11 October 2011 and a 60% revenue share thereafter, with the Thanaleng Slot Club joint venture to continue for 50 years.[262]

233. As discussed further in Section III.M. below, Sanum then began efforts before the Lao PDR courts to obtain recognition of the 2016 ST SIAC Award. These efforts, which were unsuccessful, are at the root of LHNV's ancillary claim in the parallel arbitration arising from the Respondent's non-recognition of the 2016 ST SIAC Award.

I. CLAIMANTS' SECOND MATERIAL BREACH APPLICATIONS TO THE BIT I TRIBUNALS

234. On 26 April 2016, LHNV filed a second material breach Application in the ICSID BIT I case,[263] and on 23 February 2017, Sanum submitted a similar application in the PCA BIT I Case[264] (collectively the "**Second Material Breach Applications**"). In these applications, Claimants sought revival of the BIT I Cases on the basis that the Lao PDR had materially breached various provisions of the Deed of Settlement. As described by the BIT I Tribunals in their eventual 15

[259] C-122 and R-76, 2016 ST SIAC Award.
[260] C-122 and R-76, 2016 ST SIAC Award, ¶¶ 5.5, 7.8; R-266, 2019 ST Appeal Decision, ¶ 22.
[261] C-122 and R-76, 2016 ST SIAC Award, ¶¶ 10.20, 10.21.
[262] C-122 and R-76, 2016 ST SIAC Award, ¶ 11.
[263] R-19, LHNV's Second Material Breach Application, ICSID BIT I Case, 26 April 2016.
[264] R-26, Sanum's Second Material Breach Application, PCA BIT I Case, 23 February 2017.

December 2017 decisions,[265] the Second Material Breach Applications were based on the following alleged breaches:

a. "The Government willfully breached Section 5 of the Settlement by physically seizing and unilaterally operating Savan Vegas, by expropriating the Casino's assets by decree and structuring the sale of the Casino so as to deprive Claimant of the 80% value of the proceeds";

b. "The Government willfully breached Section 6 of the Settlement by terminating the Savan Vegas PDA" and executing a new PDA with Macau Legend, purportedly as part of the auction process, which "provided for fewer rights and more obligations than the original 2007 PDA with Sanum," and thus "made Savan Vegas less valuable as a going concern";

c. "The value of the 'Gaming Assets' was further reduced by failing to include in the sale the Lao Bao Slot Club and the Savannakhet Ferry Terminal Slot Club. The Claimants reject the Government's contention that it could not sell the 'slot clubs' as the licenses were actually held by the Claimants' former Laotian partner, ST …."

d. "The Government breached Sections 7 and 8 of the Settlement in respect of the 'new flat tax' by abandoning the mutually agreed procedure, and imposing a tax which is not a flat tax but an *ad valorem* tax of 28% of gross gambling revenues…."

e. "The 28% *ad valorem* tax is discriminatory as it has only been applied to Savan Vegas and not to other casinos in Laos. …";

f. "Furthermore, the Government misused the *ad valorem* tax to justify seizing a substantial part of the Claimants' share of the purchase price paid by Macau Legend for payment of supposed back taxes";

g. "The Government accepted a lower price for the sale of the Casino in exchange for Macau Legend's agreement to pay post-purchase inflated flat-tax payments";

h. "The Government also breached Section 15 of the Settlement by depositing all of the sale proceeds in its own bank accounts or those of its wholly-owned entity [SVLL] rather than

[265] C-509, Decision on the Merits of the Claimants' Second Material Breach Application, ICSID BIT I Case, 15 December 2017 ("**ICSID 2MBA Decision**"), ¶ 92; *see also* C-562, Decision on the Merits of the Claimants' Second Material Breach Application, PCA BIT I Case, 15 December 2017 ("**PCA 2MBA Decision**"), ¶ 84.

a joint escrow account," and by diverting more than US$26 million of the US$42 million purchase price "to satisfy the Claimants' alleged tax liability which was not lawfully imposed";

i. "The Government breached Section 25 of the Settlement" by informing prospective purchasers that expansion of a runway at the Savannakhet Airport was not feasible, which impacted the value of the casino;

j. "The Government breached Section 22 of the Settlement in respect of Thakhaek development site," by refusing to negotiate in good faith and refusing to include "the most valuable 16 hectares of the site on the basis that it was private property" and rejecting Claimants' proposal for an alternative concession arrangement; and

k. "The Government materially breached Sections 23 and 27 of the Deed" by pursuing criminal investigations in U.S. courts, based on allegations of bribery and corruption that were supposed to have been suspended.

235. The BIT I Tribunals held a joint hearing on 3 and 4 July 2017 regarding the Second Material Breach Applications, and as discussed further below in Section III.L., on 15 December 2017, they each issued their decisions on those applications.

J. THE 2017 SIAC AWARD IN RESPONDENT'S FAVOR

236. Meanwhile, while the Second Material Breach Applications were pending before the BIT I Tribunals, the SIAC Case was proceeding apace before its separate tribunal.

237. As ultimately framed, the Lao PDR maintained in the SIAC Case that Sanum had breached its obligations under the Deed of Settlement by (a) refusing to cooperate in the establishment of a Flat Tax Committee, (b) failing to pay taxes beyond 1 July 2014, (c) taking no steps to sell Savan Vegas during the ten months they retained control of the Casino, and (d) failing to accept and pay RMC as an agent to monitor the operation and sale of Savan Vegas.[266] The Lao PDR also claimed that Claimants had committed various frauds both upon it and upon the SIAC Tribunal, including (a) fraudulently inducing the Lao PDR to execute the Deed by asserting it already had a "credible buyer" for Savan Vegas, (b) misappropriating approximately US$24 million from Savan Vegas by having Savan Vegas pay that amount to Sanum, ostensibly pursuant to the terms of the two

[266] C-481 and R-27, 2017 SIAC Award, ¶ 149.

allegedly fraudulent CFA Loans, and (c) continually asserting the validity of the Noble MOU when overwhelming evidence established it to be fraudulent.[267] The Lao PDR sought specific performance for the division of the costs and proceeds of the sale of Savan Vegas, indemnification for damages, and costs.[268]

238. For their part, Claimants maintained numerous counterclaims in the SIAC Case, alleging that the Lao PDR had breached the Deed of Settlement by taking unilateral action to operate, tax, and ultimately sell Savan Vegas. The SIAC Case tribunal organized the counterclaims into three separate categories. "First and primarily," Claimants alleged that the Lao PDR failed to maximize the sale proceeds of Savan Vegas, by (a) excluding the Lao Bao and Ferry Terminal Slot Clubs from the sale; (b) failing to restate the terms of the 2007 PDA in the New PDA that it formed with the new buyer of Savan Vegas; (c) failing to grant the new buyer the right to extend the runway at Savannakhet Airport; (d) mismanaging the Casino; (e) arranging a "sweetheart deal" with Macau Legend; (f) imposing an unreasonable tax rate of 28% on Savan Vegas; and (g) selling the Casino for less than its value.[269] Second, Claimants alleged that the Lao PDR breached the Deed of Settlement by failing to negotiate in good faith regarding a land concession and project development agreement with respect to land at Thakhek, because it excluded 16 hectares from what Claimants alleged was the concession area designated in the MOU signed on 20 October 2010.[270] Finally, Claimants alleged that the Lao PDR failed to terminate criminal investigations and proceedings against Claimants and their affiliates, as required under the Deed of Settlement.[271] For these various counterclaims, Claimants sought either monetary damages or alternatively rescission of the Deed and restoration to their position prior to the Deed.[272]

239. On 29 June 2017, the SIAC Tribunal issued an Award by majority in favor of the Lao PDR, with an opinion by Ms. Carolyn Lamm dissenting in part. The majority concluded, first, that Claimants had breached the Deed of Settlement by suspending all performance pending the BIT I Tribunal's resolution of the First Material Breach Application; "there is nothing in the plain language of the Deed suspending [Claimants'] performance while a Material Breach Application is pending," nor was a suspension reasonable based on the thin evidence Claimants invoked about the supposed

[267] C-481 and R-27, 2017 SIAC Award, ¶¶ 192-194.
[268] C-481 and R-27, 2017 SIAC Award, ¶ 143.
[269] C-481 and R-27, 2017 SIAC Award, ¶ 213.
[270] C-481 and R-27, 2017 SIAC Award, ¶ 214.
[271] C-481 and R-27, 2017 SIAC Award, ¶ 215.
[272] C-481 and R-27, 2017 SIAC Award, ¶ 144.

grant of a competing gaming license, which the Government refuted (and thus effectively cured) two weeks after receiving Sanum's notice alleging a material breach.[273] For these reasons, the majority concluded that Claimants materially breached their obligations with respect to (a) formation of the Flat Tax Committee;[274] (b) failing to pay any taxes to Laos between 1 July 2014 and 15 April 2015, the ten months Claimants were in control of Savan Vegas;[275] (c) failing to pay and cooperate with RMC;[276] and (d) failing to take steps to carry out the sale of Savan Vegas during the ten months they were control of the Casino (which period was not extended by the Noble MOU, a document the SIAC majority considered "not valid or *bona fide*").[277]

240. The SIAC Tribunal also concluded that Claimants had misled the Lao PDR by claiming to have a viable and credible buyer for the Casino prior to signing the Deed of Settlement, although no specific damages flowed from this misrepresentation.[278] The SIAC Tribunal did not address the Lao PDR's allegations of "loan fraud" related to the CFA Loans, finding these to be outside its jurisdiction because the issue was not encompassed by the Deed.[279] With respect to the Noble MOU, the SIAC Tribunal found by majority that Claimants' repeated reliance on the document throughout the case "must be construed as a fraud on the Tribunal" itself.[280]

241. Finally, the SIAC Tribunal found that many of the Claimants' counterclaims alleging breach of the Deed of Settlement by the Lao PDR were precluded by the Claimants' own non-performance of the Deed. The SIAC Tribunal nonetheless considered several counterclaims which it found could exist independently of the Deed, based on obligations of good faith.

242. First, with respect to the Lao PDR's duty as joint owner of Savan Vegas to act in good faith to maximize the sale proceeds, the SIAC Tribunal (sometimes unanimously, sometimes by majority):

a. rejected Claimants' claim based on exclusion of the Lao Bao and Ferry Terminal Slot Clubs from the sale of Savan Vegas, finding this to have been justified both by the language of

[273] C-481 and R-27, 2017 SIAC Award, ¶¶ 154-167.
[274] C-481 and R-27, 2017 SIAC Award, ¶¶ 169-173.
[275] C-481 and R-27, 2017 SIAC Award, ¶¶ 176-180.
[276] C-481 and R-27, 2017 SIAC Award, ¶¶ 181-183.
[277] C-481 and R-27, 2017 SIAC Award, ¶¶ 184-191.
[278] C-481 and R-27, 2017 SIAC Award, ¶¶ 195-203.
[279] C-481 and R-27, 2017 SIAC Award, ¶ 204.
[280] C-481 and R-27, 2017 SIAC Award, ¶¶ 205-210.

the Side Letter and by the absence of approval by ST, which was required under Sanum's 2007 Participation Agreement with ST;[281]

b. rejected Claimants' claim based on differences between the 2007 Savan Vegas PDA and the new PDA with Savan Vegas' buyer, on the basis that the Lao PDR was permitted to unilaterally terminate the 2007 PDA based on Claimants' failure to have Savan Vegas pay any taxes;[282]

c. rejected Claimants' claim regarding breach of an obligation to provide the new buyer a right to extend the runway at Savannakhet;[283]

d. rejected claims based on alleged mismanagement of Savan Vegas by San Marco, finding that the disagreements regarding management decisions were insufficient to support a claim of breach;[284]

e. rejected claims about the sale process to Macau Legend, finding that the decision to pre-empt the auction process and sell directly to Macau Legend was made to ensure the highest price rather than in bad faith;[285]

f. rejected Claimants' claims based on the unilateral appointment of Mr. Va in lieu of a three-member Flat Tax Committee,[286] as well as its claims regarding the 28% tax rate set by Mr. Va, finding as to the latter that it was not unreasonable for Mr. Va to interpret the "flat tax" requirement as including a "fixed tax rate" rather than a "fixed, unchanging, periodic amount," and the amount set was lower than the default rates that otherwise would be imposed under Laotian tax law;[287] and

g. rejected Claimants' claim that the Lao PDR had failed to maximize the sale proceeds of Savan Vegas, on the basis that they had not effectively rebutted the Lao PDR's valuation

[281] C-481 and R-27, 2017 SIAC Award, ¶¶ 220-228.
[282] C-481 and R-27, 2017 SIAC Award, ¶¶ 229-232.
[283] C-481 and R-27, 2017 SIAC Award, ¶¶ 233-239.
[284] C-481 and R-27, 2017 SIAC Award, ¶¶ 240-246.
[285] C-481 and R-27, 2017 SIAC Award, ¶¶ 247-265.
[286] C-481 and R-27, 2017 SIAC Award, ¶¶ 266-272.
[287] C-481 and R-27, 2017 SIAC Award, ¶¶ 273-288.

of US$30 million to US$39 million, which was less than the US42 million that Macau Legend paid for the Casino.[288]

243. The SIAC Tribunal also rejected by majority Claimants' counterclaim that the Lao PDR had breached the Deed of Settlement by failing to negotiate a land concession at Thakhek in good faith, pursuant to the Thakhek MOU. It observed that Claimants were aware even before the Deed of Settlement that the Lao PDR considered 16 hectares of the area depicted in the MOU drawings to be private property, which could not be leased to Claimants without permission from the owner; that an independent survey of the land showed 88.9 hectares remaining in the plot even excluding these 16 hectares, which met the Thakhek MOU's size requirement of "about 90 hectares more or less"; and that the Thakhek MOU itself was ambiguous as to whether these 16 hectares were included in the E-1 Parcel, as these were shaded in the a different color than the remaining 88.9 hectares of available land in the E-1 Parcel. Accordingly, the majority found that "good faith differences in the negotiation of the opening issues … prevent[ed] a reaching of a final contract," which under New York law did not constitute breach of an obligation to negotiate in good faith.[289] The majority further found that after the Lao PDR offered to provide another site to Sanum, Sanum countered with a proposal which was not consistent with the requirements of the Deed of Settlement, and which the Lao PDR therefore was not required to accept; the Lao PDR offered to consider any other proposal by Sanum, which Sanum refused to make. These circumstances did not support a conclusion that the Lao PDR did not negotiate in good faith.[290]

244. Finally, the SIAC Tribunal by majority rejected Claimants' counterclaim that the Lao PDR had violated the Deed of Settlement by bringing criminal investigations against Claimants and their affiliates, finding that the obligation in the Deed not to reinstate previously pending criminal investigations by its terms was contingent on Claimants "duly and fully implement[ing]" their obligations under the Deed, which they had failed to do. The majority noted additionally that the undertaking in the Deed only related to specific prior criminal investigations and not to new ones.[291]

245. Based on these detailed findings, the SIAC Tribunal concluded by majority – over a spirited dissent by Arbitrator Lamm[292] – that LHNV and Sanum "did not perform their obligations under the Deed,

[288] C-481 and R-27, 2017 SIAC Award, ¶¶ 289-295.
[289] C-481 and R-27, 2017 SIAC Award, ¶¶ 297-305.
[290] C-481 and R-27, 2017 SIAC Award, ¶¶ 306-307.
[291] C-481 and R-27, 2017 SIAC Award, ¶¶ 308-311.
[292] C-481, 2017 SIAC Award, Dissenting Opinion of Carolyn B. Lamm.

nor were any deadlines for performance extended"; that "[e]ach breach was material and substantial and frustrated the Deed's fundamental purposes"; that the Lao PDR accordingly "did not receive the benefit of its bargain to have the Casino sold within 10 months and taxes paid during the interim"; and that by contrast, the Lao PDR "performed its obligations under the Deed to the extent possible," given the Claimants' "intransigence." The majority found that the Lao PDR was entitled to collect US$26,659,000 of the sale proceeds of Savan Vegas as taxes, and that the remaining US15,341,000 was to be shared proportionate to their respective ownership interest in Savan Vegas.[293] While this ordinarily would result in Claimants receiving 80% or US$12,272,800 (and the Lao PDR receiving 20% or US$3,068,200), it was necessary to shift US$4,162,339.49 from Claimants' share to the Lao PDR's, since under the Deed of Settlement Claimants were supposed to bear the all cost of the sale but did not.[294] Claimants also were obligated to pay certain arbitration costs and fees,[295] with the ultimate outcome that they were entitled to receive only US$1,932,939.21 of the amount placed into escrow, while the Lao PDR was entitled to receive US$13,408,060.79.[296]

246. The SIAC Award was submitted to the BIT I Tribunals shortly before their scheduled hearing on the Second Material Breach Applications.[297] As discussed below, the BIT I Tribunals agreed with certain aspects of the SIAC Award but not with others.

K. THE BIT I TRIBUNALS' DECISIONS ON THE SECOND MATERIAL BREACH APPLICATIONS

247. On 15 December 2017, the BIT I Tribunals issued their decisions on the Claimants' Second Material Breach Applications.

248. First, the BIT I Tribunals rejected the Lao PDR's argument that principles of *res judicata* and issue preclusion barred the Second Material Breach Applications, because of the legal claims decided against the Claimants by the SIAC Tribunal on 29 June 2017.[298] In the view of the BIT I Tribunals, the Deed of Settlement "confers two distinct and separate arbitral mandates without creating any preclusive hierarchy in their authority to decide issues with their respective spheres. The Settlement creates no rule of paramountcy between the SIAC Tribunal and this Treaty Tribunal. The

[293] C-481 and R-27, 2017 SIAC Award, ¶ 312.
[294] C-481 and R-27, 2017 SIAC Award, ¶¶ 314-318.
[295] C-481 and R-27, 2017 SIAC Award, ¶¶ 320-325.
[296] C-481 and R-27, 2017 SIAC Award, ¶¶ 326-327.
[297] C-509, ICSID 2MBA Decision, ¶ 22; C-562, PCA 2MBA Decision, ¶ 16.
[298] C-509, ICSID 2MBA Decision, ¶¶ 105-117; C-562, PCA 2MBA Decision, ¶¶ 97-108.

application in these circumstances of *res judicata* or issue preclusion would be contrary to the freedom of contract exercised by the parties."[299]

249. Second, the BIT I Tribunals rejected the Lao PDR's argument that the Claimants' own breaches of the Deed of Settlement precluded them from making the Second Material Breach Applications. The BIT I Tribunals agreed that during the pendency of the First Material Breach Applications, the Claimants had "repeatedly violated important obligations under the Settlement," including by refusing to cooperate with establishing a Flat Tax Committee, to cooperate with RMC's monitoring of Casino matters pending a sale, and to cooperate in an orderly change of control of the unsold casino on 15 April 2015.[300] At the same time, the Lao PDR in various ways "clearly affirmed and relied on the terms of the Settlement to sell the Gaming Assets and to rid Laos of the Claimants and their managers and principals."[301] The BIT I Tribunals found that by opting to affirm the Settlement, the Government "obliged itself to accept the burden as well as the benefit of its terms, however distasteful it may have found the obligation to continue to deal with the officers and principals of the Claimants," a point that the dissenting arbitrator in the SIAC Tribunal had emphasized.[302] Yet the Government did not comply with that obligation. In particular, even after Claimants belatedly renewed offers of cooperation with the Flat Tax Committee and the Casino sale process following the denial of their First Material Breach Application, the Government declined those offers, explaining to Claimants' counsel that it refused to have "any dealings with the criminals you represent."[303] The BIT I Tribunal found that the Government had "erred in treating the Claimants as having forfeited important ongoing rights to renewed participation in the sale of the Gaming Assets."[304] It was "not open to the Government to simultaneously affirm and rely on the Settlement while attempting to ban the Claimants from seeking a remedy" set forth in the same Deed of Settlement.[305]

250. On the merits of the Second Material Breach Applications, the BIT I Tribunals found that the Respondent had breached Sections 8 and 23 of the Deed of Settlement. It violated Section 8 by imposing a 28% *ad valorem* tax in place of a "new flat tax" contemplated by the Deed of Settlement;

[299] C-509, ICSID 2MBA Decision, ¶ 109; C-562, PCA 2MBA Decision, ¶ 100.
[300] C-509, ICSID 2MBA Decision, ¶ 118; C-562, PCA 2MBA Decision, ¶ 109.
[301] C-509, ICSID 2MBA Decision, ¶ 127; C-562, PCA 2MBA Decision, ¶ 117.
[302] C-509, ICSID 2MBA Decision, ¶ 128; C-562, PCA 2MBA Decision, ¶ 117.
[303] C-509, ICSID 2MBA Decision, ¶¶ 127, 138; C-562, PCA 2MBA Decision, ¶¶ 117, 127.
[304] C-509, ICSID 2MBA Decision, ¶ 132; C-562, PCA 2MBA Decision, ¶ 121.
[305] C-509, ICSID 2MBA Decision, ¶ 140; C-562, PCA 2MBA Decision, ¶ 129.

the BIT I Tribunals disagreed with the SIAC Tribunal that it was "reasonable" to consider the former as a form of the latter. Rather, the Deed of Settlement's reference to a "*new* flat tax" referred back to the previous 2009 Savan Vegas FTA, which provided for a "fixed unchanging periodic" lump sum payment, not for a tax based on a percentage of revenue.[306] The imposition instead of an *ad valorem* tax was a *material* breach of Section 8, particularly given that "every other casino in Laos also pays a flat tax established as a lump sum annually" and "the Claimants regarded a flat tax as essential to the successful marketing of the Casino" in the auction process.[307]

251. The BIT I Tribunals also found that the Government had materially breached Section 23 of the Deed of Settlement by failing to discontinue previously pending applications in the U.S. courts, for information related to allegations of bribery that the Government had asserted as grounds for terminating the 2007 Savan Vegas PDA. The BIT I Tribunals acknowledged that Government's commitment to do this was conditional on the Claimants themselves observing the "terms and conditions" of the Deed of Settlement (which they had not), but observed that the Government nonetheless "continues to pursue the benefits of the Settlement" that it wished to achieve (e.g., the sale of the Gaming Assets), and thus "is not entitled to resile from a major benefit of the Settlement" to the Claimants.[308] At the same time, the BIT I Tribunals emphasized that the Deed of Settlement did not restrict the Government from opening *new investigations* into facts that were not the subject of any ongoing investigation at the time of the Settlement.[309] The Tribunal emphasized that this allowed the Government to continue to investigate the allegedly fraudulent Noble MOU and various other alleged bribes of Government officials.[310]

252. Because the BIT I Tribunals found material breaches of Sections 8 and 23 of the Deed of Settlement, they considered that Claimants were entitled to revive the previously suspended BIT I proceedings, pursuant to Section 32 of the Deed of Settlement.[311]

253. At the same time, the BIT I Tribunals made clear that they rejected Claimants' contentions regarding alleged material breaches of other Sections of the Deed of Settlement, including Sections 7, 15, 22 and 25. For example, with respect to Section 7 and the Government's withholding of more

[306] C-509, ICSID 2MBA Decision, ¶¶ 168-174; C-562, PCA 2MBA Decision, ¶¶ 156-162.
[307] C-509, ICSID 2MBA Decision, ¶¶ 175-178; C-562, PCA 2MBA Decision, ¶¶ 163-166.
[308] C-509, ICSID 2MBA Decision, ¶ 216; C-562, PCA 2MBA Decision, ¶ 204.
[309] C-509, ICSID 2MBA Decision, ¶ 217; C-562, PCA 2MBA Decision, ¶ 205.
[310] C-509, ICSID 2MBA Decision, ¶ 217; C-562, PCA 2MBA Decision, ¶ 205.
[311] C-509, ICSID 2MBA Decision, ¶¶ 179, 222; C-562, PCA 2MBA Decision, ¶¶ 167, 210.

than US$26 million from the sale on account of alleged tax arrears, the BIT I Tribunals found that the Government had miscalculated the amount due, based on an application of the 28% *ad valorem* tax rate. But at the same time, some amount of taxes indisputably was due at that time, as Savan Vegas had paid no taxes whatsoever since 31 December 2013, and the Government's waiver of taxes under the Deed of Settlement ended on 30 June 2014. The BIT I Tribunals noted that "[t]he Casino had no right to operate in Laos free of tax," a point they had emphasized in rejecting the Claimants' earlier provisional measures request regarding tax obligations.[312] Accordingly, the Government's departure from its obligations under Section 7 was "not material because there is an accumulating tax debt owed by the Claimants, and any recalculation of the precise amount of tax owing does not in any sense rob the Claimants of the substantial benefit of their Section 7 bargain."[313]

254. The BIT I Tribunals found no material breach of the obligation under Section 15 of the Deed of Settlement to establish a jointly controlled escrow account to receive the proceeds of the sale, finding that the deposit of the funds instead into an escrow account under the control of the President of the SIAC Tribunal "accomplished its functional purpose."[314] The BIT I Tribunals also rejected Claimants' claims of material breach of Section 25 due to a failure to include a right to extend the Savannakhet Airport runway as part of the Gaming Assets offered for sale,[315] and of Section 22 regarding negotiation in good faith of a Thakhek land concession.[316] With regard to the latter, the BIT I Tribunals found that Claimants had "not established a land entitlement that includes the disputed 16 hectares, and there is no undertaking by the Government in Section 22 to use its powers of eminent domain to expropriate the existing private owners for the financial benefit of the Claimants. Refusal to [do so] does not constitute evidence of 'bad faith.'" Nor did Section 22 oblige the Government to negotiate an alternate concession.[317]

[312] C-509, ICSID 2MBA Decision, ¶¶ 184-185; C-562, PCA 2MBA Decision, ¶¶ 172-173.
[313] C-509, ICSID 2MBA Decision, ¶¶ 186; C-562, PCA 2MBA Decision, ¶ 174.
[314] C-509, ICSID 2MBA Decision, ¶¶ 191-192; C-562, PCA 2MBA Decision, ¶¶ 179-180.
[315] C-509, ICSID 2MBA Decision, ¶ 201; C-562, PCA 2MBA Decision, ¶ 189.
[316] C-509, ICSID 2MBA Decision, ¶ 207; C-562, PCA 2MBA Decision, ¶ 195.
[317] C-509, ICSID 2MBA Decision, ¶¶ 207-208; C-562, PCA 2MBA Decision, ¶¶ 195-196.

L. THE 2019 BIT I AWARDS IN RESPONDENT'S FAVOR

255. Following the revival of the BIT I Cases, those cases proceeded to evidentiary hearings. On 6 August 2019, the BIT I Tribunals rendered their respective awards (the BIT I Awards). These are described briefly below.

(1) The ICSID BIT I Award

256. The ICSID BIT I Award described the allegations in that case as follows:

> The Claimants allege expropriation without compensation and Treaty breaches in respect of their investment in gambling projects described in the [Savan Vegas PDA] in respect of the Savan Vegas Casino, as well as the three slot clubs, Thanaleng, Lao Bao and Savannakhet Ferry. The claims also relate to the expected expansion of the Savannakhet Airport and opportunities for development in the Special Economic Zone at Thakhet.[318]

257. In particular, the ICSID BIT I Award said, LHNV:

> maintained the expropriation claim pursuant to Article 6 of the Treaty as well as the following Treaty claims:
>
> (a) denial of fair and equitable treatment and prohibitions on impairment by unreasonable and discriminatory measures in respect of Savan Vegas, Thakhet, Paksan, Thanaleng, Ferry Terminal and Lao Bao (Article 3(1) of the Treaty);
>
> (b) breach of contractual obligations regarding Savan Vegas and Paksong Hotel and Casino (Article 3(4) of the Treaty);
>
> (c) national treatment regarding Savan Vegas, Lao Bao and Ferry Terminal (Articles 3(2) and 4 of the Treaty);
>
> (d) Most Favoured Nation claims regarding Savan Vegas, Thanaleng, Ferry Terminal and Lao Bao concerning full protection and security, most constant protection and security and access to justice (Article 3(2) of the Treaty).[319]

258. Before deciding the substantive claims, the ICSID BIT I Tribunal noted the following with respect to the Lao PDR's allegations of corruption on the part of Claimants:

[318] R-264, ICSID BIT I Award, ¶ 65.

[319] R-264, ICSID BIT I Award, ¶ 75.

> At the threshold of its argument, the Respondent contends that the claims should be dismissed in their entirety, in part because of corruption in the creation of the investments, and in part because of corruption in the course of performance of the various PDAs and unsuccessful initiatives by the Claimants to obtain licenses for new gambling facilities.[320]

259. Specifically, the Lao PDR presented five corruption allegations, which the BIT I Tribunal categorized as the following:

(i) Bribes to Obtain the 2009 Flat Tax Agreement ("**First Allegation**").

(ii) Bribes to Extend the Flat Tax Agreement After Expiry of the 5-Year Term ("**Second Allegation**").

(iii) Claimants Paid US $500,000 in Bribes in 2012 to (i) Shut Down the E&Y Audit of Savan Vegas and (ii) to Cause the Government to Shut Down the Thanaleng Slot Club to the Disadvantage of ST Holdings ("**Third Allegation**").

(iv) The Claimants Arranged for a Further US $575,000 Transfer to Madam Sengkeo to Prevent Her from Testifying in These Proceedings ("**Fourth Allegation**").

(v) Bribery Scheme in June 2015 to Restore Control of Savan Vegas to the Claimants ("**Fifth Allegation**").

(vi) Miscellaneous Acts of Bribery and Corruption ("**Sixth Allegation**").

260. The ICSID BIT I Tribunal rejected the First and Second Allegations because the evidence presented by Respondent was neither clear nor convincing.[321] As regards the Third Allegation, with respect to both the E&Y Audit and the Thanaleng Slot Club shutdown, the ICSID BIT I Tribunal explained that it was unable to find "clear and convincing evidence" that a bribe was made, but it was satisfied on the lesser standard of probabilities that there were financial illegalities.[322]

261. In connection with the Fourth Allegation, the ICSID BIT I Tribunal explained that it was unable to find through "clear and convincing" evidence that a bribery was committed, but it was "nevertheless satisfied on the lower standard of balance of probabilities that Mr. Baldwin and Madam Sengkeo were involved in channeling funds illicitly to Lao Government officials, and further that she was paid to secure her loyalty and to avoid her testifying on behalf of the

[320] R-264, ICSID BIT I Award, ¶ 90.

[321] R-264, ICSID BIT I Award, ¶¶ 123, 127; *see similarly* R-265, PCA BIT I Award, ¶¶ 122, 126.

[322] R-264, ICSID BIT I Award, ¶¶ 139, 148; *see similarly* R-265, PCA BIT I Award, ¶¶ 138, 147.

Government, thereby obstructing justice."[323] The ICSID BIT I Tribunal explained that its "conclusion that corruption of Government officials is established to the lower standard of 'balance of probabilities' is relevant to the issue of the Claimants' good faith and the legitimacy of the Claimants´ alleged 'legitimate' expectations of fair and 'equitable' treatment."[324]

262. Regarding the Respondent's Fifth Allegation of corruption, the ICSID BIT I Tribunal found that that "bribery and corruption, as opposed to fraud and chicanery, is not established."[325] Finally, with respect to the Sixth Allegation, the ICSID BIT I Tribunal explained that "[t]here is no 'clear and convincing' evidence against the Claimants in support of any of these additional claims of bribery and corruption."[326]

263. With respect to the merits of LHNV's claims, the ICSID BIT I Tribunal found as follows.

264. First, in connection with the Thanaleng Slot Club and Case 52 between Sanum and ST, "Claimants argue that they were deprived of their investment by flawed court proceedings tainted by interference by the Respondent and without payment of compensation."[327] The ICSID BIT I Tribunal noted that the underlying dispute was one between private parties, which concerned the Lao PDR only to the extent it was alleged to have interfered in court proceedings in violation of international law.[328] The Claimants focused their BIT claims on alleged interference in the Lao Commercial Court proceedings in 2012, but the BIT I Tribunal observed that this was of limited impact, since the tiered dispute resolution provision in the Master Agreement provided in any event for recourse to arbitration if a party was unsatisfied with the result of Lao court proceedings, "without the need to demonstrate a breach of due process or other violations in the conduct of the court proceedings."[329] Sanum had exercised the various levels of remedies provided in the Master Agreement, with the ultimate result that in 2016, it obtained the 2016 ST SIAC Award against ST for US$200 million.[330] While Claimants now "say that they have not been able to enforce" the 2016 ST SIAC Award,[331] the ICSID BIT I Tribunal found that the "alleged inability to enforce the [2016

[323] R-264, ICSID BIT I Award, ¶ 157; *see similarly* R-265, PCA BIT I Award, ¶ 156.
[324] R-264, ICSID BIT I Award, ¶ 162.
[325] R-264, ICSID BIT I Award, ¶ 167; *see similarly* R-265, PCA BIT I Award, ¶ 166.
[326] R-264, ICSID BIT I Award, ¶ 168; *see similarly* R-265, PCA BIT I Award, ¶ 167.
[327] R-264, ICSID BIT I Award, ¶ 175.
[328] R-264, ICSID BIT I Award, ¶ 182.
[329] R-264, ICSID BIT I Award, ¶ 183.
[330] R-264, ICSID BIT I Award, ¶ 185.
[331] R-264, ICSID BIT I Award, ¶ 186.

ST SIAC Award] is not before this Tribunal"; the only question before it was whether Claimants' exercise of rights under the Master Agreement – and in particular, their recourse to SIAC arbitration against ST – was impeded by the Lao PDR's alleged interference in the Lao lower court proceedings. The ICSID BIT I Tribunal found "no persuasive evidence" that this was the case.[332] In consequence, it concluded that "the claim for expropriation in respect of the Thanaleng investment lacks any merit."[333]

265. Second, the ICSID BIT I Tribunal considered certain issues related to the 2007 Paksong Vegas PDA between Sanum, ST and the Lao PDR, which originally had contemplated the building and operating of a new casino and golf resort in Champasak Province, but which for various reasons was never effectively implemented. The reasons for this are not summarized here as they are not particularly pertinent for this proceeding. However, the ICSID BIT I Tribunal found that "not only has LHNV failed to demonstrate any lack of good faith on the part of the [Lao PDR] in respect of Paksong Vegas but, on the contrary, concludes that Mr. Baldwin negotiated throughout his dealings with the Respondent in bad faith," which was to be attributed to LHNV, Sanum's parent, on the basis that Mr. Baldwin was "the directing mind of LHNV."[334]

266. The ICSID BIT I Tribunal was likewise unimpressed with Claimants' claims related to the Paksan Slot Club, which are not discussed here at any length. Essentially, it found that by the time the Lao PDR ordered that slot club closed, its license already had expired on its own terms and Claimants had not shown Savan Vegas had a right to a license renewal or even that it attempted to obtain one. The BIT I Tribunal found no demonstration of bad faith on the part of the Lao PDR, but on the contrary bad faith activity by Mr. Baldwin, to be attributed to LHNV, Sanum's parent.[335]

267. With respect to the Thakhek concession, the ICSID BIT I Tribunal found that Claimants not only had failed to negotiate in good faith regarding the disputed 16 hectares in the land concession (as established in their ruling on the Second Material Breach Application), but also had "failed to establish rights to the remainder of the land referred to in the MOU." Negotiations with the SEZ Committee regarding the land concession never resulted in a final PDA, nor did Sanum complete various plans and studies that were a prerequisite for obtaining necessary approvals from all government authorities. "In the overall picture," the ICSID BIT I Tribunal found, "whether or not

[332] R-264, ICSID BIT I Award, ¶ 187.
[333] R-264, ICSID BIT I Award, ¶ 190.
[334] R-264, ICSID BIT I Award, ¶ 206.
[335] R-264, ICSID BIT I Award, ¶¶ 207-214.

Sanum had obtained a license [to operate slot clubs in the area] had no impact on the viability of its Thakhaek project."[336]

268. As for the issuance and revocation of a new slot club license for Thakhek, the ICSID BIT I Tribunal observed that "the license was effective for less than ten days and that the revocation was justified on the lack of the authority of the [Ministry of Information and Culture] to grant it," a position of which by 2011 Sanum should have been fully aware, since "the Prime Minister's Office was the essential authority on the Claimants' gambling ventures in Laos." The Prime Minister's Office never approved the Claimants' gambling project in Thakhek, which was not unreasonable given that by 2011, "[t]he Claimants had demonstrated themselves not to be good faith investors" in connection with their Paksong commitments.[337]

269. More broadly, the ICSID BIT I Tribunal considered the Claimants' lack of good faith to be fatal to the whole range of their treaty claims. It expressed its overall view of the case as follows:

> Much of the Claimants' case rests on the allegation that it proceeded in all respects in good faith but was thwarted at every turn by a corrupt and devious Government acting in bad faith. On the contrary, in the Tribunals view the evidence is clear that the Claimants dealt in bad faith with the Government from the initial signing of the Paksong Hotel and Casino PDA calling for a US$ 25 million hotel and casino and thereafter included the financial irregularities in the operation of the Savan Vegas Hotel and Casino. The Claimants never intended to build a US$25 million facility in Paksong. From the Claimants' perspective, the benefit of the Paksong PDA was a monopoly to block other more serious investors from offering gambling facilities in Champaska and Salavan Provinces. Having obtained the monopoly, the Claimants attempted to force the Government's hand in relocating the project to what, from the Government's perspective, was a much less attractive site. The bad faith continued through the disputes over the Savan Vegas Hotel and Casino, which was built but operated in defiance of Sanum's reporting obligations to the Government (and, when the books were eventually opened, revealed significant financial irregularities). The bad faith continued with Mr. Baldwin's recent efforts to deter Madam Sengkeo's appearance to testify at the merits proceeding and the sham MaxGaming offer to purchase Savan Vegas in April of 2015.[338]

[336] R-264, ICSID BIT I Award, ¶¶ 219-220.

[337] R-264, ICSID BIT I Award, ¶ 222.

[338] R-264, ICSID BIT I Award, ¶ 233.

270. The ICSID BIT I Tribunal observed that "the bad faith conduct of the investor is relevant to the grant of relief under an investment treaty."[339] But even apart from this, the Claimants' allegations of other treaty violations "also fail on the facts."[340]

271. For example, as regards Claimants' denial of justice argument in connection the Lao courts' handling of the Thanaleng Slot Club dispute between Sanum and ST (*i.e.*, Case 52), the ICSID BIT I Tribunal found that "[t]he decision of three levels of Laotian courts on the interpretation of the Master Contract went against Sanum, and in the Tribunal's view, neither the interpretation given by those Courts to the agreements nor the judicial process offended international standards."[341] The ICSID BIT I Tribunal rejected as unproven the Claimants' allegations that this was a "directed case" whose outcome was "mandated by high ranking Government officials." It concluded that "[o]n the evidence, there was no breach of fair and equitable treatment or other Treaty violation, and no wrongful treatment by the judiciary of the Claimant's Thanaleng investment by denial of justice or otherwise."[342]

272. With respect to Claimants' treaty allegations regarding the E&Y Audit, the ICSID BIT I Tribunal noted that the Lao PDR "had good cause for concern about the accounts of Savan Vegas," not least because "Sanum had not complied with its reporting obligations." Claimants failed to establish bad faith or arbitrariness by the Lao PDR in pushing for an audit in furtherance of its rights as a significant shareholder in Savan Vegas; the request for an audit was not abusive; and "in the end the Government's suspicions were vindicated by the disclosure of serious financial irregularities."[343] There was also no credible evidence that audit was conducted in an unreasonable manner prior to its abrupt stop, which the Tribunal considered most likely attributable to illicit payments by Mr. Baldwin.[344]

273. The ICSID BIT I Tribunal rejected LHNV's umbrella clause claims under Article 3(4) of the Lao-Netherlands BIT on the basis that it had not established that construction and brokerage taxes and overtime fees were wrongfully imposed, or that the Government's document and information requests during the audit of Savan Vegas were unreasonable in violation of the Shareholders'

[339] R-264, ICSID BIT I Award, ¶ 237.
[340] R-264, ICSID BIT I Award, ¶ 239.
[341] R-264, ICSID BIT I Award, ¶ 254.
[342] R-264, ICSID BIT I Award, ¶ 258.
[343] R-264, ICSID BIT I Award, ¶¶ 265-266.
[344] R-264, ICSID BIT I Award, ¶¶ 265-268.

Agreement and PDA.[345] With respect to alleged discriminatory treatment, the Tribunal found no factual foundation for complaints related to Thanaleng and Savan Vegas, and found a complaint regarding the Ferry Terminal Slot Club to have been foreclosed by the Deed of Settlement.[346]

274. Finally, the ICSID BIT I Tribunal concluded as follows:

> While the Tribunal has already rejected the Claimants' allegations for the reasons detailed above, the Claimants' bad faith initiation of some investments and bad faith performance of other investment agreements (as detailed above) and the attempt of Mr. Baldwin to compromise the integrity of this arbitration through an inducement to Madam Sengkeo not to testify provide added reasons to deny the Claimant LHNV the benefit of Treaty protection.[347]

275. The ICSID BIT I Tribunal accordingly dismissed all of LHNV's claims, finding that it had "failed to meet the evidentiary onus of establishing facts necessary to support its legal arguments."[348]

(2) The PCA BIT I Award

276. The PCA BIT I Award differed from the ICSID BIT I Award primarily in that it covered expropriation claims only, pursuant to Article 4 of the China-Lao BIT. Specifically, following a March 2018 letter by Claimants that "notionally divided and separated their claims" between the two proceedings, Sanum maintained expropriation claims regarding the Thanaleng Slot Club, Paksan, Thakhek and the Pakson Vegas Hotel and Casino. At the same time, Claimants asserted that the "totality of the facts" remained relevant to both the BIT I Cases, and the Lao PDR conjoined its "clean hands" defense to all claims by both Claimants in the ICSID and PCA proceedings.[349]

277. The PCA BIT I Tribunal reached the same conclusions as the ICSID BIT I Tribunal regarding the Respondent's allegations of corruption against Claimants and their affiliates, which are therefore not repeated here (the citations to those findings are included above). The PCA BIT I Tribunal likewise found that Mr. Baldwin (the directing mind of both Claimants) had "proceeded in bad faith from the outset," whereas Sanum had failed to establish bad faith by the Lao PDR, even if its conduct was "at times aggressive and inappropriate."[350] According to the PCA BIT I Tribunal,

[345] R-264, ICSID BIT I Award, ¶¶ 272-273.
[346] R-264, ICSID BIT I Award, ¶¶ 274-277.
[347] R-264, ICSID BIT I Award, ¶ 280.
[348] R-264, ICSID BIT I Award, ¶ 293.
[349] R-265, PCA BIT I Award, ¶¶ 71-73.
[350] R-265, PCA BIT I Award, ¶¶ 173-176.

while Sanum's claims for expropriation failed on the facts, "the Tribunal wishes to leave in no doubt its conclusion that Mr. Baldwin and Sanum exhibited manifest bad faith in various efforts not only to manipulate the Government to advance their gambling initiatives but, in the instance of Madam Sengkeo, to manipulate the arbitration process itself."[351]

278. With regard to the Thanaleng Slot Club, the PCA BIT I Tribunal recited findings that largely tracked those of the ICSID BIT I Tribunal, leading to the conclusion that Sanum's expropriation claim – which is that it was deprived of its investment by "flawed court proceedings tainted by interference by the Respondent" lacked any merit.[352]

279. With regard to the Paksong Vegas Hotel and Casino, the PCA BIT I Tribunal denied expropriation claims on the following basis:

> Claimant lost its rights under the PDA because it breached its terms and, by its own admission, the Paksong site could not be developed. This Claimant's admission contradicts its argument that work was being done and, if not done, was due to the Government order to stop the work. The loss of Paksong was not an expropriation, it was termination for breach of contract. The monopoly rights cherished by Sanum had a concomitant obligation to invest, which Sanum admits it did not fulfil.[353]

280. In connection with the Paksan Slot Club, the PCA BIT I Tribunal concluded as follows:

> At the time of the Paksan slot club's closure, the club was operating without a license and there is no documentary evidence that the Respondent had created any legitimate expectation in the Claimant that the license would be renewed or that it may operate *de facto* as if it had a license. The Claimant's argument about a de facto license begs the question of why Sanum had applied for the license's renewal in the preceding years. The Tribunal concludes that the license expired on its own terms and had terminated when the slot club was ordered to be closed.[354]

[351] R-265, PCA BIT I Award, ¶ 177.

[352] R-265, PCA BIT I Award, ¶¶ 181, 188-196.

[353] R-265, PCA BIT I Award, ¶ 218.

[354] R-265, PCA BIT I Award, ¶ 233.

281. Finally, with respect to the Thakhek project, the PCA BIT I Tribunal found that Claimants had failed to establish rights relating either to the 16 disputed hectares of land or to the remainder of the land referred to in the MOU.[355]

282. Accordingly, the PCA BIT I Tribunal decided that "the Claimants have failed to meet the evidentiary onus of establishing facts necessary to support their legal arguments. The claims are therefore dismissed."[356]

M. THE LAO COURTS' NON-RECOGNITION OF THE 2016 ST SIAC AWARD

283. Between January and August 2017 – while the disputes between Claimants and the Lao PDR were proceeding before the BIT I Tribunals – Sanum separately was seeking recognition in the Lao courts for the 2016 ST SIAC Award of US$200 million that they had obtained against ST.

284. Claimants contend that Lao PDR officials first obstructed service of their request for recognition of the award, insisting on certain procedures that were not consistent with Lao law; the Commercial Court of Vientiane then accepted written testimony from ST and the public prosecutor, of which Sanum was not informed and therefore had no opportunity to address; and finally that court held a hearing on 14 June 2017 without notifying Sanum. The same day, Claimants say, the Vientiane Court issued its decision No. 25/2017, denying recognition in Laos of the 2016 ST SIAC Award.[357]

285. The Vientiane Court found that the Master Agreement's multi-tiered dispute resolution clause,[358] upon which the 2016 ST SIAC Award was based, contradicted the Lao Constitution and Lao law by providing for arbitration *after* final court litigation. As discussed in Section III.H.(12) above, the Thanaleng disputes between Sanum and ST were litigated before the Commercial Court of Vientiane and affirmed by the Court of Appeal and the Lao Supreme Court, the latter rendering its

[355] R-265, PCA BIT I Award, ¶ 244.

[356] R-265, PCA BIT I Award, ¶ 264.

[357] Claimants' Memorial, ¶¶ 178-191.

[358] C-26, Master Agreement, Section 2, Art. 10 provided as follows:

> If any dispute shall arise, the Parties agree to conduct an amicable negotiation. If such dispute cannot be settled by mediation, the Parties may submit such disputes to the [OEDR] or Courts of the Lao PDR according to the provision and law of Lao PDR in accordance with this Agreement. …
>
> Before settlement by the arbitrator under the rules of the [OEDR], the Parties shall use all efforts to assist the dispute resolution in accordance with the laws of Lao PDR.
>
> If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC."

decision on 4 April 2014, roughly eighteen months before Sanum initiated the ST SIAC arbitration. The Commercial Court of Vientiane noted in part as follows:

> [This dispute] is not valid and is in conflict with the Constitution and the laws of the Lao PDR as provided in the Article 366 Clause 4 of the 2012 amended Civil Procedure Law due to the dispute has been adjudicated and final by the Court(s) of Lao PDR, in which the Article 98 of the 2015 Constitution of Lao PDR provided: 'Decisions reached by the People's Court, which final, must be respected by … all citizens, and must be implemented by the concerned individuals and organization[s].'[359]

286. On appeal, Sanum alleged various procedural breaches and violations of due process.[360] Substantively, it argued that since Sanum and ST had explicitly agreed to arbitration if either was left unsatisfied with the result of domestic court litigation, the Lao courts were required to accept any resulting foreign arbitral award, it, regardless of what Lao law otherwise might say about the finality of court decisions.[361]

287. On 4 August 2017, the Lao Court of Appeal affirmed the lower court decision. Among other things, it referred (as had the court below) to Article 98 of the 2015 Constitution, and also to Article 185, Clause 2 of the Amended 2012 Law of Civil Procedure, providing that "[t]he [C]ourt will not consider a case that the court issued a final decision." In the Court of Appeal's reasoning, Sanum's recognition proceedings were "not reasonable" because "when this Case has been decided and enforced finally, the Court cannot consider the case again." On the same basis, it stated that the 2016 ST SIAC Award conflicted with Lao law, because the underlying dispute between Sanum and ST "has been settled and decided already and its decision is final."[362]

288. Claimants say that the Court of Appeal affirmed the lower court decision on 4 August 2017 without taking Sanum's arguments into account, or for that matter affording it the opportunity to learn ST's position or to make substantive oral arguments following the written pleading stage.[363]

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[359] R-94, No. 25/1 Commercial Chamber of the People's Court in the Central Part, *Sanum Investment Limited v. ST Group, Ltd. et al.*, 14 June 2017, p. 4; *see also* C-360, p. 4 (same).

[360] Claimants' Memorial, ¶¶ 196, 201.

[361] R-96, Sanum Petition on Appeal, Commercial Case No. 48IFI.C, 10 July 2017, ¶ 42.

[362] R-97, Judgment of the Court of Appeals, 4 August 2017, p. 6; *see also* C-380, p. 6 (same).

[363] Claimants' Memorial, ¶¶ 202-203.

N. THE 2019 ST APPEAL DECISION IN SINGAPORE

289. While Sanum and ST were litigating in Lao courts about recognition of the 2016 ST SIAC Award, they were also litigating in the Singapore courts regarding enforcement of the same award.

290. On 28 June 2018, the Singapore High Court found that the dispute between Sanum and ST arose solely under the Master Agreement – not the Lao Bao/Ferry Terminal Participation Agreement or other agreements between them – and that the proper construction of the Master Agreement's dispute resolution clause should have resulted in an arbitral seat in Macau (not Singapore), and in a one-member tribunal (rather than a three-member tribunal). Despite these "procedural irregularities," the High Court found that the ST needed to demonstrate prejudice to justify non-recognition of the 2016 ST SIAC Award, which they had vailed to do. On this basis, the High Court affirmed Sanum's right to enforce the 2016 ST SIAC Award in Singapore and dismissed ST's application to refuse enforcement.[364]

291. However, on 20 November 2019, the Singapore Court of Appeal issued its 2019 ST Appeal Decision, which reversed the High Court ruling.

292. The appeals panel – chaired by Chief Justice Sundaresh Menon and including Judges Judith Prakash and Quentin Loh – unanimously agreed with the High Court that the dispute between Sanum and ST about an "alleged failure … to hand over the Thanaleng Slot Club to Sanum on 11 October 2011"[365] properly arose only under the Master Agreement, which therefore provided the only relevant arbitration clause to be construed.[366]

293. The Singapore Court of Appeal noted a threshold question about the validity, under Lao law, of a tiered arbitration clause "that seems to contemplate that it could leave the parties with a decision of the Supreme Court of Laos and then the parties can go to arbitration after that," with the consequence that "the arbitral tribunal would in effect be hearing an appeal against that decision."[367] ST argued that this was not a valid arbitration clause, while Sanum argued that it was.[368] The Court of Appeal expressed concern that in the absence of any expert opinion on Lao

[364] 2019 ST Appeal Decision, R-266, ¶¶ 33-34, 95.
[365] 2019 ST Appeal Decision, R-266, ¶ 15.
[366] 2019 ST Appeal Decision, R-266, ¶¶ 47, 53.
[367] 2019 ST Appeal Decision, R-266, ¶¶ 45, 63-64.
[368] 2019 ST Appeal Decision, R-266, ¶¶ 66-67.

law on this question, it did not have sufficient evidence to make a positive determination; however, ST bore the onus of proving invalidity under Lao law and had not done so.[369]

294. The Court of Appeal went on, however, to find that while the arbitration clause was valid, the arbitration that took place was not in accordance with the requirements of the clause. That was because "[n]either Singapore nor the SIAC are mentioned" in the Master Agreement, which had "no connection at all" to Singapore; "the correct seat of arbitration is Macau."[370] Moreover, even if the SIAC Rules had applied, they would require a one-member panel rather than a three-member panel.[371]

295. Unlike the High Court Judge, however, the Court of Appeal considered the error as to seat to be fundamental, and not simply a procedural irregularity that could be overlooked in the absence of demonstrated prejudice.[372] In its view:

> once an arbitration is wrongly seated, in the absence of waiver of the wrong seat, any award that ensues should not be recognised and enforced by other jurisdictions because such award had not been obtained in accordance with the parties' arbitration agreement. …
>
> We have concluded that it is not necessary for a party who is resisting enforcement of an award arising out of a wrongly seated arbitration to demonstrate actual prejudice arising from the wrong seat.[373]

296. The Court of Appeals concluded that ST had never waived the agreement to seat any arbitration in Macau, and "[i]n fact they objected to the SIAC's appointment as the arbitral institution to conduct the arbitration." In these circumstances, "we must refuse leave to Sanum to enforce the Award…."[374]

[369] 2019 ST Appeal Decision, R-266, ¶¶ 68-71.
[370] 2019 ST Appeal Decision, R-266, ¶¶ 84-85.
[371] 2019 ST Appeal Decision, R-266, ¶¶ 86-89.
[372] 2019 ST Appeal Decision, R-266, ¶¶ 95-96.
[373] 2019 ST Appeal Decision, R-266, ¶¶ 102-103.
[374] 2019 ST Appeal Decision, R-266, ¶ 104.

IV. OVERVIEW OF CLAIMS, OBJECTIONS AND DEFENSES

297. This lengthy history of events has been necessary to put into context the Parties' respective clams, objections and defenses, and requests for relief. Below, the Tribunal summarizes what is sought in this latest chapter of the Parties' long and litigious history.

A. SANUM'S CLAIMS AND REQUEST FOR RELIEF

298. Sanum presents claims under the China-Lao BIT relating to eight separate events.[375] These may be summarized as follows:

a. *Seizure of the Savan Vegas Casino* (alleged to violate BIT provisions on expropriation);[376]

b. *Termination of Payments under the CFA Loans* (alleged to violate BIT provisions on expropriation);[377]

c. *Tax Measures* (alleged to violate BIT provisions on expropriation);[378]

d. *Slot Club Measures* (alleged to violate BIT provisions on expropriation);[379]

e. *Frustration of Thakhek Concession Development* (alleged to violate BIT provisions on expropriation);[380]

[375] Letter from Claimants to Tribunal, 24 June 2019, distinguishing between Sanum's claims in this proceeding and LHNV's claims in the accompanying case, ICSID Case No. ARB(AF)16/2. In the other case, LHNV brings claims related to the same events, but also pursues an ancillary claim for a ninth event, arising out of non-recognition of the 2016 ST SIAC Award. (LHNV contends that certain elements of that claim survive the 2019 ST Appeal Decision; *see* Claimants' comments on ST Appeal Decision, 9 December 2019.) For each of the events in common between the two cases, LHNV asserts that multiple provisions of the Lao-Netherlands BIT were violated, but Sanum alleges only expropriation in violation of the China-Lao BIT and a failure to pay ICSID costs. *See* Letter from Claimants to Tribunal, 24 June 2019.

[376] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.C; Claimants' Reply, Section IV.D.

[377] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.D; Claimants' Reply, Section IV.B.

[378] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.E; Claimants' Reply, Section IV.C.

[379] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.F; Claimants' Reply, Section IV.E. This claim is primarily described as for "seizure and closure of the Ferry Terminal Slot Club," but alternatively Claimants claim for the physical assets (mainly slot machines) allegedly seized from that club and from the Lao Bao Slot Club. Crawford WS ¶ 87.

[380] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.G; Claimants' Reply, Section IV.H.

f. *Conversion of Bank Accounts and Cage/Vault Cash* (alleged to violate BIT provisions on expropriation);[381]

g. *Taking of Shophouses, Guard Houses and River House* (alleged to violate BIT provisions on expropriation);[382] and

h. *Failure to Pay ICSID Costs* (alleged to violate the BIT's arbitration clause together with ICSID Rules).[383]

299. The Claimants' request for relief at this stage of the proceedings is that the Tribunal find they prevail on all issues of jurisdiction and the merits, and the case should proceed to a hearing on quantum.[384]

B. RESPONDENT'S OBJECTIONS, DEFENSES AND REQUEST FOR RELIEF

300. The Respondent's Counter-Memorial and Rejoinder presented four threshold objections to the Tribunal's competence, which may be summarized as follows:

a. *Preclusion*: Starting from the proposition that "the facts and circumstances here are identical to [those] placed before and decided by the SIAC Tribunal,"[385] the Respondent objects that the claims are "barred by the application of the 'preclusion doctrines,'" a term it defines as including both "*res judicata* and issue estoppel."[386] Following issuance of the BIT I Awards, Respondent also asserts that the BIT I Tribunals' "findings of bribery and corruption are *res judicata* on this Tribunal."[387] Following issuance of the 2019 ST Appeal

[381] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.H; Claimants' Reply, Section IV.F.

[382] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.I; Claimants' Reply, Section IV.G.

[383] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.J; Claimants' Reply, Section IV.J.

[384] Claimants' Reply, ¶ 485.

[385] Respondent's Counter-Memorial, Section III.A; Respondent's Rejoinder, Section III. Claimants respond to this proposition in Claimants' Reply, Section III.B.

[386] Respondent's Counter-Memorial, Section III.B and ¶ 126; Respondent's Rejoinder, Section II. Claimants respond to this objection in Claimants' Reply, Section III.A and B.

[387] Respondent's Submission on the BIT I Awards, Section II. Claimants respond to this objection in Claimants' Response on the BIT I Awards, Section II.

Decision, the Respondent states that this "once and for all, disposes of [LHNV's] ancillary claim" for non-recognition of the 2016 ST SIAC Award.[388]

b. *Abuse of Process*: The Respondent objects that "Claimants' multiple successive claims arising from the same measures and for the same relief are inadmissible as an abuse of process."[389]

c. *Contract Claims*: The claims are "contract claims, not treaty claims";[390] and

d. *Material* Jurisdiction: Claimants lack "material jurisdiction" over certain specific claims.[391]

301. Following issuance of the BIT I Awards, the Respondent asserted an additional threshold admissibility objection, namely that the BIT I Tribunals' "[a]ffirmative findings on bribery and corruption warrant dismissal of all claims,"[392] and their findings regarding obstruction of justice in the BIT I Cases render Claimants not entitled to substantive treaty protection in this proceeding and their claims therefore inadmissible.[393]

302. On the merits, the Respondent rejects each of the claims as unfounded. Its defenses may be summarized as follows:

a. The Respondent lawfully terminated the Savan Vegas PDA, which bars claims related to the seizure of Savan Vegas and the CFA Loans;[394]

[388] Respondent's comments on the 2019 ST Appeal Decision, 25 November 2019, p.3. Claimants respond to this objection in Claimants' comments on the 2019 ST Appeal Decision, 9 December 2019.

[389] Respondent's Counter-Memorial, Section III.C; Respondent's Rejoinder, Section IV; Respondent's Submission on the BIT I Awards, Section V.1. Claimants respond to this objection in Claimants' Reply, Section III.A.2.3, and Claimants' Response on the BIT I Awards, Section V.A.

[390] Respondent's Counter-Memorial, Section III.D; Respondent's Rejoinder, Section V. Claimants respond to this objection in Claimants' Reply, Section III.A.1.

[391] Respondent's Counter-Memorial, Section III.E; Respondent's Rejoinder, Section VI. Claimants respond to this objection in Claimants' Reply, Section III.C.

[392] Respondent's Submission on the BIT I Awards, Sections IV.1 and V.2. Claimants respond to this objection in Claimants' Response on the BIT I Awards, Section IV and V.B.

[393] Respondent's Submission on the BIT I Awards, Section III. Claimants respond to this objection in Claimants' Response on the BIT I Awards, Section III.

[394] Respondent's Counter-Memorial, Section IV; Respondent's Rejoinder, Section VII; Respondent's Submission on the BIT I Awards, Section IV.2.

b. Claimants' failure to collect on the CFA Loans was a direct and proximate consequence of that PDA termination and Claimants' malfeasance;[395] and

c. Claimants' "discriminatory" taxation arguments fail on the merits;[396]

d. Claimants' arguments regarding "seizure and closure" of the Ferry Terminal Slot Club fail on the merits;[397]

e. Claimants' arguments regarding "conversion of seized bank accounts and cage and vault cash" fail on the merits;[398]

f. Claimants' arguments regarding a taking of Thakhek and Savannakhet properties fail on the merits;[399]

g. Claimants' arguments regarding termination of the Thakhek concession fail on the merits;[400] and

h. LHNV's claim regarding non-recognition of the 2016 ST SIAC Award is meritless, because that award is "facially unenforceable in the Lao PDR" and the Lao court proceedings do not constitute denial of justice,[401] and because more recently, the Singapore Court of Appeal declared that the 2016 ST SIAC Award should not be recognized and enforced.[402]

303. Respondent's request for relief at this stage of the proceedings is that the Tribunal should dismiss all claims as a matter of either jurisdiction or merits, and award Respondent all associated costs.[403]

[395] Respondent's Counter-Memorial, Section Vl; Respondent's Rejoinder, Section VIII.

[396] Respondent's Rejoinder, Section IX.

[397] Respondent's Rejoinder, Section X.

[398] Respondent's Rejoinder, Section XI.

[399] Respondent's Rejoinder, Section XII.

[400] Respondent's Rejoinder, Section XIII; Respondent's Submission on the BIT I Awards, Section VI.

[401] Respondent's Counter-Memorial, Section VI; Respondent's Rejoinder, Section XIV.

[402] Respondent's comments on the 2019 ST Appeal Decision, pp. 2-3. As noted above, Claimants by contrast contend that certain elements of this claim survive the 2019 ST Appeal Decision. *See* Claimants' comments on ST Appeal Decision, 9 December 2019.

[403] Respondent's Rejoinder, ¶ 279.

V. JURISDICTION AND ADMISSIBILITY

304. As noted above, the Respondent objects to jurisdiction on the following grounds: (a) the claims presented are barred by the "preclusion doctrines," *i.e.*, *res judicata* and issue estoppel; (b) the claims are an abuse of process; (c) the claims are contractual rather than treaty claims; and (d) the Tribunal lacks material jurisdiction over certain claims. Following issuance of the BIT I Awards, the Respondent also objected that (e) their findings regarding bribery and corruption warrant dismissal of all claims, and their findings regarding obstruction of justice render Claimants not entitled to substantive treaty protection and their claims therefore inadmissible. Claimants reject each of these objections. The Parties' arguments are summarized below.

A. THE PRECLUSION DOCTRINES

305. The Parties' arguments about preclusion were briefed on several occasions, as decisions in other arbitrations were issued during the life of this proceeding. The summaries below of their positions are thus grouped into: (1) the implications of the 2017 SIAC Award, (2) the implications of the BIT I Awards, and (3) the implications of the 2019 ST Appeal Decision.

(1) The Implications of the 2017 SIAC Award

a. Respondent's Position

306. The Respondent maintains that the application of the preclusion doctrines (including *res judicata* and issue estoppel), along with the current trend of decisions in investment arbitration cases, bar Claimants' claims, because these claims rely on factual predicates which have already been decided by the SIAC Tribunal.[404]

307. The Respondent relies on the *Grynberg* case – an ICSID proceeding – to argue that the Tribunal should dismiss the Claimants' claims based on issue estoppel.[405] According to the Respondent, the *Grynberg* tribunal acknowledged that the doctrine of issue estoppel is a well-established principle of international law, and employed a three-part test, under which a right, question or fact may not be re-litigated if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims

[404] Respondent's Memorial on Competence, ¶ 48.

[405] Respondent's Memorial on Competence, ¶ 49, citing RL-51, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 ("***Grynberg***"), ¶ 1.4.1.

before that tribunal.[406] In applying this test, the *Grynberg* tribunal held that the *RSM* Award – the award resulting from a prior arbitration between the parties – precluded the claims before it, specifically finding that:

> an essential predicate to the success of each of Claimants' [treaty] claims is an ability for the Tribunal to re-litigate and decide in Claimants' favour conclusions of fact or law concerning the parties' contractual rights that have already distinctly been put in issue and distinctly determined by the Prior Award. Because the Tribunal has concluded, in the answer to the first question it has considered [issue estoppel], that it cannot properly revisit those conclusions, the Tribunal therefore finds that each of Claimants' claims is manifestly without merit.[407]

308. The Respondent suggest that close adherence to the reasoning of the *Grynberg* tribunal is warranted in this case, because the procedural history, claims, legal issues, and parties' arguments in *Grynberg* are "nearly identical to those before this Tribunal."[408] The Respondent rejects Claimants' attempts to distinguish *Grynberg* from this dispute.[409] Among other things, it says, *Grynberg* cannot be distinguished on the basis of the fork-in-the-road clause in the BIT at issue there, because the *Grynberg* tribunal expressly noted that it never reached this issue because the traditional preclusion doctrine applied.[410] Moreover, the Respondent notes that because the 2017 SIAC Award is dispositive as to the allegations supporting the Claimants' claims, the *Grynberg* analysis is determinative in the present dispute as per the Claimants' own admission.[411]

309. The Respondent submits that the 2017 SIAC Award's central finding – that the Respondent did not breach any obligation under the Deed of Settlement – applies to every allegation before the Tribunal.[412] More specifically, because the Respondent did not breach any obligation under the Deed, it also did not breach its BIT obligations in light of the fact that the alleged treaty breaches arise from the Deed's terms.[413] Otherwise stated, the Respondent maintains that since the 2017

[406] Respondent's Memorial on Competence, ¶ 57, citing RL-51, *Grynberg*, ¶¶ 7.1.1-7.1.2.

[407] Respondent's Memorial on Competence, ¶ 58; Respondent's Counter-Memorial, ¶ 136, citing RL-51, *Grynberg*, ¶ 7.2.1.

[408] Respondent's Memorial on Competence, ¶¶ 52-54, 59; Respondent's Counter-Memorial, ¶ 137.

[409] Respondent's Memorial on Competence, ¶ 60; Respondent's Counter-Memorial, ¶ 138.

[410] Respondent's Memorial on Competence, ¶ 62; Respondent's Counter-Memorial, ¶ 140, citing RL-51, *Grynberg*, ¶ 4.6.9.

[411] Respondent's Memorial on Competence, ¶ 63; Respondent's Counter-Memorial, ¶ 141.

[412] Respondent's Memorial on Competence, ¶ 64, citing R-27, 2017 SIAC Award, ¶ 328(f).

[413] Respondent's Memorial on Competence, ¶ 64.

SIAC Award found that it had fulfilled its contractual obligations, this resolves the dispute before the Tribunal and each allegation is thereby covered by *res judicata*.[414]

310. Specifically, with respect to the various claims in this case, the Respondent maintains as follows:

a. Savan Vegas Seizure: Regarding the alleged seizure of Savan Vegas amounting to expropriation under the Treaty, the Respondent contends that the 2017 SIAC Award interpreted the relevant provisions of the Deed – Sections 11, 12, 19, and 32 – and concluded that the seizure took place after the expiration of Claimants' permitted period of control without any extension of the sale deadline, and that there was no evidence of mismanagement or damages arising from the Government's assumption of control.[415] That these claims already have been decided is proven, the Respondent says, by Claimants' (1) "cut[ting] and past[ing]" the witness statements and pleadings from the SIAC arbitration into this proceeding's submissions, (2) its recycling of exhibits; and (3) its identical attacks on the appointment of San Marco.[416] The Respondent submits that even if Sanum reformulates its claim in treaty terms, it is apparent that the Lao PDR could not have impaired or interfered with Claimants' rights by taking control of Savan Vegas if the Deed permitted such action, as the 2017 SIAC Award determined.[417] Further, Sanum has not provided any evidence suggesting that the Respondent violated the China-Lao BIT even though it complied with the Deed, and has distorted the BIT I Tribunals' material breach findings, to the extent they disagreed with the 2017 SIAC Award; the areas of disagreement concerned other issues, and the BIT I Tribunals denied Claimants' allegations of material breach with respect to the issues relevant to the Savan Vegas seizure.[418]

b. Savan Vegas PDA Termination: Regarding the alleged expropriation based on the Government's termination of the Savan Vegas PDA, the Respondent argues that the 2017 SIAC Award interpreted Section 6 of the Deed and found that the Respondent's obligation had been met.[419] The Respondent rejects Claimants' argument that the SIAC Tribunal did

[414] Respondent's Memorial on Competence, ¶¶ 64, 93.
[415] Respondent's Memorial on Competence, ¶¶ 68-71; citing R-27, 2017 SIAC Award, ¶¶ 157, 159, 212, 244-246.
[416] Respondent's Counter-Memorial, ¶¶ 67-76.
[417] Respondent's Rejoinder, ¶ 57; Respondent's Counter-Memorial, ¶ 78.
[418] Respondent's Rejoinder, ¶¶ 58-59.
[419] Respondent's Memorial on Competence, ¶¶ 72-73, citing R-27, 2017 SIAC Award, ¶ 231.

not have jurisdiction over the Savan Vegas PDA, noting that its findings about termination of the PDA were necessary to resolving Claimants' own counterclaims in the case.[420]

c. New 28% Tax Rate: The Respondent notes that the 2017 SIAC Award found the Respondent had complied with the Deed of Settlement's requirement to impose a new flat tax because its appointment of the Flat Tax Committee was not unreasonable and the tax ultimately imposed was flat and not "unfair or unreasonable."[421] The Respondent adds that the Deed embodied a bargain whereby the Respondent waived its right to determine taxes based on general Lao laws, and Claimants "*agreed to be bound* to that procedure and the contract as a whole (including its dispute resolution clause)."[422] The Respondent stresses that regardless of Claimants' formulation of its tax claim, the lawfulness of the tax arises directly out of the Deed and the Flat Tax Committee's actions, which the SIAC Tribunal analyzed and decided.[423]

d. Tax Assessments: The Respondent contends that the allegations of unfair taxation arising from its imposition of taxes based on the 2014 Tax Law Amendments were dealt with by the 2017 SIAC Award's conclusions that Section 7 of the Deed did not excuse Sanum from paying taxes at the rates imposed by Lao law.[424] Claimants' relitigation of the same issue is also demonstrated, the Respondent says, by its reuse of Mr. Crawford's witness statement and Mr. Bryson's expert report from the SIAC proceedings, and its reliance on the same factual exhibits.[425] The Respondent concludes that Claimants do not add anything in this case which has not already been dealt with by the 2017 SIAC Award.[426]

e. Sale of Savan Vegas: The Respondent notes that the 2017 SIAC Award found that Claimants had failed to show any failure to maximize the sale price pursuant to Section 13 of the Deed, and that the Respondent's exclusion of the Slot Clubs from the sale was

[420] Respondent's Rejoinder, ¶¶ 60-65.

[421] Respondent's Memorial on Competence, ¶¶ 75-76; Respondent's Counter-Memorial, ¶¶ 80, 84-92, citing R-27, 2017 SIAC Award, ¶¶ 271, 285, 287.

[422] Respondent's Counter-Memorial, ¶ 81 (emphasis in original).

[423] Respondent's Counter-Memorial, ¶¶ 79-80; Respondent's Rejoinder, ¶¶ 69-70.

[424] Respondent's Memorial on Competence, ¶ 78; Respondent's Counter-Memorial, ¶¶ 95, 98, citing R-27, 2017 SIAC Award, ¶¶ 180, 280.

[425] Respondent's Counter-Memorial, ¶¶ 100-101.

[426] Respondent's Counter-Memorial, ¶¶ 102-106.

justified and therefore could not have damaged the Claimants.[427] Again citing the reuse of arguments, witness statements, expert reports, and exhibits, the Respondent submits that this claim has been presented to and decided by the SIAC Tribunal, and that without a violation of Claimants' contract rights (which the SIAC Tribunal rejected), no treaty claim can exist.[428] The Respondent notes that Claimants' "*volte face*" on the ownership of the Slot Clubs is no more than an effort to avoid application of preclusion doctrines.[429] Further, the Respondent submits that because the Deed prohibited Claimants from holding interests indefinitely, its participation interest in the Slot Clubs was divested pursuant to the 2017 SIAC Award and the issue is therefore precluded in the present dispute.[430]

f. Thakhek Concession: The Respondent observes that the 2017 SIAC Award determined that the Respondent did not negotiate the Thakhek land concession in bad faith in violation of Section 22 of the Deed as Claimants now allege.[431] Further, the arguments, witness statement, and exhibits on which Claimants rely show the "identical nature of the Thakhet issue before both tribunals."[432] To the extent that Claimants reformulated their claim about the Thakhek concession in the Reply – to focus on the exclusion of 16 hectares rather than negotiation in bad faith – that issue was pleaded before the BIT I tribunals, so will be precluded by *res judicata* either under the 2017 SIAC Award or the BIT I Awards, and cannot be relitigated before the Tribunal.[433]

g. Lao judiciary: The Respondent argues that even though the alleged violations arising from the actions of the Lao judiciary were not before the SIAC Tribunal, the 2017 SIAC Award nevertheless addressed them in finding that the Respondent "respected Claimants' rights under the Deed."[434]

h. Bank accounts, cash and property: Finally, the Respondent says that the claims for conversion of seized bank accounts and Savan Vegas' cage and vault cash, and for the

[427] Respondent's Memorial on Competence, ¶¶ 79-80, 82, 84-85; Respondent's Counter-Memorial, ¶ 108, citing R-27, 2017 SIAC Award, ¶¶ 222, 226-228, 495.

[428] Respondent's Counter-Memorial, ¶¶ 109-111.

[429] Respondent's Rejoinder, ¶¶ 71-73.

[430] Respondent's Rejoinder, ¶ 74.

[431] Respondent's Memorial on Competence, ¶¶ 86-87; Respondent's Counter-Memorial, ¶ 112; citing R-27, SIAC Award, ¶¶ 303, 305, 307.

[432] Respondent's Counter-Memorial, ¶¶ 114-119.

[433] Respondent's Rejoinder, ¶¶ 77-78.

[434] Respondent's Memorial on Competence, ¶¶ 90-91.

Thakhek and Savannakhet properties, are barred by the 2017 SIAC Award because these assets were accounted for in the sale price as evidenced by the Asset Purchase Agreement.[435]

311. The Respondent submits that ICSID tribunals regularly employ the preclusion doctrines of *res judicata* and issue estoppel in circumstances similar to the present dispute.[436] Relying on the *Apotex* tribunal's in-depth examination of these two doctrines in the context of international investment law, the Respondent contends that the essence of their broad and historic application is that "'a right, question or fact' once decided 'may not be disputed again.'"[437]

312. Regarding *res judicata* specifically, the Respondent maintains that the growing trend in investment arbitration favors a flexible approach to its elements – *persona, petitum,* and *causa petendi* – because under a restrictive approach, the doctrine would seldom apply.[438] Further, the effect of *res judicata*, once employed, extends not only to the dispositive aspects of the award but also to the findings that are essential to that decision which, in turn, counsels in favor of relaxing the *petitum* and *causa petendi* requirements in the present dispute.[439] The Respondent points out that the *Apotex* tribunal bypassed the *causa petendi* element, thereby bringing *res judicata* within the realm of issue estoppel, and noted that "past international tribunals have routinely applied 'issue estoppel' either, with or without, directly using the term."[440]

313. That investment tribunals have been confronted with the precise dilemma now before the Tribunal – *i.e.*, whether to give preclusive effect to a prior commercial award in the context of investment arbitration with claims arising out of a BIT – is further evidenced by both doctrine and arbitral jurisprudence.[441] Specifically, the Respondent contends that the principle established in *Helnan*,

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[435] Respondent's Memorial on Competence, ¶¶ 80-82; Respondent's Counter-Memorial, ¶¶ 123-124.

[436] Respondent's Memorial on Competence, ¶ 94.

[437] Respondent's Memorial on Competence, ¶ 96; Respondent's Counter-Memorial, ¶¶ 142-144, citing RL-7, *Apotex Holdings Inc., Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 ("***Apotex***"), ¶ 7.12.

[438] Respondent's Memorial on Competence, ¶¶ 97-99; Respondent's Counter-Memorial, ¶¶ 145-146, 149.

[439] Respondent's Memorial on Competence, ¶¶ 100, 104; Respondent's Counter-Memorial, ¶ 148.

[440] Respondent's Memorial on Competence, ¶ 105; Respondent's Counter-Memorial, ¶ 153; citing RL-7, *Apotex*, ¶ 7.18.

[441] Respondent's Memorial on Competence, ¶ 106, citing RL-17, Charles Brower and Paula Henin, *Res Judicata*, in *Building International Investment Law: The First 50 Years of ICSID*, edited by Meg Kinnear and Geraldine Fischer, et al. (ed) (Kluwer law International 2015), Chapter 5; RL-30, *Helnan International Hotels A/S v. The Arab Republic of Egypt*, I CSID Case No. ARB/05/19, Award, 3 July 2008 ("***Helnan***"), ¶¶ 123-125; RL-51, *Grynberg*, ¶¶ 7.1.2, 7.1.3, 7.1.8; RL-24, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 ("***Desert Line***"), ¶ 138.

namely, that it is not "appropriate for an international tribunal to replace the decision of the local court on a contractual issue subject to local law," is directly applicable to the present dispute, as Claimants' claims "hinge entirely on the supposition that this Tribunal will reopen and decide each factual finding and legal conclusion set forth in the [2017] SIAC Award differently."[442]

314. As to Claimants' argument that preclusion does not apply because the 2017 SIAC Award and this dispute arise in the context of different legal orders, the Respondent argues that it is "demonstrably incorrect."[443] First, the Respondent observes that Claimants rely on a passage of Professor McLachlan's treatise, but that passage only states that treaty obligations cannot be abrogated by a state court through national decisions, which is not the context of the issue here.[444] Indeed, the same treatise later provides that investment tribunals may refer and rely on prior decisions made by contract tribunals, thereby undermining Claimants' argument.[445] That this is the accurate position of Professor McLachlan is evidenced by his decision in *Ampal*, an ICSID case, to apply issue estoppel based on an ICC commercial arbitration decision.[446]

315. Second, the Respondent submits that "recent landmark investment decisions" contradict Claimants' position regarding the implications of different legal orders.[447] Specifically, the Respondent rejects Claimants' analysis of the *Grynberg* and *Helnan* tribunals and notes that *Ampal* lends additional support to its position.[448] In particular, in the Respondent's view:

    a. *Grynberg* applied collateral estoppel based on decisions from different legal orders, as the first arbitration obtained its jurisdiction from a contract while the second did so from a bilateral investment treaty.[449] That both cases were administered by ICSID does not change the fact that a commercial arbitration decision served as the underlying basis for collateral estoppel in a treaty arbitration proceeding.

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[442] Respondent's Memorial on Competence, ¶¶ 115-116; Respondent's Counter-Memorial, ¶¶ 154-164, citing RL-30, *Helnan*, ¶ 108.

[443] Respondent's Rejoinder, ¶ 10.

[444] Respondent's Rejoinder, ¶ 11.

[445] Respondent's Rejoinder, ¶ 12, citing CL-136, Campbell McLachlan, *International Investment Arbitration: Substantive Principles*, § 4.95, p. 120.

[446] Respondent's Rejoinder, ¶¶ 12-13, citing RL-129, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 ("***Ampal***"), ¶ 259.

[447] Respondent's Rejoinder, ¶ 10.

[448] Respondent's Rejoinder, ¶ 15.

[449] Respondent's Rejoinder, ¶¶ 18-19.

b. The facts and outcome of *Helnan*, as well as the annulment proceedings that followed, directly support the Respondent's position that a "commercial arbitral award has preclusive effect on every right, question, or fact that has previously been put at issue by the parties and decided by a tribunal of competent jurisdiction."[450]

c. *Ampal* conclusively undermines the Claimants' position that no investment treaty arbitration case has given preclusive effect to a commercial arbitration award even on the *dispositif*, since. *Ampal* rejected a strict approach to the three-part identity test and affirmed collateral estoppel as a principle of public international law, while ultimately giving preclusive effect to an ICC decision.[451]

316. The Respondent rejects as inapplicable and unpersuasive the four decisions on which Claimants rely, contending that each is missing "an essential element necessary for a tribunal to apply *res judicata*/collateral estoppel."[452] Specifically, identity of the parties was lacking in *Fraport*,[453] the *Petrobart* circumstances involved the failure to bring a claim in prior proceedings rather than preclusion of a litigated and decided claim,[454] there was no final commercial award to provide the basis for preclusion in *SGS Pakistan*,[455] and *Al Tamini* involved a criminal decision rendered by a state court rather than a commercial arbitration award.[456]

317. While the Respondent agrees with Claimants that collateral estoppel exists in public international law as a subset of *res judicata*, it rejects the notion that the same "strictures" apply.[457] Relying on *Apotex*, Respondent submits that the Tribunal should conclude that international tribunals have employed the doctrine of collateral estoppel, although not expressly, even when one of the three elements of *res judicata* were not present, and therefore that this Tribunal should do the same.[458]

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[450] Respondent's Rejoinder, ¶¶ 20-24.

[451] Respondent's Rejoinder, ¶¶ 25, 28-29.

[452] Respondent's Rejoinder, ¶ 30.

[453] Respondent's Rejoinder, ¶ 31, citing CL-267, *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/11/12, Procedural Order No. 1, 17 May 2012 ("***Fraport***"), ¶ 83.

[454] Respondent's Rejoinder, ¶ 32, citing CL-51, *Petrobart Limited v. Kyrgyzstan*, SCC Case No. 126/2003, Award, 29 March 2005 ("***Petrobart***"), ¶ 365.

[455] Respondent's Rejoinder, ¶ 33, citing CL-27, *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003 ("***SGS Pakistan***"), ¶ 2.

[456] Respondent's Rejoinder, ¶ 34, citing CL-268, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, IIC 745 (2015), Award, 3 November 2015 ("***Al Tamimi***"), ¶ 359.

[457] Respondent's Rejoinder, ¶ 36, citing Claimants' Reply, ¶ 79.

[458] Respondent's Rejoinder, ¶¶ 37-39.

318. The Respondent also denounces Claimants' reformulation of their claims between the Notice of Arbitration and Claimants' Memorial on the Merits, stating that the "transparent motive" for doing so was to avoid the preclusive effect of the 2017 SIAC Award.[459] The Respondent notes that Claimants' Notices of Arbitration portrayed the Deed of Settlement as at the center of this dispute, but the Claimants later backtracked from this position after the 2017 SIAC Award clearly decided the Parties' performance of the Deed.[460]

319. For these reasons, the Respondent submits that the Tribunal must declare the claims before it as being inadmissible pursuant to *res judicata* and issue estoppel.[461]

b. Claimants' Position

320. Claimants reject the suggestion that *res judicata* prevents the Tribunal from presiding over the claims presented in this case. In its view, for findings of fact or law from previous proceedings to bar future litigation, then all three conditions of *res judicata* must be present, namely, identity of the parties, subject matter, and cause of action.[462] That test is met for the jurisdictional rulings against the Respondent by the BIT I Tribunals, the Claimants, say, because those decisions were rendered in investment arbitration disputes between the Parties over similar claims.[463] By contrast, the 2017 SIAC Award does not satisfy the identity of subject matter requirement, since it was rendered in a contract-based arbitration which is not within the same legal order as investor-State arbitration.[464]

321. Claimants reject the Respondent's preclusion argument as being grounded in a dubious trend and failing to articulate the proper tests, opting instead for a "nebulous preclusion 'principle'" that in Claimants' view improperly blends the doctrines of *res judicata* and common law collateral estoppel.[465] Claimants note that of the three decisions on which the Respondent relies – *Grynberg*, *Helnan*, and *Apotex* – only the latter was based on *res judicata*, while the second used issue preclusion based on a previous ICSID proceeding and the first rejected altogether jurisdictional

[459] Respondent's Rejoinder, ¶ 42-48.

[460] Respondent's Rejoinder, ¶¶ 42-48.

[461] Respondent's Memorial on Competence, ¶ 116.

[462] Claimants' Memorial, ¶ 300.

[463] Claimants' Memorial, ¶¶ 303-305. For example, Claimants say, the Respondent could not raise a *ratione temporis* jurisdictional objection in this case, since that was resolved in the BIT I Cases. Claimants' Memorial, ¶ 305.

[464] Claimants' Memorial, ¶¶ 301-302.

[465] Claimants' Reply, ¶¶ 55-57.

objections based on *res judicata* before dismissing the claims on their merits.[466] The Respondent's proposed approach is also flawed in that it ignores the requirement that the legal order must be the same in both decisions and fails to provide any authority for doing so, despite the fact that the Respondent's own cases adequately address the matter.[467]

322. Claimants point out that no investment treaty arbitration tribunal has permitted a commercial arbitral award to serve as the basis for preclusion pursuant to *res judicata* or collateral estoppel.[468] To the contrary, investment tribunals – including those in *Fraport, Petrobart*, *SGS Pakistan*, and *Al Tamimi* – have reached the opposite conclusion.[469]

323. Claimants submit that *res judicata* continues to apply in public international law only in the context of claim preclusion and under an orthodox approach applying the three-factor test, as evidenced by recent decisions of the International Court of Justice ("**ICJ"**) as well as the *Apotex* award upon which Respondent relies.[470] As for *Helnan*, which Respondent contends did apply *res judicata* to a commercial award, "[t]hat is simply not true": the tribunal explicitly refused to give an earlier commercial arbitral award binding effect on the international plane under *res judicata* and made no reference to collateral estoppel.[471] Claimants thus maintain that the Respondent has failed to provide any authority on which the Tribunal could support a decision to replace the traditional *res judicata* test with the Respondent's proposed approach.[472]

324. Claimants argue that neither *res judicata* nor collateral estoppel can properly apply in this case to the 2017 SIAC Award. First, *res judicata* can apply only when all of its elements, including identity

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[466] Claimants' Reply, ¶¶ 57-58.

[467] Claimants' Reply, ¶¶ 64-65.

[468] Claimants' Reply, ¶ 66.

[469] Claimants' Reply, ¶ 66, citing CL-267, *Fraport*, ¶¶ 79-84; CL-51, *Petrobart*, ¶¶ 363-369; CL-27, *SGS Pakistan*, ¶¶ 175-177; CL-268, *Al Tamimi*, ¶ 358.

[470] Claimants' Reply, ¶ 60, citing CL-322, *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (Nicaragua v. Colombia*), ICJ, Preliminary Objections, Judgment of 17 March 2016, ¶¶ 59-61 (applying the traditional tripartite test and indicating that *res judicata* applies only to the decision of the Court "in the operative clause of the judgment") and CL-323, *Separate Opinion of Judge Greenwood*, ¶¶ 4, 7 ("the identity of these three elements is a necessary, but not a sufficient, condition for the application of *res judicata*. It is also essential that the matter at issue must have been decided in the earlier proceedings. […] Strictly speaking, it is only the *dispositif* of a judgment which can have the force of *res judicata*"); CL-359, *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast (Nicaragua v. Colombia)*, ICJ, Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *Ad Hoc* Brower, 17 March 2016, ¶¶ 6-7 ("[R]es judicata may attach to the reasons of a judgment of the Court if those reasons are 'inseparable' from the operative clause of a judgment […] or if they constitute a 'condition essential to the Court's decision.'").

[471] Claimants' Reply, ¶¶ 67-71.

[472] Claimants' Reply, ¶ 72.

of legal order, are met and "under international law the proceeding must be, or must have been, conducted before courts and tribunals in the international legal order," with the starting point that "decisions and judgments of municipal courts do not have *res judicata* effect on the international level."[473] Moreover, even where all three elements are met, Claimants submit that *res judicata* in international law would extend only to the "operative part of a judgment," not all of the underlying reasons.[474]

325. Second, Claimants say that even if collateral estoppel exists within international law, it is only as a "sub-species" of *res judicata*, with the result that its application is subject to the same three-part test.[475] However, Claimants contend that it is far from clear, as advanced by the *Grynberg* tribunal, that collateral estoppel is an established principle of international law in the first place; *Grynberg* based its argument in a "century-old judgment rendered by the U.S. Supreme Court."[476] Claimants add that collateral estoppel is not generally accepted in civil law systems, such as that which Laos has adopted.[477]

326. After reviewing how past investment tribunals have dealt with collateral estoppel, Claimants reiterate the need to satisfy the three-part test of *res judicata* and concludes that as a result, contract-based arbitration "will not bind a later tribunal convened under an investment treaty," such as this one.[478] Nevertheless, even if collateral estoppel were well established in public international law without the application of the *res judicata* doctrine, it still would not apply in the present circumstances,[479] because – in the common law jurisdictions where collateral estoppel is followed – it is still subject to various exceptions and the discretion of the presiding court, especially in the context of arbitral awards.[480] Specifically, Claimants say that a four-part "gateway test" is applied, followed by an examination of whether any of the exceptions apply, and in some jurisdictions identity of the parties is also required before preclusion can be deemed appropriate to a given issue.[481]

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[473] Claimants' Reply, ¶¶ 74, 76, citing CL-269, K. Hobér, Res Judicata *and* Lis Pendens *in International Arbitration*, Recueil des Cours 366 (2013) ("**Hober**"), pp. 311-312.

[474] CL-269, Hober, p. 321.

[475] Claimants' Reply, ¶ 79.

[476] Claimants' Reply, ¶¶ 80-82.

[477] Claimants' Reply, ¶ 83.

[478] Claimants' Reply, ¶¶ 84-89.

[479] Claimants' Reply, ¶ 90.

[480] Claimants' Reply, ¶ 91.

[481] Claimants' Reply, ¶¶ 92-94.

327. Claimants maintain that several of the exceptions available in common law jurisdictions are applicable to the issues decided by the SIAC majority, thereby preventing preclusion from applying in this case.[482] These include the unavailability of review on the merits of the 2017 SIAC Award; the differing jurisdiction of the SIAC Tribunal and this Tribunal; the inadequate opportunity Claimants had to obtain a full and fair adjudication in the SIAC Case because of the SIAC majority's unfair and discriminatory discovery rulings, as emphasized by Ms. Lamm's dissents; the lack of identity of subject matter and identity of legal grounds; and the failure to identify any specific issue in this case that was also an identical and "essential" issue in the SIAC Tribunal's conclusions.[483]

328. Claimants say it would be inappropriate to give preclusive effect to the 2017 SIAC Award for two further reasons: several of the claims before this Tribunal were not before the SIAC Tribunal, and the present claims are grounded in different facts and/or law.[484] Specifically, Claimants point out that at least three of the claims before the Tribunals in this case and the accompanying *LHNV* case were not presented to the SIAC Tribunal:

a. Non-recognition of the 2016 ST SIAC Award: Claimants note that this claim (presented by LHNV as an ancillary claim but *not* a subject of a claim in this case) was not before the SIAC Tribunal and therefore was not decided by the 2017 SIAC Award; as a result, the claim is beyond the reach of the Respondent's preclusion arguments and squarely within the Tribunal's jurisdiction.[485]

b. Non-payment of the CFA Loans: Claimants say that the claim grounded on the Respondent's interference with the repayment of the CFA Loans was also not presented to the SIAC Tribunal.[486] The Respondent's argument that the claim nevertheless is precluded by 2017 SIAC Award's determination on the termination of the 2007 Savan Vegas PDA fails because (1) the SIAC Tribunal's decision was not dependent on its determination regarding the PDA;[487] (2) the SIAC Tribunal misinterpreted the scope of the issue before it, which was whether the termination breached the Deed of Settlement rather than whether

[482] Claimants' Reply, ¶ 94.
[483] Claimants' Reply, ¶¶ 94.
[484] Claimants' Reply, ¶ 114.
[485] Claimants' Reply, ¶ 115.
[486] Claimants' Reply, ¶ 116.
[487] Claimants' Reply, ¶ 117.

it was lawful overall;[488] (3) because Claimants could not have expected the SIAC Tribunal to reach that broader issue, which was beyond its jurisdiction, they were not provided the opportunity to present broader arguments and evidence;[489] and (4) the SIAC majority's conclusion – that Sanum's failure to pay any taxes justified the Respondent's unilateral termination of the PDA – was directly contradicted by five other arbitrators (Ms. Lamm's dissent in the SIAC Case and the four arbitrators who decided the second material breach applications in the ICSID and PCA BIT I Cases).[490]

c. ICSID Arbitration Costs: Claimants point out that Respondent's memorials have completely ignored its claim for the Respondent's failure to pay half of the costs of this arbitration, an issue that obviously was not before the SIAC Tribunal.[491]

329. Claimants argue that the rest of the claims in this case also were not decided by the 2017 SIAC Award, as evidenced by the SIAC Tribunal's statement that it "did not consider any issues of public international law treaty obligations."[492] Claimants add that the Respondent repeatedly mischaracterizes the treaty claims that are before this Tribunal, by referencing Claimants' initial Notices of Arbitration rather than Claimants' Memorial.[493] By contrast, an accurate analysis of Claimants' treaty claims would prove that they turn on different facts and law than those which were decided by the 2017 SIAC Award.[494] In particular:

a. Seizure and Sale of Savan Vegas: Claimants note that the 2017 SIAC Award ruled on the Claimants' decision to suspend performance under the Deed of Settlement, the Respondent's appointment of San Marco and whether San Marco acted in good faith.[495] However, these questions are neither directly before the Tribunal nor are they relevant to Claimants' claim.[496] Instead, the question before this Tribunal is whether the Respondent violated Article 4 of the China-Lao BIT by expropriating the operations of Savan Vegas

[488] Claimants' Reply, ¶¶ 118-120.
[489] Claimants' Reply, ¶¶ 121-125.
[490] Claimants' Reply, ¶ 128.
[491] Claimants' Reply, ¶¶ 130-131.
[492] Claimants' Reply, ¶ 132, citing C-481, 2017 SIAC Award, ¶140.
[493] Claimants' Reply, ¶¶ 135-137.
[494] Claimants' Reply, ¶¶ 138-139.
[495] Claimants' Reply, ¶¶ 140, 145-146.
[496] Claimants' Reply, ¶¶ 142-144.

without meeting the specified conditions for such an expropriation.[497] Because contractual good faith with respect to management of a property is not an element of any of these claims, a finding regarding that issue under New York law, such as that of the 2017 SIAC Award, is irrelevant.[498] Claimants argue that the overlap of legal propositions is what matters, not merely that a proposition arises from the same facts as another proposition.[499] The Respondent conflates the two by emphasizing the use of many of the same exhibits from the SIAC Case, without acknowledging that they are presented for different propositions.[500] Thus, the Tribunal is entitled to, and should, decide the claim regarding the Respondent's seizure of Savan Vegas independent from determinations made by the SIAC Tribunal.[501]

b. Tax Claim: Claimants submit that the Respondent mischaracterizes its tax claim so as to confuse the Tribunal into thinking that it is based on the Deed of Settlement.[502] Claimants clarify that the claims pursued by LHNV and Sanum are not "based on the Deed or the Flat Tax Committee."[503] Given the nature of the actual claims before the Tribunal, the 2017 SIAC Award's findings on the appropriateness of the tax are irrelevant.[504] Issues that *are* relevant to Sanum's tax claim – including whether the Respondent expropriated Claimants' property by withholding sale proceeds, and the effect of the Respondent's refusal to place the sale proceeds in escrow – were not decided and are therefore not precluded by the 2017 SIAC Award.[505]

c. Ferry Terminal Slot Club: on the claim arising out of the seizure and closure of the Ferry Terminal Slot Club, Claimants argue that the Respondent mischaracterizes the underlying issues as well as the extent to which the 2017 SIAC Award dealt with them.[506] Specifically,

[497] Claimants' Reply, ¶ 147 (discussing LHNV's broader claims under the Lao-Netherlands BIT); *see also* Letter from Claimants to Tribunal, 24 June 2019, distinguishing between LHNV's claims and Sanum's claims.

[498] Claimants' Reply, ¶ 147.

[499] Claimants' Reply, ¶ 148. Claimants cite the Tribunal's Procedural Order No. 2, which requested that the Respondent clarify in connection with its various preclusion arguments whether it "contends that *proposition* was presented to the SIAC Tribunal," rather than "whether Respondent contends that certain *facts* were before the SIAC Tribunal." *Id.* (citing PO2, ¶ 48(a)) (emphasis added by Claimants).

[500] Claimants' Reply, ¶¶ 150, 155.

[501] Claimants' Reply, ¶ 159.

[502] Claimants' Reply, ¶ 161.

[503] Claimants' Reply, ¶¶ 162-163.

[504] Claimants' Reply, ¶ 163.

[505] Claimants' Reply, ¶¶ 164-167.

[506] Claimants' Reply, ¶¶ 174-176.

the SIAC Tribunal's findings on whether the Deed of Settlement required the sale of the Slot Clubs is irrelevant to whether the Respondent expropriated them.[507]

d. Thakhek claim: Claimants say the Respondent falsely characterizes the Thakhek claim as being based on commitments in the Deed of Settlement, whereas it is actually based on the Thakhek MOU signed on 20 October 2010.[508] The distinction is important because the 2017 SIAC Award ruled only on whether the Respondent complied with the Deed, whereas the Tribunal in this case is being asked to determine whether the Respondent violated Article 4 of the China-Lao BIT by failing to compensate Sanum for extinguishing its concession rights.[509] Claimants reiterate that overlapping facts and utilization of the same exhibits does not prevent the Tribunal from deciding different claims.[510]

e. Savan Vegas Cash: Regarding Savan Vegas' cage and vault cash, Claimants reject the Respondent's argument that the 2017 SIAC Award dealt with the "Case 48 claim" already by establishing that the Respondent respected Claimants' rights under the Deed.[511] To the contrary, the questions before this Tribunal is whether the Respondent "expropriated the assets without due compensation," which was not before the SIAC Tribunal.[512] The Claimants say the Respondent's argument ignores the contrary findings of the BIT I Tribunals,[513] and the fact that the Deed of Settlement covered different assets and rights.[514] Thus, Claimants submit that the Tribunal can and should exert jurisdiction over this claim.[515]

f. Thakhek and Savannakhet properties: Finally, Claimants maintain that the claim arising out of the taking of Thakhek and Savannakhet properties was not presented, much less decided, by the SIAC Tribunal.[516] Respondent does not contend otherwise. Nor does

[507] Claimants' Reply, ¶ 177.

[508] Claimants' Reply, ¶¶ 190-191.

[509] Claimants' Reply, ¶¶ 194-195 (discussing LHNV's broader claims under the Lao-Netherlands BIT); *see also* Letter from Claimants to Tribunal, 24 June 2019, distinguishing between LHNV's claims and Sanum's claims.

[510] Claimants' Reply, ¶¶ 197-200.

[511] Claimants' Reply, ¶ 205.

[512] Claimants' Reply, ¶¶ 201-202 (discussing LHNV's broader claims under the Lao-Netherlands BIT); *see also* Letter from Claimants to Tribunal, 24 June 2019, distinguishing between LHNV's claims and Sanum's claims.

[513] Claimants' Reply, ¶ 206.

[514] Claimants' Reply, ¶ 207.

[515] Claimants' Reply, ¶ 208.

[516] Claimants' Reply, ¶ 209.

Respondent provide documentation proving that the properties were included in the sale to Macau Legend.[517] Because the taking of these properties is unaltered by the Deed of Settlement, this claim is also well within the Tribunal's jurisdiction.[518]

330. For these reasons, Claimants submit that the Respondent's proposed approach to the preclusion doctrines is unfounded and inapplicable to the Tribunal's authority to preside over the claims.

(2) The Implications of the BIT I Awards

a. Respondent's Position

331. The Respondent asserts that the ICSID BIT I Award and the PCA BIT I Award are "relevant, material, and dispositive of the claims that remain pending before this Tribunal."[519] In particular, it says, the BIT I Awards' findings regarding bad faith, and in particular obstruction of justice, are *res judicata*, "tarnish and contaminate all of Claimants' present claims arising out of these same investments, same facts, same parties, and same investment treaties," and should bring the Tribunal to "dismiss Claimants' claims as inadmissible, an abuse of process, and contrary to established international public policy."[520] These arguments are summarized below.

332. The Respondent first submits that the BIT I Awards' findings regarding bribery and corruption are *res judicata* on this Tribunal.[521] The Respondent recalls its prior submission that a decision as to an issue or fact is entitled to preclusive effect regardless of whether an identity of *causa petendi* exists.[522] In any event, the application of *res judicata* to the BIT I Awards would satisfy even the

333. Claimants' restrictive understanding of the triple-identity test, because the Claimants previously asserted – in the context of arguing that jurisdictional findings against the Respondent in the BIT I Cases should be considered *res judicata* – that the BIT I Cases "generally satisfy [the] three-part test," as they "involved the same parties, essentially the same subject matter, and essentially similar claims."[523] The Claimants also stated, in that context, that "the preclusive effect of the *res judicata* doctrine can and should be applied to issues already resolved by either the Rigo Tribunal or the

[517] Claimants' Reply, ¶¶ 210-213.
[518] Claimants' Reply, ¶ 214.
[519] Respondent's Submission on the BIT I Awards, ¶ 1.
[520] Respondent's Submission on the BIT I Awards, ¶ 7.
[521] Respondent's Submission on the BIT I Awards, ¶¶ 9-17.
[522] Respondent's Submission on the BIT I Awards, ¶ 10.
[523] Respondent's Submission on the BIT I Awards, ¶¶ 11-12, citing Claimants' Memorial, ¶ 303.

Binnie Tribunal which are unaffected by [the] temporal distinction" between pre-Deed and post-Deed conduct.[524] The Respondent says that the same rationale should be applicable against the Claimants with respect to the Respondent's defenses of bribery and corruption in this case, since those issues were decided in the BIT I Awards. Indeed, the Claimants should be estopped from denying that the BIT I Award's findings on bribery and corruption are not binding on the Parties, given their previous acceptance that the jurisdictional findings in those cases constitute *res judicata.*[525]

334. With respect to the BIT I Awards' findings regarding obstruction of justice, the Respondent contends that this renders Claimants unentitled to substantive treaty protection.[526] The Respondent invokes the public international law principle that no party should be allowed to benefit from its own wrongful act, and relying on *Churchill*, submits that investors who attempt to manipulate the arbitration process cannot benefit from the substantive protections provided in the same treaties, such that their claims should be deemed inadmissible. [527] The Respondent notes that the BIT I Tribunals considered it "well established that the bad faith conduct of the investor is relevant to the grant of relief under an investment treaty,"[528] and that such conduct "is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal."[529]

335. The Respondent also contends that bribery and corruption are a defense to the merits of the claims asserted, and must result in dismissal of the Claimants' claims.[530] In particular, the BIT I Tribunals found that the Claimants had most probably engaged in two illegal acts: (i) paying a bribe to stop the 2012 E&Y forensic audit of Savan Vegas; and (ii) paying a bribe to advance the Claimants' agenda at the Thanaleng Slot Club. These findings warrant dismissal of all claims,[531] and in particular refute the Claimants' argument on the merits that the Savan Vegas PDA was terminated

[524] Respondent's Submission on the BIT I Awards, ¶ 12, citing Claimants' Memorial, ¶ 304.

[525] Respondent's Submission on the BIT I Awards, ¶¶ 16-17.

[526] Respondent's Submission on the BIT I Awards, ¶¶ 18-35.

[527] Respondent's Submission on the BIT I Awards, ¶ 20, citing RL-186, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (Annulment Proceedings), Decision on Annulment (excerpt), 18 March 2019 ("***Churchill* Annulment**"), ¶ 257, and RL-185, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (excerpt), 6 December 2016 ("***Churchill* Award**"), ¶ 528.

[528] Respondent's Submission on the BIT I Awards, citing R-264, ICSID BIT I Award, ¶ 237, and R-265, PCA BIT I Award, ¶ 175.

[529] Respondent's Submission on the BIT I Awards, ¶¶ 24-35.

[530] Respondent's Submission on the BIT I Awards, ¶¶ 36-42.

[531] Respondent's Submission on the BIT I Awards, ¶¶ 39-42.

as a pretext and not because of genuine concerns about illegal conduct as well as non-payment of taxes.[532]

336. The Respondent also contends that in light of the BIT I Cases, LHNV's claim in the accompanying case regarding non-enforcement of the 2016 ST SIAC Award claim, which arises in connection with the Thanaleng Slot Club, is an abuse of process and moreover tainted by corruption.[533] First, relying on *Orascom*,[534] the Respondent asserts that "[t]he pursuit of damages in multiple investment arbitrations arising out of Claimants' alleged contractual interest in the Thanaleng Slot Club is an abuse of process,"[535] because LHNV is seeking the same economic relief requested by the Claimants in the BIT I Cases.[536] LHNV continues in this quest notwithstanding that the ICSID BIT I Award held that "the claim for expropriation in respect of the Thanaleng investment lacks any merit," and that "neither the interpretation given by [the Laotian courts] to the agreements nor the judicial process offended international standards."[537] LHNV's tactics have forced the Respondent to defend itself in three separate arbitrations, because the Claimants keep asserting in different fora their alleged rights to seek redress for the same harm.[538] Moreover, the BIT I Tribunals have now found that the Thanaleng claim is tainted by corruption, specifically because of Mr. Baldwin's provision of US$200,000 to Madam Sengkeo's son-in-law, to try (unsuccessfully) to get the Government to suspend the Thanaleng Slot Club's license as a "pressure tactic to force ST Holdings to negotiate a solution rather than continue with litigation."[539]

337. The Respondent submits that the Claimants' Thakhek claims also must be dismissed in light of the BIT I Awards, which held that Thakhek "was simply a commercial possibility that never reached the stage of agreement" and that the Claimants were not entitled to recover on those grounds.[540] This finding echoed those of the 2017 SIAC Award, which determined (i) that the Claimants were not entitled to recover with respect to Thakhek; (ii) that the Claimants had no rights to a concession, but only a right to negotiate in "good faith" a "potential" concession; and (iii) that the Government

[532] Respondent's Submission on the BIT I Awards, ¶¶ 43-51.

[533] Respondent's Submission on the BIT I Awards, ¶¶ 52-61.

[534] RL-47, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017 ("***Orascom***"), ¶ 543.

[535] Respondent's Submission on the BIT I Awards, ¶ 52.

[536] Respondent's Submission on the BIT I Awards, ¶ 53.

[537] Respondent's Submission on the BIT I Awards, ¶ 55, citing R-264, ICSID BIT I Award, ¶ 190.

[538] Respondent's Submission on the BIT I Awards, ¶ 57.

[539] Respondent's Submission on the BIT I Awards, ¶¶ 58-61 (quoting R-264, ICSID BIT I Award, ¶ 141; R-265, PCA BIT I Award, ¶ 140).

[540] Respondent's Submission on the BIT I Awards, ¶¶ 62-70.

had not breached its contractual obligations in denying the Claimants a concession.[541] The Respondent contends that the findings of both the BIT I Awards and the 2017 SIAC Award are *res judicata* on this Tribunal, which therefore should dismiss the Claimants' Thakhek claims on the merits.[542]

338. The Respondent also suggests that this Tribunal take into account the BIT I Awards' findings that most of Mr. Baldwin's testimony lacked credibility, which render unreliable the Claimants' assertions based on his testimony, with no way of verifying the validity of Claimants' remaining assertions of "fact." This is in addition to the Respondent's argument that the BIT I Awards are *res judicata* with respect to Claimants' perpetration of bribery, obstruction of justice and bad faith. Taken together, the result is that the Claimants' entire case lacks credibility, and their claims for investment treaty protection accordingly should be dismissed.[543]

b. Claimants' Position

339. The Claimants submit that the BIT I Awards have no preclusive effect here.[544] They note that the BIT I Tribunals found the Respondent "has not established bribery and corruption against the Claimants on 'clear and convincing evidence,'" which they considered to be the applicable standard, but simply commented *in dicta* that the evidence regarding a few illegality allegations sufficed on a lesser standard of the balance of probabilities.[545]

340. First, Claimants reiterate the arguments about the preclusion standards that they offered in connection with the 2017 SIAC Award, distinguishing *res judicata* from collateral estoppel in national legal systems and international arbitration. They contend that if issue preclusion applies at all in international arbitration, it should be subject to the extensive limitations and exceptions that apply in common law jurisdictions.[546]

341. Second, Claimants contend that *res judicata* does not apply with respect to any findings regarding bribery and corruption. Even aside from the fact that the BIT I Awards held that bribery and corruption were not established by the required clear and convincing evidence standard, the

[541] Respondent's Submission on the BIT I Awards, ¶ 64.

[542] Respondent's Submission on the BIT I Awards, ¶ 70.

[543] Respondent's Submission on the BIT I Awards, ¶¶ 71-74.

[544] Claimants' Submission on the BIT I Awards, Section II.

[545] Claimants' Submission on the BIT I Awards, ¶ 2 & nn. 2, 3.

[546] Claimants' Submission on the BIT I Awards, ¶¶ 8-24 (discussing a four-part "gateway test" and relevant exceptions that apply in U.S. courts).

Claimants' claims are different here than in the BIT I cases, and the BIT I Awards' commentary on bribery and corruption arose instead in commentary on some of the Respondent's defenses. That makes issue preclusion principles (*i.e.*, collateral estoppel) the relevant doctrine to consider, not claim preclusion doctrine (*i.e.*, *res judicata*).[547]

342. Third, Claimants say that collateral estoppel does not apply either with respect to any of the findings that the Respondent invokes, because the BIT I Tribunals themselves found the evidence did not satisfy the required standard of proof significantly higher than a balance of probabilities.[548] The BIT I Tribunals' commentary about certain allegations meeting that lower threshold was "mere *obiter dicta* that [is] not entitled to be accorded preclusive effect," particularly since this Tribunal should find that "clear and convincing evidence is the correct standard" to apply.[549] Moreover, Claimants say they did not have a full and fair opportunity to litigate the Respondent's allegations of bribery, corruption and other illegal conduct, because while the BIT I Tribunals had allowed the Lao PDR to present fresh evidence regarding such alleged conduct (notwithstanding the Deed of Settlement's express "frozen record agreement" limiting the revived BIT I cases to the existing record), it rejected Claimants' request to introduce a rebuttal expert report from Mr. Kurlantzick.[550] By contrast, since Mr. Kurlantzick's reports were received in evidence on the merits in this arbitration, this Tribunal should independently evaluate the issues and reach its own conclusions.[551]

343. Claimants add that even if a balance of probabilities were the applicable standard for the matters of issue, none of the particular findings in the BIT I Awards that the Respondent invokes are entitled to be given collateral estoppel effect here.[552] That includes, for various different reasons, the statements about (a) the Noble MOU,[553] (b) a supposed bribe to obstruct Madame Sengkeo's testimony,[554] (c) a supposed bribe to stop the Ernst & Young audit,[555] (d) a supposed bribe to

[547] Claimants' Submission on the BIT I Awards, ¶¶ 26-32.
[548] Claimants' Submission on the BIT I Awards, ¶¶ 33-34.
[549] Claimants' Submission on the BIT I Awards, ¶¶ 34-36.
[550] Claimants' Submission on the BIT I Awards, ¶¶ 37-40.
[551] Claimants' Submission on the BIT I Awards, ¶ 40.
[552] Claimants' Submission on the BIT I Awards, ¶ 41.
[553] Claimants' Submission on the BIT I Awards, ¶¶ 42-61.
[554] Claimants' Submission on the BIT I Awards, ¶¶ 62-74.
[555] Claimants' Submission on the BIT I Awards, ¶¶ 75-85.

advance Claimant's Thanaleng agenda,[556] and (e) alleged bad faith relating to Paksong Vegas and Thakhek.[557]

344. Claimants say the BIT I Awards' statements regarding Claimants' supposed financial impropriety, manifest bad faith and related findings are not entitled to preclusive effect for similar reasons as those concerning alleged bribery and corruption, namely that Claimants were not provided a full and fair opportunity to litigate these contentions and because the Tribunals applied the wrong standard of proof.[558]

345. Claimants also deny that the BIT I Awards' findings about Thakhek are entitled to any preclusive effect, for two reasons. First, the "frozen record agreement" in the Deed of Settlement prevented Claimants from adducing evidence in the BIT I Cases that should have been key facts in any merits analysis. Second, the claims in this case are somewhat different from those in the BIT I Cases (concerning the value of the land and business opportunities without gaming, not the value of the concession for gaming activities).[559]

346. Separate from the preclusion issues, the Claimants reject the Respondent's new assertion that their alleged conduct in other proceedings should deprive them of substantive Treaty protection for purposes of the claims in this case. This "boils down to an assertion that Claimants have in effect become outlaws disentitled to the protection of the law, because none of their evidence, in any proceeding, can be credited …."[560] This argument should be rejected for three reasons. First, it is an entirely new defense raised in post-hearing submissions;[561] second, the blanket disregard of all of Claimants' evidence would deny due process;[562] and third, the forfeiture of claims that the Respondent seeks is impermissible, particularly given that the Claimants' alleged procedural wrongdoing did not take place in this proceeding.[563] In these circumstances, the Respondent's allegations of fraud on the BIT I Tribunals and obstruction of justice – even in the event that they were substantiated – would not justify the relief that it seeks.[564]

[556] Claimants' Submission on the BIT I Awards, ¶¶ 86-92.
[557] Claimants' Submission on the BIT I Awards, ¶¶ 93-94.
[558] Claimants' Submission on the BIT I Awards, ¶¶ 95-100.
[559] Claimants' Submission on the BIT I Awards, ¶¶ 101-120.
[560] Claimants' Submission on the BIT I Awards, ¶ 122.
[561] Claimants' Submission on the BIT I Awards, ¶¶ 123-128.
[562] Claimants' Submission on the BIT I Awards, ¶¶ 123, 129-136.
[563] Claimants' Submission on the BIT I Awards, ¶¶ 123, 137-139.
[564] Claimants' Submission on the BIT I Awards, ¶¶ 140-156.

347. The Claimants further assert that the Respondent's allegations of bribery and corruption by the Claimants do not insulate it from liability. Tribunals should be wary in general of States abusing corruption allegations,[565] and in this case, there are huge gaps and flags in the evidence that undermine the Respondent's allegations with respect to alleged wrongdoing in connection with the Ernst & Young audit[566] and the activities of Madam Sengkeo's son-in-law in connection with the Thanaleng investment.[567] In any event, remedies for any wrongdoing must be proportionate – there is no one remedy that fits all for allegations of corruption – and such proportionality is particularly required when a State is complicit in the alleged illegality.[568] Finally, to the extent any consequences in this case should derive from the Claimants' alleged conduct, that determination properly should be handled at the quantum stage, after this Tribunal has issued its decision on liability.[569]

348. The Claimants also reject the Respondent's argument that the BIT I Awards dispose of the Claimants' arguments about a pretextual termination of the Savan Vegas PDA. According to the Claimants, the BIT I findings in 2019 regarding bribery and corruption do not establish why the Lao PDR terminated the Savan Vegas PDA in 2015, and thus do not refute Claimants' argument that the PDA was terminated as a pretext.[570]

349. Finally, the Claimants contend that LHNV's ancillary claim arising out of the Respondent's refusal to recognize the 2016 ST SIAC Award cannot be considered as an abuse of process, given that it could not have been included in any prior proceedings,[571] and it is not "tainted by corruption" as the Respondent contends.[572]

350. To conclude, the Claimants contend that there is no basis for Respondent's suggestion that they be stripped of Treaty protection because of findings in the BIT I Awards: "Claimants deserve their day in court on the claims in this proceeding, on which this Tribunal can and should evaluate the evidence and the law for itself."[573]

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[565] Claimants' Submission on the BIT I Awards, ¶¶ 157-166.
[566] Claimants' Submission on the BIT I Awards, ¶¶ 167-173.
[567] Claimants' Submission on the BIT I Awards, ¶¶ 174-178.
[568] Claimants' Submission on the BIT I Awards, ¶¶ 187-201.
[569] Claimants' Submission on the BIT I Awards, ¶¶ 202-204.
[570] Claimants' Submission on the BIT I Awards, ¶¶ 205-209.
[571] Claimants' Submission on the BIT I Awards, ¶¶ 210-212.
[572] Claimants' Submission on the BIT I Awards, ¶¶ 213-219.
[573] Claimants' Submission on the BIT I Awards, ¶ 220.

(3) The Implications of the 2019 ST Appeal Decision

a. Respondent's Position

351. The Respondent contends that the 2019 ST Appeal Decision "once and for all, disposes of [LHNV's] ancillary claim" for non-recognition of the 2016 ST SIAC Award,[574] by finding that Award not entitled to recognition and enforcement even in the courts of its stated (but wrong) seat, Singapore. The Respondent states that the 2019 ST Appeal Decision "not only bars liability, but would also annul any causal connection between the ancillary claim and the quantum sought from that claim."[575] The Respondent adds that while the 2016 ST SIAC Award is not enforceable in Singapore or any other jurisdiction, Sanum can still seek to initiate a new arbitration against ST in the proper seat (Macau) if it wishes.[576]

b. The Claimants' Position

352. Claimants acknowledge that the Singapore Court of Appeal has now "effectively set aside the [2016 ST SIAC Award], holding that it should not be recognized or enforced in any jurisdiction."[577] Claimants maintain, however, that certain elements of its claim for the prior failure of the Lao courts to recognize and enforce the 2016 ST SIAC Award survive the 2019 ST Appeal Decision. That is "because the Lao courts improperly handled and decided the Recognition Action in order to protect the powerful" family that owned ST, not because of any finding that the SIAC Tribunal had erred in denominating Singapore as the arbitral seat.[578] The Lao courts committed serious violations of due process during their proceedings, and denied recognition based on favoritism rather than on the merits of the case. These procedural abuses are not vindicated by the 2019 ST Appeal Decision, which also does not eliminate LHNV's damages: while LHNV no longer can recover the amount of the "newly unenforceable ST SIAC Award," it may still recover other damages from the Lao PDR's wrongful conduct, namely the significant costs and expenses it incurred in connection with the Lao court proceedings and with bringing the due process failures of those proceedings to this Tribunal's attention. In other words, the Claimants say, the 2019 ST

[574] Respondent's comments on the 2019 ST Appeal Decision, 25 November 2019, p. 3.
[575] Respondent's comments on the 2019 ST Appeal Decision, 25 November 2019, p. 2.
[576] Respondent's comments on the 2019 ST Appeal Decision, 25 November 2019, p. 2.
[577] Claimants' comments on ST Appeal Decision, 9 December 2019, p. 1.
[578] Claimants' comments on ST Appeal Decision, 9 December 2019, pp. 1-2.

Appeal Decision "is not dispositive of Lao Holdings' Recognition Action claim as Respondent suggests."[579]

(4) The Tribunal's Analysis

353. The Tribunal is in the unenviable position of being the last of many adjudicators to consider issues related to the breakdown of the relationship between the Claimants, ST, and the Lao PDR – and also to be hearing claims for which the Parties' briefing straddled the issuance of decisions in several other cases. In consequence, the Parties' arguments in this proceeding became a "moving target," evolving with each new ruling in other cases.

354. Throughout the case, the Tribunal has sought to impose rigor on the Parties' briefing about the implications (if any) of the decisions in other cases. For example, in its PO2, the Tribunal observed that the 2017 SIAC Award did not purport to decide any claims for treaty breaches, but did decide certain contested issues of fact based on the record and arguments before it, and rendered certain findings about the Deed of Settlement under its governing law of New York. The Tribunal noted that "[t]hese findings may well be *relevant* to the treaty claims before this Tribunal, although the extent of their relevance and materiality is debated between the Parties," with the Respondent contending that the findings "definitively addressed every factual predicate necessary for Sanum and LHNV to establish any of their existing claims," and the Claimants contending that the 2017 SIAC Award "does not touch upon most of the facts critical to these proceedings."[580] Given this debate, the Tribunal urged the Parties to provide a more "systematic comparison between the specific propositions upon which Claimants rest their case for treaty violations and the specific findings of the SIAC Tribunal," in order to help determine "whether the propositions presented here were both fully litigated and actually decided in the proper case."[581] It also explained that such systematic analysis would be useful even if the Tribunal ultimately rejected a formal preclusive effect of the 2017 SIAC Award, because the Parties also debated "whether portions of that Award nonetheless should be deemed persuasive and therefore to be followed as a matter of logical reasoning, or alternatively should be deemed either not fully litigated or ultimately unpersuasive, and therefore to be either ignored or distinguished in this Tribunal's reasoning."[582] For similar

[579] Claimants' comments on ST Appeal Decision, 9 December 2019, p. 3.
[580] PO2, ¶ 43 (citations omitted).
[581] PO2, ¶¶ 44-45.
[582] PO2, ¶ 45.

reasons, the Tribunal later invited the Parties to make submissions on the implications for this case of the BIT I Awards and the 2019 ST Appeal Decision.

355. Having now reviewed the totality of the Parties' submissions, the Tribunal identifies certain unique features of this case that render problematic any proposal to resolve the current claims solely or largely based on preclusion doctrines.

356. First, it is undeniable that many of the disputed facts before this Tribunal featured in other proceedings, but often in the context of different legal claims. For example, both the SIAC Case and the material breach applications before the BIT I Tribunals adjudicated *contract* disputes, namely the Parties' respective compliance with contractual obligations arising from their 2014 Deed of Settlement, not treaty disputes arising from alleged breach of the Lao PDR's obligations under the BITs. By contrast, once the BIT I Cases were revived in consequence of the BIT I Tribunals' findings of material breach of the Deed of Settlement, those Tribunals did adjudicate *treaty* disputes arising under the BITs – but by virtue of the Parties' express agreement in the Deed of Settlement, the scope of the revived BIT I Cases was limited to the treaty claims that had been pleaded in those cases *prior to the Deed of Settlement*; the Parties were not permitted to add any new claims nor seek any additional relief.[583] At least in principle, those claims also were to be decided on the evidentiary record as it existed as of the Deed of Settlement,[584] although the BIT I Tribunals had been informed of subsequent events for purposes of their very different role (as contract adjudicators) in deciding the material breach applications.

357. By contrast, the claims asserted in this arbitration and the accompanying *LHNV* case allege treaty breaches based on State conduct that occurred *after the Deed of Settlement*. Of course, both Parties provide extensive briefing about prior events, but the claims are framed formally as challenges to new acts and measures that were not the subject of treaty claims in the BIT I Cases. At the same time, some of those acts and measures did feature in both the material breach proceedings before the BIT I Tribunals, which were necessary to determine whether to revive the previously pending treaty claims about earlier acts and measures, and in the contract-based arbitration before the SIAC Tribunal.

358. In the Tribunal's view, the combination of these distinctions renders this case ill-suited for any sweeping pronouncements on the applicability of preclusion doctrines in investment treaty

[583] R-5, Deed of Settlement, 15 June 2014, Section 34.

[584] R-5, Deed of Settlement, 15 June 2014, Section 34.

arbitration. Even if the Tribunal were to accept in principle that such doctrines (whether framed as *res judicata* or some form of issue preclusion) might have a footing in international treaty cases, the different postures and scope of the prior and current cases would render it impossible to apply preclusion principles here in any clean way, at least not across the board to all claims asserted. There is strong authority for the notion that international arbitration tribunals hearing claims under international treaties are not bound by the findings of tribunals sitting in different legal orders, such as municipal courts or local commercial arbitrations; this would render it inappropriate for the Tribunal to deny jurisdiction based simply on the SIAC Case findings. While the Tribunal has greater sympathy in principle for notions of preclusion based on prior resolution of treaty claims between the same parties, this depends in large part on the relationship between the prior treaty claims and those later asserted. An investor's failure to prove that one set of government acts violated a State's treaty obligations should not prevent it, as a matter of either law or fairness, from seeking to prove that a different set of later government acts rose to the level of treaty breach.

359. Given the temporal distinctions set up by the Deed of Settlement – that the BIT I Cases (once revived) could adjudicate only claims based on pre-Deed of Settlement acts – the Tribunal is unable to find that the BIT I Awards preclude Claimants' pursuit of new claims, to the extent they are *truly* based on subsequent State measures. While we have considerable sympathy for the Lao PDR being put to the burden of litigating with Claimants again and again, we are unable to find sufficient identity of legal claims to deny jurisdiction outright based on *res judicata* or other forms of preclusion or estoppel. We consider ourselves to have both the authority and the duty to evaluate, on our own, the post-Deed of Settlement legal claims that are placed before us. These precise claims, alleging treaty violations, have not been put into arbitration before.

360. At the same time, the Tribunal does not believe it should turn a blind eye to the extensive *factual findings* made by the SIAC and BIT I Tribunals, to the extent that similar factual debates (based on much of the same evidence) are presented in this case – albeit now as part of a background story predating the *later* State acts which Claimants challenge as treaty violations. As a jurisdictional matter, the Tribunal is not precluded from examining the evidence for itself, but the record before it does include the analyses provided by the prior tribunals. Those analyses are entitled to due consideration even though they are not binding.

361. In considering the persuasiveness of prior factual findings, the Tribunal obviously distinguishes between analyses that reflect a sound, thoughtful and careful approach and those based on more cursory analysis or on a restricted evidentiary record. This does not mean that this Tribunal sits in

judgment of prior tribunals with respect to the issues that they decided and in the circumstances that they faced. It simply means that in considering the somewhat different claims placed before *this* Tribunal, we are likely to find more persuasive prior assessments of evidence that involved a detailed forensic exercise than those that did not.[585]

362. The Parties have both cited authority that is broadly consistent with this approach. For example, Claimants cited the *Ampal* tribunal's statement that, "independently" of its view that the law entitled it to defer to the factual findings of a prior contract-based tribunal with respect to questions governed by the contract, "it has … conducted its own evaluation of the evidence presented to it about the same factual matters," and "[o]n the basis of this evaluation, the present Tribunal is satisfied that the findings of fact of the ICC tribunal set out above are correct …."[586] Claimants in fact urged the Tribunal to adopt this approach, which they described as a "Practical Answer on How to Deal with Conflicting Findings by Multiple Previous Tribunals":

- First, examine the conflicting findings for factual determinations that must also be made in the instant case;
- Next, weigh the relative merits of each; and
- Finally, conduct your own evaluation of the evidence before you and come to your own decision.[587]

363. Respondent in turn cited a statement from the ICJ concluding that, "in principle," it accepted "as highly persuasive" certain findings of fact made after trial by the International Criminal Tribunal for the former Yugoslavia ("**ICTY**"), and accorded "due weight" to "any evaluation" conducted by the ICTY "on the facts as so found."[588] The notion of according "due weight" of course permits the later tribunal to determine what weight is "due," *i.e.*, *how much* persuasive value should be accorded to a prior factual analysis based on the applicable circumstances.

364. The Tribunal considers that this practical approach, rather than an inflexible doctrinal approach, is particularly warranted in the unusual circumstances of this case. As discussed above, the claims in

[585] As Lord Mance explained, in the different context of how enforcement courts may "examine … with interest" arbitral findings relevant to jurisdiction while not being bound by such findings, "Courts welcome *useful* assistance." *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Nov. 3, 2010), ¶¶ 30-31 (emphasis added).

[586] Claimants' Closing Presentation, slide 87 (quoting RL-129, *Ampal*, ¶ 282).

[587] Claimants' Closing Presentation, slide 90.

[588] Respondent's Closing Presentation, slide 84 (quoting RL-31, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ, Judgment, February 26, 2007, I.C.J. Reports 2007, ¶ 223).

this case rest on much the same corpus of *historic* events (prior to the Settlement Deed) as were examined in prior cases, but also involve certain *later* events (subsequent to the Settlement Deed) that were examined by tribunals only for a limited purpose – namely, to determine whether there was a breach of the Settlement Deed. The post-Settlement Deed events were not examined for the purpose of determining whether they could give rise to any viable treaty claims. There are also certain factual allegations in this case that appear not to have been examined yet by any prior tribunal, for any purpose.

365. For these reasons, while the Tribunal considers it appropriate to *consider* the analysis of prior tribunals, in circumstances where particular factual issues were previously adjudicated, we do not consider that we are rigidly bound by such determinations. Instead, we pose the common-sense question, "why should we come to a different conclusion, notwithstanding our legal authority to do so?" This framework cannot be applied on a global basis, but rather must be examined issue by issue. We therefore take it up in the context of our examination of the various merits claims asserted, in Section VI below.

B. SUCCESSIVE CLAIMS AND ABUSE OF PROCESS

366. Separate from the application of preclusion doctrines, the Respondent argues that the Tribunal does not have competence or the claims are inadmissible because the Claimants' claims are "successive" of those in prior proceedings and accordingly constitute an abuse of process.[589] The Claimants argue that there has been no abuse of process and that the Respondent's argument is misplaced, distinguishable, and unjustifiable.[590]

(1) Respondent's Position

367. The Respondent maintains that because the claims repeat the same facts and occurrences, request the same relief, and allege the same financial harm as in prior proceedings, they are inadmissible and abusive.[591]

368. The Respondent submits that abuse of process is "an applicable doctrine in international investment law" recognized by the UNCITRAL Commission on International Trade Law and arbitral

[589] Respondent's Memorial on Competence, ¶ 117.
[590] Claimants' Reply, ¶ 96.
[591] Respondent's Memorial on Competence, ¶ 117; Respondent's Counter-Memorial, ¶ 165.

jurisprudence.[592] Further, the current trend is to apply it in "situations where a claimant files successive and repetitious cases arising from the same dispute and same alleged economic harm."[593] This trend is evidenced by "a growing dialogue in the international community and recent cases."[594]

369. The Respondent closely examines the *Orascom* tribunal's discussion on abuse of process, which concluded that "non-substantive procedural manipulations of the investment system should not trump the recognized objectives of avoiding multiple claims and double recovery."[595] According to the Respondent, the *Orascom* tribunal found the abuse of process doctrine appropriate to apply where *res judicata* and collateral estoppel were inapplicable due to procedural manipulation, because investors who freely exercise comparable substantive and procedural rights in prior arbitrations should be precluded from bringing subsequent claims for the same harm.[596]

370. The Respondent rejects Claimants' contention that the principle in *Orascom* should be confined to corporate restructuring, arguing that it should apply any time "a party seeks recovery for the same economic harm in multiple forums." In its view, Claimants seek to do precisely that, despite having lost before the SIAC Tribunal.[597] The Respondent notes that in both the SIAC Case and here, the Claimants seek an identical measure of damages, namely the fair market value of Claimants' investments.[598] The Respondent says Claimants have simply rebranded the SIAC Case claims as new treaty claims, in violation of the investment arbitration process, and that the Tribunal should therefore reaffirm *Orascom* by dismissing them.[599]

371. Following issuance of the BIT I Awards, the Respondent invoked abuse of process again, contending that LHNV's claim in the accompanying case regarding non-enforcement of the 2016 ST SIAC Award is an abuse of process because it seeks damages in connection with the same

[592] Respondent's Memorial on Competence, ¶¶ 117, 119-121; Respondent's Counter-Memorial, ¶¶ 57-58, 165, 167; citing RL-65, UNCITRAL, 48th session, *Concurrent Proceedings in Investment Arbitration-Note by the Secretariat*, UN Doc. A/CN.9/848, 17 April 2015, ¶ 1; RL-47, *Orascom*, ¶ 542.

[593] Respondent's Memorial on Competence, ¶ 118; Respondent's Counter-Memorial, ¶ 166.

[594] Respondent's Rejoinder, ¶¶ 84-89.

[595] Respondent's Memorial on Competence, ¶ 138; Respondent's Counter-Memorial, ¶ 186; citing RL-47, *Orascom*, ¶ 835.

[596] Respondent's Memorial on Competence, ¶ 138; Respondent's Counter-Memorial, ¶ 199.

[597] Respondent's Memorial on Competence, ¶ 140; Respondent's Rejoinder, ¶ 94.

[598] Respondent's Memorial on Competence, ¶¶ 140-142; Respondent's Counter-Memorial, ¶¶ 189-193.

[599] Respondent's Memorial on Competence, ¶ 152.

alleged contractual interest – in the Thanaleng Slot Club – as Claimants sought in the BIT I Cases under an expropriation theory.[600]

(2) Claimants' Position

372. Claimants say that the abuse of process objection fails in three respects.

373. First, Claimants reject the Respondent's suggestion that there is a "clear and significant trend" in favor of use of the doctrine.[601] They point out that the ILA Interim Report, on which Respondent relies to establish the doctrine's alleged popularity, was made in the context of commercial arbitration, "did not take into account the complexity of the policy concerns involved when differing treaty (much less treaty and contract) rights are involved," and have not been well received.[602] Abuse of process, according to Claimants, is actually still in its early stages – as the Respondent acknowledged in the ICSID BIT I Case – and therefore should be applied with caution.[603] Specifically, the Tribunal should decline Respondent's invitation to extend the doctrine beyond the limited scope established by prior tribunals, in a manner that would prevent "entities who are entitled to treaty protection from exercising their rights," in circumstances where *res judicata* does not itself apply.[604]

374. Second, Claimants say that *Orascom* – the sole decision on which the Respondent relies – "is neither instructive nor persuasive … because it relied on a 'peculiar' set of facts" and itself admitted that its decision was a result of exceptional circumstances.[605] The claimant in *Orascom* merely asserted different damages for the same alleged treaty violations, whereas here, Claimants are asserting treaty violations based on different State acts than were at issue in either the contract-based SIAC Case or the BIT I Cases.[606]

375. Finally, Claimants maintain that there are no extraordinary circumstances that could warrant an abuse of process finding.[607] To the contrary, Claimants observe that they sought to consolidate the

[600] Respondent's Submission on the BIT I Awards, ¶¶ 52-61.
[601] Claimants' Reply, ¶ 97.
[602] Claimants' Reply, ¶¶ 98-99.
[603] Claimants' Reply, ¶¶ 100-102, citing C-398, ICSID BIT I Case, Decision on Jurisdiction, 21 February 2014, ¶¶ 82-83.
[604] Claimants' Reply, ¶¶ 103-104.
[605] Claimants' Reply, ¶¶ 96, 106-108.
[606] Claimants' Reply, ¶ 105.
[607] Claimants' Reply, ¶ 96.

BIT I claims before a single tribunal, rather than use successive claims as a litigation strategy, and it was the Respondent, not the Claimants, who insisted that the BIT I claims not be consolidated.[608] Further, the original BIT I treaty claims, the Claimants' counterclaims in the SIAC Case, and the claims in the BIT I material breach proceedings were "all governed by different grants of exclusive jurisdiction."[609]

376. As for the Respondent's abuse of process argument about LHNV's ancillary claim related to non-recognition of the 2016 ST SIAC Award, the Claimants add that this cannot be considered as an abuse of process, given that it is based on final decisions of the Lao courts that had not been issued earlier, and therefore could not have been included in any prior proceedings.[610]

377. For these reasons, Claimants argue that that exercising their rights under the BITs to bring the claims asserted before this Tribunal is not an abuse of process as the Respondent insists.[611]

(3) The Tribunal's Analysis

378. Respondent has presented this objection as alternatively a matter of jurisdiction or one of admissibility. It contends that, whatever lens the Tribunal adopts, Claimants' claims in this case are impermissibly "successive" of those heard in prior cases, and accordingly are abusive; the Tribunal therefore should decline to hear the dispute between the Parties on the merits.

379. The ICJ has stated that a call for dismissal of a claim on the ground of its allegedly abusive nature should be characterized as an objection related to admissibility.[612] More generally, it has described objections to admissibility as involving "an assertion that, even if the Court has jurisdiction and the facts stated by the applicant … are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[613]

[608] Claimants' Reply, ¶¶ 108-111.

[609] Claimants' Reply, ¶ 112.

[610] Claimants' Submission on the BIT I Awards, ¶¶ 210-212.

[611] Claimants' Reply, ¶¶ 112-113.

[612] *See Immunities and Criminal Proceedings (Equatorial Guinea v. France*, ICJ, Preliminary Objections, Judgment of 6 June 2018, ¶ 145. While Judge Donahue dissented from certain findings in that case, she concurred in that respect, stating that the Court had properly characterized the abuse of process objection as one going to admissibility rather than jurisdiction. *See id.*, Dissenting Opinion of Judge Donoghue, ¶ 2.

[613] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ, Judgment of 6 November 2003, ICJ Reports 2003, p. 161, ¶ 29.

380. Precisely because the effect of an admissibility objection is to bar a party from proceeding even if it otherwise has met jurisdictional requirements, the ICJ has cautioned that such objections, including those premised on abuse of process, carry a high threshold of proof. Specifically, the Court required "clear evidence that [a party's] conduct could amount to an abuse of process," and stated that "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process."[614]

381. In this case, Respondent's core proposition is that the "[a]buse of process doctrine applies 'where an investor has already obtained a decision on the merits in one forum but continues to pursue the same claim in another forum.'"[615] Relying on the *Orascom* decision, Respondent contends that "[i]t is abusive to proceed before multiple tribunals on the basis of overlapping assumptions and identical economic harm to maximize chances of prevailing."[616]

382. The *Orascom* case was quite different from this one, however, in at least one critical respect. There, the *same host State measures* were challenged in successive treaty cases, with the latter case filed after the tribunal in the former case already had rejected a treaty challenge to those measures. The only difference between the two challenges to the same government measures was that the second case was filed by a different company in a vertical ownership chain ultimately owned by the same individual:

> [T]he Claimant first caused one of its subsidiaries, OTH, to bring claims against Algeria. Then, it caused a different subsidiary in the chain, Weather Investments, to threaten to bring a different arbitration in relation to the same dispute. Finally, … it pursued yet another investment treaty proceeding in its own name for the same investment … in relation to the *same host state measures* and the same harm.[617]

It was these facts which led the *Orascom* tribunal to find the second treaty case to be "an abuse of the system of investment protection."[618]

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[614] *Immunities and Criminal Proceedings (Equatorial Guinea v. France*, ICJ, Preliminary Objections, Judgment of 6 June 2018, ¶ 150.

[615] Respondent's Opening Presentation, slide 27 (quoting RL-67, UNCITRAL, 50th session, *Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration – Note by the Secretariat*, UN Doc. A/CN.9/915, 24 March 2017, ¶¶ 18-19.

[616] Respondent's Opening Presentation, slide 28 (discussing RL-47, *Orascom*, ¶ 543).

[617] RL-47, *Orascom*, ¶ 545 (emphasis added).

[618] RL-47, *Orascom*, ¶ 545.

383. This case involves a very different procedural context. To a large extent, the multiplicity of proceedings was a function of the convoluted dispute resolution process to which all Parties agreed in the Deed of Settlement. As discussed in Section III.F, the Deed of Settlement provided for two different procedures to govern allegations of breach, depending which party was accusing the other of such breach: Claimants could bring "material breach" claims before the BIT I Tribunals, and the Lao PDR could bring breach claims before a SIAC commercial tribunal. The two mechanisms had different consequences in the event of a finding of breach. The SIAC Tribunal was empowered to enforce the terms of the Deed of Settlement if Claimants failed to comply with their obligations. By contrast, if the BIT Tribunals found a material breach by the Lao PDR, then Claimants' remedy was to revive their suspended BIT I arbitrations and pursue their original treaty claims on the basis of the existing record. Claimants however could not add any new claims or evidence nor seek any additional relief.

384. This scenario was almost bound to create a tangle of concurrent proceedings, in the entirely predictable scenario in which both Parties accused the other of material breach and opted to initiate their own proceedings to obtain applicable relief. Moreover, the Parties' agreement left no room for introducing in any of the multiple proceedings they spawned any additional *treaty* claims arising out of new State conduct. Such conduct could be invoked as a breach of the Settlement Deed to revive the suspended BIT I Cases, but could not be added then to the revived BIT I Cases as an ancillary or additional claim. In these circumstances, the Tribunal cannot find it abusive for Claimants to bring such claims in a *new* proceeding, when the Parties' prior agreement left no other mechanism for them to assert treaty claims about subsequent wrongful acts.

385. As explained in the Introduction in Section I, this proceeding asserts BIT claims arising out of actions taken by the Lao PDR *after* the conclusion of the Deed of Settlement. Thus, while *Orascom* involved successive treaty claims challenging the *same State conduct* after a treaty-based tribunal already had rendered judgment with regard to that conduct, this case involves treaty claims challenging *new State conduct* which no prior tribunal has been authorized to examine as such. While some of that new State conduct was also alleged to have breached of the Deed of Settlement, neither the SIAC Tribunal nor the BIT I Tribunals (hearing the "material breach" applications) considered any consequent BIT claims.

386. Nor was this case "successive," as was the *Orascom* case, when it was filed. The case was initiated in May 2016, *before* any award was rendered in any of the other proceedings. The 2017 SIAC Award was issued on 29 June 2017, the BIT I Tribunals issued their decisions on the Claimants'

Second Material Breach Applications on 15 December 2017, and the BIT I Awards were rendered on 6 August 2019. To be precise, therefore, this case was initiated as a parallel rather than a successive case.

387. These distinctions dispose of the two specific complaints on which Respondent focuses its abuse of process objection.

388. First, Respondent complains that Claimants have simply rebranded as treaty claims the complaints about post-Deed of Settlement conduct on which Respondent prevailed, from the standpoint of breach of contract claims, in the SIAC Case. This complaint might have had more traction had Respondent's theory of treaty breach been limited to umbrella clause claims predicated on a failure to observe undertakings in the Deed of Settlement. But as summarized in Section IV.A, Claimants in both this and the accompanying *LHNV* case pursue treaty claims that are not contractual in nature, and that do not turn exclusively (if at all) on the terms of the Deed of Settlement. Moreover, even for those treaty claims that challenge conduct which was also alleged to have breached the Deed of Settlement, it is of course possible for conduct to violate BIT obligations even if it does not independently violate contractual obligations.

389. Second, Respondent complains that LHNV's ancillary claim regarding non-recognition of the 2016 ST SIAC Award is an abuse of process because it seeks damages related to Sanum's alleged interest in the Thanaleng Slot Club, notwithstanding the ICSID BIT I Award's dismissal of an expropriation claim concerning the same alleged interest. Although this debate is not strictly relevant to the Sanum case where the ancillary claim was not admitted, the Tribunal notes for both cases that this complaint overlooks the critical fact that the *State measures* challenged in the cases were different ones. In the ICSID BIT I Case, the complaint was about alleged improprieties in Case 52, the local court proceedings that ST filed against Sanum. As discussed in Section III.L.1, the ICSID BIT I Award found that any such improprieties were of limited impact, since the tiered dispute resolution clause in the Master Agreement between ST and Sanum permitted Sanum to have recourse to SIAC arbitration if it was unsatisfied with the result of the Lao court proceedings, and Sanum had exercised that right without impediment by the Lao PDR, ultimately obtaining the 2016 ST SIAC Award against ST for US$200 million. The ICSID BIT I Award emphasized that *subsequent events* – including its alleged inability to enforce the 2016 ST SIAC Award – were "not before this Tribunal."[619] In the *LHNV* case, of course, those subsequent events are front-and-center: LHNV

[619] R-264, ICSID BIT I Award, ¶¶ 182-190.

claims treaty violations because of the Lao courts' refusal to enforce the 2016 ST SIAC Award. That award against ST is invoked as a "protected investment" in its own right,[620] one which allegedly was expropriated by the conduct and outcome of the recognition proceedings.[621] This is not a "successive" claim, since it was never before the BIT I Tribunals to begin with.

390. Respondent nonetheless asserts "abuse of process" because the claim before the ICSID BIT I Tribunal and the one before this Tribunal both seek to recover for "essentially the same economic harm," meaning the loss of Sanum's asserted interest in the Thanaleng Slot Club.[622] The abuse, Respondent says, lies in the fact that LHNV "alleges 2 different dates of expropriation for the same economic interest."[623] But this argument obviates the *reason* why two different dates of expropriation were asserted, namely that the two cases challenged different State conduct, occurring at different times. The abuse of process doctrine cannot be expanded to forbid a claimant from challenging a later government act, simply because it previously challenged an earlier (different) government act impacting the same economic interest. As noted in Section V.A.4, an investor's failure to prove that one set of government acts violated a State's treaty obligations should not prevent it, as a matter of either law or fairness, from seeking to prove that a different set of later government acts rose to the level of treaty breach. The alternative approach which Respondent urges, focused on the underlying "economic interest" rather than the State measures at issue, would insulate States from any inquiry in the event of repeated assaults on a disfavored investment. This is not, and cannot be, the function of the abuse of process doctrine.

391. For these reasons, the Tribunal rejects the Respondent's "abuse of process" objection as applied to the circumstances of this case.

C. NATURE OF THE CLAIMS

392. The Respondent argues that the Tribunal does not have competence because the claims in essence are contractual claims rather than treaty claims.[624] Claimants argue that the Respondent's actions,

[620] *See* Claimants' Opening Presentation, slide 23.

[621] *See, e.g.,* Claimants' Opening Presentation, slide 26 (alleging that "The Lao Court Did ST's Bidding By Blocking Enforcement of Sanum's Arbitral Award").

[622] *See, e.g.*, Respondent's Opening Presentation, slide 150 (quoting RL-47, *Orascom*, ¶ 543); Respondent's Memorial on Competence, ¶¶ 140-142; Respondent's Rejoinder, ¶¶ 94, 189-193.

[623] Respondent's Opening Presentation, slide 151.

[624] Respondent's Memorial on Competence, ¶ 153.

characterized by sovereign authority, are treaty claims that can and should be decided by the Tribunal.

(1) Respondent's Position

393. The Respondent argues that because its actions underlying the claims were carried out in accordance with the Deed of Settlement and in response to the Claimants' failure to abide by the Deed, the claims are not proper treaty claims, but rather "repurposed breach of contract claims."[625] Specifically, the Respondent maintains that contrary to the Claimants' position, neither of the two limited situations that may permit contract claims to be arbitrated in investment treaty arbitration – namely, where a breach of contract amounts to a breach of treaty obligations and where the applicable treaty contains an "umbrella clause" – apply to the present dispute.[626]

394. The Respondent submits that because the threshold for treaty claims is "activity beyond that of an ordinary contracting party," a State's action must be "in its capacity as a sovereign, and not merely as a merchant" in order for a contract claim to be elevated to a treaty claim.[627] Further, a State's reasonable reaction to a co-contracting party's non-observance of its contractual obligations cannot give rise to a treaty claim; the Respondent cites the *Bayindir* decision in support.[628] The Respondent points out that the 2017 SIAC Award has already established that it did not use its sovereign powers to interfere with the Deed of Settlement or breach the Deed itself; to the contrary, its actions were justified as reasonable responses to the Claimants' breach.[629] Therefore, it did not cross the threshold of sovereign acts and its actions cannot amount to treaty violations because they were always motivated by compliance with the Deed.[630]

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[625] Respondent's Memorial on Competence, ¶ 154; Respondent's Counter-Memorial, ¶ 201.

[626] Respondent's Memorial on Competence, ¶ 155; Respondent's Counter-Memorial, ¶ 202.

[627] Respondent's Memorial on Competence, ¶ 156; Respondent's Counter-Memorial, ¶ 204; citing RL-69, *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 172-175; RL-10, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 315; RL-11, *Bayindir İnşaat Turizm Ticaret ve Sanayi A.Ş. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 ("***Bayindir***"), ¶ 180; RL-63, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶ 354; RL-23, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 692.

[628] Respondent's Memorial on Competence, ¶ 157-162; Respondent's Counter-Memorial, ¶ 205-210; citing RL-11, *Bayindir*, ¶ 461.

[629] Respondent's Memorial on Competence, ¶¶ 156, 163-164; Respondent's Counter-Memorial, ¶¶ 212-213.

[630] Respondent's Memorial on Competence, ¶¶ 164-165.

395. In addition, the Respondent says, the specific nature of the Deed and the Respondent's actions as a result of it prevent the claims from being elevated to treaty violations.[631] That is because settlement agreements are given binding force in the context of investment arbitration, "such that many arbitral tribunals refuse to hear matters within the scope of such agreements and consider related claims 'have ceased to exist due to the settlement agreement.'"[632] The Respondent submits that the Deed of Settlement was a unique type of settlement agreement – essentially, a contract to disinvest, given that it provides for the Claimants' exit from Laos following the sale of their assets.[633] Thus, claims whose underlying issues are governed by the Deed are inadmissible.[634]

396. The Respondent argues that all of the claims now before the Tribunal are within the scope of the Deed of Settlement because they relate either to the sale process or to the mechanisms activated by the Deed to resolve disputes regarding the sale process.[635] Because all claims fall within the Deed's scope and the 2017 SIAC Award has declared the Respondent's actions as lawful with binding effect, the Respondent posits that the claims now before the Tribunal are "*prima facie* inadmissible in this arbitration."[636] This has been confirmed by "numerous public international law sources" and Claimants have not offered any authority stating otherwise.[637]

397. The Respondent also maintains that when faced with contractual claims, an investment tribunal must decline jurisdiction if the underlying contract contains a dispute resolution clause.[638] In support the Respondent cites the *Vivendi II* committee's holding that "the claimant must first submit its dispute to the contractually-agreed-upon forum and, if the claimant was unsatisfied with the outcome in that forum, it would then be allowed a single treaty claim before an investment tribunal for denial of justice."[639] Applying that approach to this case, the Respondent contends that the dispute resolution clauses in the Deed of Settlement provide the necessary mechanisms to resolve

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[631] Respondent's Memorial on Competence, ¶ 166; Respondent's Counter-Memorial, ¶ 214.

[632] Respondent's Memorial on Competence, ¶ 167; Respondent's Counter-Memorial, ¶ 215; citing RL-47, *Orascom*, ¶ 524.

[633] Respondent's Memorial on Competence, ¶ 168; Respondent's Counter-Memorial, ¶ 216.

[634] Respondent's Memorial on Competence, ¶ 172.

[635] Respondent's Memorial on Competence, ¶¶ 172-173; Respondent's Counter-Memorial, ¶ 217-220; Respondent's Rejoinder, ¶¶ 102-103.

[636] Respondent's Memorial on Competence, ¶ 173; Respondent's Counter-Memorial, ¶ 221; Respondent's Rejoinder, ¶ 105.

[637] Respondent's Rejoinder, ¶ 106.

[638] Respondent's Memorial on Competence, ¶ 174; Respondent's Counter-Memorial, ¶ 222.

[639] Respondent's Memorial on Competence, ¶ 175; Respondent's Counter-Memorial, ¶ 223; citing RL-22, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi II***"), ¶ 98.

all disputes, as illustrated by the Claimants' own use of those mechanisms.[640] This, in turn, prevents the Tribunal from serving as a "general alternative" for Claimants' dispute, given that the contractually-agreed-upon proceedings already have been utilized.[641]

398. Regarding "umbrella clauses" – the second circumstance under which contract claims sometimes may be arbitrated in investment treaty arbitration – the Respondent argues (for purposes of the *LHNV* case where umbrella clause claims are pursued) that Article 3(4) of the Lao-Netherland BIT does not transform contract disputes into investment disputes.[642]

399. The Respondent maintains that an "umbrella clause" is insufficient on its own to elevate contractual claims to treaty claims.[643] Whether the contract already provides for a dispute mechanism and whether there is a connection between the contract and the BIT are additional factors that previous tribunals have taken into account.[644] Specifically, the Respondent highlights the *SGS v. Pakistan* committee's holding that claimants:

> should not be allowed [to] rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum … [and] should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim.[645]

400. The Respondent argues, therefore, that because the claims now before the Tribunal are contractual in nature and the Deed of Settlement contains a dispute resolution clause, the effect of the Lao-Netherland BIT's potential "umbrella clause" is moot.[646]

401. As to the cases where tribunals have asserted jurisdiction over contract claims, the Respondent notes that they are "not the general consensus among investment tribunals" and are sustained by reasoning that is inapplicable to the present dispute, due to the "specific and exclusive" dispute

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[640] Respondent's Memorial on Competence, ¶¶ 176-177; Respondent's Counter-Memorial, ¶¶ 224-225.

[641] Respondent's Memorial on Competence, ¶ 177; Respondent's Counter-Memorial, ¶ 227.

[642] Respondent's Memorial on Competence, ¶ 181.

[643] Respondent's Memorial on Competence, ¶ 182; Respondent's Counter-Memorial, ¶ 230.

[644] Respondent's Memorial on Competence, ¶¶ 182-184; Respondent's Counter-Memorial, ¶ 230; citing RL-38, *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, ¶ 81; RL-58, *SGS Société Générale de Surveillance S.A. v. The Philippines*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, 29 January 2004 ("***SGS Philippines***"), ¶¶ 127-128; RL-21, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007 ("***CMS* Annulment**"), ¶ 95(c).

[645] Respondent's Memorial on Competence, ¶¶ 185-187; Respondent's Counter-Memorial, ¶ 235; citing RL-58, *SGS Philippines,* ¶ 154.

[646] Respondent's Memorial on Competence, ¶ 190; Respondent's Counter-Memorial, ¶ 238.

resolution clause in the Deed of Settlement. The Respondent contends that the Deed's dispute resolution clause precludes the claims now before the Tribunal from being heard.[647]

402. For these reasons, the Respondent submits that Claimants' claims are of contractual nature, cannot be elevated to treaty claims, and should be dismissed by the Tribunal.[648]

(2) Claimants' Position

403. Claimants reject the Respondent's characterization of *Bayindir* as suggesting that claimants must establish a State's contractual breach in order to support a treaty claim.[649] The Respondent cited excerpts of the *Bayindir* decision without the necessary context, the Claimants say; a proper reading shows that the tribunal reviewed the State's conduct under the contract only to determine whether the State had expropriated the claimants' rights under that same contract.[650] The *Bayindir* tribunal did not use the contract's terms as the standard against which to assess the State's conduct under the treaty, and in fact, ultimately rejected the jurisdictional challenge even though the contract contained an exclusive dispute resolution clause.[651]

404. Claimants also note that even if the Respondent's characterization of *Bayindir* were accepted, the SIAC Award would not preclude the claims now before the Tribunal, given that the BIT I Tribunals unanimously decided that Respondent in fact breached the Deed.[652]

405. According to Claimants, the Respondent's actions that gave rise to the present expropriation claims were effected "under color of State authority," and the Respondent admits as much.[653] The Respondent's position that these acts were contemplated by the Deed of Settlement does not make the claims contractual or shield the Respondent from liability under the BIT.[654]

406. As for the Respondent's argument regarding the binding force given to settlement agreements in the context of arbitration, the Claimants contend that the conduct challenged in this case arose after

[647] Respondent's Memorial on Competence, ¶ 191; Respondent's Counter-Memorial, ¶ 239.
[648] Respondent's Memorial on Competence, ¶ 192; Respondent's Counter-Memorial, ¶ 240.
[649] Claimants' Reply, ¶ 43.
[650] Claimants' Reply, ¶ 44.
[651] Claimants' Reply, ¶¶ 44-46.
[652] Claimants' Reply, ¶ 43.
[653] Claimants' Reply, ¶ 47.
[654] Claimants' Reply, ¶¶ 47-48.

the Deed was executed, whereas in the cases the Respondent cites, the settlement agreements gave finality to claims over prior events.[655]

407. Claimants also reject the Respondent's position that the Tribunal must decline jurisdiction if the underlying contract includes a dispute resolution clause; that is based on the very reasoning that led to the annulment of the first *Vivendi* award, they say.[656] Rather, Claimants submit, investment tribunals "accept jurisdiction for alleged breaches of the relevant treaty, as distinguished from alleged breaches of the contract through which the investment was established."[657]

408. In this case, Claimants say, their treaty claims are not based on the Respondent's breach of the Deed of Settlement, but rather on the exercise of public authority by its executive and judicial branches, which include seizure of property, adoption of punitive tax measures, corrupt judicial proceedings, nullification of property rights, and cancellation of licenses.[658] The relevant question is not whether these actions were justified by the Deed but whether they violate the Respondent's obligations under the BIT.[659]

409. Finally, Claimants observe that there is an important distinction between what the Deed authorized and what it compelled, and the Respondent does not, and cannot, argue that its actions fall under the latter.[660] Even if *arguendo* that were the case, it would have no bearing on whether the conduct itself was wrongful as a violation of the China-Lao BIT.[661]

410. For these reasons, Sanum submits that its claims in this case arise out of the Respondent's treaty violations and are therefore within the Tribunal's jurisdiction.

(3) The Tribunal's Analysis

411. The Tribunal begins with the unexceptional observation that a claim for treaty breach is analytically distinct from one for contract breach, and requires a different analysis. Demonstrating a breach of contract does not lead inexorably to a finding a treaty violation, and conversely, compliance with

[655] Claimants' Reply, ¶ 49.

[656] Claimants' Reply, ¶¶ 50-51; citing RL-22, *Vivendi II*, ¶¶ 101-102.

[657] Claimants' Reply, ¶ 51; citing CL-141, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 ("***Vivendi III***"), ¶¶ 7.3.8-10.

[658] Claimants' Reply, ¶ 52.

[659] Claimants' Reply, ¶ 52.

[660] Claimants' Reply, ¶ 53.

[661] Claimants' Reply, ¶ 54.

contractual obligations does not equate necessarily to performance of treaty obligations. The two inquiries pose different questions and require proof of different factual and legal elements.

412. Claimants have alleged violation of several different BIT provisions in this case and the accompanying *LHNV* case, by virtue of several distinct instances of State conduct. These allegations do not depend, as a matter of law, on a showing that Respondent failed to observe the Deed of Settlement. Indeed, as discussed in Section IV.A, even Claimants' "umbrella clause" claims in the LHNV case do not invoke a failure to observe obligations in the Deed of Settlement; instead, they rest on alleged failures to observe obligations under local law. Claimants also allege violations of other BIT provisions, including provisions on expropriation in both cases, and in the LHNV case also provisions on fair and equitable treatment, unreasonable or discriminatory impairment, and interference with transfers. While some of those claims involve certain *facts* that also were at issue in prior contract proceedings (*i.e.*, before the SIAC Tribunal and the BIT I Tribunals hearing "material breach" applications about the Deed of Settlement), such overlaps do not on their own render treaty claims inadmissible. Claimants are entitled to try to prove their treaty claims on the merits, and the Tribunal is not divested of its authority to consider those treaty claims, simply because a contract formed part of the underlying factual matrix.

413. Of course, Respondent remains free to argue on the merits that Claimants have not met their required showing under the BIT. If the Tribunal ultimately agrees, the consequence will be a failure of the treaty claims. But it would be premature for the Tribunal to dismiss the claims at the threshold stage simply because the issues raised are, to some extent, intertwined with contractual matters that have been addressed in different proceedings.

414. The Tribunal is equally unpersuaded by Respondent's jurisdictional argument that an investment treaty tribunal may not proceed to the merits if an underlying contract between the parties contains a dispute resolution clause directing disputes to another forum. First, the Deed of Settlement's dispute resolution provisions established the venues for claims alleging breach of the Deed's terms. Nothing in those provisions purported to address the venue for *BIT claims* challenging future State conduct, much less to waive Claimants' right to bring such claims if it wished to do so.

415. More generally, international treaty obligations, and the right to enforce them by procedures specified in such treaties, exist on a different level of the international legal order than domestic

law rights.[662] In the investment treaty context, sovereign States agree to create procedural rights for the benefit of their respective investors, allowing them to enforce in particular fora the substantive obligations that these States undertake to one another. These procedural rights are different in kind from procedural rights created by private law contracts or other private law relationships. For that reason, there is a high standard for proving that a party intended to waive its right to bring future treaty claims, simply by entering into a contract selecting a forum to resolve breach of contract claims. As prior tribunals have found, there would have to be direct and convincing evidence that a party intended such a waiver.[663] No such evidence exists in this case, and it cannot be inferred simply from the forum selection clauses of the Deed of Settlement.

416. For these reasons, the Tribunal rejects Respondent's objection to jurisdiction or admissibility on the grounds that the claims in essence are contractual rather than treaty claims.[664] The Tribunal accepts that Claimants have pleaded BIT claims sufficiently to have them analyzed as such on the merits. Nothing in the dispute resolution clause of the Deed of Settlement deprives Claimants of their right to assert such BIT claims, particularly with respect to challenged State conduct occurring after the Deed was executed.

D. MATERIAL JURISDICTION

417. The Respondent argues that the Tribunal does not have material jurisdiction over several of the claims before the Tribunal. Specifically, the Respondent maintains that the Tribunal lacks material jurisdiction over Sanum's claims and allegations related to (a) Thakhek, (b) expropriation, or (c) criminal investigations and the use of privileged documents.[665] The Claimants in turn argue that these objections are meritless, and that the Tribunal is entitled to decide the claims. The Claimants

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[662] *See generally* CL-31, *SGS Societe Generale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award on Jurisdiction, 12 February 2010 ("***SGS Paraguay***"), ¶ 178 (describing the "international law 'safety net' of protections that [BITs] are meant to provide separate from and supplementary to domestic law regimes").

[663] *See, e.g.,* CL-31, *SGS Paraguay*, ¶¶ 178, 180 (the right to access a dispute resolution forum offered in a treaty "should not lightly be assumed to be waived," and therefore "at least in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction to hear Treaty claims"); RL-22, *Vivendi II*, ¶ 76 (noting that a concession contract "did not in terms purport to exclude the jurisdiction of an international tribunal arising under … the BIT; at the very least, a clear indication of an intention to exclude that jurisdiction would be required").

[664] Respondent's Memorial on Competence, ¶ 153.

[665] Respondent's Counter-Memorial, ¶ 241. The Respondent advanced additional material jurisdiction objections to LHNV's claims for violation of the Lao-Netherlands BIT's provisions on fair and equitable treatment, most-favoured nation treatment and discriminatory measures.

add that the Respondent grounded these objections in Claimants' Notices of Arbitration rather than their subsequent Memorial on the Merits.[666]

418. The Tribunal addresses separately below the Respondent's three "material jurisdiction" objections relevant to Sanum's claims.

(1) Thakhek Claims

a. Respondent's Position

419. First, the Respondent argues that the Tribunal does not have jurisdiction over claims related to Thakhek because they do not involve a qualifying "investment."[667] Because the Thakhek issue concerns only the pre-investment stage of a potential investment, it falls short of the China-Lao BIT's limit to consent to disputes "in connection with *an investment in the territory* of the other Contracting State." The Respondent contends that this definition concern only investments that the investment were "*already made*," not those merely foreseen or discussed.[668]

420. According to the Respondent, the basis for the Thakhek claims is Section 22 of the Deed of Settlement, but this provision – along with a US$500,000 USD payment – merely accorded Claimants the right to discuss a future investment with the Respondent, without constituting a protected investment under the China-Lao BIT's terms.[669] In support, the Respondent cites the *Mihaly* holding, amongst others, that:

> pre-investment and development expenditures [cannot] automatically be admitted as "investments" in the absence of the consent of the host State to the implementation of the project … The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment."[670]

421. The Respondent argues that Claimants' subsequent shift in its pleadings, to assert that its claims arise under the Thakhek MOU and not the Deed of Settlement, do not resolve the jurisdictional

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[666] Claimants' Reply, ¶ 215.

[667] Respondent's Memorial on Competence, ¶¶ 194-195; Respondent's Counter-Memorial, ¶ 242.

[668] Respondent's Memorial on Competence, ¶ 195; Respondent's Counter-Memorial, ¶ 243 (emphasis in original); Respondent's Rejoinder, ¶¶ 108, 111.

[669] Respondent's Memorial on Competence, ¶ 196; Respondent's Counter-Memorial, ¶ 244.

[670] Respondent's Memorial on Competence, ¶ 197; Respondent's Counter-Memorial, ¶ 245; Respondent's Rejoinder, ¶ 113; citing RL-45, *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 ("***Mihaly***"), ¶ 59-61; RL-167, *William Nagel v. The Czech Republic,* SCC Case No. 049/2002, Final Award, 9 September 2003, ¶¶ 299-300.

impediment.[671] Even so, neither the US$900,000 USD payment required under the Thakhek MOU, nor the rights encompassed by the MOU (*i.e.,* the investment as pled in Claimants' Reply), meet the required standard – which the Claimants say is the production of something that can be deprived – because "both related only to a right to negotiate in good faith for a potential future investment."[672]

b. Claimants' Position

422. Claimants argue that the Respondent's objection to Thakhek's status as a protected investment under the China-Lao BIT, on the basis that it is merely a pre-investment, is undermined by the Respondent's statement that the second US$500,000 USD payment would grant Claimants a "'contractual right to discuss a potential for *further* investment,' thus conceding that the payments were the initial investments."[673] The Claimants add that the Respondent itself acknowledges the BIT's recognition of "any performance having economic value" as a qualifying investment.[674]

423. As to the US$900,000 payment envisioned by the Thakhek MOU, Claimants reject the characterization of this as "pre-investment expenditures," which they say is based solely on *Mihaly*, a materially distinguishable case, and not on the terms of the governing BIT.[675] *Mihaly* is distinguishable on its face because it was based on a different BIT definition of "investment" than the applicable one here, and the *Mihaly* tribunal held that the parties were not bound by any of the instruments presented, whereas in this case, it is undisputed that the Thakhek MOU binds the Parties.[676]

424. In Claimants' view, to determine whether it has jurisdiction over this claim, the Tribunal must determine whether "*either* the $900,000 paid by Claimants directly to Respondent under the terms of the MOU *or* the rights granted to Sanum under the MOU constitute an investment."[677] Claimants make the following arguments:

[671] Respondent's Rejoinder, ¶ 110.

[672] Respondent's Rejoinder, ¶ 112.

[673] Claimants' Reply, ¶ 216; citing Respondent's Counter-Memorial, ¶ 244 (emphasis by Claimants).

[674] Claimants' Reply, ¶ 217; citing Respondent's Counter-Memorial, ¶ 243 (citing CL-18, Lao-Netherlands BIT, Art. 1(a)).

[675] Claimants' Reply, ¶¶ 218-219.

[676] Claimants' Reply, ¶¶ 221-222.

[677] Claimants' Reply, ¶ 223 (emphasis in original).

a. Because the Thakhek MOU uses the terms "concessionee" to refer to Claimants, it thereby indicates that the MOU governs how the concession land would be developed, not whether the concession would be granted in the first place;[678]

b. Since the Thakhek MOU granted Claimants *in rem* rights in relation to the land, the land qualifies as an "asset" under the China-Lao BIT,[679] which defines "investments" as including "other property rights" in addition to movable and immovable property, and refers specifically to "a claim to money" and "concessions conferred by law";[680]

c. The rights encompassed by the MOU constitute an investment under Article 1(1) of the China-Lao BIT as "concessions conferred by law," as referenced by the MOU's denomination of Sanum as the "Concessionee," and its reference to "the special authority the deputy prime minister exercised to approve it";[681]

d. The fund established via the US$900,000 contribution, as well as the rights to receive a refund or reimbursement from the fund, qualify under Article 1(1)(c) of the China-Lao BIT as "a claim to money or to any performance having an economic value";[682] and

e. The illustrative list in the China-Lao BIT is not exclusive, but rather "wide-ranging and open," in the words of the PCA BIT I Tribunal.[683]

c. The Tribunal's Analysis

425. Sanum has asserted claims for violation of the expropriation provision of the China-Lao BIT in connection with what it calls the "Frustration of Thakhek Concession Development."[684] Respondent objects that the Tribunal does not have jurisdiction *ratione materiae* over these claims, because Sanum had no qualifying investment related to Thakhek.

[678] Claimants' Reply, ¶ 225.

[679] Claimants' Reply, ¶ 229.

[680] CL-49, Lao-China BIT, Article 1(1).

[681] Claimants' Reply, ¶ 229.

[682] Claimants' Reply, ¶¶ 228-229 (making this argument under the equivalent Lao-Netherlands BIT, and arguing that the terms of the Lao-China BIT are "very similar").

[683] Claimants' Reply, ¶¶ 230-231 (citing C-399, PCA BIT I Case, Award on Jurisdiction, 13 December 2013, ¶ 318).

[684] Letter from Claimants to Tribunal, 24 June 2019, distinguishing between Sanum's claims in this proceeding and LHNV's claims in the accompanying case.

426. In Article 8 of the China-Lao BIT, the Lao PDR consented to submit to arbitration any dispute between it and "an investor" of China, in "connection with an investment of that national in the territory" of the Lao PDR," that "involve[s] the amount of compensation for expropriation …."[685] In order to invoke this clause as the basis for the Tribunal's jurisdiction over the Thakhek claims, Sanum therefore must establish that its expropriation claim arises "in connection with an investment" of Sanum.

427. Article 1(1) of the China-Lao BIT states, *inter alia*, as follows:

> For the purpose of this Agreement:
>
> (1) The term "investments" means every kind of asset invested by investors of one Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the Latter, including mainly,
>
> a) movable and immovable property and other property rights;
>
> b) shares in companies or other forms of interest in such companies;
>
> c) a claim to money or to any performance having an economic value;
>
> d) copyrights, industrial property, know-how and technological process;
>
> e) concessions conferred by law including concessions to search for or to exploit natural resources.[686]

428. The structure of Article 1(1) is that it first states a general definition ("[t]he term 'investments' means *every kind of asset*"), and then adds that this includes "mainly" an illustrative list of assets. The latter step shows that the Contracting Parties expected assets falling within the list to be covered by the BIT's protections, because the acquisition of such assets generally would reflect a process of investing. Thus, in the great majority of cases, all that a tribunal must do to confirm its jurisdiction *ratione materiae* is to satisfy itself that the claimant possesses an asset on the list.

429. Nonetheless, in rare cases further inquiry may be necessary, because the list of illustrative assets in Article 1(1) does not trump the objective, ordinary meaning of the word "investments" that precedes it. Like any other treaty, the China-Lao BIT must be interpreted pursuant to the principles

[685] CL-49, China-Lao BIT, Articles 8(1), 8(3).

[686] CL-49, China-Lao BIT, Article 1(1).

of the Vienna Convention on the Law of Treaties ("**VCLT**"), and in particular VCLT Article 31(1)'s requirement that provisions of the BIT are to be interpreted and applied in accordance with the "ordinary meaning" of their terms, in the "context" in which they occur and in light of the BIT's "object and purpose."[687] The word "investment" has an ordinary meaning which is not supplanted by the Contracting Parties' identification of a list of illustrative assets that are presumed to satisfy it. The very fact that the list of assets in Article 1(1) is not exclusive – but by definition includes only the assets "mainly" expected to qualify – confirms the need for the word "investments" to be attributed an independent meaning. As several tribunals have observed,[688] unless the term "investment" is recognized as bearing some *intrinsic* meaning, the non-exclusive nature of the list would provide no benchmark by which a tribunal could evaluate the qualifications of other forms of assets outside the illustrative list. Moreover, without some objective benchmark, Article 1(1)'s extreme generality ("every kind of asset") could be seen as encompassing even transactions that bear *none* of the traditional hallmarks of investment.

430. For example, it is widely accepted that a one-time purchase of goods does not constitute an "investment," but if such a sale is not for an outright payment but instead results in a receivable, then ostensibly that receivable could be characterized as a "claim to money or to any performance having an economic value." That is one of the forms of assets generally included in BIT definitions of "investment," as it is in Article 1(1)(c) of the China-Lao BIT. Yet most observers would still maintain that a one-time sale resulting in receivables is not an "investment" in the ordinary meaning of the term, even if such receivables might be technically characterized as an "asset" falling within the broad asset list of a BIT. The illustration demonstrates, in the words of the *Romak* tribunal, how a "mechanical application of the categories listed" in a BIT could "eliminate any practical limitation to the scope of the concept of 'investment,'" and "render meaningless the distinction between investments, on the one hand, and purely commercial transactions on the other."[689]

431. The obvious conclusion is that an asset list – particularly one preceded by an unbounded "every kind of asset" phraseology – cannot function on its own as a sufficient definition of investment.

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[687] VCLT Article 31(1).

[688] *See, e.g.,* RL-105, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009 ("***Romak***"), ¶¶ 178-180 (rejecting claimant's argument that it "should simply confirm that [its] assets fall within one or more of the categories listed," because this approach would 'deprive[] the term 'investments' of any inherent meaning," an outcome which is inconsistent with the non-exhaustive nature of the categories enumerated; the tribunal explained that "there may well exist categories different from those mentioned in the list," and "[a]ccordingly there must be a benchmark against which to assess those non-listed assets … in order to determine whether they constitute an 'investment' within the meaning of" the BIT).

[689] RL-105, *Romak*, ¶¶ 184-185.

Rather, it requires interpretation by reference to the ordinary meaning of the concepts of "investment" and "investing."

432. Pursuant to the VCLT command to look to the "ordinary meaning" of the term, the Tribunal observes that according to common dictionary definitions, the noun "investment" refers to some *contribution of resources*, made in an attempt to earn a return over a *period of time*, a process that necessarily involves the possibility or *risk* of not earning a return.[690] Many other tribunals, employing similar "ordinary meaning" analyses, have found these three basic elements to be inherent in any objective definition of "investment." Although some tribunals have reached this conclusion solely through an analysis of the ICSID Convention, others have stated – as does this Tribunal – that the same interpretation of the word "investment" applies independently to its use in investment treaties, whether or not a case is proceeding under the ICSID Convention.[691]

433. The corollary implication is that protection under a BIT would *not* be extended to assets that did not come to be held by the putative investor through any act of real investing. Notably, "investing" in an asset is different from merely "owning" or "holding" an asset; the latter terms refer to legal title or possession, while the former refers to a form of conduct, the taking of an act. As the *Quiborax* tribunal explained the point, a distinction must be made between the objects (or "legal materialization") of an investment, such as shares or title to property, and the action of investing, which requires some contribution of money or other resources[692] The Tribunal does not accept that

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[690] *See, e.g.,* Merriam-Webster, https://www.merriam-webster.com/dictionary/investment#h1 (defining "investment" as "the outlay of money usually for income or profit: capital outlay"); Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/investment (defining it as "the act of putting money, effort, time, etc. into something to make a profit or get an advantage, or the money, effort, time, etc. used to do this"); and Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/investment?q=investment (defining it as "the act of investing money in something," or "the money that you invest, or the thing that you invest in").

[691] *See, e.g.,* CL-98, *Quiborax S.A. et al. v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 215 (noting cases concluding that "the objective meaning was inherent to the term investment, irrespective of the application of the ICSID Convention"); RL-125, *Romak,* ¶ 207 ("The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in … the BIT," because the term in the BIT "has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk …"); RL-47, *Orascom*, ¶ 372 ("the use of the term 'investment' in both the ICSID Convention and the BIT imports the same basic economic attributes of an investment derived from the ordinary meaning of that term, which comprises a contribution or allocation of resources, duration, and risk"); RL-112, *Vestey*, ¶ 192 ("the BIT notion of investment implies that the asset falling within the list be the result of an allocation of resources made by the investor").

[692] CL-98, *Quiborax*, ¶ 223. *See also* RL-1, *Abaclat et al v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction, 4 August 2011, ¶ 347 (considering that a BIT's "list of examples of what is considered an investment" was focused on the "rights and values which may be endangered by measures of the Host State … and therefore deserve protection," but "[n]evertheless, this definition is of course based on the *premise* of the existence of [a] contribution," which "derives from the wording of other provisions" of the BIT) (emphasis added).

the terms can be conflated, so that a qualifying national who somehow comes to *own* an asset in the host State, but *without* having made any contribution, still can be considered to have "invested" in that asset. The term "invested," like the term "investment," has an objective meaning, one that is not satisfied by ownership alone.

434. The point of this observation is that, in order to establish for purposes of Article 8 of the China-Lao BIT that the dispute in question arises "in connection with an investment" of Sanum in the Lao PDR, Sanum must show not only that it *holds* an asset that falls within the illustrative list of Article 1(1) of the BIT, but also that it *invested* something in the ordinary meaning of the word (*i.e.,* that it *contributed* in some way) to obtain that asset or to enhance its value.

435. This brings the discussion back to the separate elements which Sanum contends constituted its "investment" in connection with Thakhek: (a) the rights granted to it under the Thakhek MOU, and (b) the Claimants' payment of US$900,000 in two tranches, pursuant respectively to the Thakhek MOU and the Deed of Settlement, the latter of which cross-referenced the Thakhek MOU.[693]

436. As discussed in Section III.C.3 above, the Thakhek MOU was signed on 20 October 2010 between Sanum (which was labeled the "Concessionee") and a "Government Committee" with certain responsibility for development of a special enterprise zone known as the SEZ. The Thakhek MOU provided for certain preliminary and reciprocal steps which, if successfully concluded, could lead to an eventual land concession agreement for Sanum to develop a project on certain "Concession Land" (as defined) in the SEZ. Without getting too deeply in the details for present purposes, the preliminary steps included (a) Sanum's submission of various studies and plans for its use of the Concession Land;[694] (b) the Government's approval of those "required documents," followed by the signing of a land concession agreement;[695] (c) Sanum's upfront payment of US$400,000 upon signing of the Thakhek MOU, with an additional US$500,000 to be paid later, for the Government to "spend on the survey, measurement and allocation of the Concession Land," and to "compensate the people for the Concession Land" if the Government was required to take ownership of certain parcels; [696] (d) "[o]nce the exact location of the Concession Land has been agreed upon," Sanum's

[693] Claimants' Reply, ¶ 223.

[694] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.

[695] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.

[696] C-100 and R-107, Thakhek MOU, Arts. 2.2, 2.3.

confirmation of "its acceptance of the Concession land"; [697] and (e) eventually, Sanum's clearing of the land and commencement of construction activities within a certain timetable.[698]

437. It appears undisputed that in October 2010, Sanum paid the initial US$400,000 pursuant to the Thakhek MOU. A dispute later arose regarding the precise contours of the land parcels contemplated for the "Concession Land." Sanum did not submit the various studies and plans, the Government did not approve such plans, and no land concession agreement was ever signed.

438. Nonetheless, following various legal actions and as discussed in Section III.E above, the Parties agreed on 15 June 2014, in the Deed of Settlement, to revive discussions regarding a Thakhek development. The Deed of Settlement provided that "[s]ubject to the Claimants' payment" of the remaining US$500,000 that had been contemplated in the Thakhek MOU, "the Parties will negotiate in good faith and conclude a land concession and project development agreement" at Thakhek as had previously been discussed in the Thakhek MOU, "on the basis that no gaming activities whatsoever will be allowed at or in connection with that … site."[699]

439. It appears undisputed that in September 2015, Sanum paid the second tranche (US$500,000) of the sums initially contemplated in the Thakhek MOU, and as subsequently agreed in the Deed of Settlement. The Parties did not, however, reach agreement on a land concession at Thakhek, leading Claimants to bring various claims in various fora. The Claimants failed in their claims before the SIAC Tribunal and the BIT I Tribunals.[700] The Claimants now bring further treaty claims regarding Thakhek, which they explain as different from those rejected by the prior tribunals.[701]

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[697] C-100 and R-107, Thakhek MOU, Art. 3.1.

[698] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.

[699] R-5, Deed of Settlement, 15 June 2014, Section 22.

[700] As discussed in Sections III.J, III.K and III.L, the SIAC Tribunal rejected Claimants' counterclaim that the Lao PDR had breached the Deed of Settlement by failing to negotiate a land concession in good faith, finding that "good faith differences in the negotiation" regarding the land contours "prevent[ed] the reaching of a final contract." C-481 and R-27, 2017 SIAC Award, ¶¶ 297-307. The BIT I Tribunals, considering the material breach applications, likewise found no breach of the Deed of Settlement's requirement of negotiation in good faith, noting that the Claimants "had not established a land entitlement" to certain disputed hectares and the Lao PDR had not acted in bad faith in refusing to expropriate certain private owners in that area. C-509, ICSID 2MBA Decision, ¶¶ 207-208; C-562, PCA 2MBA Decision, ¶¶ 195-196. On the merits of the Claimants' revived *pre*-Deed of Settlement treaty claims, the BIT I Tribunals later found that Claimants had failed to establish any rights to the disputed land portions, nor had they completed the various plans and studies required by the Thakhek MOU, as a result of which they had not established any viable project with which the Respondent had improperly interfered by its revocation of a slot club license for Thakhek that had been issued improperly ten days earlier. *See* R-264, ICSID BIT I Award, ¶¶ 219-220, 222; R-265, PCA BIT I Award, ¶ 244.

[701] Specifically, Claimants say their current claims, which challenge the extinguishment of their Thakhek MOU concession rights in violation of the Lao-Netherland BIT and China-Lao BIT respectively, differ from those addressed

440. It does not appear that Respondent presented to the BIT I Tribunals any objection *ratione materiae* with respect to the Claimants' Thakhek claims. Nonetheless, the objection has been made in this case, and it deserves proper attention, as do all of Respondent's other jurisdictional objections in this case.

441. For *ratione materiae* purposes, the threshold question is whether Sanum has established, as required by Article 8 of the China-Lao BIT, that this is a dispute "in connection with an investment" of Sanum in the Lao PDR. The Respondent says "no," characterizing the Claimants as never having moved beyond the "pre-investment" stage of a potential investment,[702], and accordingly never having obtained any "definitive rights."[703] The Claimants disagree, stating *inter alia* that the Thakhek MOU granted them a "claim to … a[] performance having economic value" within the meaning of Article 1(1)(c) of the China-Lao BIT,[704] and that this also constituted a "concession[] conferred by law" under Article 1(1)(e) of the BIT, particularly given the MOU's recitation in its preamble that it was "[b]ased on the Law on the Promotion of Investment."[705] The Claimants also contend that the Thakhek MOU granted them *in rem* rights in relation to certain land, within the meaning of Article 1(1)(a) of the BIT's reference to "immovable property and other property rights."[706]

442. The Tribunal certainly disagrees with the latter proposition; the Thakhek MOU did not grant any *in rem* rights to land. Rather, it established a process that, depending on various future contingencies, might lead to a future signing of a separate land concession agreement. These contingencies not only included Sanum's completion of various studies and the Government's approval of such,[707] but also reaching a future "agree[ment]" on the "exact location" of any

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in the 2017 SIAC Award because the latter ruled only on whether Respondent had complied with the Deed of Settlement. Claimants' Reply, ¶¶ 190-191, 194-195. Claimants say their claims are different from the treaty claims rejected by the BIT I Awards because the "frozen record agreement" prevented them from adducing evidence about post-Deed of Settlement events (including the Respondent's acceptance of the further US$500,000 payment), and because their claims now are for loss of non-gaming opportunities, not the value of the concession for gaming activity. Claimants' Submission on the BIT Awards, ¶¶ 101-120.

[702] Respondent's Memorial on Competence, ¶¶ 194-195; Respondent's Counter-Memorial, ¶ 243; Respondent's Rejoinder, ¶¶ 108-112, 226-227.

[703] Respondent's Rejoinder, ¶¶ 226-227.

[704] Claimants' Reply, ¶¶ 217, 229.

[705] Claimants' Reply, ¶¶ 227, 229; C-100 and R-107, Thakhek MOU, Preamble.

[706] Claimants' Reply, ¶¶ 226, 229.

[707] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.

"Concession Land,"[708] and finally establishing the land concession agreement.[709] Only at that point would Sanum have rights *in rem* to land.

443. Nonetheless, the Thakhek MOU did convey certain rights to Sanum, even of a conditional nature, which Sanum would not have had but for that document – and presumably that third parties did not equally have. Sanum obtained a right to a certain process which, if it ultimately fulfilled its own required steps, implicitly committed its counterpart (a government entity) to taking certain corresponding steps in good faith. An MOU is not yet a land concession, but it is still a form of preliminary agreement. In this case, the Thakhek MOU had specific provisions both for its "[i]mplementation" and for the conditions under which it "may be revoked"; it specified a period of effectiveness.[710] It thus had certain formalities which reflected a degree of substance beyond a mere "minuting" of preliminary non-binding discussions.

444. In any event, the Tribunal need not decide whether, in the abstract, an MOU that neither party begins to perform could ever constitute a claim to a "performance having an economic value" within the meaning of Article 1(1)(c) of the China-Lao BIT.[711] That is because in this case, there was at least *partial performance* of the anticipated reciprocal undertakings, by virtue of Claimants' payment of the full US$900,000 required from Sanum under its terms, and its counterpart's apparent acceptance of that payment. Unlike the *Mihaly* case on which Claimants rely, in which initial expenditures were unilateral and not required by certain letters of intent which expressly recited their non-binding nature,[712] here the payments were made in implementation of specific requirements of the Thakhek MOU. The Tribunal considers that, for purposes of a *ratione materiae* analysis, this partial performance by Sanum of at least *some* of the conditions established by the Thakhek MOU (which payments also constitute a "contribution" within the ordinary meaning of the term "investment") is sufficient to provide standing to make assertions about other alleged requirements of the Thakhek MOU.

445. To be clear, the Parties may still debate *on the merits* whether the Government was under any concrete obligations to perform under the Thakhek MOU, based on Sanum's partial performance of its obligations and before Sanum satisfied other conditions of the Thakhek MOU. To the extent

[708] C-100 and R-107, Thakhek MOU, Art. 3.1.
[709] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.
[710] C-100 and R-107, Thakhek MOU, Art. 8.
[711] Claimants' Reply, ¶ 217.
[712] *See* RL-45, *Mihaly,* ¶¶ 48, 59.

the Government was under any such obligation, the Parties may also debate on the merits what the scope of such obligation may have been. The Tribunal returns to these issues in Section VI.E. below. But from a *jurisdictional* standpoint, the Tribunal finds that Claimants' contribution of funds towards the staged implementation of the Thakhek MOU, as required of Sanum by its terms, is sufficient to qualify at least minimally as an initial investment in the MOU itself. This satisfies both the asset list in Article 1(1) of the BIT and the ordinary meaning of the word "investment," in terms of a contribution entailing some risk for a project expected to have a reasonable duration. The Respondent's objection *ratione materiae* with respect to the Thakhek claims is therefore denied.

(2) Expropriation Claim

a. Respondent's Position

446. Second, regarding Claimants' expropriation claims, the Respondent submits that the facts alleged do not meet a *prima facie* test and are therefore beyond the Tribunal's jurisdiction.[713]

447. The Respondent notes that the requisite showing of infringement on Claimants' contractual rights remains unsatisfied, given that the 2017 SIAC Award concluded that the Respondent "did not violate any obligation under the Deed."[714] As to Claimants' argument regarding the standard to be used by the Tribunal in assessing these claims, the Respondent contends that the circumstances of the present dispute – where the facts pled have been found to be untrue by a prior tribunal – are not found in any of the cases Claimants cite in support, thereby warranting the application of *res judicata* to the SIAC Award's findings regarding compliance with the Deed of Settlement. In these circumstances, Respondent says, the expropriation claims fail *prima facie* and should be dismissed.[715]

b. Claimants' Position

448. With respect to the expropriation claims, Claimants argue that the Respondent's description of the *prima facie* test that must be met in order for the Tribunal to assert jurisdiction is "exactly backwards."[716] The cases Respondent cites show that tribunals actually conduct their jurisdiction analysis under the presumption that the facts alleged by the claimant are true.[717] Further, Claimants

[713] Respondent's Memorial on Competence, ¶¶ 199-200; Respondent's Counter-Memorial, ¶¶ 248-249.

[714] Respondent's Memorial on Competence, ¶¶ 201-202; Respondent's Counter-Memorial, ¶ 250; Respondent's Rejoinder, ¶¶ 115-116.

[715] Respondent's Rejoinder, ¶¶ 115-116.

[716] Claimants' Reply, ¶¶ 233-234.

[717] Claimants' Reply, ¶ 234.

reiterate that their claims are treaty claims – not Deed-based claims as the Respondent insists – such that the Tribunal has material jurisdiction over them.[718]

c. The Tribunal's Analysis

449. In the Tribunal's view, this objection fails for the same reasons explained in Section V.C.3 above, with respect to Respondent's separate objection about the nature of the claims. As explained there, the claims in this case allege violations of the expropriation provisions of the China-Lao BIT. The alleged violations are not presented as flowing simply from an alleged breach of the Settlement Deed. Accordingly, even if the Tribunal were persuaded by all of the SIAC Tribunal's findings regarding Respondent's compliance with the Deed of Settlement, that would not necessarily dispose of the treaty claims in this case.

450. This conclusion flows more generally from the fact that treaty claims (including the expropriation claims to which this objection is addressed) are analytically distinct from contract breach claims. A party's failure to prove a breach of contract does not mean that it has no possibility of proving some *other* type of interference with an investment that might extinguish investment rights and value to such an extent as to give rise to a finding of expropriation. Just as breach of contract does not lead inexorably to a finding a treaty violation, compliance with contractual obligations does not equate necessarily to performance of treaty obligations. The two inquiries pose different questions and require proof of different factual and legal elements.

451. Accordingly, the Tribunal rejects Respondent's objection predicated on the notion that its victory in the SIAC Case, with respect to alleged breaches of the Deed of Settlement, *prima facie* implies that Claimants could not prevail on their treaty claims. The conclusion Respondent urges does not follow from its premise.

(3) Claims Regarding Criminal Investigations and Privileged Documents

a. Respondent's Position

452. Finally, the Respondent says that any claims related to criminal investigations and the use of privileged documents are beyond the scope of investment arbitration and therefore not within the Tribunal's jurisdiction because violations to a State's criminal law may only be heard by the State

[718] Claimants' Reply, ¶ 235.

itself.[719] Further, in the present dispute, the criminal investigations undertaken by Lao authorities are unrelated to Claimants' investments and alleged treaty claims.[720]

b. Claimants' Position

453. Claimants argue that by objecting to the Tribunal's jurisdiction over claims arising out of criminal investigations and the use of privileged documents, the Respondent "attacks a straw man," because Claimants have presented no such claims in their Memorial.[721]

c. The Tribunal's Analysis

454. The Tribunal agrees with Claimants on this issue. They have pleaded no claims that Respondent violated the China-Lao BIT through wrongful conduct of criminal investigations or misuse of the Claimants' privileged documents. Given the absence of any such claims, there is no need for the Tribunal to assess the decree to which an investment tribunal may consider such claims. The objection is denied.

E. INADMISSIBILITY BASED ON BIT I FINDINGS OF WRONGDOING

455. As discussed in Section V.A.2 above, following the issuance of the BIT I Awards, the Respondent took the position that even if the Tribunal has jurisdiction to hear the Claimants' various claims, it should deem them inadmissible essentially because the Claimants, by virtue of wrongdoing established in those Awards, have forfeited any entitlement to substantive treaty protection.

(1) Respondent's Position

456. In essence, the Respondent argues that the BIT I Awards' findings regarding bad faith, and in particular obstruction of justice, "tarnish and contaminate all of Claimants' present claims" and render Claimants unentitled to substantive treaty protection,[722] which should bring the Tribunal to dismiss all of the claims as inadmissible.[723] As discussed in Section V.A.2, the Respondent invokes the principle that no party should be allowed to benefit from its own wrongful act, and relying on *Churchill*, submits that investors who attempt to manipulate the arbitration process (as the BIT I Tribunals found had likely occurred with respect to Mme. Sengkeo's testimony) cannot benefit

[719] Respondent's Memorial on Competence, ¶¶ 206-207; Respondent's Counter-Memorial, ¶¶ 254-255.
[720] Respondent's Memorial on Competence, ¶ 207; Respondent's Counter-Memorial, ¶ 255.
[721] Claimants' Reply, ¶ 240.
[722] Respondent's Submission on the BIT I Awards, ¶¶ 18-35.
[723] Respondent's Submission on the BIT I Awards, ¶ 7.

from the substantive protections provided in the same treaties which grant access to arbitration.[724] The Respondent further suggests that the BIT I Awards' findings regarding Mr. Baldwin's lack of credibility should lead to a finding that the Claimants' assertions of fact throughout this case are unreliable, leading to the dismissal of all claims for investment treaty protection.[725]

(2) Claimants' Position

457. Claimants' response to this objection is likewise summarized in Section V.A.2. In essence, Claimants reject the assertion that their alleged conduct in other proceedings should deprive them of substantive Treaty protection in this case, or lead to a conclusion that none of their evidence on any issue can be credited.[726] The BIT I Tribunals' findings were made to a "balance of probabilities," not to the "clear and convincing evidence" standard that they themselves endorsed. In any event, this is an entirely new defense raised in post-hearing submissions;[727] the blanket disregard of all of Claimants' evidence would deny due process;[728] and the forfeiture of claims that the Respondent seeks is impermissible, particularly given that the Claimants' alleged procedural wrongdoing did not take place in this proceeding.[729] In these circumstances, the "Claimants deserve their day in court on the claims in this proceeding, on which this Tribunal can and should evaluate the evidence and the law for itself."[730]

(3) The Tribunal's Analysis

458. The remedy Respondent seeks is an extraordinary one: a refusal by the Tribunal to entertain Claimants' claims on the merits, even if it concludes it has jurisdiction to do so.

[724] Respondent's Submission on the BIT I Awards, ¶ 20, citing RL-186, *Churchill* Annulment, ¶ 257, and RL-185, *Churchill* Award, ¶ 528.

[725] Respondent's Submission on the BIT I Awards, ¶¶ 71-74.

[726] Claimants' Submission on the BIT I Awards, ¶ 122.

[727] Claimants' Submission on the BIT I Awards, ¶¶ 123-128.

[728] Claimants' Submission on the BIT I Awards, ¶¶ 123, 129-136.

[729] Claimants' Submission on the BIT I Awards, ¶¶ 123, 137-139.

[730] Claimants' Submission on the BIT I Awards, ¶ 220.

459. Respondent's asserted grounds for this relief involve wrongdoing said to have occurred (a) in the performance of Claimants' investments,[731] and (b) in their conduct of the prior BIT I Cases.[732] Importantly, Respondent does not rest its admissibility objection on (c) any wrongdoing in Claimants' initial establishment of any investment, nor does it allege (d) any wrongdoing with respect to their conduct of this arbitration.[733] These distinctions are important for the Tribunal's analysis.

460. First, it is widely accepted that illegalities in the *initial establishment* of an investment may preclude treaty protection, rendering a tribunal without jurisdiction to examine any merits claims. This flows directly from the wording of many investment treaties, and some tribunals have found it to be implicit even if not so specified.[734] But wrongdoing in the subsequent *performance* of an investment is generally considered not to bar a tribunal from hearing a dispute, even though it may be quite relevant to the merits of the parties' respective claims or defenses or as a factor in assessing damages.[735] In the latter scenario, where a tribunal has jurisdiction to hear treaty claims on the merits, it generally should do so – considering allegations of wrongdoing within the substantive context of the various issues that it is called upon to decide. The alternate course that Respondent urges, namely a refusal *even to entertain* treaty claims over which it has jurisdiction, because of

[731] Specifically, Respondent invokes the BIT I Tribunals' finding that Claimants more likely than not paid a bribe to stop the 2012 E&Y Audit of Savan Vegas, channeling funds to an unknown "Government person or persons" through an intermediary, Mme. Sengkeo. *See* Respondent's Submission on the BIT I Awards, ¶ 37; *see also* R-264, ICSID BIT I Award, ¶¶ 136-139; R-265, PCA BIT I Award, ¶¶ 135-138. Respondent also invokes the BIT I Tribunals' findings that Claimants more likely than not paid a bribe in 2012 to try to persuade officials to suspend ST's slot club license at Thanaleng. *See* Respondent's Submission on the BIT I Awards, ¶¶ 38, 58-61; *see also* R-264, ICSID BIT I Award, ¶ 148; R-265, PCA BIT I Award, ¶ 147.

[732] Specifically, Respondent invokes the BIT I Tribunals' finding that Claimants more likely than not made payments intended to persuade Mme. Sengkeo not to testify on Respondent's behalf. *See* Respondent's Submission on the BIT I Awards, ¶¶ 30-34; *see also* R-264, ICSID BIT I Award, ¶¶ 156-157, 238(c); R-265, PCA BIT I Award, ¶¶ 155-156, 176(c).

[733] As Claimants observe, Respondent never contended, at any time before or during the Hearing in this case, that it wished to obtain evidence from Mme. Sengkeo in this proceeding. Claimants' Submission on the BIT I Awards, ¶¶ 74, 130. Nor did it argue that any prior interference with her testimony in the BIT I Cases had deprived it of the ability to present its case in this arbitration.

[734] *See generally* RL-142, J. Kalicki, M. Silberman and B. McAsey, "What are the Appropriate Remedies for Findings of Illegality in Investment Arbitration?" in A. Menaker (ed.), INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY, ICCA Congress Series 19 (2018) ("Kalicki *et al*., Remedies for Illegality"), p. 722 & n.5 (citing cases).

[735] *See generally* RL-142, Kalicki *et al*., Remedies for Illegality, p. 721 ("Different illegalities raise different conceptual questions, involve different procedural issues, and, accordingly, require different remedies."); *id.*, p. 731 (explaining that improper conduct after acquisition of an investment has been treated variously as a merits defense, as a basis for a counterclaim, or as a factor in assessing damages).

certain bad acts by the investor during the life of the investment, would impose an ongoing legality qualification for dispute resolution which the BIT itself does not demand.

461. Second, wrongdoing by a party in the *conduct of an arbitration* should be taken very seriously by the tribunal which has authority to administer that proceeding, and by any authority called upon to enforce its award. In extreme circumstances, such wrongdoing may rise to the level of an abuse of process, resulting in a forfeiture of the wrongdoer's continued access to the arbitral forum. But it is a quantum leap from that proposition to the one Respondent posits here, namely that wrongdoing in a *prior* arbitration should bar a party from any right to pursue relief in a *later* one.[736] The Tribunal sees no basis to accept this extreme proposition, and does not do so.

462. Respondent's admissibility objection is therefore denied.

463. Accordingly, the Tribunal need not examine for purposes of any threshold admissibility determination the other points that the Parties debate about the BIT I Tribunals' findings of wrongdoing. This includes whether to give weight to findings by those tribunals that were announced to be established on a "balance of probabilities," yet also were found expressly *not* to meet the higher threshold of "clear and convincing evidence" that the BIT I Tribunals stated they would require to prove bribery, corruption or other grave illegalities.[737] It also includes the potential relevance of additional evidence that was submitted in this case but not previously in the BIT I Cases, ostensibly because of the "frozen record" agreement which applied after those cases were revived.[738] The Tribunal understands the Parties' respective positions on these issues. In its own consideration of the merits of the Parties' dispute, it has evaluated all relevant evidence based on its own assessment of their persuasive value, bearing in mind the nature of the allegations at issue and the cogency of the proof. It has not simply deferred to the analyses of prior tribunals.

[736] *See* Respondent's Submission on the BIT I Awards, ¶ 35 (contending that in light of Claimants' conduct in the BIT I Cases, "[t]his Tribunal simply cannot verify the legitimacy of the facts placed before it and relied upon by Claimants to support the merits of their claims. Through Claimants' own bad faith abuse of the arbitration process, they have forfeited … any right to 'relief of any kind from an international tribunal.'") (citations omitted).

[737] R-264, ICSID BIT I Award, ¶¶ 7, 109-110, 278; R-265, PCA BIT I Award, ¶¶ 107-108.

[738] *See, e.g.,* Claimants' Submission on the BIT I Awards, ¶¶ 37-40, 73 (noting submission in this case of expert evidence from Mr. Kurlantzick which Claimants were not permitted to introduce in the BIT I Cases).

VI. LIABILITY

464. As noted above, Sanum presents claims in connection with eight different events, and contends that the Respondent's actions with respect to each event violated its obligations with respect to expropriation under Article 4 of the China-Lao BIT. Unlike the *LHNV* case, this case does not involve any claims other than expropriation. Nor does it involve the additional event (non-recognition of the 2016 ST SIAC Award) that is addressed on its merits in the separate decision being rendered in the *LHNV* case today.

465. The Respondent rejects each of the claims pursued by Sanum. Below, the Tribunal summarizes each claim asserted and the Parties' respective positions on that claim, before setting out the Tribunal's analysis.

A. SEIZURE AND SALE OF THE SAVAN VEGAS CASINO

(1) The Claim Asserted

466. Sanum argues that by virtue of the seizure and sale of the Savan Vegas Casino, the Respondent expropriated its investment in breach of Article 4 of the China-Lao BIT.[739]

(2) The Parties' Positions

a. Claimants' Position

(i) Expropriation

467. Sanum argues that the Respondent violated Article 4(1) of the China-Lao BIT by a "direct expropriation" of its investment in Savan Vegas, without meeting the conditions established therein, including for compensation as further provided in Article 4(2).[740] To establish its investment, Sanum submits that at all times relevant to the present dispute, it has held 80% of the shares in Savan Vegas.[741]

[739] LHNV presents an equivalent claim about expropriation in breach of Article 6 of the Lao-Netherlands BIT, and also claims for unreasonable impairment of its investment in violation of Article 3(1) of that BIT, and violation of Article 3(4) of that BIT, the "umbrella clause," by failing to comply with local law, in particular Article 61 of the 2009 Law on Investment Promotion and Article 15 of the Lao Constitution. *See* Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.C; Claimants' Reply, Section IV.D.

[740] Claimants' Memorial, ¶ 345.

[741] Claimants' Memorial, ¶ 346.

468. Sanum acknowledges that under Article 4(2) of the Lao-China BIT, compensation for an expropriation is to be calculated from the date that expropriation is "proclaimed."[742] It maintains that this proclamation took place on 16 April 2015 when the Respondent announced it was going to, and subsequently did, "exercise[] [its] police power in seizing physical control over Savan Vegas"; this act was then ratified on 28 September 2015, when the Respondent issued a declaration divesting Claimants of their rights in Savan Vegas and establishing a new company to carry on its operations.[743] Sanum adds that on 24 October 2015, the Respondent admitted in writing to the SIAC Tribunal that it had committed an expropriation.[744] Sanum also complains about the subsequent sale of the new company, suggesting that the sale value was much lower than the "actual value" of the assets transferred.[745]

469. In Sanum's view, fixing the expropriation as the of date it was first "proclaimed" (which it claims was on 16 April 2015) is consistent with the customary international law goal ensuring that compensation will reflect the "genuine value of the investments affected."[746] To use a later date, including that on which the expropriating party officially recognized an earlier *de facto* expropriation, would enable the expropriating party to benefit from the "drastic [change in] valuation that would have occurred since the taking of affected investments had actually transpired."[747]

(ii) **Response to the Respondent's Defenses**

470. Sanum rejects (as "incorrect") the Respondent's defenses regarding the seizure of Savan Vegas.[748]

471. First, Sanum argues that the 2017 SIAC Award does not insulate the Respondent because the claims here present a different set of issues that were not before the SIAC Tribunal, let alone decided by

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[742] Claimants' Memorial, ¶ 348.

[743] Claimants' Memorial, ¶¶ 347-348.

[744] Claimants' Memorial, ¶ 347; Claimants' Reply, ¶ 453; citing C-15, Prof. Don Wallace, Jr. letter to SIAC Tribunal re Expropriation, 23 October 2015, p.4.

[745] Claimants' Reply, ¶ 147.

[746] Claimants' Memorial, ¶ 348, citing CL-136, Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principle*, 2d ed. (OUP: Oxford, 2017) §§ 9.10-9.12, pp. 415-416; CL-137, Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages, and Valuation* in Muchlinski, Ortino & Schreuer, eds., *The Oxford Handbook of International Investment Law* (OUP: Oxford, 2008), pgs. 1082-1083; CL-138, Michael Reisman & Robert Sloan, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BYIL 115 (2003).

[747] Claimants' Memorial, ¶ 348.

[748] Claimants' Reply, ¶ 455.

it.[749] According to Sanum, the question before this Tribunal is not whether Claimants rightfully suspended their performance under the Deed of Settlement, or whether the Government was contractually entitled to terminate Claimants' control over the casino and appoint a third-party gaming operator, which were issues before the SIAC Tribunal.[750] Rather, the question here – which was not before the SIAC Tribunal – is whether the Respondent substantially interfered with Savan Vegas' operations so as to constitute an expropriation.[751] In Sanum's view, "[c]ontractual good faith with respect to management of a property is not an element of any of these claims, so a finding of contractual good faith under New York law is irrelevant to these proceedings."[752]

472. Second, Sanum says the Respondent cannot shield itself by invoking the 18 June 2015 termination of the Savan Vegas PDA, since that took place two months after the physical seizure of the Savan Vegas Casino.[753] That termination in any event was not justified by either of the rationales it recited, namely the Claimants' purported failure to pay taxes or its alleged criminal activity.[754] Sanum contends that the Tribunal may consider that question without regard to the SIAC Tribunal's findings about PDA termination, since that tribunal was never vested with authority to examine (nor did it examine) whether the PDA was lawfully terminated according to its terms. The SIAC Tribunal's remit was to determine only whether PDA termination breached the Deed of Settlement; neither party presented arguments about whether termination was permitted under the Lao law which governed the Savan Vegas PDA.[755]

473. Moreover, with respect to the taxation pretext for PDA termination, the SIAC Tribunal's findings must be reconsidered in light of the BIT I Tribunals' later finding (in their decisions on the second material breach applications) that the Respondent itself violated the Deed of Settlement by imposing a 28% tax rather than a true "flat tax" as the Parties had agreed.[756] Sanum also argues that the tax delinquency in question (which also led to the withholding of US$26,659,000 from the Casino's sale proceeds) was based on tax rates that are alleged in this case to have been

[749] Claimants' Reply, ¶ 455 (cross-referencing arguments in prior sections of the submission).
[750] Claimants' Reply, ¶¶ 140-146.
[751] Claimants' Reply, ¶ 147.
[752] Claimants' Reply, ¶ 147.
[753] Claimants' Reply, ¶ 453.
[754] Claimants' Reply, ¶ 455 (cross-referencing arguments in prior sections of the submission).
[755] Claimants' Reply, ¶¶ 118-120, 127.
[756] Claimants' Reply, ¶ 128.

discriminatory, far higher than imposed on other gaming enterprises in Laos; discriminatory taxation cannot be a valid excuse for confiscation.[757]

474. With respect to the alternate bribery/corruption basis for PDA termination, Sanum contends that this was not the real contemporaneous reason for termination, and cannot in any event explain why the Respondent failed to accord Sanum any due process – including the opportunity to hear and confront the allegations against it – before terminating the PDA and expropriating Savan Vegas.[758] Sanum also notes that the BIT I Tribunals found the Respondent's allegations regarding bribery (for example in relation to the Ernst & Young audit) were "not established" to the "standard of 'clear and convincing evidence,'"[759] and criticizes the BIT I Tribunals' statements about a "balance of probabilities" as based on speculative or erroneous evaluation of evidence.[760]

475. Sanum presents further arguments about the taxation and bribery/corruption rationales for PDA termination, in the context of its submissions on the CFA Loan claim, discussed in Section VI.C. below.

476. Finally, Sanum rejects the Respondent's reliance on certain investment treaty awards for the proposition that international law permits a "lawful termination of a contractual relationship between a host State and a foreign investor" without compensation. In Sanum's view, these cases each show how host States can legitimately terminate a concession or a contract, in contrast to how the Respondent itself proceeded.[761] Specifically, Sanum argues that:

a. *Swisslion* can be distinguished by the fact that the agreement there was not unilaterally terminated but instead submitted to fair resolution by the courts (and in any event, the tribunal there found a violation of fair and equitable treatment obligations);[762]

b. *Malicorp* can be distinguished by the host State's honestly (albeit mistakenly) held belief that the investor was unable to meet its contractual obligations;[763]

[757] Claimants' Reply, ¶¶ 160-173.

[758] Claimants' Reply, ¶¶ 363, 369-370.

[759] Claimants' Submission on the BIT I Awards, ¶ 75.

[760] Claimants' Submission on the BIT I Awards, ¶¶ 80-82.

[761] Claimants' Reply, ¶ 456, citing Respondent's Counter-Memorial, ¶¶ 332-341.

[762] Claimants' Reply, ¶ 457, citing RL-104, *Swisslion DOO Skopje v. Macedonia*, ICSID Case No. ARB/09/16, IIC 558 (2012), Award, 6 July 2012 ("***Swisslion***"), ¶¶ 287-299.

[763] Claimants' Reply, ¶ 458, citing RL-122, *Malicorp Ltd v. Egypt*, ICSID Case No. ARB/08/18, IIC 476 (2011), Award, 7 February 2011, ¶¶ 124-126, 130, 136, 143.

c. *Parkerings* confirmed that a "substantial breach" of an underlying contract could amount to a fair and equitable treatment breach, but found that the claimant had failed to prove wrongful termination of contract or that its right to complain had been denied by the State's courts;[764]

d. *Tokios Tokelės* likewise concluded that a State would breach fair and equitable treatment obligations by using its sovereign powers to 'harass, intimidate, or retaliate against an investor for political purposes," but found insufficient evidence to make that case; moreover, unlike in *Tokios Tokelės*, here the Respondent terminated the PDA *after* expropriating the Savan Vegas Casino, and the PDA termination was a "*post hoc* pretextual explanation," and "anything but the inevitable conclusion of a fair and balanced exercise of regulatory enforcement undertaken in good faith";[765] and finally,

e. *Genin* is inapposite because that tribunal adopted an "inappropriately narrow construction of the relevant treaty's FET clause," and because the host State's conduct was not as egregious as the Respondent's conduct in this case.[766]

b. Respondent's Position

477. The Respondent contends that its lawful termination of the Savan Vegas PDA bars claims related to the seizure of Savan Vegas, as well as claims (addressed separately in Section VI.C. below) related to the CFA Loans.

478. In the Respondent's view, the Savan Vegas PDA "represents the core bundle of rights acquired by Sanum to operate the Savan Vegas investment in the Lao PDR." That PDA however provided the Lao PDR with an explicit contractual right to terminate the investment if Sanum breached its corresponding obligations.[767] In this instance, the Government lawfully terminated the PDA as a direct result of Claimants' "undisputed failure to pay tax, documented corrupt behavior, including

[764] Claimants' Reply, ¶ 459, citing RL-123, *Parkerings-Compagniet A.S. v. Lithuania*, ICSID Case No ARB/05/8, IIC 302 (2007), Award on Jurisdiction and Merits, 11 September 2007 ("***Parkerings***"), ¶¶ 256-266.

[765] Claimants' Reply, ¶¶ 460-461, citing RL-125, *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/08/18, Award, IIC 331 (2007), 26 July 2007 ("***Tokios Tokelės***"), ¶¶ 2-4, 126 and Dissenting Opinion, ¶¶ 2-4.

[766] Claimants' Reply, ¶ 462, citing RL-124, *Genin v Estonia*, Award, ICSID Case No ARB/99/2, (2002) 17 ICSID Rev-FILJ 395, (2001) 6 ICSID Rep 236, IIC 10 (2001), 25 June 2001, ¶¶ 352-371.

[767] Respondent's Counter-Memorial, ¶ 256.

bribery, and financial irregularities." This termination complied with Lao law and international law, the Respondent says, and provided Claimants with due process.[768]

479. With respect to taxation, the Respondent notes that according to Article 24(5) of the PDA, the "Government shall be entitled to terminate this Agreement unilaterally" if Sanum "fails to perform its obligations" under Articles 4, 9 or 10. Article 10(1) of the PDA provided that Sanum "shall be liable to fully perform customs duty and tax obligation to the Government" according to applicable laws, and Article 10(2) specified that one of the relevant obligations "[f]or the Casino business" was to "execute the tax obligation in accordance with the tax law of Lao PDR."[769] While the 2009 Savan Vegas FTA allowed Sanum to pay tax at a "greatly reduced rate" for five years, this agreement expired on 31 December 2013.[770] The Deed of Settlement anticipated a process for establishing a new tax rate to apply from 1 July 2014, but this did not relieve Sanum of its overarching obligation under the PDA to pay taxes in the interim. To the contrary, the Respondent says, the Deed of Settlement provided in Section 6 that the Savan Vegas PDA should be treated "as being restated as of the Effective Date …."[771] Yet Sanum immediately breached its duties under the PDA and the Deed by refusing to pay any taxes at all from 1 July 2014, and both the SIAC and ICSID BIT I Tribunals denied provisional measures requests with respect to Sanum's tax obligations.[772] Sanum continued not to pay taxes, even after the Government put Claimants on notice that its ongoing failure to pay taxes would result in termination of the PDA (and sent three "required notices of delinquency" in accordance with the PDA and Lao law); the Government appropriately acted on that notice after the SIAC Tribunal declined to enjoin PDA termination.[773] The SIAC Tribunal later found that the "admitted failure to have Savan Vegas pay any taxes permitted Laos to unilaterally terminate the 2007 PDA," pursuant to the PDA's own terms.[774] As for Claimants' argument that the particular tax rate assessed was wrongful, the Respondent says

[768] Respondent's Counter-Memorial, ¶ 257.

[769] Respondent's Counter-Memorial, ¶¶ 260-262 (referencing these Articles); R-33, Savan Vegas PDA, Articles 10(1), 10(2), 24.

[770] Respondent's Counter-Memorial, ¶ 264.

[771] Respondent's Counter-Memorial, ¶¶ 266-267.

[772] Respondent's Counter-Memorial, ¶¶ 270-276.

[773] Respondent's Counter-Memorial, ¶¶ 276-279.

[774] Respondent's Counter-Memorial, ¶ 330.

that an investor's view to that effect cannot justify its unilateral decision to stop paying taxes altogether.[775]

480. The Respondent adds that termination of the Savan Vegas PDA was consistent not only with the PDA's own terms, but also with the 2009 Law on Investment Promotion on which Claimants rely, which obligates concessionaires "[t]o fully pay duties, taxes and other fees in a timely manner" and provides that the "investment shall be cancelled" after the investor is provided with a series of notices but fails to cure the relevant delinquencies.[776] The Respondent cites various investment treaty awards for the proposition that PDA termination for failure to pay tax was "completely within the norms of public international law,"[777] and contends that "[i]n the absence of special circumstances, taxation does not constitute 'expropriation' or otherwise violate international law."[778]

481. With respect to bribery and corruption – the Respondent's other stated basis for PDA termination – the Respondent contends that in the highly regulated gaming industry, it was appropriate for it to act based on the evidence before it: "[i]n all gaming jurisdictions, criminals are not tolerated as gaming operators."[779] The 2009 Law on Investment Promotion clearly prohibits investors from providing bribes, and states that an investment "shall" be cancelled where a party violates contractual obligations or Lao laws and regulations.[780] The Respondent states that as of the date of PDA termination (June 2015), it already had gathered (and introduced in the BIT I arbitrations) evidence of various bribes, including one in neighboring Cambodia to obtain a lottery license, and another involving payments to Mme. Sengkeo to facilitate a bribe to obstruct the Ernst & Young audit of Savan Vegas' finances. The Respondent adds that upon taking control of Savan Vegas and obtaining access to its files, the Government "immediately discovered new evidence" of corruption within Laos and in relation to Savan Vegas, including evidence of a bribe in 2009 to

[775] Respondent's Rejoinder, ¶¶ 127-131 (citing provisional measures decisions of the BIT I and SIAC tribunals). With respect to the tax rate, the Respondent argues that it could have taxed Savan Vegas at the Lao law code rate (35% of gross gaming revenue plus 10% VAT) from 1 January 2014 through the date of PDA termination, but it elected instead to seek specific performance of the Deed of Settlement from the SIAC Tribunal, and thus eventually applied the 28% tax rate Mr. Va eventually determined, in order to calculate Savan Vegas' tax delinquency for purposes of deducting it from Sanum's share of the Macau Legend sale proceeds. Respondent's Counter-Memorial, ¶ 292.

[776] Respondent's Counter-Memorial, ¶¶ 280-282 (quoting Articles 69 and 76 of the 2009 Law on Investment Promotion); Respondent's Rejoinder, ¶¶ 124, 132.

[777] Respondent's Counter-Memorial, ¶¶ 283-286 (citing RL-101, *Oostergetel*).

[778] Respondent's Counter-Memorial, ¶¶ 287-291.

[779] Respondent's Counter-Memorial, ¶ 293.

[780] Respondent's Counter-Memorial, ¶¶ 295-296 (quoting Articles 73 and 76 of the 2009 Law on Investment Promotion); Respondent's Rejoinder, ¶ 139.

obtain the original Savan Vegas FTA.[781] This evidence of illegal activity justified the Government's termination of the Savan Vegas PDA in June 2015, Respondent says,[782] and the Claimants received due process in the form of the SIAC arbitration, which was the "contractually-mandated legal procedure" the Parties agreed would resolve disputes between them.[783] The Respondent adds that the BIT I Tribunals later validated its concerns, by finding it more probable than not that the Claimants offered bribes to stop the Ernst & Young audit,[784] and that the Government already had alleged such bribery prior to the termination of the Savan Vegas PDA.[785]

482. According to the Respondent, the justified termination of the Savan Vegas PDA "effectively cancelled [SVCC's] Concession, and thereby the permits, licenses, certificates and registrations necessary to operate a business in the Lao PDR."[786] The assets of Savan Vegas were then transferred to SVLL to hold until a sale could take place as contemplated by the Deed of Settlement, in a process that was "thoroughly canvassed in the SIAC Arbitration."[787] The SIAC Tribunal found that the transition of control of the gaming assets complied with the Parties' agreement to sell the assets; the legal consequences of this finding are that the Government did not violate Sanum's rights in April 2015 when it effectuated the transition of control,[788] just as it did not do so with respect to the PDA termination two months later in June 2015.[789] The Respondent rejects Claimants' suggestion that the SIAC Tribunal did not have jurisdiction to make findings about PDA termination, arguing that both Parties put that termination directly before the SIAC Tribunal, in the context of their arguments about contractual rights and obligations under the PDA that were incorporated into the Deed of Settlement.[790]

483. The Respondent argues that while the SIAC Tribunal's findings related to the Parties' contractual rights rather than treaty claims, the "final determination of this contract dispute was within its

[781] Respondent's Counter-Memorial, ¶¶ 297-315; Respondent's Rejoinder, ¶¶ 158-160.

[782] Respondent's Rejoinder, ¶¶ 162, 165. The Respondent rejects Claimants' argument that its invocation of bribery and corruption was a "pretext" developed later, contending that the Government had contemporaneous evidence prior to the termination of the Savan Vegas PDA. Respondent's Submission on the BIT I Awards, ¶¶ 45-51.

[783] Respondent's Rejoinder, ¶¶ 170, 174-175.

[784] Respondent's Submission on the BIT I Awards, ¶ 37.

[785] Respondent's Submission on the BIT I Awards, ¶¶ 45-47.

[786] Respondent's Counter-Memorial, ¶ 317.

[787] Respondent's Counter-Memorial, ¶¶ 318-321.

[788] Respondent's Counter-Memorial, ¶ 323.

[789] Respondent's Counter-Memorial, ¶ 330.

[790] Respondent's Rejoinder, ¶¶ 120-121, 170-171 (noting *inter alia* that the Claimants pled before the SIAC Tribunal that the Lao PDR "breached the [Deed of] settlement by expropriating Respondent's assets," specifically when it "terminated the Savan Vegas PDA" and "expressly expropriated Savan Vegas by government decree").

competence" and is entitled to preclusive effect,[791] in the absence of any showing of procedural or substantive defects that would render the SIAC proceedings unacceptable from the viewpoint of international law.[792] As to the treaty claims in this case, the Respondent adds, there is "ample authority in international law" that where a government terminates a concession contract in compliance with the contract's own terms, such termination does not give rise to a treaty violation or require compensation for expropriation.[793] Other cases have held that the legitimate termination of a concession for wrongdoing likewise does not constitute a taking or otherwise violate international law.[794]

(3) The Tribunal's Analysis

484. Article 4 of the China-Lao BIT begins as follows:

> Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting state in its territory, unless the following conditions are met ….[795]

The provision then sets forth a series of conditions under which an expropriation, as defined in the passage above, would be legal and permissible under the BIT.

485. To invoke Article 4, a claimant must first demonstrate, in accordance with the Article's terms, that the respondent State took measures that deprived it of a right or asset which qualifies as an investment under the BIT. This is a matter of first principles: the doctrine of expropriation involves protected rights in property. As the tribunal in *Emmis* observed, that proposition is inherent in the word "expropriation" itself, which is built on the Latin root for "property"; a finding of expropriation accordingly must be premised on a showing that "Claimants … held a property right

[791] Respondent's Counter-Memorial, ¶ 331.

[792] Respondent's Rejoinder, ¶ 122.

[793] Respondent's Counter-Memorial, ¶¶ 333-336 (citing *Swisslion*, *Malicorp*, and *Parkerings*).

[794] Respondent's Counter-Memorial, ¶¶ 337-341 (citing *Genin* and *Tokios Tokelės*).

[795] CL-49, China-Lao BIT, Art. 4(1).

of which they have been deprived."[796] The property right or asset in question "must have vested (directly or indirectly) in the claimant for him to seek redress."[797]

486. Here, Sanum focuses on its interest in the Savan Vegas Casino and Savan Vegas PDA, through its ownership of 80% of the shares of SVCC.

487. Unlike some of the prior arbitrations between the Parties, this case challenges measures taken *after* the Deed of Settlement. Accordingly, Sanum's rights with respect to Savan Vegas must be defined as the ones it held in the wake of that Deed, and not those preceding it. Most notably, by virtue of its agreement to the Deed of Settlement and its Side Letter, Sanum no longer had unfettered rights to control and operate the Savan Vegas Casino. Rather, as discussed in Section III.E, *its legal rights were the following*, conceptually organized into three categories of "control," "sale," and "receipt":

- *Control:* To continue to manage and operate the "Gaming Assets" – defined to include the Savan Vegas PDA and associated licenses and concessions issued in connection with the casino – *until* either a sale of those assets to an unrelated third party, or a period of ten months, whichever was earlier;[798]

- *Sale*: That the sale of the Gaming Assets would take place "on a basis that will maximize Sale proceeds," for which it was agreed that the Savan Vegas PDA would be treated as having a remaining 50-year term, and that taxes would be due from 1 July 2014 based on a "new flat tax" to be determined;[799] and

- *Receipt*: To receive 80% of *the sale proceeds*, less sales costs.[800]

After the conclusion of these steps, "Sanum would have no further interest in Savan Vegas or in its relationship to Laos," in the words of the SIAC Tribunal.[801]

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[796] CL-171, *Emmis International Holding, B.V., et al. v. Hungary*, ICSID Case No. ARB 12/2, Award, 16 April 2014 ("***Emmis***"), ¶ 159; *see also id.*, ¶ 161 (explaining that "[t]he need to identify a proprietary interest that has been taken is confirmed by the definition of 'investment' in the Treaties," which refers to "assets," a term whose ordinary meaning itself involves an item of property or property rights).

[797] CL-171, *Emmis*, ¶ 168 (citing numerous cases requiring identification of the rights duly held by a claimant as precondition to determining if those rights were taken).

[798] R-5, Deed of Settlement, 15 June 2014, Sections 5, 10-12, 14.

[799] R-5, Deed of Settlement, 15 June 2014, Sections 6, 8, 9, 13.

[800] R-5, Deed of Settlement, 15 June 2014, Section 6, as clarified by Side Letter to the Deed of Settlement, 18 June 2014, p. 1.

[801] R-27, 2017 SIAC Award, ¶ 248.

488. With this understanding of Sanum's legal rights, *the facts* relevant to determining if it was deprived of these rights may be summarized as follows:

- Although the Parties had various disputes about compliance with the Deed of Settlement, the Lao PDR advised Claimants in December 2014 and March 2015 that, in the absence of any sale or binding MOU with a purchaser of Savan Vegas, it intended to proceed with the transfer of control at the end of the agreed ten-month period, *i.e.*, on 15 April 2015.[802]

- The ICSID BIT I Tribunal denied LHNV's request for provisional measures related to the transfer of control, as well as the threatened termination of the Savan Vegas PDA and the subsequent sale.[803]

- On 16 April 2015, the Lao PDR took physical control of the Casino and appointed a manager-operator pending the sale;[804]

- On 18 June 2015, the Lao PDR notified Sanum of its intent to terminate the Savan Vegas PDA and all associated licenses and concessions, for various reasons stated therein;[805]

- On 30 June 2015, the SIAC Tribunal denied Claimants' request for provisional measures requiring the return of the casino to Sanum's control and barring termination of the Savan Vegas PDA,[806] and the next day the Lao PDR confirmed PDA termination effective from 18 June 2015;[807]

- On 28 September 2015, the Lao PDR issued a declaration formally transferring all assets owned by SVCC to SVLL in order to accomplish the sale;[808]

[802] R-12, Letter from Dr. Bounthavy Sisouphanthong, Vice Minister Ministry of Planning and Investment, to John Baldwin and Christopher Tahbaz, 24 December 2014; R-152, Letter from Dr. Bounthavy Sisouphanthong to John Baldwin and Christopher Tahbaz, 30 March 2015.

[803] R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶ 49; R-14, Email from Judge Ian Binnie to Christopher Tahbaz, 14 April 2015.

[804] R-27, 2017 SIAC Award, ¶ 124; C-509, ICSID 2MBA Decision, ¶ 59.

[805] R-64, PDA Termination Notice, 18 June 2015.

[806] R-17, Order on Respondents' Amended Application for Provisional Measures, SIAC Case, 30 June 2015.

[807] R-65, Letter regarding PDA Termination, 1 July 2015.

[808] C-509, ICSID 2MBA Decision, ¶ 75.

- Claimants thereafter objected that the new PDA which was to be executed with the eventual purchaser contained less favorable terms than the Savan Vegas PDA, but the SIAC Tribunal declined to intervene in the sale process;[809]

- Following efforts to conduct an auction, the Lao PDR eventually decided to accept a direct purchase offer from Macau Legend, on the basis of a process and on terms which were contemporaneously reported to the SIAC Tribunal;[810] the sale of the Savan Vegas Casino to Macau Legend closed on 31 August 2016;[811]

- The SIAC Tribunal later rejected in substance Claimants' claim based on differences between the Savan Vegas PDAs and the Macau Legend PDA, and found Claimants had breached their Deed of Settlement obligations by failing to take steps to carry out the Savan Vegas sale during the ten months they remained in control of the Casino;[812]

- The SIAC Tribunal later reviewed and approved the allocation of the US$42 million sale proceeds: it found that (a) the Government had been "entitled to designate and collect US$26,659,000 of the sale proceeds of Savan Vegas as taxes," calculated on the basis of the 28% *ad valorem* tax determined by Mr. Va, and (b) the balance of US$15,341,000, which the Government had placed in escrow pending the SIAC Tribunal's award, was to be shared between Savan Vegas' shareholders proportionate to their respective stake, after deductions for sales costs pursuant to the Deed of Settlement and arbitration costs which the SIAC Tribunal assessed;[813]

- The BIT I Tribunals later disagreed (in the Material Breach proceedings) with the way Savan Vegas' unpaid tax liability had been calculated, finding that the *ad valorem* rate applied was inconsistent with the Deed of Settlement's provision for a "new flat tax";[814] however, given the nature of the Material Breach proceedings, which were solely for the purpose of determining whether the BIT I proceedings could be revived, the BIT I

[809] C-481 and R-27, 2017 SIAC Award, ¶ 127; C-509, ICSID 2MBA Decision, ¶ 76.
[810] C-481 and R-27, 2017 SIAC Award, ¶¶ 124-137
[811] C-509, ICSID 2MBA Decision, ¶ 86.
[812] C-481 and R-27, 2017 SIAC Award, ¶¶ 184-191, 229-232.
[813] C-481 and R-27, 2017 SIAC Award, ¶¶ 312-327.
[814] C-509, ICSID 2MBA Decision, ¶¶ 168-174; C-562, PCA 2MBA Decision, ¶¶ 156-162.

Tribunals did not make any finding regarding the proper alternative tax rate, nor did it order any resulting redistribution of the Casino sale proceeds.

489. These facts necessarily inform any assessment of Sanum's expropriation claim. The Tribunal approaches that assessment in three parts, focusing respectively on the three categories of legal rights (identified above) that Sanum actually had under the Deed of Settlement.

(i) The right to manage and operate the Gaming Assets

490. First, with respect to the right to manage and operate the Casino and other "Gaming Assets," this was time-limited as a matter of contract. Under the Deed of Settlement, the control rights lapsed after ten months if Claimants had not concluded a sale before that time. Otherwise stated, *Sanum had no legal right to manage or operate the Casino after ten months*. Sanum did not voluntarily yield control, however. As for the Lao PDR, it waited ten months to act. In this context, the fact that the Lao PDR thereafter took unilateral action to accomplish the transfer of control – first by commandeering the physical assets and then by a decree transferring legal control – does not equate to expropriation. The same conduct might have been expropriatory had Claimants not already agreed to a transfer of control. But given the Deed of Settlement, the Lao PDR's actions with regard to the transfer of control were an *enforcement* of the Parties' contractual agreement, not a deprivation of Claimants' legal rights. These actions therefore cannot give rise to a valid claim for expropriation.

(ii) The right to a sale process seeking to maximize proceeds

491. Second, with respect to the sale process, Sanum has not proven a deprivation of its right that this process take place "on a basis that will maximize Sale proceeds" from the buyer. While it is true that the package of assets offered to prospective buyers did not include the Savan Vegas PDA– which had been terminated *inter alia* due to Savan Vegas' refusal to pay any taxes while a dispute over the proper rate was pending – the sale package *did* include an alternative long-term PDA. The SIAC Tribunal carefully examined the terms of that package, and rejected Claimants' allegation that it reflected a "sweetheart deal" designed to "depress the sale price" at Claimants' expense.[815] Rather, the SIAC Tribunal found that the Lao PDR had attempted in good faith "to ensure the highest price," in circumstances where there was "insufficient evidence that another credible, qualified and interested buyer existed when the Casino was being sold."[816] Moreover, the SIAC

[815] C-481 and R-27, 2017 SIAC Award, ¶¶ 252, 255.

[816] C-481 and R-27, 2017 SIAC Award, ¶ 255.

Tribunal observed that "the essential feature of the New PDA, like the 2007 PDA, was a guarantee of exclusive gaming rights for 50 years."[817] The sale to Macau Legend was also on the basis of a new "flat tax" agreement,[818] which was consistent at least in principle with the Deed of Settlement's proviso for taxation under a "new flat tax" over the remaining term of the Savan Vegas PDA. The SIAC Tribunal concluded that "even if it could be said that [the Government] was obliged to include the same terms contained in the 2007 PDA in the new PDA and that [it] failed to do so, we have no evidence before us quantifying any loss that could be directly attributable to the different terms in the two PDAs," or even establishing qualitatively that "the terms of the New PDA were important or even relevant to fixing the sales price."[819]

492. While such findings do not bind this Tribunal, Claimants have not demonstrated that an alternative finding is warranted in these proceedings. Accordingly, the Tribunal rejects Sanum's assertion that it was deprived of its legal right to a sale process which sought to "maximize Sale proceeds," by virtue of putative differences between (on the one hand) the Savan Vegas PDA and the "new flat tax" to be determined under the Deed of Settlement, and (on the other hand) the Macau Legend PDA and accompanying tax agreement. While it is possible that the terms of the latter resulted in a lower sales price than the terms of the former might have done, this has not been proven. In any event a sales price differential would not in and of itself equate to an "expropriation" of Sanum's legal right to a process which sought, in good faith, to maximize proceeds.

493. This is particularly true given that the Lao PDR had a good faith basis for terminating the Savan Vegas PDA. That PDA expressly authorized termination if Sanum caused Savan Vegas to fail to pay applicable taxes.[820] While the Parties subsequently disputed whether taxes had been assessed at the correct rate, given the agreement in the Deed of Settlement to a "new flat tax," the fact remains that Savan Vegas paid *no taxes at all* for an extended period beginning on 1 July 2014.[821] The SIAC Tribunal found that this non-payment permitted the Government to terminate the Savan

[817] C-481 and R-27, 2017 SIAC Award, ¶ 231.

[818] C-481 and R-27, 2017 SIAC Award, ¶ 136.

[819] C-481 and R-27, 2017 SIAC Award, ¶ 232.

[820] R-33, Savan Vegas PDA, 10 August 2007, Article 10(1) (requiring Sanum to "fully perform … tax obligation to the Government" according to applicable laws), Article 10(2) (requiring "the casino business" to "execute the tax obligation in accordance with the tax law of Lao PDR"), Article 24(5) (providing that "[i]n the event that the Company fails to perform its obligations" under Articles 4, 9 or 10, … the Government shall be entitled to terminate this Agreement unilaterally").

[821] This conclusion is not affected by Claimants' argument that Sanum "set aside" enough funds to meet what it considered would be a "lawful" tax assessment. Claimants' Opening Presentation, slide 113 (citing First Crawford Statement, ¶ 58). A taxpayer's decision to set aside funds is not the same as the remittance of funds to a tax authority.

Vegas PDA.[822] While the BIT I Tribunals thereafter disagreed with the rate at which taxes had been assessed, they likewise emphasized that "[t]he Casino had no right to operate in Laos free of tax," and indeed that Claimants had been warned of this prior to PDA termination, when their provisional measures requests were denied.[823] This Tribunal shares the view that Sanum's non-payment of *any* taxes while the dispute over the proper rate was pending was in contravention of the Savan Vegas PDA, and that the Lao PDR therefore had a good faith basis for exercising its contractual right of termination.

494. Given this conclusion, there is no need for the Tribunal to evaluate the correctness of the Government's other justifications for PDA termination, which were predicated on its view that Claimants had engaged in criminal activity. Nor does the Tribunal have to evaluate Claimants' counterargument that PDA termination on that additional basis was improper without any procedure first being offered to Claimants to respond to accusations of criminal activity. The existence of one good faith basis for terminating the Savan Vegas PDA – the complete cessation of all tax payments – renders it irrelevant whether the Government had additional good faith bases for so acting.

(iii) The right to receive 80% of the sale proceeds

495. Finally, with respect to Sanum's contractual right to receive 80% of the sale proceeds, less sales costs, it is notable that the calculation of distributions was overseen by the SIAC Tribunal, and was not a function of unilateral action by the Lao PDR. The State did collect from this sum the unpaid tax liability based on Mr. Va's calculations, but then it placed the balance in escrow "to be released to and divided between the Parties per the instructions of the [SIAC] Tribunal."[824] It then waited for the SIAC Tribunal's decision and distributed the funds accordingly. Sanum had a full opportunity to present its positions in the SIAC proceedings regarding the proper allocation of the sale proceeds.

496. While Sanum no doubt was unhappy with the decision the SIAC Tribunal rendered, it is difficult to see State action which was taken in express *compliance* with a contemporaneous decision of an agreed independent authority, in a case in which an investor actively participated, as expropriatory

[822] C-481 and R-27, 2017 SIAC Award, ¶ 231.
[823] C-509, ICSID 2MBA Decision, ¶¶ 184-185; C-562, PCA 2MBA Decision, ¶¶ 172-173.
[824] C-481 and R-27, 2017 SIAC Award, ¶ 296.

of that investor's legal rights.[825] This is true even though the BIT I Tribunals later disagreed with the SIAC Tribunal's finding regarding the rate at which Savan Vegas' outstanding tax liability should have been calculated. While it is true that a different method of tax calculation upfront would have resulted in a different balance to be placed into escrow for distribution according to the SIAC Tribunal's instructions, a State which complies with the contemporaneous decisions of a properly vested authority does not commit expropriation simply because another properly vested authority, with no hierarchical precedence over the first, later reaches a different conclusion after the State already has acted.

497. Moreover, an expropriation claim does not lie where the alleged deprivation is simply a portion of the overall value of an investment. Article 4 of the BIT, like many expropriation clauses, addresses measures depriving investors "of their investments,"[826] not simply reducing the value of an investment by some lesser amount. This reflects a virtual consensus in international law that in order to be expropriatory, State conduct must have (in the words of the *CME* tribunal) "effectively neutralize[d] the benefit" of the investment for the investor.[827] The *Electrabel* tribunal referred to "the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings," in explaining "the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment."[828]

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[825] *Cf.* CL-184, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("***Electrabel***"), ¶¶ 6.70-6.72 (finding that Hungary terminated a power purchase agreement pursuant a final decision of by the European Commission, and that "[w]here Hungary is required to act in compliance with a legally binding decision of an EU institution, … it cannot (by itself) entail international legal responsibility for Hungary. … [I]t would be absurd if Hungary could be held liable under the ECT for doing precisely that which it was ordered to do" by an authority whose decisions were legally binding on it).

[826] CL-49, China-Lao BIT, Art. 4.

[827] CL-106, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 150, 604.

[828] CL-184, *Electrabel*, ¶ 6.62; *see also* CL-32, *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶ 183 (the government measures at issue must cause "substantial effects of an intensity that reduces and/or removes the legitimate benefits . . . to an extent that they render their further possession useless"); CL-361, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 285 (the investment must have been "virtually annihilated"); CL-65, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ("***Tecmed***"), ¶¶ 115-116 (to satisfy this test, a claimant must demonstrate that it "was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the [investment] or its exploitation – had ceased to exist" or "the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed").

498. In this case, even if the Tribunal were to share the BIT I Tribunals' view (rather than the SIAC Tribunal's' view) that the rate applied was not consistent with the contractual understanding of a "flat tax," it has not been demonstrated that the tax assessed resulted in a taking of all the Casino's value. The BIT I Tribunals did not determine what amount would have been an appropriate "new flat tax" amount to apply, following the Deed of Settlement; they simply disagreed with the SIAC Tribunal that an *ad valorem* tax based on revenue was not, in its structure, a "flat tax." But while this would result in a *breach of contract* finding, it does not automatically equate to *expropriation*. Whatever the differential may have been between the rate that was applied to calculate Savan Vegas' outstanding taxes, and the rate that hypothetically should have been applied, it has not been shown that this differential was so large as to effectively nullify all value in Sanum's investment. In these circumstances, a putative error in calculating the appropriate tax level – before distributing the balance of sale proceeds proportionately to Savan Vegas' shareholders – would not qualify as an act of expropriation.

499. Finally, Sanum cannot elide this conclusion by redefining the relevant "investment" (for purposes of its expropriation claim) simply as *that which was taken*, as it appears to attempt when arguing that the tax expropriated "a claim to money."[829] The implication seems to be that by deducting an allegedly excessive amount in taxes from the Casino sales price, the Government expropriated whatever amount is shown to be excessive. By this theory, the loss of "x" dollars would equate to an expropriation of "x" dollars, even when the broader investment enterprise has not been expropriated; almost any economic impact of a State act could be deemed an expropriation, provided the investor first defined its relevant "investment" as only the particular interest (a "claim to money") which was impacted by the act.

500. The Tribunal agrees with other tribunals that have rejected similar attempts to redefine an investment into separate interests, rights and assets, in order to demonstrate expropriation of one of those pieces. As the *Electrabel* tribunal explained, "[i]f it were possible so easily to parse an investment into several constituent parts each forming a separate investment … it would render meaningless … [the] approach to indirect expropriation based on 'radical deprivation' and 'deprivation of any real substance' as being similar in effect to a direct expropriation or nationalisation. It would also mean, absurdly, that an investor could always meet the [magnitude

[829] Claimants' Memorial, ¶ 402.

of deprivation] test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test."[830]

501. For all the reasons above, the Tribunal rejects Sanum's expropriation claim with respect to the transfer and sale of Savan Vegas.

B. TAXATION

(1) The Claim Asserted

502. Sanum argues that the Respondent's tax treatment of Savan Vegas violated the China-Lao BIT by expropriating Sanum's investment in breach of Article 4 of that BIT.[831]

(2) The Parties' Positions

a. Claimants' Position

(i) Expropriation

503. Sanum maintains that in Laos, casinos always have been taxed on the basis of a flat tax, except for one instance: Savan Vegas' tax treatment from 1 July 2014 to 31 August 2016. During this period, the Respondent "purported to retroactively tax Savan Vegas at a rate of 28% of [gross gaming revenue], with no deduction for junket commissions or other promotional expenses required to attract VIP customers to the property." Meanwhile, Kings Roman Casino and Dansavanh Nam Ngum Resort Casino, the two other casinos in Laos, were always taxed on a flat-tax basis.[832]

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[830] CL-184, *Electrabel*, ¶ 6.57. *See also* CL-255, *Merrill & Ring Forestry L. P. v. Canada*, NAFTA, Award, 31 March 2010 ("***Merrill & Ring***"), ¶ 144 (for an expropriation inquiry, "the business of the investor has to be considered *as a whole* and not necessarily with respect to an individual or separate aspect, particularly if this aspect does not have a stand-alone character") (emphasis added); RL-109, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 ("***Telenor***"), ¶ 67 (rejecting an argument that the investor had suffered a total expropriation of the portion of its overall revenue that it was required to pay into a central fund, and holding that for an expropriation to occur, "the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value"); CL-114, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 ("***CMS***"), ¶¶ 256, 263-264 (rejecting the notion that an investment could be disassembled into a number of discrete rights, each of which is capable of being expropriated independently of the overall investment).

[831] LHNV presents an equivalent claim about expropriation in breach of Article 6 of the Lao-Netherlands BIT. It also claims that the Lao PDR treated its investment less favorably than other investors in the Lao PDR, in breach of Articles 4 and 3(2) of that BIT; violated Article 3(4) of the Lao-Netherlands BIT, the "umbrella clause," by failing to comply with local law, in particular Article 61 of the 2016 Law on Investment Promotion and Article 15 of the Lao Constitution; and interfered with LHNV's transfer of its investment out of Laos, in breach of Article 5 of the Lao-Netherlands BIT. *See* Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.E; Claimants' Reply, Section IV.C.

504. According to Sanum, the improper imposition of the 28% *ad valerem* tax rate on Savan Vegas in turn led to the Respondent's decision to withhold US$26,659,000 of the Savan Vegas sale proceeds, which constitutes an expropriation of Sanum's investment in violation of Article 4 of the China-Lao BIT.[833] Specifically, the Respondent expropriated "a claim to money and a right *in rem*, arising from the sale of the casino, as contemplated in the Settlement Deed."[834] That this act constitutes an unlawful expropriation is, according to Sanum, evidenced by the absence of compensation as well as the discriminatory manner in which it was executed.[835]

(ii) **Response to the Respondent's Defenses**

505. Sanum reiterates that the claims reflected above were not before the SIAC Tribunal, such that the Respondent's primary defense, which is based on its *res judicata* argument, fails.[836]

506. Sanum rejects the Respondent's reliance on a supposedly unfettered "sovereign right" to tax, which is misplaced even according to the acknowledgements in Professor Sornarajah's treatise – which the Respondent cites in support of its position – that excessive taxation may result in expropriation and that BIT clauses, as opposed to customary international law, govern expropriations.[837] The other authorities on which the Respondent relies are similarly inapplicable, as they include caveats on a State's taxing powers, or are awards distinguishable on the basis of the *prima facie* merits of the claims asserted or on the counsels' misunderstanding of the applicable law and procedure.[838]

507. Finally, Sanum seeks an adverse inference against the Respondent's defense, on the basis of its alleged failure to comply with the Tribunal's order to produce specific documentation relating to this claim.[839]

[833] Claimants' Memorial, ¶ 402.
[834] Claimants' Memorial, ¶ 402.
[835] Claimants' Memorial, ¶ 403.
[836] Claimants' Reply, ¶ 444.
[837] Claimants' Reply, ¶ 448, citing CL-296, M. Sornarajah, *The International Law on Foreign Investment* (4th ed. 2017), p. 486.
[838] Claimants' Reply, ¶¶ 449-450.
[839] Claimants' Reply, ¶ 451, citing Procedural Order No. 5, 18 May 2018, Annex B, Requests 22, 24, 26.

b. Respondent's Position

508. The Respondent argues that Sanum's taxation claim fails on the merits because, even if the arguments were factually correct (which they are not), they are not "legally significant."[840]

509. In general, the Respondent's position is that the Deed of Settlement and the 2017 SIAC Award's rulings on compliance with the Deed are central to disposition of Sanum's taxation claim.[841] The Respondent submits that the Deed "governed all aspects of the flat tax's creation from start to finish," which makes it "central to the 'result' achieved," because the Parties' commercial bargain to accept the outcome of the Flat Tax Committee as long as it was fair and reasonable was embodied by the Deed.[842]

510. Further, the Respondent contends that this claim was covered by the 2017 SIAC Award, which found that "[s]imply garnering evidence that US$2 million could be a fair and reasonable tax rate under the circumstances in Cambodia is not sufficient to prove that the 28% tax rate imposed on Savan Vegas in Laos was neither fair nor reasonable." This ruling precludes Sanum from re-arguing the point in the present proceeding.[843] Specifically, the Respondent notes that in the SIAC arbitration, Claimants rejected the use of the two other casinos in Laos as a basis to set Savan Vegas' tax rate, arguing that they were not a "reliable basis."[844] Sanum should not be permitted to reformulate its position now, inconsistently with its prior arguments, for the purpose of alleging treaty violations.[845]

(3) The Tribunal's Analysis

511. The Tribunal's accompanying decision in the *LHNV* case recaps at length the history that led to the tax rates imposed on Savan Vegas after expiration of its FTA, and compares this to the history that led to the different tax rates agreed with other casinos under their FTAs. That detailed analysis was necessary in the *LHNV* case, which asserted a "less favorable treatment" claim under the Lao-Netherlands BIT. The Tribunal does not repeat the detailed analysis here, as it is less directly relevant to the single claim for expropriation that Sanum asserts under the China-Lao BIT. Suffice

[840] Respondent's Rejoinder, ¶ 200.

[841] Respondent's Rejoinder, Section IX.

[842] Respondent's Rejoinder, ¶¶ 201, 204.

[843] Respondent's Rejoinder, ¶¶ 200, 207; R-27, SIAC Award, ¶¶ 282-283.

[844] Respondent's Rejoinder, ¶ 206, citing R-189, Expert Report of William Bryson, SIAC Case, 14 October 2016, p. 31.

[845] Respondent's Rejoinder, ¶ 207.

it to say that, ultimately, the Tribunal was unable to conclude in the *LHNV* case that the Lao PDR afforded LHNV "less favourable treatment" with regard to taxation than it afforded any putative comparable investors "in the same circumstances." Any differential treatment *vis-à-vis* the tax treatment of the two concurrently operating casinos, or of Macau Legend after it purchased the Savan Vegas assets in the sale contemplated by the Deed of Settlement, was reasonably justified on the basis of different circumstances.

512. This conclusion informs, but it is not essential to, the Tribunal's assessment of Sanum's expropriation claim under the China-Lao BIT. The gravamen of that claim is that the Respondent wrongfully withheld US$26,659,000 of the Savan Vegas sale proceeds to cover taxes allegedly due, before distributing the balance among Savan Vegas' shareholders pursuant to the Deed of Settlement, and that the Respondent's decision to withhold that sum constitutes an expropriation in violation of Article 4 of the China-Lao BIT. Specifically, Sanum alleges expropriation of "a claim to money and a right *in rem*, arising from the sale of the casino, as contemplated in the Settlement Deed."[846]

513. The Tribunal has already explained, in Section VI.A.3 above, why an expropriation claim cannot lie in relation to this issue. Under the Settlement Deed, Claimants' right was to a proportion of the sale proceeds, but it is undisputed that Savan Vegas first owed the Government some sum of unpaid taxes (the only open issue was how much). The collection of the unpaid taxes out of the sale proceeds, prior to the distribution of the balance to Savan Vegas' shareholders, was not *per se* an expropriation. This conclusion does not change because of a dispute about the specific level of taxes withheld, given that the tax withholding did not effectively nullify all value from the sale (a balance of US$15,341,000 remained after taxes, to satisfy the costs of the sale and then be distributed among shareholders). Nor can Sanum avoid this conclusion by redefining its investment simply as the subset of moneys withheld allegedly in excess of a proper contractual entitlement. Sanum's investment was not simply in an amount of over-withheld tax. The Tribunal again refers to the many other cases which have rejected similar attempts to redefine an investment into separate pieces, in order to demonstrate expropriation of one such piece.[847]

[846] Claimants' Memorial, ¶ 402.

[847] *See* CL-184, *Electrabel*, ¶ 6.57; CL-255, *Merrill & Ring*, ¶ 144; RL-109, *Telenor*, ¶ 67; CL-114, *CMS*, ¶¶ 256, 263-264.

C. NON-PAYMENT OF THE CREDIT FACILITY AGREEMENT LOANS

(1) The Claim Asserted

514. Sanum argues that when the Respondent seized control of Savan Vegas on 16 April 2015, it caused SVCC to stop making payments to Sanum on the CFA Loans, and thereafter moved all assets (but not liabilities) out of SVCC and into SVLL, so as to render SVCC unable to repay the CFA Loans.[848] By this conduct, the Respondent allegedly expropriated Sanum's investment in breach of Article 4 of the China-Lao BIT.[849]

(2) The Parties' Positions

a. Claimants' Position

(i) Expropriation

515. Sanum argues that the CFA Loans qualify as an investment under Article 1(1)(c) of the China-Lao BIT, because they represent a "claim to money or to any performance having an economic value." But for the Respondent's interference, Sanum says, SVCC would have continued repaying the CFA Loans; specifically, the outstanding balance of US$51,473,926 (as of 16 April 2015), plus additional interest and fees bringing the total to approximately US$56.5 million, would have been repaid by no later than June 2017.[850] However, the Respondent ensured that SVLL, the new enterprise established to control Savan Vegas, would not be liable for the obligations arising out of the CFA Loans.[851] This resulted in a "permanent" disruption of SVCC's repayments to Sanum which constitutes an indirect expropriation in violation of Article 4 of the China-Lao BIT.[852] The expropriation was illegal because (1) no compensation was paid or offered; (2) the taking was discriminatory, because it was executed to benefit the Respondent and the ultimate purchasers of Savan Vegas, over the interests of Sanum; (3) this was not pursued for any public purpose; and (4) it was not implemented in a manner consistent with either Lao law or due process.[853]

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[848] Claimants' Memorial, ¶ 361.

[849] LHNV presents an equivalent claim about expropriation in breach of Article 6 of the Lao-Netherlands BIT. It also claims that the Respondent's conduct interfered with transfers of payments related to an investment, in violation of Article 5 of that BIT, and violated Article 3(4) of the Lao-Netherlands BIT, the "umbrella clause," by failing to comply with local law, in particular Articles 60-61 and 64 of the 2016 Law on Investment Promotion. *See* Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.D; Claimants' Reply, Section IV.B.

[850] Claimants' Memorial, ¶¶ 362, 364. Relying on Dr. Kalt, Claimants say the net present value of this sum, as of 16 April 2015, was approximately US$45.7 million. *Id.*, ¶ 364.

[851] Claimants' Memorial, ¶ 363.

[852] Claimants' Memorial, ¶¶ 362, 364.

[853] Claimants' Memorial, ¶ 363.

516. Sanum submits that this "same scenario" – government interference making it impossible for a joint venture enterprise to repay loans made by a foreign investor to establish and operated it – resulted in a finding of expropriation and an award of full compensation in the *Tenaris* case.[854]

(ii) **Response to the Respondent's Defenses**

517. Sanum rejects the Respondent's position that termination of the Savan Vegas PDA is the "dispositive occurrence" that decides the claims arising from the CFA Loans.[855]

518. First, Sanum submits that the findings of the 2017 SIAC regarding PDA termination are not binding in this dispute for the reasons stated above.[856]

519. Second, PDA termination cannot excuse the Respondent's conduct regarding the CFA Loans because the termination was unlawful.[857] Specifically, the Respondent's first stated basis for terminating the PDA – namely, SVCC's failure to pay taxes – was itself wrongful, as the particular taxes imposed were discriminatory and a material breach of the Deed of Settlement.[858] If the Tribunal agrees with Sanum that taxes were wrongfully imposed, the question becomes whether *any* taxes would have been owed under tax treatment that was no less favorable than that received by other casino owners, and whether a tax debt in such amount could in turn justify the Respondent's termination of the Savan Vegas PDA, which Sanum describes as "the corporate equivalent of a death penalty."[859] Sanum submits that the answer is no.[860]

520. As to the Respondent's second alleged basis for terminating the PDA – namely, that Sanum engaged in corrupt practices – Sanum contends this was pretextual, but even if it could be established as the "real, contemporaneous reason" for the termination, no due process was accorded, in violation of the fair and equitable treatment provision in Article 3(1) of the China-Lao BIT.[861] Sanum submits that "[i]nternational gaming practice … requires Respondent to investigate

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[854] Claimants' Memorial, ¶ 365, citing CL-76, *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Venezuela*, Award, ICSID Case No ARB/11/26, IIC 764 (2016), Award, 29 January 2016 ("***Tenaris***"), ¶ 289, 569-570.

[855] Claimants' Reply, ¶ 355, citing Respondent's Counter-Memorial, ¶ 347.

[856] Claimants' Reply, ¶ 356.

[857] Claimants' Reply, ¶ 359.

[858] Claimants' Reply, ¶¶ 359, 361.

[859] Claimants' Reply, ¶ 362.

[860] Claimants' Reply, ¶ 362.

[861] Claimants' Reply, ¶ 363 & n.645. Sanum asserts that "[w]hile the BIT does not provide Sanum with a means of pursuing compensation for a breach of Article 3(1), the customary law of international responsibility still applies. ...

and present sufficient evidence of wrongdoing prior to taking adverse licensure action," and requires that a licensee be given the "opportunity to present its own case and refute the claims against it."[862] Customary international law also requires due process as explained by the *ADC* tribunal.[863] The Respondent's decision to terminate the PDA without providing Sanum with adequate due process "departed significantly from established custom and practice" and cannot now serve as a defense to the Respondent's improper intervention with the repayment of the CFA Loans.[864]

521. Sanum argues that the invocation of alleged bribery and corruption was *ex post facto* and merely a pretext.[865] It points to (1) the statement in a Government report that transferring SVCC's assets was intended to prevent CFA Loan repayment;[866] (2) the MPI's letter expressing concern about garnishment of all SVCC assets, because a criminal action had not begun;[867] (3) the Respondent's agreement in the Deed of Settlement to release then-pending corruption allegations and allow Sanum to keep managing SVCC and Savan Vegas pending a sale;[868] (4) several letters from the MPI to Sanum to November 2015, welcoming Sanum's investment into Thakhek, which is inconsistent with a contemporary belief that it or its principles were corrupt or unsuitable for investment in Laos;[869] (5) SVCC's eventual replacement with Macau Legend, a company "mired in alleged organized crime associations";[870] and (6) the Respondent's failure to produce any documents proving the contemporary existence of any suitability analysis or investigation of the

When Laos engages in conduct that fails to afford FET to a Chinese investor, it commits a wrongful act pursuant to its BIT with China." *Id.*, n.645.

[862] Claimants' Reply, ¶¶ 366-367, citing Amerine Expert Report, p. 6.

[863] Claimants' Reply, ¶ 368, citing CL-52, *ADC*, ¶ 435.

[864] Claimants' Reply, ¶¶ 369-370.

[865] Claimants' Reply, ¶ 371.

[866] Claimants' Reply, ¶ 372, citing C-60, Summary Monitoring Report on the Management and Operation of Savan Vegas, 5 October 2016, p. 2 ("San Marco Capital Partner LLC transferred the assets of Savan Vegas Hotel and Casino Co., Ltd. to be under the ownership of Savan Vegas Laos Co., Ltd based on the advice of an expert aiming to separate and solve the outstanding debts of the former owner created.").

[867] Claimants' Reply, ¶ 373, citing C-337, Letter from MPI to Public Prosecutor No. 2585/MPI. IPD, 24 October 2016, p. 2, ¶ 4.

[868] Claimants' Reply, ¶ 374, citing C-4, Deed of Settlement, Arts. 11 and 23.

[869] Claimants' Reply, ¶ 375, citing C-8, Letter from MPI to Sanum, 10 November 2015, p. 3; C-9, Letter from MPI to Sanum, 24 November 2015, p. 1.

[870] Claimants' Reply, ¶ 377, citing Amerine Expert Report, pp. 10-12.

Claimants.[871] Sanum argues that the real reason for the Respondent's bribery and corruption allegations is that Claimants were *unwilling* to engage in such behavior.[872]

522. With respect to the Respondent's specific bribery and corruption allegations, Sanum argues as follows:

a. the payments said to be a bribe in neighboring Cambodia were in fact a "legitimate payment to the Government of Cambodia that was required to obtain permission for the lottery license," and is supported among other things by signed receipts;[873]

b. the US$300,000 payment to Madame Sengkeo was not for a bribe related to the Ernst & Young audit, but rather was a personal loan to "a long-time business colleague who did not hold a position in the Government";[874] Mr. Baldwin did not interfere with any audit but rather directed his staff to reach out to the auditors when they unexpectedly left Savan Vegas;[875]

c. the US$30,000 payment to Madame Sengkeo was not for a bribe related to the Savan Vegas FTA, but rather was a "success fee" which she earned by negotiating a flat-tax for Savan Vegas pursuant to her engagement agreement.[876]

523. Sanum also rejects the Respondent's contention that the CFA Loans were not real loans and did not actually require repayment.[877] First, the concepts the Respondent invokes – "disguised equity contribution" for debt recharacterization and "equitable subordination" – do not exist under Singapore law.[878] Second, Singapore insolvency law does not prioritize Laotian tax obligations as argued by the Respondent.[879] Third, the Respondent is wrong to characterize the arrangement as an

[871] Claimants' Reply, ¶ 378.

[872] Claimants' Reply, ¶ 376, citing Second Baldwin WS, ¶¶ 6-13; First Kurlantzick Expert Report, ¶¶ 52-67; Second Kurlantzick Expert Report, ¶¶ 15-41.

[873] Claimants' Reply, ¶¶ 380-381, 383, citing Second Baldwin Witness Statement, ¶¶ 14-19.

[874] Claimants' Reply, ¶¶ 384-385, citing Second Baldwin Witness Statement, ¶¶ 20, 23.

[875] Claimants' Reply, ¶¶ 387-389, citing Second Baldwin Witness Statement, ¶¶ 24-26.

[876] Claimants' Reply, ¶¶ 393-399, citing Second Baldwin Witness Statement, ¶¶ 35, 38, 40.

[877] Claimants' Reply, ¶ 402.

[878] Claimants' Reply, ¶ 403, citing Ming Expert Report, ¶¶ 24, 27.

[879] Claimants' Reply, ¶ 404 (pointing out that Respondent relies on a section of the Singapore Bankruptcy Act that does not apply to companies and that the section which does apply provides that priority is given to taxes only when they are payable pursuant to Singapore's tax laws). *Id.*, citing Ming Expert Report, ¶¶ 29-30,

"insider loan whose terms were egregious and unconscionable on their face."[880] Sanum argues that SVCC was forced to borrow money from Sanum because it was unable to secure financing through traditional Lao banking, and debt financing (as opposed to equity) was used because the Master Agreement prohibited Sanum and ST from diluting their ownership interests.[881] Finally, the CFA Loans' specific terms were fair and reasonable in light of "the limited availability of traditional loans and the economic environment in Laos, coupled with heightened risk factors causing SVCC's credit rating to be the equivalent of 'junk bond' quality."[882]

524. Sanum further rejects the Respondent's various "technical excuses as to why SVCC" did not have an obligation to repay the CFA Loans.[883] It argues as follows:

a. Contrary to the Respondent's arguments, the absence of notices of receipts or drawdown does not remove SVCC's obligation to repay the CFA Loans under Singapore law[884] or general commercial and accounting practices.[885] Sanum adds that the disbursements were accounted for pursuant to SVCC's general ledger, the Sanum Loan Schedule, and SVCC's audited financial statements, which would make it "wholly improper to disregard the loan … simply because notices or receipts of drawdown were absent."[886]

b. The Respondent's proposition that Sanum's transfer of slot machines to SVCC should not be counted as disbursements under the CFA Loans is meritless.[887] In accounting terms, the transfer of equipment has the same effect as if cash had been provided to SVCC, who then used it to buy slot machines.[888] Sanum adds that Respondent's argument (based on the Yeo Report) regarding missing documentation on the transfers is unsubstantiated,[889] and the

[880] Claimants' Reply, ¶ 404, citing Respondent's Counter-Memorial, ¶ 369.

[881] Claimants' Reply, ¶¶ 406-407.

[882] Claimants' Reply, ¶ 408, citing Ricky Lee Expert Report, 10 August 2018, ¶¶ 3.6, 3.8, 7.15.

[883] Claimants' Reply, ¶ 410.

[884] Claimants' Reply, ¶ 411. Specifically, Sanum argues that under Singapore law, (1) these may be waived by the lender, *i.e.* Sanum, effectively modifying the loan's terms; (2) after accepting disbursements, SVCC would be estopped from refusing to repay the CFA Loans on the basis of non-compliance with notice and receipt of drawdowns; and (3) SVCC's remedy for non-compliance with notice and receipt of drawdowns would be actual damages rather than forgiveness of the loan. Claimants' Reply, ¶¶ 412-419, citing Ming Expert Report, ¶¶ 13-22.

[885] Claimants' Reply, ¶ 415, citing Premjit Dass Second Expert Report, 10 August 2018, ¶¶ 3.2.11-3.2.22.

[886] Claimants' Reply, ¶¶ 417-419, citing Second Dass Expert Report, 10 August 2018, ¶¶ 3.2.19-3.2.20; Second Crawford Witness Statement, ¶¶ 14(a), 14(c).

[887] Claimants' Reply, ¶ 420, citing Respondent's Counter-Memorial, ¶¶ 375-379.

[888] Claimants' Reply, ¶ 421, citing Second Dass Expert Report, ¶ 3.3.10.

[889] Claimants' Reply, ¶ 422 (arguing, in reliance on Yeo Expert Report, ¶ 20 and Second Crawford Witness Statement, ¶ 16, that that (1) Mr. Crawford found that the machines were booked by machine type in accordance with the General

discrepancies asserted in the Yeo Report are immaterial as they are the product of "simple transpositions of information or typographical errors."[890]

c. The Respondent's contention that disbursements for expenses and management fees should not be counted under the CFA Loans is mistaken.[891] Each of the invoices questioned by Mr. Yeo's report is "fully supported and correctly specifies the expense reimbursements and management fees that SVCC in fact owed to Sanum as reflected in the invoice."[892] The Master Agreement also authorized Sanum to be reimbursed for SVCC's actual expenses with an additional 5% fee.[893]

d. Contrary to Mr. Yeo's assertion, the 2011 disbursements were made in accordance with the CFA Loans and the notices and receipts made pursuant to Mr. Crawford's arrival and exercise of due diligence at SVCC were prepared "to make a complete record" rather than for any improper purpose.[894]

e. The invoices for SVCC's payment of services performed by Debevoise were "prepared in connection with standard Lao banking practices" and requirements and is nevertheless a moot issue because they had no material impact on SVCC's finances and have been credited to SVCC as a reduction on the CFA Loans.[895]

f. Finally, the CFA Loan balance has not been miscalculated, as the Respondent argues;[896] SVCC made payments whenever it had available funds, Sanum properly applied the payments as prescribed by the CFA Loans, Sanum waived certain late fees to which it was

Ledger; (2) Mr. Yeo's concern over the machine's physical location is irrelevant to whether SVCC had control over them; and (3) the valuation reports presence, or lack thereof, has no bearing on the machine's valuation in the General Ledger which were used for the audit by Grant Thornton).

[890] Claimants' Reply, ¶ 423, citing Yeo Expert Report, ¶¶ 21-22.

[891] Claimants' Reply, ¶ 427.

[892] Claimants' Reply, ¶ 428, citing Second Crawford Witness Statement, ¶ 21.

[893] Claimants' Reply, ¶¶ 429-430, citing Second Crawford Witness Statement, ¶ 27.

[894] Claimants' Reply, ¶¶ 432-433, citing Second Crawford Witness Statement, ¶¶ 29, 31.

[895] Claimants' Reply, ¶ 434, citing Second Crawford Witness Statement, ¶¶ 36, 38-39; Second Dass Expert Report, ¶¶ 4.5.2-4.5.3.

[896] Claimants' Reply, ¶ 435.

entitled, and Sanum's charge of compound interest was in compliance with the Promissory Notes, Singapore law, reasonable commercial practices, and the CFA's terms.[897]

525. Finally, Sanum rejects the Respondent's position that the claim arising out of the CFA Loans is not a valid investment arbitration claim because it constitutes "classic double counting" and because Sanum never invested in Savan Vegas.[898] To the contrary, Sanum submits that it paid US$4 million in cash for an equity interest in SVCC, independent from the money loaned under the CFA Loans, which entitled Sanum to its share of proceeds from the Savan Vegas sale.[899] Thus, the CFA Loans qualify as a separate investment by Sanum, as concluded by the BIT I Tribunal.[900]

b. Respondent's Position

526. The Respondent argues in general that SVCC's inability to repay the CFA Loans was a direct and proximate consequence of the lawful termination of the Savan Vegas PDA, which in turn was based on Claimants' malfeasance.[901] In consequence, the Respondent did not expropriate the CFA Loans; nor did it interfere with Claimants' rights to the these unsecured loans by transferring Savan Vegas' assets to SVLL for the sale authorized by the Deed of Settlement.[902] In any event, the CFA Loans were not an actual loan but rather were illegitimate, and Sanum's CFA Loan claim constitutes double counting given its other claims in the case.[903] These arguments are described further below.

(i) **PDA Termination**

527. First, the Respondent argues that SVCC's inability to repay the CFA Loans was simply a consequence of its justified termination of the Savan Vegas PDA; the lawfulness of the PDA termination is therefore "dispositive" of this claim. Specifically, the Respondent submits that it lawfully terminated the PDA as a result of Sanum's malfeasance, which in turn stripped SVCC of its concession and licenses such that it was unable to generate revenue to repay the CFA Loans.[904] The "but for" cause for defaulting on Sanum's loan is therefore the PDA's termination, not the

[897] Claimants' Reply, ¶¶ 436-438, citing Second Crawford Witness Statement, ¶¶ 4-9, 12; C-623, Promissory note, 1 January 2008; C-624, Promissory note, 4 March 2009; Ming Expert Report, ¶¶ 38-44; Lee Expert Report, ¶¶ 7.14-7.15; Second Dass Expert Report, ¶ 4.4.7.

[898] Claimants' Reply, ¶ 440, citing Respondent's Counter-Memorial, ¶ 398.

[899] Claimants' Reply, ¶ 441.

[900] Claimants' Reply, ¶¶ 441-442, citing C-399, PCA BIT I Case, Award on Jurisdiction, 13 December 2013, ¶ 320.

[901] Respondent's Counter-Memorial, Section Vl; Respondent's Rejoinder, Section VIII.

[902] Respondent's Counter-Memorial, ¶ 360.

[903] Respondent's Counter-Memorial, ¶¶ 362, 398.

[904] Respondent's Counter-Memorial, ¶¶ 350-351.

alleged seizure of the casino as Sanum claims. Thus, Sanum (not the Respondent) is responsible for SVCC's inability to repay the CFA Loans.[905]

528. The Respondent recalls the two bases on which the Savan Vegas PCA was lawfully terminated, namely Sanum's failure to pay taxes and its ongoing unlawful acts.[906] As to the former, the Respondent terminated the PDA because Sanum failed to pay taxes in breach of the Deed of Settlement, the PDA, and Lao Law.[907] Article 24 of the PDA entitled the Respondent to terminate the PDA unilaterally if Sanum failed to perform its obligations, including its tax obligations under Article 10.[908] Similarly, under Articles 69 and 76 of the 2009 Law on Investment Promotion, Sanum was required to pay taxes in a timely manner, and the consequences of its not doing so was that its investment could be rightfully cancelled by the Respondent.[909] Sanum was responsible for making sure that SVCC paid tax pursuant to Section 7 of the Deed from 1 July 2014 until the casino's sale,[910] but Sanum refused to pay tax from 1 July 2014 onward, and also failed to seek relief from Lao's tax authorities.[911] Sanum also refused to participate in the Flat Tax Committee despite the Respondent's multiple invitations, extension of the deadline, and notification of the consequences that would ensue – namely, taxation under existing tax laws – in further violation of the Deed.[912] In fact, Sanum refused to pay tax even after the ICSID BIT I Tribunal denied interim relief and warned that "as LHNV continues to do business in Laos, it can reasonably expect to be bound by Laotian income tax laws applicable to gambling casinos unless and until a new flat tax agreement is negotiated."[913] During the SIAC arbitration, the Respondent provided advance notice of its forthcoming decision to terminate the Savan Vegas PDA, relying, in part, on Sanum's failure to pay tax.[914] The Respondent also notes that during the time that Sanum sought tax relief from the BIT I and SIAC tribunals, the Respondent did not "interfere in any way with Sanum's ability to do business in Laos," yet during this time, the Claimants withdrew approximately US$24 million to

[905] Respondent's Counter-Memorial, ¶¶ 350-352.

[906] Respondent's Counter-Memorial, ¶ 257; Respondent's Rejoinder, ¶ 119.

[907] Respondent's Counter-Memorial, ¶ 260; Respondent's Rejoinder, ¶ 132.

[908] Respondent's Counter-Memorial, ¶¶ 261-262, citing R-33, Savan Vegas PDA.

[909] Respondent's Counter-Memorial, ¶¶ 281-282; Respondent's Rejoinder, ¶ 124; citing RL-94, 2009 Lao Law on Investment Promotion.

[910] Respondent's Counter-Memorial, ¶ 269; citing R-5, Deed of Settlement, Section 7; R-33, Savan Vegas PDA.

[911] Respondent's Counter-Memorial, ¶ 271.

[912] Respondent's Counter-Memorial, ¶ 272, citing R-54, Letter from Director General, Ministry of Finance, Sithisone Thepphasy, to John Baldwin and Christopher Tahbaz, re: the Deed of Settlement 15 December 2014.

[913] Respondent's Counter-Memorial, ¶ 274, citing R-13, Decision on Second Application for Provisional Measures, ICSID BIT I Case, ¶¶ 32, 34, 36.

[914] Respondent's Counter-Memorial, ¶¶ 276-277.

accounts overseas without any payment of tax or reporting of profits.[915] The PDA termination was ultimately put before and decided by the SIAC Tribunal, which determined, in a "final and binding" manner, that the Respondent was entitled to terminate the PDA for failure to pay tax.[916]

529. According to the Respondent, multiple investment treaty cases recognize that the termination of a concession for non-payment of tax does not violate public international law. The Respondent relies in particular on *Oostergetel*, where the tribunal stated as follows before dismissing the claim:

> it does not appear reasonable or legitimate for a taxpayer to expect to be relieved from tax liabilities … Given that (i) the Claimants failed to comply with the conditions set in these negotiations; (ii) the tax debts continued to increase; and (iii) the traditional activity of [the business in question] in the field of yarns and threads was completely abandoned, any expectations on the part of the Claimants that the authorities would invariably maintain a lenient attitude, appear unjustified.[917]

More generally, the Respondent asserts, a State's power to tax is "incidental to statehood" and "within the reserved domain of its police powers," such that the exercise of this power does not constitute expropriation or violate international law.[918]

530. Thus, the Respondent submits that it lawfully terminated the Savan PDA and had no duty to compensate for this termination. The Respondent adds that it could have imposed taxes at the Lao law code rate (35% + 10% VAT) from 1 January 2014, but elected instead to seek specific performance of the Deed of Settlement, and therefore applied the reduced 28% tax rate (established by Mr. Va) against Sanum's tax delinquency.[919] The Respondent rejects Claimants' suggestion that because Sanum considered these tax rates to be unfair, it was somehow justified in withholding tax payments. This argument is "completely unsupported," and is identical to that made (and rejected) in the SIAC arbitration.[920] Public international law does not condone investors' misconduct on the

[915] Respondent's Counter-Memorial, ¶ 278, citing BDO Expert Report of Kenneth Yeo, 23 March 2018, Appendix 28.

[916] Respondent's Rejoinder, ¶¶ 122, 172.

[917] Respondent's Counter-Memorial, ¶¶ 283-286; citing RL-101, *Oostergetel*, ¶¶ 236, 248.

[918] Respondent's Counter-Memorial, ¶ 287, citing RL-75, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties*, Kluwer Law International, 2009, p. 357.

[919] Respondent's Counter-Memorial, ¶ 292.

[920] Respondent's Rejoinder, ¶ 126.

basis of the investor's pre-emptive determinations that "the state measures in question violate their treaty rights."[921]

531. Separate from the issue of taxes, the Respondent maintains that it also terminated the Savan Vegas PDA because Sanum was a criminal enterprise.[922] Specifically, Sanum's criminal activity violated (1) Article 73 of the Investment Promotion Law, which forbids bribing "officers and Government staff," and thereby activated Article 76 of the same law which permits cancellation of an investment for a party's breach of "contract or laws and regulations";[923] (2) Article 157 of the Lao Penal Code, which criminalizes bribery and corruption;[924] and (3) the United Nations Convention Against Corruption, which Laos has ratified.[925] More generally, Sanum's criminal activity violated "universal notions of international public policy."[926]

532. Because unlawful conduct is "notoriously difficult to prove" by direct evidence, the Respondent submits that circumstantial evidence alone suffices for a tribunal to make a finding of corruption, and that the Tribunal must consider all evidence that potentially establishes corruption so as to "ensure the promotion of the rule of law and the sanctity of the final award."[927] Specifically, the Respondent urges the Tribunal to follow the *Metal-Tech* and *Spentex* tribunals' consideration of six "red flags" of corruption:

> 1. Consultant lacks experience in the sector;
> 2. Consultant is not a resident of the country where the project is located;
> 3. Consultant has no significant business presence within the country;
> 4. Consultant requests "urgent" payments and/or unusually high commissions;
> 5. Consultant requests payments be paid in cash, in a third country, to a numbered bank account, or to some other person or entity than whom the agreement was signed;

[921] Respondent's Rejoinder, ¶¶ 127-128.

[922] Respondent's Counter-Memorial, ¶ 297.

[923] Respondent's Counter-Memorial, ¶¶ 295-296; Respondent's Rejoinder, ¶¶ 136, 139; citing RL-94, Lao Law on Investment Promotion.

[924] Respondent's Rejoinder, ¶ 136, citing RL-150, Lao Penal Code.

[925] Respondent's Rejoinder, ¶¶ 137-138, citing RL-162, United Nations Convention Against Corruption (UNCAC), Article 15.

[926] Respondent's Rejoinder, ¶ 140.

[927] Respondent's Counter-Memorial, ¶ 293; Respondent's Rejoinder, ¶¶ 142, 147; citing RL-135, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 14 July 2010, ¶ 221; RL-145, Betz on *Spentex v. Uzbekistan*, p. 131 (quoting *Spentex v. Uzbekistan*, Award, ¶ 856); RL-101, *Oostergetel,* ¶ 303.

6. Consultant has a close personal/professional relationship to the government that could improperly influence a decision.[928]

533. The Respondent contends that Sanum's criminal conduct includes (1) a US$120,000 bribe to General Sen to obtain a lottery license in Cambodia;[929] (2) a US$300,000 cash payment to Madame Sengkeo to serve as a bribe to obstruct Ernst and Young's audit of Savan Vegas;[930] and (3) a US$30,000 bribe to secure the favorable Flat Tax Agreement.[931] These actions are "riddled with 'red flags' of corruption" such that Claimants' position that no unlawful conduct has taken place lacks credibility.[932] In particular, the Respondent says, the corrupt conduct involving Madame Sengkeo aligns with "red flags" 1, 3, 4, 5, and 6 because she had no business experience in Laos or anywhere else, charged unusually high commissions, requested "urgent" payments, was well connected to the Government and received payment in cash, via a third party, in another country, and in numbered bank accounts.[933] The use of General Sen also aligns with "red flags" of corruption – namely, 1, 4, 5, and 6 – because he had no experience in the gaming license area, required "urgent" payments to remain "happy" in the form of cash or check, charged high commissions, and had personal ties to the Cambodian government.[934]

534. According to the Respondent, Sanum's illegal and corrupt conduct (as established by both direct and circumstantial evidence), along with Claimants' failure to meet its burden of establishing the "character, honestly, and integrity necessary to maintain a gaming license in Laos," justified the Respondent's termination of the Savan Vegas PDA.[935] A termination of this basis did not violate international law, the Respondent says, citing findings in the *Swisslion*, *Malicorp*, *Parkerings*,

[928] Respondent's Rejoinder, ¶¶ 148-153; citing RL-151, *Metal-Tech Ltd. v. The Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 293; RL-145, Betz on *Spentex v. Uzbekistan*, p. 135.

[929] Respondent's Counter-Memorial, ¶¶ 297-301.

[930] Respondent's Counter-Memorial, ¶¶ 302-304; Respondent's Rejoinder, ¶ 159; citing R-42, Letter from the Head of the Inspection Committee, Ministry of Finance to E&Y, 11 July 2012.

[931] Respondent's Counter-Memorial, ¶¶ 307-314; Respondent's Rejoinder, ¶159; citing R-38, Emails of John Baldwin, et al. relating to Flat Tax Agreement Bribery.

[932] Respondent's Rejoinder, ¶¶ 154-157.

[933] Respondent's Rejoinder, ¶ 159; citing R-51, Sixth Witness Statement of John Baldwin, ¶¶ 10-14; R-42, Letter from the Head of the Inspection Committee, Ministry of Finance, to E&Y, 11 July 2012; R-43, Letter from E&Y to Ministry of Finance, 12 July 2012; R-46, Ministry of Finance 1st Interim Report to the Inspection Committee by Ernst & Young, 20 July 2012, § 1.2.1; R-44, Sengkeo Phimmasone's ANZ bank wire transfers of $10,000 on each of 12-13 July 2012; R-47, Sengkeo Phimmasone's ANZ bank wire transfer of $9,400 on 22 August 2012; R-38, Emails of John Baldwin et al. relating to Flat Tax Agreement Bribery; R-161, Second Witness Statement of John Baldwin, SIAC Case, 8 June 2015, ¶ 16.

[934] Respondent's Rejoinder, ¶ 160; citing R-100, General Sen Emails, at Email of 27 August 2012; R-100, General Sen Emails, at Email of 23 August 2012; R-63, Transcript testimony of John Baldwin, SIAC Case, 16 June 2015, 223:5-6.

[935] Respondent's Counter-Memorial, ¶ 315; Respondent's Rejoinder, ¶ 161.

Genin, and *Tokios Tokelės* cases.[936] The Respondent adds that although gaming operators are not entitled to traditional due process because they are "held to a higher standard," the SIAC arbitration proves that "Claimants *did* receive due process" pursuant to the Deed and international law.[937] *ADC* – the case on which Sanum relies – is distinguishable because that tribunal referred to an absence of due process where "'no legal procedure of such nature exists at all'," and merely requires that the legal procedure chosen '"be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard,'" a standard that was met by the SIAC arbitration.[938]

535. The Respondent also submits that because the CFA Loans were secured only by contract rights and not by any physical assets, the transfer of Savan Vegas' assets to SVLL for sale in accordance with the Deed of Settlement did not interfere with Sanum's rights pursuant to the CFA Loans.[939] Specifically, the first CFA Loan was secured by the Pledge Agreement, which did not mortgage the real property underlying the casino and only assured Savan Vegas' contract rights under (1) the PDA, dated 11 April 2006, between Laos and Savan Vegas; (2) the Addendum, dated 26 July 2006, to the PDA; and (3) the Land Lease Concession Agreement, dated 15 November 2006, between Laos and Savan Vegas – thereby making Sanum's rights "derivative only of Savan Vegas' rights."[940] The 2007 Savan Vegas PDA and separate Pledge Agreement secured the second CFA Loan by granting Sanum the contract rights which Savan Vegas had under the PDA, the Addendum to the PDA, and the Land Lease Concession.[941] The result, the Respondent says, is that when the underlying contracts were terminated on 18 June 2015, Sanum was stripped of its interests in them, and the CFA Loans – which were "no longer […] collateralized by any property of any kind" –

[936] Respondent's Counter-Memorial, ¶¶ 334-338; citing RL-104, *Swisslion*, ¶ 314 ("lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated"); RL-122, *Malicorp*, ¶ 137 (the "letter rescinding the Contract was sufficiently well founded, and gave the Respondent the right to withdraw from the Contract. It follows that the rescission of the [concession] Contract cannot be considered as a form of expropriation under international law"); RL-123, *Parkerings*, ¶ 445 (the "reason invoked was a 'material breach on the part of the Consortium form by [claimants] of . . . provisions of the Agreement.' The record does not show that the State … acted differently than another contracting party would have done"); RL-124, *Genin*, ¶ 367 (dismissing all claims before it based on the State's "ample grounds" for terminating the claimants' license); and RL-125, *Tokios Tokelės*, ¶¶ 10, 131, 136 (dismissing claims due to reasonable suspicions of the legality of claimant's operation).

[937] Respondent's Counter-Memorial, ¶ 293; Respondent's Rejoinder, ¶¶ 166-170 (emphasis in original).

[938] Respondent's Rejoinder, ¶ 173; citing CL-52, *ADC*, ¶ 435.

[939] Respondent's Counter-Memorial, ¶ 360.

[940] Respondent's Counter-Memorial, ¶¶ 355-356, citing R-34, CFA I, Section 10.

[941] Respondent's Counter-Memorial, ¶ 357, citing R-36, CFA II, Section 10.

became unsecured obligations of Savan Vegas.[942] Sanum's remedies are consequently limited to legal action against Savan Vegas under Lao Law and the SIAC arbitration, pursuant to the CFA Loans' own arbitration clause.[943]

(ii) **Validity of the CFA Loans**

536. Separate from these arguments about PDA termination, the Respondent also maintains that the CFA Loans do not constitute valid obligations owed to Sanum because the loans were illegitimate.[944] The CFA Loans were a disguised equity contribution, not negotiated at arms-length, and an insider loan with egregious and unconscionable terms which permitted Sanum to defraud Savan Vegas' minority shareholder while pillaging the Savan Vegas earnings.[945]

537. The Respondent points to Claimants' alleged bribe to avoid turning over approximately 40,000 documents requested by Ernest & Young, and to Ernest & Young's interim audit report, as preliminary evidence of the Loans' questionable structure. The doubts raised by these events were subsequently confirmed, it says, by the Respondent's inspection of the Savan Vegas' books in April 2015, and by BDO's audit's conclusions that "Mr. Baldwin … grossly overstated the amount actually loaned to Savan Vegas; … applied unconscionable terms for what the law considers a 'shareholder loan'; … doctored and falsified financial records and … used the loan as a mechanism for self-dealing and to pay unrelated parties huge sums under bogus consulting agreements at the expense of the minority shareholders."[946]

538. More specifically, the Respondent rejects Claimants' claim that but for the Respondent's acts, the CFA Loans would have been repaid within a year. It notes that (a) Savan Vegas already devoted US$85 million to repaying the loan, yet the principal was not reduced "by as much as a single dollar"; (b) Sanum applied a 10% late fee to almost every payment, even though the timing of payments was controlled by Mr. Baldwin; and (c) the CFA Loans carried a 26.4% median interest rate.[947] The Respondent concludes that Mr. Baldwin improperly "managed to extract from Savan Vegas—at the expense of the Government, a minority shareholder—over $85 million dollars," on

[942] Respondent's Counter-Memorial, ¶¶ 357-358.

[943] Respondent's Counter-Memorial, ¶ 358.

[944] Respondent's Counter-Memorial, ¶¶ 361-362; Respondent's Rejoinder, ¶ 181.

[945] Respondent's Counter-Memorial, ¶¶ 369-370.

[946] Respondent's Counter-Memorial, ¶¶ 364-367, citing R-46, First Interim Report to the Inspection Committee by Ernst & Young, July 20, 2012, ¶ 1.3.17; BDO Expert Report of Kenneth Yeo, 23 March 2018.

[947] Respondent's Counter-Memorial, ¶¶ 372-373; Respondent's Rejoinder, ¶ 192; citing BDO Expert Report of Kenneth Yeo, 23 March 2018, ¶¶ 40, 46, 52-33.

the basis of what BDO found to be only US$7.8 million loaned in compliance with CFA terms (as opposed to the total US$49.7 million in loans claimed on Sanum's books).[948]

539. According to the Respondent, "two fundamental problems with alleged loan amounts" make it impossible for Sanum to establish damages, even if it could prove liability.[949] First, millions of dollars claimed on the Sanum books were not actually loaned to Savan Vegas and/or do not comport with the Savan Loan Schedule.[950] Second, years of interest, compounded interest, and penalties were improperly charged against the CFA Loans, and the "vast majority of loan disbursements" also charged were not compliant with the CFA Loans' terms and conditions, including on the basis of fraudulent documentation, forged and false invoices, and even wire fraud.[951] With respect to the disbursements, the Respondent rejects the Claimants' suggestion that Singapore law would excuse the absence of notices or receipts for disbursements, on the basis that its expert, Mr. Ming, admitted that no reported cases in Singapore have actually considered the issue for a contract whose terms specifically require such notices before disbursement; Mr. Ming also erroneously concluded that notices of drawdown benefit only the lender.[952]

540. Because Sanum engaged in inequitable conduct granting it an unfair advantage and causing economic detriment to Savan Vegas, the Respondent submits that "Sanum's recharacterized equity interest are fully subordinated to the equity interests of the Laotian government and until all claims of Savan Vegas have been paid in full and the Laotian government has been repaid its equity position, no distributions are owing to Sanum."[953]

541. Finally, the Respondent maintains that Sanum's CFA Loans claim is invalid in the context of an investment arbitration because it constitutes "double counting."[954] Specifically, the Respondent argues that Sanum never invested capital to obtain its shares in SVCC but merely loaned funds for construction, such that by accepting 80% of the sale proceeds from the sale to Macau Legend, in accordance with the 2017 SIAC Award, it "received full payment for its 'investment.'"[955] This, in

[948] Respondent's Counter-Memorial, ¶¶ 375-376.

[949] Respondent's Counter-Memorial, ¶ 377.

[950] Respondent's Counter-Memorial, ¶ 378.

[951] Respondent's Counter-Memorial, ¶¶ 378-379, 382-388; Respondent's Rejoinder, ¶¶ 183, 195; citing BDO Expert Report of Kenneth Yeo, 23 March 2018. ¶ 16.

[952] Respondent's Rejoinder, ¶¶ 185-187, citing Expert Report of Lok Vi Ming, 10 August 2018, ¶¶ 15-17.

[953] Respondent's Counter-Memorial, ¶ 390.

[954] Respondent's Counter-Memorial, ¶ 398.

[955] Respondent's Counter-Memorial, ¶¶ 398-399.

turn, impedes the CFA Loans claim for "double counting."[956] The Respondent distinguishes Claimants' reliance on *Tenaris* on the basis that that case involved a "valid loan, not [one] made in lieu of a capital contribution."[957]

(3) The Tribunal's Analysis

542. As a predicate to examining Sanum's expropriation claim regarding the CFA Loans, it is worth noting the range of the Parties' underlying disputes regarding the propriety of the loan terms, the actual amounts disbursed under the loans, and the manner in which SVCC's repayments were applied.

543. First, with respect to the loan terms, the Tribunal recalls its summary in Section III.H.8 of the provisions for accrual not just of regular interest but also of an additional layer of "Overdue Interest," and for the charging not only of regular "Maintenance Fees" and "Administrative Fees," but also of "Disbursement Fees" for each draw down and "Late Fees" for each late payment. Claimants say these provisions were "well within the range of reasonable and fair lending terms," given the limited availability of traditional loans and the economic environment in Laos.[958] Respondent says these terms were unconscionable in context of what it describes as "self-serving shareholder loans,"[959] and its expert Mr. Yeo testified in the SIAC Arbitration that the terms were in "loan shark territory."[960]

544. Second, the Parties dispute how much money actually was disbursed to SVCC under the CFA Loans. Claimants say that in total, SVCC drew down approximately US$50 million in principal, covering construction and pre- and post-operating costs; some of this was extended in kind rather than in cash, for example through Sanum's purchase of gaming equipment on SVCC's behalf.[961] Claimants also charged Sanum's attorneys' fees for the BIT I arbitrations against the CFA Loans, because (in their view) the work also benefitted SVCC.[962] Respondent by contrast says Claimants' calculation of the drawdown amounts is "grossly overstated," based on the results of a BDO

[956] Respondent's Counter-Memorial, ¶ 399, citing CL-76, *Tenaris*, ¶¶ 289, 569-570.

[957] Respondent's Counter-Memorial, ¶ 400.

[958] Claimants' Reply, ¶ 408.

[959] Respondent's Counter-Memorial, ¶¶ 348, 362, 367.

[960] Respondent's Opening Presentation, slide 116 (quoting R-217, Testimony of Ken Yeo, Merits Hearing Transcript, 25 January 2017, SIAC Case No. ARB143/14/MV, pp. 944:18-945:23).

[961] Claimants' Memorial, ¶¶ 49-50; Baldwin Statement, ¶ 26; Crawford Statement, ¶ 10.

[962] Claimants' Memorial, ¶ 60; Crawford Statement, ¶¶ 19, 21.

forensic audit that the Lao PDR ordered after taking control of Savan Vegas.[963] According to the BDO audit, only US$7.8 million was loaned in compliance with the Credit Facility Agreements,[964] with much of the claimed balance "rife with documentation errors, forgeries, and outright fraud."[965] Some of the errors that Respondent identifies appear undisputed, although Claimants defend these as oversights rather than deliberate wrongdoing.[966]

545. Third, the Parties dispute the propriety of Sanum's allocation of the substantial repayments that SVCC made over a period of years. According to Claimants, SVCC was required to use 80% of its EBITDA each month for repayment but was not always able to spare this amount given the cyclical nature its gaming business and the early capital improvements required,[967] with the result that significant interest and late charges properly accrued and SVCC's payments were applied to those in accordance with the Credit Facility Agreements. Respondent by contrast argues that Claimants effectively controlled the repayment schedule, given Sanum's management control of SVCC,[968] and that the result of Claimants' decisions about payment timing and payment allocation were that, despite SVCC's making average monthly payments to Sanum of $1 million a month for 77 consecutive months, the principal balance was never reduced.[969] Respondent also observes that,

[963] Respondent's Counter-Memorial, ¶¶ 367, 383-385; BDO Expert Report of Kenneth Yeo; Respondent's Rejoinder, ¶¶ 181, 187-188, 190.

[964] Respondent's Counter-Memorial, ¶¶ 375, 389; BDO Expert Report of Kenneth Yeo, ¶¶ 59, 66; Respondent's Rejoinder, ¶ 181.

[965] Respondent's Counter-Memorial, ¶ 377. Respondent alleges for example that Claimants claim disbursements for which there was no notice or receipt of drawdown, questionable expenses and management fees sent to third parties, backdated disbursements, false invoices paid for legal counsel in prior arbitrations, and improperly charged late fees and interest. Respondent's Counter-Memorial, ¶¶ 377-381; BDO Expert Report of Kenneth Yeo, ¶¶ 19-27, 31-35, 54-57.

[966] For example, it is undisputed that in February 2012, Claimants acknowledged internally that "in order to comply with the requirements of the Credit Facility … we should have in our files executed copies of Draw Requests," but this was not done at all during 2011, so Claimants then prepared backdated "requests and receipts for all of 2011," and asked the former General Manager to sign them even though he already had left the company. *See* Respondent's Opening Presentation, slide 120 and Closing Presentation, slides 60-62 (reproducing transcript excerpts in which Mr. Crawford admitted that "they did not document these transactions that are called for under the Credit Agreement" and that there were not always drawdown notices and receipts). It also appears undisputed that Claimants altered legal services invoices addressed to them by Debevoise & Plimpton, so as to appear that Debevoise instead had invoiced SVCC, which was not its client. *See* Respondent's Opening Presentation, slide 121 (illustrating the alteration); Tr., 12 June 2019, 870:8-11 (Mr. Yeo characterizing this as "falsification of documents … the likes of which I have never seen in my 30 years as a forensic accountant"). Claimants do not deny that the alteration was made, and although they defended the logic of charging these invoices to SVCC's account under the CFA Loans, they later agreed to credit the amounts back to reduce the CFA loan balance. *See* Claimants' Reply, ¶ 434.

[967] Claimants' Memorial, ¶ 53; Crawford Statement, ¶ 9.

[968] Respondent's Counter-Memorial, ¶¶ 373-374; BDO Expert Report of Keneth Yeo, ¶¶ 52-53.

[969] BDO Expert Report of Kenneth Yeo, ¶¶ 40, 46; Respondent's Counter-Memorial, ¶ 372; Respondent's Rejoinder, ¶ 180. According to Mr. Yeo, part of the problem was that instead of applying payments first to interest and then to principal as provided in the Credit Facility Agreement terms, Sanum applied payments to other fees and expenses

between June 2014 and March 2015, the effective interest rate charged on the CFA Loans varied between 23% and 32%, with a median of 26.4%.[970] Respondent's expert Mr. Yeo testified that "in my 30 years as a CPA I've never seen anything like that."[971] Respondent accuses Claimants of using the CFA Loans to "extract[] money out of the casino" through the guise of loan repayments rather than recognizing profits, which allowed them "to avoid paying taxes" and making distributions on equity to minority shareholders.[972] According to Respondent, Claimants ultimately extracted over US$85 million from SVCC, but "[n]ot a dollar was ever paid in principal, [and] not a dollar of profit was ever declared to its shareholders."[973]

546. With this background in mind, the Tribunal turns below to Sanum's expropriation claim regarding the CFA Loans.

547. Sanum alleges expropriation of its direct investment in the CFA Loans. This is a different investment than that addressed in prior Sections, because here the interest in question derives not from Sanum's role as a *shareholder in* SVCC, but rather from its separate role as a *lender to* SVCC. Under the China-Lao BIT, a "claim to money" is listed among the assets that may be considered an investment,[974] and loan agreements would qualify as such provided that funds actually are extended (and thus are actually "invested").[975] Since there is no doubt that Sanum lent SVCC at least some considerable funds under the Credit Facility Agreements, the Tribunal accepts that that Sanum does have an investment interest in the CFA Loans. The Tribunal also agrees with other tribunals which have found that loan interests in principle are capable of being expropriated.[976]

548. At the same time, Sanum's right to repayment of the CFA Loans was from a private company, SVCC, and the likelihood of repayment depended on the status of SVCC's cash flow. This in turn depended on SVCC's rights in the Savan Vegas PDA, which the Credit Facility Agreements identified as Sanum's primary security for the loans.[977] From the outset, therefore, Sanum accepted

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after interest, "[s]o nothing was applied to principal." R-217, Testimony of Ken Yeo, Merits Hearing Transcript, 25 January 2017, SIAC Case No. ARB143/14/MV, pp. 943:21:944:23.

[970] Respondent's Counter-Memorial, ¶ 373.

[971] R-217, Testimony of Ken Yeo, Merits Hearing Transcript, 25 January 2017, SIAC Case No. ARB143/14/MV, pp. 943:21:945:17.

[972] Respondent's Counter-Memorial, ¶¶ 348, 362, 367.

[973] Respondent's Counter-Memorial, ¶ 376.

[974] CL-49, China-Lao BIT, Article 1(1)(c).

[975] *See* C-399, PCA BIT I Award on Jurisdiction, 13 December 2013, ¶ 320 (concluding the same).

[976] *See, e.g.,* CL-76, *Tenaris*, ¶ 289.

[977] R-34, CFA I, Art. 10; R-36, CFA II, Art. 10.

some risk that SVCC would not be able to repay the CFA Loans, if the Savan Vegas PDA was terminated in accordance with its terms or if some other developments or agreements adversely impacted SVCC's prospects of continuing cash flow. That risk was an inherent part of Sanum's investment in the CFA Loans. The Lao PDR was not a guarantor of SVCC's loan repayment to Sanum.

549. One of the express terms of the Savan Vegas PDA was a requirement that Sanum "fully perform … [its] tax obligation," including that "[f]or the casino business [it] execute the tax obligation in accordance with the tax law of Lao PDR."[978] Another express term was that if Sanum "fails to perform its obligations" in connection with tax, "the Government shall be entitled to terminate this Agreement unilaterally."[979] These provisions were consistent with the 2009 Lao Law on Investment Promotion, which expressly required investors "[t]o fully pay duties, taxes and other fees in a timely manner" and prohibited them from "fail[ing] to fulfill obligations" with respect to tax, including by "conceal[ing] income and profit."[980]

550. The Parties' subsequent Deed of Settlement bore on this obligation, by confirming that – although the Lao PDR waived collection of taxes on all gaming operations from 1 January through 30 June 2014 – "taxes shall be due and payable as from 1 July 2014."[981] Although these were to be calculated "promptly" by a three-member Flat Tax Committee,[982] the Claimants almost immediately suspended performance under the Deed of Settlement and declined to participate in the formation of the Flat Tax Committee.[983] They also refused to pay any taxes in the interim as calculated under the otherwise applicable tax laws.[984]

551. The Claimants' refusal to participate in that Committee, followed by their refusal to pay any taxes in the interim as calculated under the otherwise applicable tax statute, was a breach of both the Deed of Settlement and applicable Lao law. In many systems of law, taxpayers are obligated to pay

[978] R-33, Savan Vegas PDA, Article 10.1, 10.2.2.

[979] R-33, Savan Vegas PDA, Article 24.5.

[980] C-376, 2009 Law on Investment Promotion, Articles 69.2, 73.2.

[981] R-5, Deed of Settlement, 15 June 2015, Section 7.

[982] R-5, Deed of Settlement, 15 June 2015, Sections 8, 9.

[983] *See* R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶¶ 27, 31-34 (finding *inter alia* that "the Government was quite prepared to proceed with the renegotiation of a Flat Tax Agreement under the Terms of Settlement," but it was the Claimants who "refused to participate"); R-27, SIAC Award, ¶ 79.

[984] *See, e.g.,* R-14, Decision on Claimant's Second Application for Provisional Measures, ISID BIT I Case, 18 March 2015, ¶¶ 31-32; R-27, SIAC Award, ¶ 79.

assessments from the fiscal authorities even while they are contesting the accuracy of calculations; the existence of a dispute does not relieve a taxpayer from its duties to pay in the interim. In this case the Lao PDR sent SVCC a first notice of delinquency regarding its tax obligations in January 2015,[985] and in mid-March 2015, the ICSID BIT I Tribunal instructed LHNV that "for so long as [it] continues to do business in Laos, it can reasonably expect to be bound by the Laotian income tax laws applicable to gambling casinos unless and until a new Flat Tax Agreement is negotiated," adding that LHNV "has not made out a case for relief from compliance with the current Laotian tax laws."[986] The Lao PDR followed up with two further notices of delinquency, in late March 2015 and mid-April 2015 respectively.[987] SVCC's decision nonetheless not to pay the assessed taxes, even under protest while it challenged their calculation, reasonably justified the subsequent termination of the Savan Vegas PDA,[988] under the terms of the PDA itself.

552. The Tribunal has previously found (in Sections VI.A.3 and VI.B.3 above) that the PDA termination did not constitute an expropriation of Sanum's investment interest *as a shareholder* in SVCC, particularly where the sale process for the casino included the offer of a replacement PDA for the same term of 50 years, subject to a flat tax; the sale value was calculated on that basis; and the proceeds of the sale were distributed to all shareholders, after payment of applicable taxes. But the PDA termination did have *different* implications for Sanum's *distinct* investment interest *as a lender* to SVCC. As a result of PDA termination, SVCC lost the main asset against which the CFA Loans had been secured. However, this risk could have been foreseen in light of Sanum's (a) original decision to secure the loans largely based on PDA contract rights, and (b) its subsequent decision to flout the PDA's obligation that taxes be paid in accordance with Lao law, along with the Deed of Settlement's procedures for the prompt determination of a new flat tax as a substitute for the otherwise applicable statutory tax rate.

553. The Deed of Settlement had another clear implication for the value of Sanum's investment in the CFA Loans. To be recalled, the Deed of Settlement provided for "a sale of the Gaming Assets," with the proceeds to be shared *pro rata* by the shareholders after Claimants bore all costs of the sale.[989] The "Gaming Assets" were described as the package of PDAs authorizing SVCC to operate

[985] R-55, Tax Notice to SVCC, 27 January 2015.

[986] R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015, ¶¶ 34-36.

[987] R-57, Tax Notice to SVCC, 27 March 2015; R-29, Tax Notice to SVCC, 20 April 2015.

[988] R-64, PDA Termination Notice, 18 June 2015; R-65, Letter regarding PDA Termination, 1 July 2015.

[989] R-5, Deed of Settlement, 15 June 2015, Sections 10, 16.

various gaming enterprises.[990] Nothing in the Deed of Settlement required the sale of the joint venture company itself (SVCC), as opposed to simply its assets. To the contrary, the Deed of Settlement expressly provided leeway *for the transaction to be structured either way*: Article 30 refers to "the Sale, *whether* it is an asset sale *or* corporate sale."[991] The "or" in Section 30 is significant, because it established a choice between two different mechanisms for what would be transferred to the buyer, and the two options carried very different implications for Sanum's two different investment interests: its investment in SVCC's shares versus its investment as lender to SVCC under the CFA Loans. On the one hand, a *sale of the company as a whole* would transfer to the buyer SVCC's corporate liabilities as well as its assets; that could obligate the buyer to assume SVCC's debt under the Credit Facility Agreements, but at the same time it would be expected to reduce the sale value and accordingly the sum to be disbursed to shareholders. By contrast, *an asset sale* would leave corporate liabilities in the SVCC, for it to sort out any way it wished with Sanum, but this would be expected to increase the sale value to potential buyers, and thus the prospective return to shareholders from the distribution of the sale proceeds. The choice between these mechanisms was left open in the Deed of Settlement, presumably to be negotiated between the entity charged with responsibility for concluding the sale and the prospective buyer.

554. Importantly, the Deed of Settlement also provided that the responsibility for negotiating and concluding the sale *would change hands after an agreed time period*. The agreement was to give that responsibility to Sanum for 10 months, following which the responsibility to complete the sale would devolve to an outside gaming operator, acting with "a fiduciary duty to each [of] the Claimants and Laos as interested parties in the Gaming Assets," with a duty to seek to "*maximize Sale proceeds* to the Claimants and Laos."[992] Nothing was said about a duty to maximize Claimants' chances of recovering on the CFA Loans, which were inherently in tension with the agreed contractual duty to maximize the sale price from an outside buyer.

555. As it transpired, Sanum was not able to conclude a sale deal in 10 months (*i.e.,* by 15 April 2015), and responsibility therefore shifted (as a matter of contract) to an outside operator to implement these provisions. Objectively, the logical structure to "maximize Sale proceeds" was as an asset sale, not a corporate sale, and this is the structure that was pursued. The declaration that the Lao PDR issued on 28 September 2015 was entirely consistent with this structure, by providing for a

[990] R-5, Deed of Settlement, 15 June 2015, Section 6.

[991] R-5, Deed of Settlement, 15 June 2015, Section 30 (emphasis added).

[992] R-5, Deed of Settlement, 15 June 2015, Sections 11, 12, 13 (emphasis added).

transfer of SVCC's assets (but not its corporate liabilities) to SVLL, pending a sale of SVLL to the ultimate purchaser.[993]

556. The decision to proceed by an asset sale rather than a corporate sale was also logical for the Lao PDR given the deep suspicions it evidently harbored – dating back to the time of the aborted Ernst & Young audit – about the way the CFA Loans had been managed by Sanum, The BIT I Tribunals closely considered the evidence regarding the abrupt termination of that audit, including the Lao PDR's allegation that Claimants had paid a bribe, channeled through Mme. Sengkeo, in order to shut the audit down. Although the BIT I Tribunals were unable to find "clear and convincing evidence" that a bribe was made, they stated that they were satisfied on the lesser standard of probabilities that there were financial illegalities in connection with these events.[994]

557. In particular, the BIT I Tribunals found as follows:

> 128. On 8 July 2012, Mr. Baldwin wired Sanum's Chief Financial Officer, Mr. Clay Crawford, that 'Savan has an extraordinary expense of $500,000 this week. I've [sic] tell you about it when we speak on the phone, but please think about our cash situation.'
>
> 129. Mr. Baldwin accepts that the sum of US $500,000 was subsequently sent to Vientiane including US $300,000 cash in a backpack delivered to Madam Sengkeo by his personal assistant, Bruce Douglas. …
>
> 130. Mr. Baldwin acknowledges ordering Mr. Douglas, to fly to Vientiane with US $300,000 cash. It is established that US $300,000 was subsequently deposited in Madam Sengkeo's bank account. …
>
> 135. Mr. Baldwin's explanation of the US $300,000 payment to Madam Sengkeo is not credible. It is clear on the evidence that Mr. Baldwin and his CFO, Mr. Clay Crawford, were concerned about the threat to Sanum's business posed by the E&Y audit. Mr. Baldwin had every incentive to influence the Government to call off the E&Y audit in the summer of 2012.…
>
> 136. … [T]he Claimants had a powerful motive to stop the audit as Mr. Baldwin and Mr. Crawford knew (and the Government merely suspected) of the existence of financial skeletons in the Savan Vegas books later

[993] C-58, Declaration of the Ministry of Planning and Investment 2324/2325 regarding putting SVCC assets into SVLL, 28 September 2015 ("noting the Deed of Settlement …, the Government has determined to form a new company to hold the assets of the casino and related operations … of [SVCC] … and to cause the new company to sell the Assets …. The Company shall have no liability to any person or entity for any liabilities that it does not specifically assume").

[994] R-264, ICSID BIT I Award, ¶¶ 139, 148; *see similarly* R-265, PCA BIT I Award, ¶¶ 138, 147.

> uncovered by the BDO audit. All in all, the Tribunal concludes that the Claimants got a senior Government official to stop the audit and that the $270,000 was paid through Madam Sengkeo (i.e. $300,000 less 10%) to that Government person or persons.
>
> 137. That said, the Tribunal is troubled by the fact that the Government has apparently not identified any bribe-*takers*….
>
> 138. … In the circumstances, while the evidence of Mr. Baldwin that Madam Sengkeo required the funds for her personal use is deeply unsatisfactory, so too is the Governments apparent failure even to *attempt* (so far as the evidence is concerned) to get to the bottom of the matter, not only potentially to punish the wrongdoers, but to provide solid evidence that a bribe was given and taken by Government official(s) to stop the E&Y audit.
>
> 139. The Tribunal concludes that it is more probable than not that Madam Sengkeo was used as a conduit to bribe Government officials to stop the E&Y audit, but that this conclusion is not established to the higher standard of 'clear and convincing evidence'. The Tribunal is satisfied, however, on the lesser standard of probabilities, that Mr. Baldwin involved the Claimants in serious financial illegalities in respect of the halt of the E&Y audit.[995]

558. This Tribunal is likewise unconvinced by Mr. Baldwin's explanation that the sudden payment of US$ 300,000 to Mme. Sengkeo in 2012 was for a personal loan, albeit informal and provided without any loan documentation or repayment terms.[996] Moreover, although there is insufficient evidence to prove a direct link between these payments and the shutdown of the audit, the timing is certainly suspicious. Ernst & Young received an unexpected direction to complete its work just days after the cash was flown into the country on Mr. Baldwin's directions and delivered to Mme Sengkeo.

559. Whether this correlation is sufficient to support an inference of causation is beside the point, however. It is not strictly necessary for the Tribunal to find that a bribe was paid in 2012 to justify the decision, made three years later in 2015, to structure the sale of Savan Vegas' "Gaming Assets" as an "asset sale" rather than a "corporate sale" of SVCC. As discussed above, this was one of two options that were offered expressly under the Deed of Settlement, and the Lao PDR was within its rights to select the "asset sale" option. Its decision to do so was rational in any event, but was particularly understandable in a context where any pre-existing suspicions about Sanum's handling

[995] R-264, ICSID BIT I Award, ¶¶ 128-130, 135-139 (emphasis in the original).

[996] Tr., 11 June 2019, 524:14-525:8, 536:4-5 (Baldwin).

of the CFA Loans would now be reinforced by the information becoming available through access to SVCC's accounts. That information clearly suggested that the CFA Loans had been administered in a way that prioritized Sanum's interest as lender rather than the interests of SVCC and its shareholders.

560. In particular, in assessing Sanum's handling of the CFA Loans, the Tribunal focuses not so much on the *original loan terms*, since the Lao PDR's representative had agreed to these in the context of a 2009 meeting of SVCC's shareholders.[997] That approval makes it problematic for the Lao PDR to complain later about the Agreements' stacking of "Late Fees" on top of "Administration," "Maintenance" and "Disbursement" fees, and of "Overdue Interest" on top of regular interest. The bigger concern, however, was with *how payments were scheduled and allocated*. SVCC's payments on the CFA Loans were regularly marked as "late," triggering a cascade of these additional charges. Yet the decision on when SVCC should make payments on the loans was in the sole discretion of Mr. Baldwin, in consultation with Mr. Crawford, who served simultaneously as CFO for both Sanum and SVCC.[998] Claimants thus had a clear conflict of interest in this process: as Mr. Crawford admitted during the Hearing, the decision every month as to whether SVCC should make payment one week versus another effectively would determine whether Sanum could charge SVCC for Late Fees and Overdue Interest on the payment.[999]

561. While *in principle* these decisions might be made by prioritizing SVCC's best interests in light of its available cash flow, the Tribunal has great difficulty accepting that this was the interest Messrs. Baldwin and Crawford *actually* prioritized in practice. Claimants' own expert calculates that Sanum charged SVCC an additional almost US$25 million *simply because of late payments* (i.e., Late Fees and Overdue Interest), over and above all other categories of regular interest and Disbursement, Administration and Maintenance Fees.[1000] The magnitude of this impact, coupled with the fact that SVCC made a total of US$85 million in repayments (on loans that Claimants themselves say never exceeded roughly US$50 million in principal), without any portion of the repayments ever being applied to pay down any loan principal, strongly suggests malfeasance at SVCC's expense.

[997] C-42, SVCC and Paksong Vegas Shareholders Meeting Minutes, 18 March 2009, pp. 1, 3.

[998] Respondent's Closing Presentation, slide 64 (reproducing testimony of Clay Crawford, Transcript, 11 June 2019, 420:21-421:16).

[999] *Id.*

[1000] Claimants' Opening Presentation, slide 167 (citing Second Dass Report, Table 5).

562. It is not clear precisely when this pattern of suspicious activity became fully clear to the Lao PDR, but it is logical that at least the broad contours of the problem began to emerge soon after it obtained access to Savan Vegas' records after the transfer of control. The Tribunal therefore is not surprised that SVCC ceased making loan payments from that time forward, and that the sale was pursued thereafter as an "asset sale" rather than a "corporate sale" of SVCC, exercising one of the options provided by the Deed of Settlement.[1001]

563. Based on these facts, the Tribunal finds no expropriation by the Lao PDR of the CFA Loans. To summarize: Sanum retained its contractual right under the Credit Facility Agreements to seek collection from SVCC. The fact that Sanum lost its main form of collateral (the Savan Vegas PDA) was not an expropriation of its investment in the loans, when the PDA termination was reasonably predicated on Sanum's own refusal to pay any taxes as required under the PDA and the Deed of Settlement. Nor did the Lao PDR expropriate Sanum's investment in the CFA Loans when a decision was made to structure the "Gaming Assets" sale as an asset sale rather than a corporate sale, pursuant to the Deed of Settlement's express contemplation that either structure could be pursued. The permissibility of this choice is reinforced by the Deed of Settlement's command that the sale be structured to "maximize Sale proceeds to the Claimants and Laos,"[1002] rather than to maximize Claimants' prospects of recovering further on the CFA Loans. The history of Sanum's handling of the CFA Loans further reinforced the reasonableness of selecting the asset sale option under the Deed of Settlement. There was no expropriation of Sanum's legal rights in this regard.

D. SEIZURE AND CLOSURE OF THE FERRY TERMINAL SLOT CLUB

(1) The Claim Asserted

564. Sanum argues that by seizing the Ferry Terminal Slot Club, the Respondent expropriated its investment in breach of Article 4 of the China-Lao BIT.[1003]

[1001] R-5, Deed of Settlement, 15 June 2015, Section 30.

[1002] R-5, Deed of Settlement, 15 June 2015, Sections 11, 12, 13 (emphasis added).

[1003] LHNV presents an equivalent claim about expropriation in breach of Article 6 of the Lao-Netherlands BIT. It also claims that the Respondent failed to provide fair and equitable treatment in violation of Article 3(1) of that BIT, and violated Article 3(4) of the Lao-Netherlands BIT, the "umbrella clause," by failing to comply with Lao PDR statutes, specifically Articles 60-61 and 64 of the 2016 Law on Investment Promotion and Articles 15-16 of the Lao Constitution. *See* Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.F; Claimants' Reply, Section IV.E.

(2) The Parties' Positions

a. Claimants' Position

565. Sanum maintains that on or about 16 April 2015 the Respondent wrongfully seized and subsequently closed the Ferry Terminal Slot Club, in which Claimants had a 60% interest in a joint venture with ST.[1004] The Respondent also seized the slot machines at this club, along with those at the Lao Bao Slot Club, which had a value in excess of US$390,000; it subsequently refused to return them, having transferred them to Savan Vegas (which was then under State control).[1005]

566. Sanum asserts that the seizure and subsequent refusal to return the assets was grounded in a court order arising from Case 48, which required the State to "seize all property (buildings, premises, money and equipment) of Savan Vegas … to become the property of the State."[1006] Case 48 however was "rife with fundamental and pervasive procedural defects," including withholding relevant documents from Sanum and its counsel. Sanum contends that letters from the MPI later discovered in the Case 48 file essentially admit the Respondent's violation of its 2009 Law on Investment Promotion and its investment treaty obligations, in connection with the court order sanctioning the seizure.[1007]

(i) **Expropriation**

567. Sanum submits that the Respondent's seizure and closure of the clubs, along with the conversion of the clubs' assets, interfered so substantially with the operations of these enterprises that it constitutes an expropriation under international law.[1008] Despite Claimants having a 60% ownership interest, the Respondent did not offer to compensate them for the taking, on the basis that ST held the licenses to operate the club.[1009]

568. The progression of the Respondent's taking shows that the standard of due process under international law for expropriation – requiring "an actual and substantive legal procedure for a

[1004] Claimants' Memorial, ¶¶ 408-409.

[1005] Claimants' Memorial, ¶¶ 282, 408-409; citing Crawford Witness Statement, ¶ 87; C-148, SVLL letter to ST Group, 19 July 2016. While Claimants' primary claim is for the full value of the Ferry Terminal Slot Club, Claimants claim in the alternative for the physical assets (mainly slot machines) allegedly seized from that club and from the Lao Bao Slot Club. Crawford WS ¶ 87.

[1006] Claimants' Memorial, ¶ 410, citing C-330, Case 48 Decision at p. 14.

[1007] Claimants' Memorial, ¶¶ 410-412; citing Witness Statement of Jorge Menezes, 30 August 2017, ¶¶ 17-92; C-336, Letter from MPI to Court of Appeal No. 2270/MPI. IPD, 16 September 2019; C-337, Letter from MPI to Public Prosecutor No. 2585/MPI. IPD, 24 October 2016.

[1008] Claimants' Memorial, ¶ 414.

[1009] Claimants' Memorial, ¶ 415.

foreign investor to raise its claims against the depriving actions already taken or about to be taken against it" – was not met.[1010] Specifically, Sanum contends that the 2015 acts of the Lao executive, as well as the 2016 acts of the Lao judiciary in Case 48, demonstrate that (1) due process was not afforded before or after the taking; (2) the public interest was not served through it; and (3) it was inconsistent with Lao law, such that the Respondent illegally expropriated Claimants' interest in the Ferry Terminal Slot Club and the slot machines at the Lao Bao Slot Club, in violation of Article 4 of the China-Lao BIT.[1011]

(ii) **Response to the Respondent's Defenses**

569. Sanum disputes that this claim was before the SIAC Tribunal, as the Respondent argues, and says that it therefore cannot be precluded by the 2017 SIAC Award.[1012] Further, Sanum points out that the Respondent "relies almost entirely on its *res judicata*/collateral estoppel jurisdictional objection" and otherwise fails to address this claim in its Counter-Memorial, thereby leaving Claimants' position on it uncontroverted.[1013]

b. Respondent's Position

570. The Respondent argues that the 2017 SIAC Award precludes Claimants' claim regarding the "seizure and closure" of the Ferry Terminal Slot Club, such that it fails on the merits.[1014] The Respondent maintains that the Claimants' complaints arising from these events were put before the SIAC Tribunal and disposed of by it.[1015]

571. According to the Respondent, the Deed of Settlement undisputedly required Claimants to sell their interest in the slot clubs.[1016] The separate contracts between Sanum and ST define their respective rights in the slot clubs, and demonstrate that "Mr. Baldwin's representation during settlement negotiations that Sanum owned slot club licenses that could be extended 50 years was not true."[1017] In fact, the Respondent learned upon taking control of the Savan Vegas, and Mr. Baldwin confirmed in the SIAC hearing, that Sanum owned only the land concessions but not the buildings

[1010] Claimants' Memorial, ¶¶ 416-417.
[1011] Claimants' Memorial, ¶ 418.
[1012] Claimants' Reply, ¶ 464.
[1013] Claimants' Reply, ¶¶ 464-465.
[1014] Respondent's Rejoinder, Section X.
[1015] Respondent's Rejoinder, ¶ 216.
[1016] Respondent's Rejoinder, ¶ 211.
[1017] Respondent's Rejoinder, ¶ 212.

or licenses, which were owned by ST.[1018] Therefore, ST's permission was required to sell the slot clubs, and the Respondent wrote to Sanum on several occasions requesting that it "resolve this ownership issue" with ST.[1019] The Respondent contends that its request was never fulfilled, and that this problem in fact was "created by Claimants for the purpose of frustrating the sale of the gaming assets." The impasse led the Respondent to order the closure of the slot clubs in July 2016, and they remained closed in order to protect Macau Legend's exclusivity rights.[1020] These steps were justified in implementation of the Deed of Settlement, Respondent argues, and Claimants' attempt to explain them otherwise – as based on orders in Case 48 – is a "red herring. Case 48 is unrelated to the transition of the Slot Clubs or the reason the Government was entitled to transition control."[1021]

572. According to the Respondent, the SIAC Tribunal was presented with this issue and heard the Parties' arguments before disposing of it in the 2017 SIAC Award. That Award concluded that the Respondent "was permitted to transition control of the Slot Clubs; the Deed did not require sale of the Slot Clubs; Claimants had no ownership interest in the Slot Clubs; and no damage could have been caused to Claimants by excluding the Slot Clubs from the sale."[1022] Additionally, the Respondent contends that the SIAC arbitration afforded Claimants the necessary due process for this claim.[1023]

573. Finally, the Respondent points out that Sanum's position does not remain uncontroverted, as Sanum posits, because the Respondent's purported reliance "almost entirely on its *res judicata*/collateral estoppel" argument is not at odds with addressing all of Sanum's purported merits arguments.[1024]

(3) The Tribunal's Analysis

574. As a predicate to analyzing Sanum's BIT claims about the Ferry Terminal Slot Club and the slot machines there and at the Lao Bao Slot Club, the Tribunal sets forth certain relevant facts.

[1018] Respondent's Rejoinder, ¶ 213; citing R-217, Transcript testimony of John Baldwin, SIAC Case, 25 January 2017, 1046:15-19, 1050:14-20.

[1019] Respondent's Rejoinder, ¶ 214.

[1020] Respondent's Rejoinder, ¶ 215.

[1021] Respondent's Counter-Memorial, n.168.

[1022] Respondent's Rejoinder, ¶ 216.

[1023] Respondent's Rejoinder, ¶ 216.

[1024] Respondent's Rejoinder, ¶ 210; citing Claimants' Reply, ¶ 464.

575. First, Sanum's underlying interest in the Ferry Terminal and Lao Bao Slot Clubs arose from its agreements with another private party, ST. As recited in the 2007 Lao Bao/Ferry Terminal Participation Agreement, ST already held licenses for gaming businesses in both clubs. ST agreed that Sanum would "participate in its Business Operations and … supply certain slot machines and other electronic gaming … on a generated revenue participation basis (sharing revenue)."[1025] ST in turn was responsible for procuring and maintaining "all relevant licenses."[1026] The Participation Agreement confirmed that ST would remain "the owner of the Business Operations and premises" where the slot machines would be installed.[1027] Sanum would remain the owner of the slot machines supplied to the clubs.[1028]

576. Aside from Sanum's continuing ownership of the slot machines, its interest in the clubs was not a shareholding, but rather a contractual right to a portion of the revenue stream to be generated through operation. The Lao Bao/Ferry Terminal Participation Agreement provided that 30% of the "Generated Revenue" would be paid to the Lao Government in corporate income taxes, and the remaining revenue (after reduction to cover operating expenses) would be shared between Sanum and ST. Sanum's contractual interest was described as "60% of net profit after tax and expenses," with the 40% balance belonging to ST.[1029] All of these terms assumed, however, that the clubs would remain in operation and that Sanum and ST would remain in an acceptable working relationship. But neither Sanum nor ST could assign their Participation Agreement rights to a third party without the other's approval,[1030] and both Sanum and ST had the right to terminate the Participation Agreement in the event of the other's failure to comply with its terms.[1031] The Participation Agreement also acknowledged a risk that the clubs could close business operations independent of either side's breach, for example "due to the change of Lao government policy."[1032]

577. In 2009, Sanum and ST concluded an "Ancillary Agreement" which again acknowledged that ST held the relevant "concessions, permits, licenses, [and] Land Leases" for the Ferry Terminal and Lao Bao Slot Clubs, which made it the "beneficiary and beneficial owner" of those legal rights. However, ST agreed to "mortgage" 60% of these rights to Sanum, with the result that if there was

[1025] C-27, Lao Bao/Ferry Terminal Participation Agreement, "Whereas" clause (A).
[1026] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 6.1.
[1027] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 6.5.
[1028] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 8.
[1029] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 4.1.
[1030] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 15.
[1031] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 10.
[1032] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 9.

a "sale, transfer, assignment, distribution, cancellation or expiration" of these rights, any "proceeds from such action shall be distributed" 60% to Sanum and 40% to ST.[1033] While this document no doubt had contractual implications as between Sanum and ST, there is no evidence that any "mortgage" or assignment document was ever registered with the State, altering the official record of ST as the holder of the relevant licenses and leases.

578. As it transpired, the relationship between Sanum and ST had seriously deteriorated by early 2012. On 11 April 2012, ST served a notice of termination related to the Lao Bao/Ferry Terminal Participation Agreement, and on 3 May 2012, ST filed a legal petition in Case 48 requesting *inter alia* that its termination of this agreement be deemed lawful on account of Sanum's breach.[1034]

579. *Importantly, however*: no judicial decisions were rendered in Case 48 before LHNV and Sanum had *separately* reached agreement with the Government, through the Deed of Settlement on 15 June 2014, to exit the gaming market in the Lao PDR. By Claimants' own contention, nothing of note happened in Case 48 between the time it filed its short Defense on 8 June 2012, and ST's apparent filing of an Additional Statement of Claim against Sanum on 28 November 2014,[1035] which was more than five months after the Deed of Settlement. Moreover, by Claimants' own rendition, no relevant court orders were entered in Case 48 for almost two years after the Deed of Settlement, with the first instance decision not being handed down until 4 May 2016.[1036] Critically, this was more than a year after the key Government act which Sanum challenges as a violation of its BIT rights: the 16 April 2015 "seizure" of the Ferry Terminal and Lao Bao Slot Clubs, including the slot machines located therein.[1037]

580. As a matter of sheer chronology, therefore, the Government's challenged acts regarding the Slot Clubs cannot be seen as an implementation of any judicial decision in Case 48, as Claimants imply.[1038] In these circumstances, there is no need for the Tribunal to assess the propriety of what followed in Case 48. All of the judicial acts in that case of which Claimants complain long postdated

[1033] C-145, Ancillary Agreement between Sanum and ST, 1 September 2009, Article 4.

[1034] C-325, ST Petition in Case 48, 3 May 2012, p. 18, "Suggestions for consideration," ¶ 5.

[1035] C-326, Defense by Sanum and SVCC in Case 48, 8 June 2012; C-331, ST Statement of Additional Claims, 28 November 2014; Claimants' Memorial, ¶ 243 (contending that they were unaware of ST's November 2014 filing).

[1036] C-330, "Case 48" Decision No. 10/FI.C, 4 May 2016; *see* Section III.H.12 above.

[1037] *See* Claimants' Memorial, ¶¶ 13, 282, 409, 413.

[1038] *See* Claimants' Memorial, ¶¶ 410, 413.

the Government acts which allegedly deprived Sanum of its rights with respect to the Ferry Terminal and Lao Bao Slot Clubs.

581. Rather, the challenged acts must be evaluated in light of the Deed of Settlement between Claimants and the Lao PDR. Section 6 of that document had expressly included Claimants' rights with respect to the Ferry Terminal and Lao Bao Slot Clubs within its definition of "Gaming Assets."[1039] In Sections 10-12, the Deed of Settlement required Claimants to "take steps to establish and expeditiously carry out a sale of the Gaming Assets," with the understanding that Claimants had "the right to continue to manage and operate the Gaming Assets" through the sale *or for 10 months*. If Claimants had not managed to sell the "Gaming Assets" by the end of 10 months, then a third party gaming operator would "step in to manage and operate the Gaming Assets in place of the Claimants until the Sale is completed."[1040] Sanum admits in its Memorial that in the Deed of Settlement, the "[t]he parties agreed that … Ferry Terminal Slot Club, and Lao Bao Slot Club would be sold to a third party" along with the Savan Vegas Casino.[1041]

582. In Section 16, the Deed of Settlement provided that net sale proceeds for the "Gaming Assets" would be shared 80%-20% between Claimants and the Lao PDR.[1042] This split was logical with respect to Savan Vegas in light of the 80%-20% ownership structure of SVCC.[1043] But it was wholly illogical as applied to the Ferry Terminal and Lao Bao Slot Clubs, in which the Lao PDR never had a participation interest, and Sanum's own interest was shared on a 60%-40% basis with another private company (ST), which was not a party to the Deed of Settlement. Recognizing this error almost immediately, Sanum and the Lao PDR entered into a Side Letter two days later. Importantly, the Side Letter reaffirmed that the Ferry Terminal and Lao Bao Slot Clubs were included in the definition of "Gaming Assets" in Section 6 of the Deed of Settlement, but added to Section 6 that "ST owns 40% of the Lao Bao and Ferry Terminal Slot Clubs."[1044] The Side Letter made no changes to Sections 10-12 regarding the required sale of the "Gaming Assets" or the transfer of control after ten months if required to complete that sale. It did clarify, however, that "the two references to 'Gaming Assets' in Section 16 refer to Savan Vegas only, not the Slot Clubs."[1045] As

[1039] R-5, Deed of Settlement, 15 June 2014, Section 6.
[1040] R-5, Deed of Settlement, 15 June 2014, Sections 10-12.
[1041] Claimants' Memorial, ¶ 140.
[1042] R-5, Deed of Settlement, 15 June 2014, Sections 16.
[1043] R-5, Deed of Settlement, 15 June 2014, Sections 5.
[1044] R-6, Side Letter to the Deed of Settlement, 18 June 2014.
[1045] R-6, Side Letter to the Deed of Settlement, 18 June 2014.

noted above, Section 16 was the provision which had addressed the allocation of sale proceeds, providing for an 80%-20% split between Claimants and the Lao PDR.

583. According to Claimants, the effect of the Side Letter was to carve Sanum's interest in the Ferry Terminal and Lao Bao Slot Clubs out from the requirement of a mandatory sale. According to Respondent, the effect of the Side Letter was more limited: to carve the two slot clubs out from the 80%-20% split of net proceeds, as between Claimants and the Lao PDR, that was provided for Savan Vegas. The Tribunal considers the latter interpretation to be more persuasive textually, given that (a) the Side Letter confirmed the two slot clubs remained part of the definition of "Gaming Assets," and (b) the only Section from which the slot clubs expressly were removed was Section 16 which addressed the sale price allocation, *not* Sections 10-12 addressing the sale process as such. This interpretation moreover does justice to the overarching thrust of the Deed of Settlement, which was to provide for Claimants' exit entirely from the Lao PDR gaming market, in exchange for receiving value for their various assets through a sale process which was expressly subject to a change in control if not completed within 10 months.

584. Notably, it was precisely at the 10-month mark (on 16 April 2015), with no sale concluded by Claimants of any of their gaming assets, that the Government took control of the Ferry Terminal and Lao Bao Slot Clubs. This timing, which coincided with the Lao PDR's taking control of the Savan Vegas Casino, confirms that the Government's acts were related to its interpretation of the Deed of Settlement, which authorized a transfer of control of all Gaming Assets after ten months. Indeed, the Government's letter announcing that "from this day [it] is the controlling authority for all decisions relating to the management and control of Savan Vegas Casino and the Savannakhet Ferry Terminal and Lao Bao slot clubs" expressly referenced the Deed of Settlement, along with the decisions of the ICSID BIT I Tribunal denying LHNV's request for provisional measures related to the transfer of control.[1046] There was no reference to the still-dormant Case 48.

585. The Government's letter of 16 April 2015 referred to its understanding that Claimants were the "Concession holders licensed to operate" the relevant businesses, and as such would "fully cooperate in the turnover of control and management."[1047] This was consistent with Claimants' implicit representation through the Deed of Settlement that they were authorized to reach agreement

[1046] C-147, Letter from Vice Minister Bounthav Sisouphanthong, 16 April 2015 (referencing R-5, Deed of Settlement, 15 June 2014; R-13, Decision on Claimant's Second Application for Provisional Measures, ICSID BIT I Case, 18 March 2015; and R-14, Email from Judge Ian Binnie to Christopher Tahbaz, 14 April 2015).

[1047] C-147, Letter from Vice Minister Bounthav Sisouphanthong, 16 April 2015.

with the Government regarding the future of the Slot Clubs, just as with regards to Savan Vegas. In short order after the transfer of control, however, the Government evidently realized that this was not so straightforward for the Slot Clubs, because ST in fact was the license holder as well as the owner of the premises. These rights could not be sold to a third party simply on the basis of Claimants' agreement to that process in the Deed of Settlement, without ST confirming that a new buyer would receive undisputed rights to operate the clubs. Accordingly, on three separate occasions over the next several months, the Government asked Sanum to work this out with ST, so as to enable the Slot Clubs to be sold to a third party.[1048]

586. For example, the first of the Government's letters, dated 15 July 2015, stated as follows:

> Contrary to your assertions concerning Sanum's ownership in the slot clubs, after review of official records and the documents you provided to us, there does not appear to be a legal basis to include the Lao Bao and Ferry Terminal Slot Clubs … within the Savan Vegas assets to be sold.
>
> … The Government cannot include a slot club license in a sale of the Gaming Assets when a third party appears to be the sole owner of the license without that parties' [sic] consent.
>
> … (Sanum has suggested that a partial assignment [of land rights] was effected via a 'mortgage' granted by an ST entity, but again no definitive evidence of a legally binding transfer has been presented.) Unless the registered holder of the land were to grant the Government its consent to transfer all or part of the licenses and land rights to the new buyer, the Government is in no position to do so.
>
> … To be clear, the Government has no objection to the inclusion of the Slot Clubs in the Savan Vegas sale, so we urge that Sanum and ST arrive at a solution by which the buyer can have rights in the Slot Clubs that are acknowledged and not in dispute.[1049]

587. The Government reiterated on 2 August 2015 that "we are unable to discern how the Government can sell two slot clubs that have a third party in ownership of the land, the gaming license and 40% of the revenues. It is now clear that you misrepresented the facts concerning your right to sell the two slot clubs in the negotiations in Singapore inducing the Government to sign the Deed. We

[1048] R-164, Letters from David Branson to Sanum Investments Limited, Christopher Tahbaz, and John Baldwin, 15 July 2015, 2 August 2015 and 5 October 2015.

[1049] R-164, pp. 2-6 (Letter from David Branson to Sanum Investments Limited, Christopher Tahbaz, and John Baldwin, 15 July 2015).

suggest strongly that you resolve this ownership issue with ST Group as soon as is possible."[1050] On 5 October 2015, the Government warned that if Sanum did not "provide a solution to the slot club sale issue … the Government will have to solve the problem without Sanum's participation in the solution."[1051]

588. It is undisputed that Sanum never provided a solution to this problem.[1052] Indeed, there is no evidence that it even *tried* to raise the issue with ST. By this time, as discussed above, Sanum and ST no longer had any cooperative relationship at all: ST already had sought to terminate all of its underlying agreements with Sanum, including the Lao Bao/Ferry Terminal Participation Agreement, and had a pending lawsuit against Sanum seeking judicial approval of that termination.

589. In these circumstances, it is understandable why the Government ultimately concluded that it could not validly include the Slot Club rights in a sale to a third party, even though Claimants for their part had expressly agreed to give up their interest in these "Gaming Assets" as part of their overall exit from the Lao gaming sector. At the same time, it was implicit in the Deed of Settlement that the new buyer of the *main* asset – the Savan Vegas Casino, along with the "restated" Savan Vegas PDA[1053] – would not have to contend with ongoing competition from the Slot Clubs, which could lessen the value of the long-term Savan Vegas concession on which it was bidding. One of the critical provisions of the Savan Vegas PDA had been a grant of "monopoly rights for … Casino business operations … in the three (3) neighboring provinces close to the Project development zone … namely: Savannaket, Khammaouae and Bolikhamsay …."[1054] Claimants themselves recognized as much, describing the Deed of Settlement as involving a grant of "exclusivity" to the new buyer. While the Government explained in response that "[t]he agreement to provide exclusivity was based on the assumption in the Deed of Settlement that the Slot Clubs would not be competing facilities inasmuch as they were to be a part of the sale,"[1055] the Government evidently concluded that eliminating such competition through alternative means was the best proxy for enhancing the value of the main sale asset, Savan Vegas. In these proceedings, the Lao PDR explains that this is

[1050] R-164, pp. 7-9 (Letter from David Branson to Sanum Investments Limited, Christopher Tahbaz, and John Baldwin, 2 August 2015).

[1051] R-164, pp. 10-11 (Letter from David Branson to Sanum Investments Limited, Christopher Tahbaz, and John Baldwin, 2 August 2015).

[1052] *See* R-27, SIAC Award, ¶¶ 226-227 (citing Mr. Baldwin's concession to that effect during examination).

[1053] R-5, Deed of Settlement, 15 June 2014, Section 6.

[1054] C-7, Savan Vegas PDA, 10 August 2007, Article 9(24).

[1055] R-164, p. 5 (Letter from David Branson to Sanum Investments Limited, Christopher Tahbaz, and John Baldwin, 15 July 2015).

why it ultimately decided to close the two Slot Clubs in July 2016: to ensure that the buyer of Savan Vegas would receive the value of effective exclusivity.[1056]

590. On 19 July 2016, SVLL (which had been operating both Savan Vegas and the Slot Clubs on an interim basis since the April 2015 transfer of control) therefore informed the ST Group that "[e]ffective immediately SVLT will stop operating the two slot clubs," noting that "[t]he Exclusivity agreement in the [SVLL] PDA, which will be passed on to Macau Legend, bars the operation of these slot clubs without an agreement with SVLT or Macau Legend."[1057]

591. The Tribunal is not aware of any protest from ST about the shutdown of the Ferry Terminal and Lao Bao Slot Clubs. In any event, that would not be within the Tribunal's remit to consider. The question before this Tribunal is whether the Government's decisions violated Sanum's rights under the BIT, in light of its prior revenue participation interest in the Slot Clubs. The Tribunal considers below Sanum's expropriation claim with regard to three separate aspects of the Government's challenged conduct: (a) the decision in April 2015 to take over control of the Slot Clubs; (b) the decision in July 2016 to shut down Slot Club operations; and (c) the fate of the actual slot machines previously in use at the Ferry Terminal and Lao Bao Slot Clubs

592. As discussed in previous sections, the starting point for any expropriation analysis is the identification of a specific property right or assets which was vested in the claimant, of which it allegedly was deprived as a result of a State measure. With respect to the Ferry Terminal and Lao Bao Slot Clubs (separate from the slot machines themselves), Claimants were not the owners of either physical property or licenses or concessions granted by the State. Rather, as discussed above, Sanum was the holder of certain contract rights vis-à-vis ST, another private party, but it simultaneously was subject to certain contract obligations, not only to ST under the Participation Agreement but also to the Lao PDR under the Deed of Settlement as modified by the Side Letter.

593. The Tribunal agrees with Sanum that contract rights, in principle, can qualify as protectable assets under the BIT, for example as rights to "performance having an economic value" under Article 1(a)(iii).[1058] But the nature of the protectable asset must be assessed in the round.

[1056] Respondent's Rejoinder, ¶ 215.

[1057] C-148, Letter from T. Miller to ST Group, 19 July 2016.

[1058] Claimants' Reply, ¶¶ 184, 188.

594. First, although Sanum's agreement with ST entrusted it with *management* rights over club operations, these were subsequently time-limited by virtue of Claimants' agreement, in the Deed of Settlement, that management and control would be transitioned to a third-party operator if no sale of the clubs had been arranged after 10 months. The Government's actions in April 2015 to take control of operations was an *implementation* of Claimants' undertaking in the Deed of Settlement, not an *overrid*e of its contractual rights. The Tribunal therefore finds no taking of property rights, in violation of Article 4 of the BIT, with respect to the April 2015 events.

595. With respect to the July 2016 closure of the slot clubs, Claimants had agreed in the Deed of Settlement to exit the Lao gaming market, including by ceding all of its interests in the Ferry Terminal and Lao Bao Slot Clubs, which were expressly confirmed in the Side Letter to be part of the "Gaming Assets" referenced in the Deed of Settlement. Claimants thus had no protectable legal right to a continued participation in the future revenue stream of these clubs, beyond the date that the "Gaming Assets" were sold to a third party.

596. It is true that Claimants did have a contractual right to obtain value from any sale of slot club operations. This value was to be commensurate with the 60% revenue sharing participation interest reflected in its Ferry Terminal/Lao Bao Participation Agreement with ST, and with its Ancillary Agreement with ST on a 60% interest in the proceeds of any sale, disposition or "cancellation" of the licenses and land lease. The Side Letter acknowledged that Sanum's interest was at the 60% level, although it incorrectly referred to the notion of ownership rather than revenue participation rights. In any event, a revenue participation interest, and an interest in the proceeds from the sale or disposition of licenses, is only of meaningful value to the extent such interests can be separately sold.[1059] But as it transpired, Claimants' contract interests could *not* be sold to a third party without ST's approval, both as a matter of Claimants' express non-assignment agreement with ST,[1060] and because the relevant licenses and land leases remained registered legally in ST's name.

597. In these circumstances, since the Government could not include the Slot Club licenses in a sale to a new buyer, it opted alternatively to close the Slot Clubs in order to provide the new owner of

[1059] *See* Respondent's Rejoinder, ¶ 73, quoting Claimants' Reply, ¶ 185, n. 287; CL-211, C. McLachlan, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017), ¶ 8.151 (noting that contract rights "can be the object of expropriation," and adding more generally that expropriation "may extend to any right which can be the object of the commercial transaction, i.e., freely sold and bought and thus has a monetary value").

[1060] C-27, Lao Bao/Ferry Terminal Participation Agreement, Article 15 ("Either party to the Agreement shall not assign its rights and obligations under this Agreement, unless to a direct affiliate of such party, without the prior written consent of the other party.").

Savan Vegas with exclusive gaming rights, unfettered by any potential competition. As discussed above, this decision respected the underlying commitment in the Savan Vegas PDA to bestow "monopoly rights" in three provinces, and also respected the fundamental aim of the Deed of Settlement to sell those Savan Vegas PDA rights to a new buyer. As a matter of logic, the elimination of competition from the Slot Clubs would have enhanced the sale value of Savan Vegas, even though it is not possible to reconstruct by how much. And under the Deed of Settlement, Sanum stood to receive 80% of the (enhanced) Savan Vegas sale value, which is a higher percentage interest than the 60% share it might have obtained from a putative sale of the Slot Club licenses, had it been able to arrange ST's consent to such a sale.

598. The Tribunal is not convinced that the Government's alternate approach to implementing the Deed of Settlement did such harm to Sanum as to constitute an expropriation, either (a) of its legal rights in the Slot Clubs, following its agreement with the Government to exit the Lao gaming market, or (b) of any residual value of its interest in the Slot Clubs, particularly given the collapse of its relationship with ST and the then-pending litigation seeking to terminate all arrangements between the erstwhile joint venture partners. Claimants have not convincingly established that in the wake of their private dispute with ST and their divestiture agreement with the Lao PDR, their partial (non-ownership) interest in future slot club revenue could have been monetized in any way that had significant value – much less more value than an 80% interest in conveying *exclusive* gaming rights to the new buyer of Savan Vegas.

599. Finally, regarding the slot machines, it is true that ST had no claim on these machines, under its agreements which acknowledged that they were owned by Sanum. The Tribunal understands that the Deed of Settlement originally had envisioned monetizing these assets by including them in the sale of the still-operating slot clubs. While the Deed of Settlement granted Claimants "the right to export from the Lao PDR *unused* slot machines currently held in storage at the Lao PDR,"[1061] this evidently referred to different machines which had been stored at the Savan Vegas Casino for several years, and which the Government at least twice during 2015 requested Sanum to retrieve based on its own arrangements.[1062] This provision for export cannot have referred to the machines which were then *actually in use* at the Ferry Terminal and Lao Bao Slot Clubs, which Clubs remained fully in operation for two more years (until July 2016). It is logical that the latter machines

[1061] R-5, Deed of Settlement, 15 June 2014, Section 21 (emphasis added).

[1062] R-164, p. 6 (Letter from David Branson to Sanum Investments Limited, Christopher Tahbaz, and John Baldwin, 15 July 2015) and p. 11 (Letter from David Branson to Sanum Investments Limited, Christopher Tahbaz, and John Baldwin, 2 August 2015).

were originally intended for sale along with the Slot Clubs themselves, rather than the Deed of Settlement envisioning a sale of empty premises at less value than an operational club.

600. Once it became clear that the Slot Clubs could not be sold as operating enterprises, and a decision was made in July 2016 to shut them down to enable the buyer of Savan Vegas to obtain the benefits of exclusivity, some solution was required for disposition of the used slot machines. It appears that a decision was made to "remove [them] to safe storage" on the property of SVLL.[1063] The reference to "safe storage" implies that the Government viewed this as an interim step rather than a permanent disposition. The record does not indicate what happened to these machines next, but in the absence of suggestion from either Party that they remain in storage somewhere years later, it seems most likely that they were transferred to Macau Legend for use in the Savan Vegas Casino, when all of SVLL's other gaming assets were sold to it in implementation of the Deed of Settlement.

601. What cannot be known is whether these slot machines, originally sourced from the Ferry Terminal and Lao Bao Slot Clubs, were factored into the price that Macau Legend paid for the assets it acquired. The Asset Purchase Agreement with Macau Legend refers to the acquisition of the Savan Vegas "Project," and includes slot machines among the "Project Assets" that were transferred for consideration.[1064] But in the absence of an inventory by original source, it is not clear if this included only the machines previously in operation at Savan Vegas, or also the machines from the Slot Clubs which were transferred to SVLL for interim storage.

602. Under either scenario, however, the non-return of the slot machines does not result in an expropriation of Sanum's investment in the Lao PDR.

603. First, the value of the slot machines was relatively low. Claimants claim this was US$390,000, relying on Mr. Crawford's witness testimony,[1065] but a close look at that testimony reveals that this figure is stated to be the undepreciated value of *both* the used slot machines and other unidentified "fixed assets" which were "acquired" at the Ferry Terminal and Lao Bao Slot Clubs.[1066] By the very nature of "fixed assets," those other assets would not have been capable of either separate return to Claimants or inclusion in the sale to Macau Legend for use at Savan Vegas, after the Ferry

[1063] C-148, letter to ST Group, 19 July 2016.

[1064] C-183, Asset Purchase Agreement for Savan Vegas between Lao PDR, Savan Vegas Lao Ltd., Macau Legend Development Ltd, and Savan Legend Resorts Sole Company Ltd., First Whereas Clause and Annex B ("Project Assets and Assumed Liabilities").

[1065] Claimants' Memorial, ¶¶ 2, 282, 518 & nn. 820, 857 (relying on)

[1066] First Crawford Statement, ¶ 87.

Terminal and Lao Bao Slot Clubs closed down. Focusing then on the slot machines themselves, Mr. Crawford states that as of April 2015, "the undepreciated net remaining value of the slot machines which remain in Laos was US$178,000."[1067]

604. Second, if the slot machines were included in the package of assets valued for sale to Macau Legend, then Claimants already imputedly received 80% of their value, based on the distribution of Savan Vegas sale assets between Claimants and the Lao PDR on an 80%-20% basis. In this scenario, Claimants have been deprived of only the remaining 20% of the value of the machines originally sourced from Ferry Terminal and Lao Bao Slot Clubs (since those machines were owned by Sanum outright, and not 20% owned by the Government as for Savan Vegas assets, Sanum should have received 100% of their resale value). However, while this mistake in allocating the proceeds of a slot machine sale might reflect a contract breach, the differential between an 80% and 100% allocation of the resale value of used equipment cannot be equated with an expropriation. As discussed in Section VI.A.3, it is axiomatic that the mere deprivation of a *portion* of an asset's overall value does not result in its expropriation.

605. Even in an alternate scenario where the stored slot machines from the Ferry Terminal and Lao Bao Slot Clubs may have transferred to Macau Legend without having been factored into the sale price for the other SVLL-controlled assets which were sourced from Savan Vegas, this still would not equate to an expropriation of the investment that Sanum made in the Lao PDR. Sanum's investment was in the shares of SVCC and in an overall set of gaming ventures in the Lao PDR; it was not an investor in specific items of slot machine equipment. Even if Sanum purchased the slot machines in question,[1068] the cost of doing so hardly amounted to a major component of Sanum's overall investment. In these circumstances, the non-return to Sanum of these particular used slot machines, whose undepreciated net value in April 2015 is said to have been US$178,000, cannot have resulted in the deprivation of all or substantially all of the value of Sanum's investment. Stated otherwise: even if there was a contract breach related to the disposition of these slot machines, the Tribunal is unable to equate a breach of that limited significance with an expropriation of Sanum's property rights under the BIT.

[1067] First Crawford Statement, ¶ 87.

[1068] There is debate between the experts Dr. Kalt and Mr. Yeo whether Sanum paid for the slot machines or instead drew on SVCC's funds, which it effectively controlled, to acquire them. The answer does not matter for purposes of the expropriation analysis.

E. THE THAKHEK CONCESSION

(1) The Claim Asserted

606. Sanum argues that by terminating the Thakhek concession rather than continuing with negotiations on specific land use terms, the Respondent frustrated the development of the Thakhek Concession. By this conduct, the Respondent expropriated Sanum's investment in breach of Article 4 of the China-Lao BIT.[1069]

(2) The Parties' Positions

a. Claimants' Position

607. Sanum maintains that pursuant to the Thakhek MOU which was incorporated into the Deed of Settlement, it completed the required US$900,000 payment to obtain a concession for the 90-hectare parcel of land, before the Respondent arbitrarily refused to continue negotiations on the land's use terms as well as its development.[1070] The Respondent's conduct thus resulted in violations of its treaty obligations.

(i) **Expropriation**

608. Sanum submits that its rights to the concession land at Thakhek constituted an investment. The Respondent accepted a total of US$900,000 from the Claimants for the concession (US$400,000 in October 2010 and US$500,000 in September 2015), but failed to permit development of the concession lands or to offer compensation for extinguishing Claimants' concession rights. Accordingly, the Respondent expropriated Sanum's investment in violation of Article 4 of the China-Lao BIT.[1071]

(ii) **Response to the Respondent's Defenses**

609. Sanum rejects the Respondent's reliance on "its *res judicata*/collateral estoppel jurisdictional objection" to argue that the SIAC Tribunal has already dealt with this claim.[1072] Further, Sanum

[1069] LHNV presents an equivalent claim about expropriation in breach of Article 6 of the Lao-Netherlands BIT. It also claims that the Respondent failed to provide fair and equitable treatment in violation of Article 3(1) of that BIT, and violated Article 3(4) of the Lao-Netherlands BIT, the "umbrella clause," by failing to comply with Article 64 of the 2016 Law on Investment Promotion; or alternatively, violated Article 3(5) of the BIT by failing to afford Claimants the protections of Article 64, which are more specific and favorable than comparable prohibitions in the Lao-Netherlands BIT. *See* Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.G; Claimants' Reply, Section IV.H.

[1070] Claimants' Memorial, ¶¶ 425-426.

[1071] Claimants' Memorial, ¶ 427.

[1072] Claimants' Reply, ¶ 470.

notes that the Respondent "makes no other argument related to the merits" of this claim in its Counter-Memorial, such that it remains uncontroverted.[1073]

610. With respect to the BIT I Awards' findings regarding Thakhek, Sanum argues that these are not entitled to any preclusive effect, both because the "frozen record agreement" in the Deed of Settlement prevented Claimants from adducing evidence in the BIT I Cases that should have been key facts in any merits analysis, and because the claims in this case differ from those in the BIT I Cases by concerning the value of the land and non-gaming business opportunities, not the value of a concession for gaming activities.[1074] With respect to the former point, Sanum argues that it was prevented in the BIT I Cases from establishing that *after* the Deed of Settlement, it paid a second installment of moneys due under the Thakhek MOU (US$500,000) to complete the entirety of a US$900,000 fund which was supposed to be used by the Government "to compensate the people for the concession land."[1075] The "frozen record agreement" also prevented claimants from presenting any new evidence regarding the value of the property and business activities without gaming activities, Sanum says.[1076] For the same reason, Sanum argues that the BIT I Awards' finding that "Claimants' slot license was justifiably revoked" is "completely irrelevant here, because Claimants' only claim before this Tribunal is for the value of the land and business-opportunities without gaming."[1077]

b. Respondent's Position

611. The Respondent argues that the Thakhek Concession claim is barred by the 2017 SIAC Award under the abuse of process doctrine, and moreover that the claim it fails on the merits because Sanum lacks any property rights in Thakhek which could be subject to expropriation.[1078]

612. The Respondent points out that Section 22 of the Deed of Settlement imposes nothing more than a contractual obligation to negotiate a potential investment in "good faith" under New York law. Whether the Government reneged on this commitment is "the same claim (using the same facts) that was first placed before the SIAC Tribunal …."[1079] The SIAC Tribunal "disposed completely

[1073] Claimants' Reply, ¶ 471.

[1074] Claimants' Submission on the BIT I Awards, ¶¶ 101-120.

[1075] Claimants' Submission on the BIT I Awards, ¶¶ 106, 108-109, 116-118.

[1076] Claimants' Submission on the BIT I Awards, ¶ 111.

[1077] Claimants' Submission on the BIT I Awards, ¶¶ 111, 119.

[1078] Respondent's Counter-Memorial, Section III.A.7; Respondent's Rejoinder, Section XIII; Respondent's Submission on the BIT I Awards, Section VI.

[1079] Respondent's Counter-Memorial, ¶¶ 112-113.

of this frivolous claim," and "[s]ince then, there have been no new factual developments regarding Thakhek."[1080] In particular, the SIAC Tribunal considered and rejected the Claimants' argument that the Lao PDR refused to include all of the land specified in the MOU in the new concession agreement, and instead excluded a valuable portion of land adjacent to National Road 13.[1081] The SIAC Tribunal also rejected Claimants' allegations that the Government wrongfully refused to negotiate an alternate proposal with a different plot of land, and to the contrary found that Laos was open to considering reasonable proposals by Sanum, which Sanum did not provide.[1082] The Respondent maintains that "[t]he sideshow of Thaket has gone on long enough."[1083]

613. The Respondent rejects Claimants' argument that its claim here is materially different than before the SIAC Tribunal, because it is purportedly based on the Thakhek MOU rather than the Deed of Settlement. In any event, the Respondent says that the reformulated claim also fails on the merits, because Sanum never held "definitive rights."[1084] The MOU is "a non-binding agreement executed at the provincial level of the Government for the purposes of negotiating a *future investment*."[1085] Thus, according to the Respondent, the MOU merely enumerates the requirements that had to be met, but were not, in order for any investment rights to vest.[1086]

614. Specifically, the Respondent points out that it never granted "formal approval for a casino or slot club" on the concession land, and that a US$25,000 payment recorded in Sanum's general ledger as "Exp Allow re Thakhaek slot club license" was in fact a bribe for the illegal license Sanum obtained from the MIC, which did not have the authority to grant such a license without approval from the Prime Minister's office.[1087] Consequently, the illicit license was cancelled on 2 March 2011 and the MOU's terms were never met.[1088]

[1080] Respondent's Counter-Memorial, ¶ 115.
[1081] Respondent's Counter-Memorial, ¶ 117.
[1082] Respondent's Counter-Memorial, ¶¶ 118-119.
[1083] Respondent's Counter-Memorial, ¶ 120.
[1084] Respondent's Rejoinder, ¶¶ 226-227.
[1085] Respondent's Rejoinder, ¶ 227 (emphasis in original).
[1086] Respondent's Rejoinder, ¶ 227.
[1087] Respondent's Rejoinder, ¶¶ 227-229, citing R-108, General Ledger Savan Vegas Hotel and Casino, 3-10 February 2011.
[1088] Respondent's Rejoinder, ¶ 230.

615. Because the MOU's terms were never met, Sanum never obtained a "Project Development Agreement, a Land Concession, or any other rights" which could be expropriated.[1089] In support of its position, the Respondent cites *Generation Ukraine*, where the tribunal stated that:

> Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred …. Since there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place, the legal materialisation of the Claimant's alleged investment is a fundamental aspect of the merits in this case.[1090]

616. The Respondent also observes that the BIT I Tribunals ultimately validated its arguments in this respect, by determining that Thakhek "was simply a commercial possibility that never reached the state of agreement."[1091]

617. Thus, the Respondent maintains that this Tribunal cannot address Claimants' Thakhek Concession claim due to jurisdictional concerns, but that even if it does, the claim lacks merit and therefore must fail.[1092] This is particularly the case in the wake of the BIT I Awards, whose findings are *res judicata*, and when paired with the prior findings of the 2017 SIAC Award, must "fully and finally defeat Claimants' Thakhek claims in these arbitrations."[1093]

(3) The Tribunal's Analysis

618. As previously discussed, an expropriation claim requires, at its core, the identification of a specific property right or asset of which the claimant allegedly was deprived as a result of a State measure.

619. Sanum alleges two relevant investments with respect to Thakhek: (a) the rights granted to it under the Thakhek MOU, and (b) its payment of US$900,000 in two tranches, pursuant respectively to the Thakhek MOU and the Deed of Settlement.[1094] Sanum says these investments were expropriated by the Government's "removing the highway frontage from the concession land

[1089] Respondent's Rejoinder, ¶¶ 230, 232.

[1090] Respondent's Rejoinder, ¶ 231, citing RL-139, *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶ 6.2, 8.8.

[1091] Respondent's Submission on the BIT I Awards, ¶ 62. The Respondent quotes a number of specific findings from the BIT I Awards. *Id.*, Respondent's Submission on the BIT I Awards, ¶¶ 66, 67.

[1092] Respondent's Rejoinder, ¶ 232.

[1093] Respondent's Submission on the BIT I Awards, ¶ 70.

[1094] Claimants' Memorial, ¶ 427; Claimants' Reply, ¶¶ 223, 226.

without fairly compensating Claimants," and "refus[ing] to grant Claimants a land concession and PDA that included the 16 hectares, while keeping $900,000 paid for the concession …."[1095]

620. Sanum's reference to "concession land" begs the question of what rights it actually had with respect to land in the Thakhek area. As discussed above in Section V.D.1.c (which assessed Respondent's *ratione materiae* objection to the Thakhek claims), the Thakhek MOU did not grant Sanum any definitive rights to land or to a concession over land. Rather, it established *a process* which, depending on various future contingencies, might lead to a future signing of a separate land concession agreement. These contingencies included not only (a) Sanum's making of two payments totaling US$900,000, but also (b) its completion of various studies for Government review and possible approval,[1096] and (c) its reaching a future "agree[ment]" with the Government on the "exact location" of any "Concession Land."[1097] Only at that point was a formal land concession agreement to be concluded,[1098] which would establish rights for Sanum with respect to specific land. In the context of this multi-step process envisioned in the Thakhek MOU, Claimants' payment of the initial tranche of US$400,000 was no doubt partial performance, but this did not establish a definitive right to concession land, pending completion of the remaining steps.

621. Moreover, the Thakhek MOU did not unambiguously promise that the land in question would include an extensive stretch of highway frontage. The future "Concession Land" was described as a plot "with the land area of about 90 hectares more or less," to be located "on the South of the Bridge and on the West of Road No. 13 South."[1099] Claimants contend that the word "*on*" – as in "on the South of" and "on the West of" – denotes that the plot would extensively abut the highway, and not just fall generally within the southwest quadrant bounded by these roads.[1100] The Tribunal finds the preposition to be insufficient to prove Claimants' point, given other ambiguities in the record. For example, the "land area drawing" referenced in and attached to the Thakhek MOU shaded a subset of the E-1 Parcel (including most but not all of the highway frontage) *in a different color* than the rest of the E-1 Parcel,[1101] without clearly delineating the implications of the different shading.

[1095] Claimants' Opening Presentation, slides 218-219.
[1096] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.
[1097] C-100 and R-107, Thakhek MOU, Art. 3.1.
[1098] C-100 and R-107, Thakhek MOU, Arts. 1.3, 1.4.
[1099] C-100 and R-107, Thakhek MOU, Art. 2.1.
[1100] Claimants' Opening Presentation, slide 221.
[1101] C-100.008, Thakhek MOU.

622. It is true that the Thakhek MOU envisioned an effort by the Government to obtain rights to land in the area "so that the Government will be able to grant the Concession Land to Concessionee according to this MOU."[1102] But the MOU did not promise that the Lao PDR would expropriate private land (including privately owned highway frontage land) if the current owners proved unwilling to sell their parcels through a voluntary transaction. Similarly, Sanum's agreement "to donate" US$900,000 was described in part as "to compensate the people for the Concession Land," although there were also several other described uses for these funds, such as to "resolve the problems; and spend on the survey, measurement, and allocation of the Concession Land."[1103] And even the reference to "compensat[ing] the people" is ambiguous. The phrase equally could refer to (a) consideration for obtaining *publicly* owned parcels (owned by "the people" in the parlance of the Lao PDR, which is the Lao *People's* Democratic Republic), or (b) to an anticipated attempt to *purchase* the private land from the current owners through voluntary negotiations. It was not clearly (c) a promise of forced expropriation of private lands if those owners refused to sell.

623. In any event, the Thakhek MOU referred to the "exact location of the Concession Land" as something that *remained to be agreed*: "Once the exact location of the Concession Land has been agreed upon, the Concessionee will confirm its acceptance of the Concession Land …."[1104] In other words, negotiation of "the exact location" (following the survey and measurement of the land) was one of several remaining steps before concession rights could vest; another was for Sanum to "complete the Feasibility Study, Master Plan, Social-Economic and Environmental Impact Study for the Concession Land."[1105] Indeed, the "Land Concession Agreement" was only to be signed "after all of the[se] required documents … have been approved by the Concessioner."[1106]

624. The Thakhek MOU did not provide for a return of Sanum's agreed "donat[ion]" if these further steps did not succeed, *e.g.,* if Sanum failed to supply the studies it had promised, or if those studies ultimately were not approved, or if the private land could not be acquired. In this context, the initial donation may be seen as consideration Sanum paid for the Government's commencing a process to be implemented in good faith. The payment did not guarantee a successful outcome to that process, much less bestow legal rights to a concession over a particular parcel of land.

[1102] C-100 and R-107, Thakhek MOU, Art. 1.3.
[1103] C-100 and R-107, Thakhek MOU, Art. 2.2.
[1104] C-100 and R-107, Thakhek MOU, Art. 3.1.
[1105] C-100 and R-107, Thakhek MOU, Art. 1.3.
[1106] C-100 and R-107, Thakhek MOU, Art. 1.3.

625. Equally important, Sanum's "rights" with respect to Thakhek (such as they were) were impacted by the terms to which the Parties subsequently agreed in the 2014 Deed of Settlement. In that document, Sanum agreed to make the second of the two payments originally anticipated in the Thakhek MOU (for US$500,000), following which the parties would "negotiate in good faith and conclude" a land concession and PDA for *non*-gaming activity "with respect to the 90 hectares of land at Thakhet identified in the MOU."[1107] The Deed of Settlement did not state that the Thakhet MOU itself remained in effect, in the way that it expressly characterized the Savan Vegas PDA as "restated" for purposes of an eventual sale to a new buyer.[1108] To the contrary, since the Thakhet MOU by its terms had concerned a future gaming concession, and the Claimants ceded in the Deed of Settlement any right to future gaming activity in the Lao PDR,[1109] it is clear that the Thakhet MOU no longer remained in effect according to its original terms. Rather, the Deed of Settlement was a new agreement, which merely *cross-referenced* the MOU for purposes of identifying the land over which the Parties would now "negotiate in good faith and conclude" a *new* land concession and PDA, this one to cover *non-gaming* activity only. This cross-reference did not however add any detail about the precise land location covered by the earlier MOU. As such, it did not resolve the preexisting dispute over whether the parcel referenced in the Thakhet MOU included road frontage or not. The Deed of Settlement simply committed the Parties to a new round of negotiations in good faith.

626. As the SIAC majority found, under the governing law of New York, an obligation to negotiate in good faith does not guarantee a final agreement, since "good faith differences in the negotiation of the open issues may prevent a reaching of a final contract."[1110] The fact that the Parties also agreed in the Deed of Settlement to "conclude" a new land concession and PDA after their good faith negotiations does not change this result. At best the "and conclude" language reflected an agreement to agree, a construct that remains subject to the vagaries of a good faith negotiation. It does not give rise to any enforceable property right with respect to specific terms on which the Parties might fail, in good faith, to reach agreement.

[1107] R-5, Deed of Settlement, 15 June 2014, Section 22.

[1108] R-5, Deed of Settlement, 15 June 2014, Section 6.

[1109] *See* Claimants' Opening Presentation, slide 206 ("Claimants' Thakhek gaming rights are irrelevant because the claims here don't concern gaming rights"). Because the focus of Claimants' current claims is on an alleged right to use the concession land for non-gaming activity, the Tribunal sees no need to reach the Respondent's new argument in its Rejoinder that Claimants earlier alleged Thakhek gaming rights were procured by bribery. Respondent's Rejoinder, ¶¶ 228-230. The record regarding such alleged bribery is murky at best. *See* Claimants' Opening Presentation, slides 206-213.

[1110] C-481 and R-27, 2017 SIAC Award, ¶ 302 (quoting caselaw).

627. As it transpired, the Parties were unable to reach agreement, in the negotiations that followed, with respect to the highway frontage area. The 2017 SIAC Award found, by majority, that the Lao PDR had not exhibited bad faith in its approach to negotiations. Among other things, the majority concluded that: (a) the Thakhek MOU was "ambiguous" from the start as to whether the highway frontage would be included, given this was largely private land and the attached map shaded it differently than the remaining hectares in the E-1 Parcel;[1111] (b) the Parties' dispute over the 16 hectares of private land predated the Deed of Settlement, and Sanum understood that this "remained an open issue for negotiations"[1112]; (c) the Government offered a parcel measuring 88.9 hectares, which "meets the size requirement" in the Thakhek MOU of "about 90 hectares more or less," whereas including the additional 16 hectares of private land fronting the road would have "appreciably exceed[ed]" that requirement[1113]; (d) the Government offered to provide another site of Sanum's choosing, but Sanum's only proposal was starkly inconsistent with the Deed of Settlement, for example by demanding new exemptions on taxes and fees; and (e) Sanum refused to present any other proposal despite the Government's invitation.[1114]

628. The dissenting arbitrator in the SIAC Case by contrast considered that the Thakhek MOU *had* included the 16 hectares at issue, and that the Government breached its obligations of good faith under the Deed of Settlement by refusing to consider including this land, without which (the dissent reasoned) Sanum's development plan "lacked a commercial rationale … because there would have been no road footage."[1115] The dissent's perception about "no road footage" is not quite accurate, however, as the Government apparently had offered to provide Sanum (well before the Deed of Settlement) with at least a modest amount of highway frontage, allowing access from the highway to a larger plot farther back from the road.[1116] Claimants acknowledged at the Hearing that the Government thus did offer *some* road frontage, and stated that they were not contending the parcel offered was "landlocked" or inaccessible from the road – simply that it was less visible from the highway, and thus less commercially desirable, than the extensive frontage land Claimants contended they had been promised in the original Thakhek MOU.[1117]

[1111] C-481 and R-27, 2017 SIAC Award, ¶ 304.
[1112] C-481 and R-27, 2017 SIAC Award, ¶ 303.
[1113] C-481 and R-27, 2017 SIAC Award, ¶ 303.
[1114] C-481 and R-27, 2017 SIAC Award, ¶¶ 305, 307 (citing exhibits).
[1115] C-481 and R-27, 2017 SIAC Award, Dissenting Opinion, ¶¶ 98-99.
[1116] C-0244.1, 20 January 2012 Revised Draft PDA.
[1117] Tr. Day 1, 117:14-118:4 (Claimants' Opening).

629. Like the SIAC majority, the BIT I Tribunals declined to find any material breach of the Deed of Settlement regarding the negotiation in good faith of a Thakhek land concession. Their principal finding was that Claimants had "not established a land entitlement that includes the disputed 16 hectares, and there is no undertaking by the Government [in the Deed of Settlement] to use its powers of eminent domain to expropriate the existing private owners for the financial benefit of the Claimants. Refusal to expropriate private land for private gain of the Claimant does not constitute evidence of 'bad faith.'"[1118] Subsequently, after Claimants' original treaty claims were revived by virtue of an unrelated material breach of the Deed of Settlement, the BIT I Tribunals both rejected Claimants' expropriation claim related to the original Thakhek MOU. Claimants had alleged in the BIT I Cases that the Government "[r]efus[ed] to honor a written agreement to turn over 90 hectares of concession land … by arbitrarily removing the most valuable 16 hectares, which was the keystone of the project because it contained the highway frontage."[1119] The ICSID BIT I tribunal rejected LHNV's expropriation claim on the basis that "the Claimants have … failed to establish rights to the remainder of the land referred to in the MOU," among other things because the Land Concession Agreement envisioned by the MOU "never went beyond the negotiation stage"; the MOU itself "subjects the exact location of the Concession Land to a future agreement," and "[t]here was never any agreement in this respect."[1120] The PCA BIT I Tribunal agreed with these findings,[1121] adding as follows:

> The Claimant alleges that the 16-hectare parcel on Highway 13 was essential to the success of the Thakhaek project, yet negotiations for the 16-hectare parcel never reached agreement in the Tribunal's view. Thus Sanum acquired no rights in Thakhaek property. There was no Land Concession Agreement for a site on which gambling facilities *could* be built. The other approvals that would have been required contingent on the signing of the Land Concession Agreement (which never happened) became moot. The Thakhaek project was not expropriated. …. The project itself never came into legal existence. The MOU provided that the Claimant's Thakhaek project could not proceed without 'the final approval of, by or from all Government authorities (central and local)' which was never obtained.[1122]

[1118] C-509, ICSID 2MBA Decision, ¶ 207; C-562, PCA 2MBA Decision, ¶ 195.

[1119] C-62, Lao Holdings NV Amended Notice of Arbitration, 22 May 2012, ¶ 8(10); C-61, Sanum Amended Notice of Arbitration, 7 June 2013, ¶¶ 9, 58; R-3, Claimant's Memorial, ICSID BIT I Case, 22 July 2013, ¶¶ 57-58.

[1120] R-264, ICSID BIT I Award, ¶¶ 219-220.

[1121] R-265, PCA BIT I Award, ¶¶ 244-245.

[1122] R-265, PCA BIT I Award, ¶ 249.

630. The PCA BIT I Tribunal acknowledged that the Claimants had paid US$400,000 pursuant to the Thakhek MOU, but did not find this altered its legal conclusions: "The Tribunal appreciates the chagrin of the Claimant at paying US $400,000 which, in the end, did not result in a viable project but the failure cannot be attributed to any actionable fault on the part of the Government….[T]here is insufficient evidence of bad faith on either side in respect of Thakhek. It was simply a commercial possibility that never reached the stage of agreement."[1123]

631. In *this* case, which continued the lengthy saga of Thakhek claims, Sanum argues that because of the "frozen record agreement" that governed the BIT I Cases when they eventually resumed, the BIT I tribunals were unaware that the Claimants paid a further US$500,000 following the Deed of Settlement. The Tribunal accepts this assertion as true: there is no evidence that the BIT I Tribunals were aware of this subsequent payment. But that payment did not demonstrably change the analysis. It brought the paid sums to the total US$900,000 level originally envisioned by the Thakhek MOU, but this simply represented a predicate step under the Deed of Settlement for the resumption of good faith negotiations over a possible land concession. Nothing in the Deed of Settlement had promised that this payment would do more, such as secure the Government's abandonment of its prior (good faith) position regarding an inability to convey the private land fronting the highway, absent agreement by the private owners to sell their parcels. Nor did the Deed of Settlement, like the Thakhek MOU before it, promise that the payments by Claimants would be returned if good faith negotiations over a possible land concession ultimately proved unsuccessful.

632. All of this history is important because, as noted at the outset, the expropriation claim before this Tribunal must be assessed on the basis of what the relevant "property right" is that Sanum alleges it held but subsequently was taken. Having considered all the evidence and arguments, the Tribunal concludes that Sanum *did not hold* any property right to a land concession that included the 16 hectares of privately owned land, and therefore no such right was taken from it. Nor did it hold a property right to a return of the US$900,000 paid in two tranches, when the instruments pursuant to which the sums were paid promised only negotiations in good faith and without a guaranteed outcome. It held rights only to a good faith negotiation process. And like the other tribunals which preceded it, this Tribunal sees no basis for finding that the Government acted in bad faith with respect to the Thakhek negotiations. Accordingly, there is no basis for a finding that any right or asset of Sanum was expropriated.

[1123] R-265, PCA BIT I Award, ¶¶ 249-250.

F. THE SANUM BANK ACCOUNTS AND SAVAN VEGAS CAGE AND VAULT CASH

(1) The Claim Asserted

633. Sanum argues that the Respondent seized and converted its Lao bank accounts as well as the Savan Vegas cage and vault cash. By this conduct, the Respondent allegedly expropriated Sanum's investment in breach of Article 4 of the China-Lao BIT.[1124]

(2) The Parties' Positions

a. Claimants' Position

634. Sanum submits that the Respondent seized and converted five of its bank accounts in the Lao PDR, which held a combined US$135,375.76, and failed to return this amount despite repeated promises to do so.[1125] Additionally, the Respondent kept US$1.95 million in cash from Savan Vegas' cage and vault.[1126] These actions were carried out in breach of the Respondent's treaty obligations.

(i) Expropriation

635. Sanum maintains that the Respondent "maintained determinative control over" the Sanum accounts after the Deed of Settlement's execution, thereby "tacitly acknowledging that the State possessed no legitimate claim to enjoy the benefits associated with these rights."[1127] After Case 48 resulted in a judgment, the Respondent confirmed that it would not, and did not, return the funds in the Sanum bank accounts.[1128] Similarly, the Respondent took the cash from the Savan Vegas cage and vault and has not returned it.[1129] Sanum submits that this conduct violates Article 4 of the China-Lao BIT.

[1124] LHNV presents an equivalent claim about expropriation in breach of Article 6 of the Lao-Netherlands BIT. It also claims that the Respondent interfered with LHNV's ability to transfers its assets out of Laos, in violation of Article 5 of that BIT, and violated Article 3(4) of the Lao-Netherlands BIT, the "umbrella clause," by failing to comply with local law, in particular Article 61 of the 2016 Law on Investment Promotion and Article 15 of the Lao Constitution. Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.H; Claimants' Reply, Section IV.F.

[1125] Claimants' Memorial, ¶ 436.

[1126] Claimants' Memorial, ¶ 437.

[1127] Claimants' Memorial, ¶ 438.

[1128] Claimants' Memorial, ¶¶ 438-439.

[1129] Claimants' Memorial, ¶ 440.

(ii) **Response to the Respondent's Defenses**

636. Sanum again rejects the Respondent's reliance on "its *res judicata*/collateral estoppel admissibility objection," arguing that this claim was "decidedly *not* before the SIAC Tribunal."[1130] Further, Sanum contends that because the Respondent makes no other argument in its Counter-Memorial in response to this claim, it remains uncontroverted.[1131]

b. Respondent's Position

637. The Respondent argues that Sanum's claim arising out of the bank accounts and cage and vault cash is an abuse of process and fails on the merits because the amounts alleged were included in the sale price to Macau Legend.[1132]

638. With respect to the merits, the Respondent invokes the Asset Purchase Agreement, which makes it clear that the amounts alleged by Sanum were included in the sale price to Macau Legend.[1133] Specifically, Section 2.6 of the Asset Purchase Agreement states that "[t]he Buyer shall receive the Cage Cash at Closing without additional payment," while Section 2.5 provides that the assets, at the time of the takeover, would include working capital of "not less than One Million U.S. Dollars."[1134] Further, the Respondent points out that this claim was "at the very heart" of 2017 SIAC Award.[1135]

639. Second, the Respondent contends that Sanum's claim should be precluded or dismissed for abusively seeking "an identical remedy for an identical financial asset while pursuing these claims before different tribunals under incompatible factual assumptions."[1136] In particular, Sanum also filed a Notice of Arbitration against San Marco Capital Partners, LLC and Ms. Kelly Gass, which accuses Ms. Gass of stealing or misdirecting the same US$135,375.76 which is alleged in this case to have been taken by the Respondent, without any reference to Ms. Gass.[1137] Respondent contends

[1130] Claimants' Reply, ¶ 466.

[1131] Claimants' Reply, ¶ 467.

[1132] Respondent's Rejoinder, Section XI.

[1133] Respondent's Rejoinder, ¶ 217.

[1134] Respondent's Rejoinder, ¶ 219.

[1135] Respondent's Rejoinder, ¶ 219.

[1136] Respondent's Rejoinder, ¶ 220.

[1137] Respondent's Rejoinder, ¶¶ 220-221; citing R-230, *Sanum Investments Limited and Lao Holdings, N.V. v. San Marco Capital Partners, LLC and Kelly Gass*, SIAC Case No. ARB414/17/QW, Notice of Arbitration, 19 December 2017, ¶¶ 36, 38(a).

that the inconsistency between these positions is an abuse which also exposes Sanum's inability to prove its claim, as both factual assertions cannot be true.[1138]

(3) The Tribunal's Analysis

640. Although addressed by the Parties under a single header, the Sanum bank account and Savan Vegas cage and vault cash claims involve different facts and different analytical issues. The Tribunal therefore addresses them separately below.

a. The Sanum Bank Accounts

641. The first claim concerns the five Sanum bank accounts which Sanum says collectively contained US$ 135,375.76 (as of 31 July 2013),[1139] but which were (a) first frozen in July 2012 by court order,[1140] and (b) later were "drain[ed]" on Government orders following the April 2015 change of control over Savan Vegas, with the funds never returned to Sanum's control.[1141]

642. The Tribunal has received little briefing with respect to the judicial treatment of the Sanum accounts, and is thus left to review the underlying court documents without guidance from the Parties. For example, Sanum claims that the court froze these accounts *sua sponte* as security for potential court fees associated with Sanum's then-pending counterclaim against ST in Case 52.[1142] But the actual freezing order states that it was requested by ST, and it neither references court fees nor distinguishes between ST's pending claims against Sanum and Sanum's pending counterclaims against ST. The freezing order simply states that it was granted "in order to ensure the Petition, protect State interests, interests of general public, parties to the case and interests of the legal proceedings …."[1143] Neither Party has presented authority about the circumstances under Lao law in which a court may issue an asset freeze in connection with a pending civil case.

643. Similarly, Sanum complains (in a single sentence) that when the case was decided the next day in ST's favor, the Case 52 First Instance Decision relied on an allegedly inapt legal provision to assess a US$ 4,810,977 penalty on Sanum, measured as 2% of the value of its unsuccessful counterclaim

[1138] Respondent's Rejoinder, ¶ 222.

[1139] Claimants' Memorial, ¶¶ 279-281.

[1140] C-169, Commercial Chamber, the People's Court, No. 11/PC.VTC, Order to Seize Sanum Assets, 25 July 2012.

[1141] Claimants' Memorial, ¶ 17.

[1142] Claimants' Memorial, ¶¶ 95, 279.

[1143] C-169, Commercial Chamber, the People's Court, No. 11/PC.VTC, Order to Seize Sanum Assets, 25 July 2012, p. 2.

against ST.[1144] Sanum says that this penalty, which was never collected from Sanum except to the extent of the much lesser amounts in the frozen bank accounts, was predicated on a legal provision that "imposes a 2% tax on a ***successful*** claimant, for the recovery of what is treated as taxable earnings," not a penalty on the losing party for bringing an unsuccessful claim.[1145] But the actual legal provision Sanum invokes (Article 9.1 of the Lao Law on Court Fees) is less clear than Sanum's description of it would suggest. Article 9.1 states that "the *party losing the case* shall pay," as part of court fees, "State taxes" which are "based on the value of the *property awarded* by the court."[1146] Neither Party in this case grapples with the actual wording of the provision, which on the one hand seems to peg taxes to "property awarded" (*i.e.,* claims granted, with value therefore changing hands), but on the other hand does place the burden of such State taxes squarely on the losing party, not on the successful party as Sanum implies. Moreover, the interpretation of Article 9.1 is further complicated by the text of Article 18.1 of the same Law, which states that "State taxes shall be implemented as follows: 1. Two percent of the *value of the claim* shall be deducted as State taxes."[1147] This provision would seem to peg the tax assessment to the claim asserted, whether or not that claim results in "property" being "awarded." Sanum does not mention Article 18, even though it was cited by the Case 52 First Instance Decision in the same sentence as Article 9 (and seven other provisions of the Law on Court Fees).[1148] The Lao PDR for its part does not discuss any of these issues at all in its memorials.

644. It is equally unclear from the Parties' memorials whether Sanum ever raised this particular legal objection (about the proper interpretation of Article 9.1) when it appealed the Case 52 First Instance Decision to the Lao Court of Appeal.[1149] The Case 52 Appeal Decision which affirmed the lower court judgment stated that Sanum challenged the 2% assessment on the basis that *it was ST* whose "actions are the cause of the counterclaim made by Sanum … for total damages,"[1150] but that is a

[1144] Claimants' Memorial, ¶ 279 and n. 536 (discussing C-123 and R-118, Case 52 First Instance Decision, 26 July 2012, p. 6).

[1145] Memorial, ¶ 279 and n. 536 (emphasis in original; discussing C-413, Lao Law on Court Fees, 16 January 2007, Article 9.1).

[1146] C-413, Lao Law on Court Fees, 16 January 2007, Article 9.1 (emphasis added). Articles 2 and 8 of the same law define "Court fees" as including "State taxes" as well as expenses of the proceedings; Article 26 states that "[t]he losing party …. shall pay State taxes as decided by a final court decision. If the claim is partly decided in favour of the plaintiff, the defendant shall pay the State taxes on the portion awarded by the court to the plaintiff. The remaining tax shall be paid by the plaintiff."). *Id.*, Articles 2, 8, 26.

[1147] C-413, Lao Law on Court Fees, 16 January 2007, Article 18.1 (emphasis added).

[1148] C-123 and R-118, Case 52 First Instance Decision, 26 July 2012, p. 7.

[1149] C-124 and R-129, Case 52 Appeal Decision, 11 December 2013, p. 12.

[1150] C-124 and R-129, Case 52 Appeal Decision, 11 December 2013, p. 5.

different argument than asserting that Lao law permits a court to assess State taxes only on damages *awarded* rather than sums *claimed and denied*. There is no evidence in the Case 52 Appeal Decision that Sanum raised the latter argument on appeal. There is equally no evidence that Sanum raised this alleged error of law before the Lao Supreme Court, which eventually affirmed the Court of Appeal.[1151]

645. Ultimately, however, the Tribunal finds that it need not rule on the interpretation of these Lao law issues or the propriety of the Lao courts' analysis of them. That is because the Parties in this case seem to agree that the funds in the frozen Sanum bank accounts were never actually withdrawn from those accounts for the purpose of applying them to the "State taxes" assessed by the courts against Sanum in Case 52. Rather, in Sanum's telling, the funds remained in the accounts until sometime in 2015 – long after the Case 52 proceedings concluded – when an SVCC employee, allegedly acting on the Government's instruction after the change in control of Savan Vegas, "drained all of the money from each of these accounts."[1152] The Lao PDR seems to agree that the funds were not used for court fees, because it asserts that the bank account(s) "were … the assets of Savan Vegas and were sold with Savan Vegas under the Deed of Settlement."[1153]

646. In these circumstances, the Tribunal sees no need to try to unravel the murky story of Case 52 court fees, even if it (*arguendo*) could do so despite the Parties' scant pleadings on the subject. Whatever the original basis for the 2012 judicial freezing of the Sanum bank accounts, the sums in question ultimately were not employed to satisfy any judicial imposition of court fees arising from Case 52. The more pertinent question is therefore whether subsequent events – outside the framework of the Case 52 proceedings, and following the Deed of Settlement – provide support for either side's entitlement to these funds.

647. Sanum contends that "[a]s a part of the Settlement, the funds were supposed to be released."[1154] Sanum does not cite any particular provision of the Deed of Settlement, but instead cites only to Mr. Baldwin's witness statement, which likewise does not invoke any particular provision of the Deed of Settlement.[1155] The Tribunal for its part has read the Deed of Settlement carefully, and sees no provision addressing the fate of the Sanum bank accounts frozen in Case 52.

[1151] C-125 and R-135, Case 52 Supreme Court Decision, 4 April 2014.

[1152] Claimants' Memorial, ¶ 280 (citing First Baldwin Statement, ¶ 107).

[1153] Respondent's Counter-Memorial, ¶¶ 122-123.

[1154] Claimants' Memorial, ¶ 280.

[1155] First Baldwin Statement, ¶ 107.

648. Nonetheless, other documents executed several weeks after the Deed of Settlement do support Sanum's additional assertion that "the Government repeatedly promis[ed]" to return the frozen bank account funds to Claimants, as part of the settlement process.[1156]

649. First, on 10 July 2014, the Ministry of Justice issued a Decision which assigned the "Office of Justice of Vientiane Capital … to supervise the enforcement of the case settlement," specifically in two respects: "[t]o cancel the freezing of the bank accounts of Sanum …" and "[t]o cancel the collection of the taxes" that had been assessed on Sanum, in higher amounts, in the court proceedings. The Ministry of Justice Decision stated that "[a]ll the sectors concerned are required to take actions in accordance with this Decision."[1157] Second, on the same day, the Director of the "Center for controlling the enforcement of court decision[s]" issued a Directive in furtherance of the Ministry of Justice's Decision, which ordered the cancelling of "the freezing order … dated 25 July 2012" for the Sanum bank accounts in question, and added that "[t]hese bank accounts can be used as normal in accordance with the laws of Lao PDR," adding that the collection of taxes ordered by the Case 52 courts likewise "shall be cancelled." The Directive added that the bank in question, ST, Sanum "and other relevant agencies" were "to acknowledge and take actions in strict manners."[1158]

650. Notably, although other aspects of the Parties' settlement quickly unraveled, the Lao PDR never disputed its undertaking to unfreeze the Sanum accounts. After Claimants' arbitration counsel asserted on 23 May 2015 that "Sanum's bank accounts in Laos remain frozen, despite the 'Directive' purporting to cancel the freezing order,"[1159] the Lao PDR's arbitration counsel responded that "[t]he bank accounts were unfrozen last year. We sent you the letters to that effect in August 2014."[1160] Nothing in this response suggested that the Lao PDR believed anyone other than Sanum would be entitled to withdraw funds from these accounts. Nonetheless, some six months later, Claimants' counsel advised that "[r]ecently, a Sanum representative attempted to withdraw funds … [and] was told that the funds had been withdrawn by a representative of Savan Vegas."[1161] The record does not reflect any response to this correspondence.

[1156] Claimants' Memorial, ¶ 436.

[1157] C-450, Decision 534/MoJ Releasing Bank Accounts, 10 July 2014.

[1158] C-449, Directive 191/PCV Releasing Bank Accounts, 10 July 2014.

[1159] C-79, C. Tahbaz letter to MPI and D. Branson regarding Deed of Settlement, 23 May 2015.

[1160] C-80, Email from D. Branson to C. Tahbaz, 30 May 2015.

[1161] C-451, Letter from C. Tahbaz to D. Branson, 11 November 2015.

651. Nonetheless, it now seems agreed that the funds *were* withdrawn from Sanum's accounts, and most likely placed into SVLL accounts, at least as an interim step. This is the explanation that Mr. Baldwin states he was provided by the employee who actually performed the function,[1162] and it is broadly consistent with the Lao PDR's arguments in this case, to the effect that the sums from the Sanum accounts ultimately were included in the sale of Savan Vegas assets to Macau Legend. The only way that this could have occurred (as per the Lao PDR's insistence that it did) is if the funds first were withdrawn from the Sanum accounts and then deposited into SVLL accounts, with the latter eventually to be transferred to Macau Legend. The Tribunal therefore takes it as established that the withdrawal took place as Mr. Baldwin was informed.

652. Sanum disputes whether the funds thereafter actually were transferred from SVLL to Macau Legend, or alternatively remained in Government hands. There is no direct evidence in this case either way: the Tribunal has not been presented with records about what happened to the SVLL bank accounts. Instead, both Parties point to the Asset Purchase Agreement as indicative of what was *supposed* to have been transferred to Macau Legend (and according to Sanum, what correspondingly was not).

653. Ultimately, it does not matter where the funds landed, because the Tribunal finds that *they never should have been withdrawn from the Sanum accounts and transferred to SVLL in the first place*. As Sanum properly notes, the bank accounts belonged to Sanum, not SVCC.[1163] Nothing in the Deed of Settlement authorized the sale of Sanum's own bank accounts to a subsequent buyer of the Savan Vegas assets. As for the Asset Purchase Agreement on which the Lao PDR relies,[1164] the definition of "Project Assets" to be sold to Macau Legend clearly pertain to assets related to the Savan Vegas "Project," which in turn was defined as "[t]he Savan Vegas Hotel and Entertainment Complex,"[1165] not assets held by Savan Vegas shareholders which might be deployed for other purposes. Making the point even more clear, this definition refers to the assets "that are owned by or in which the Seller has an interest," and the "Seller" was defined by the Asset Purchase Agreement as SVLL, which was "wholly owned by the Ministry of Finance of the Lao PDR."[1166]

[1162] First Baldwin Statement, ¶ 107.

[1163] Claimants' Reply, ¶ 207.

[1164] Respondent's Rejoinder, ¶ 80.

[1165] R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement), Annex B (the "Project Assets consist of all tangible and intangible assets property, rights and interests *in respect of the Project* as a going concern that are owned by or in which the Seller has an interest at the Closing, excluding any and all Cash other than Cage Cash …."); *id.*, Whereas Clause 1 (definition of the "Project").

[1166] R-75, Annex B; *id.*, Whereas Clause 2 (definition of the "Seller").

These definitions cannot be interpreted to extend to bank accounts that were owned *by Sanum* rather than by SVLL. Moreover, even if (*arguendo*) it were somehow possible to elide the distinction between Sanum and SVLL ownership of the bank accounts, the definition of Project Assets expressly excludes "*any and all Cash* other than Cage Cash," with the word "Cash" clearly defined to include "bank … accounts."[1167] Thus, SVLL's bank accounts (into which Sanum's accounts were drained) were never supposed to be transferred to Macau Legend in any event.

654. In other words, nothing in these terms authorized the Lao PDR to empty Sanum's bank accounts, whether for purposes of transfer to Macau Legend or otherwise. That act was wrongful. And contrary to the Lao PDR's assertions,[1168] nothing in the SIAC Award provides otherwise: that decision did not even purport to address any claim related to the Sanum bank accounts. The Tribunal is equally unpersuaded by the Lao PDR's argument that the bank account claim "should be precluded or dismissed" because Claimants are pursuing a claim for the same funds against a third party (Ms. Gass) pursuant to a different theory of wrongdoing.[1169] In the absence of any contention that Claimants have actually *collected* these sums from another party, the Tribunal does not find its mere attempt to do so sufficiently compelling as to bar its claim in this case.

655. In conclusion, the Tribunal finds that (a) the sums frozen in Sanum's bank accounts during Case 52 ultimately were not used to satisfy any court fees that were assessed against it in that case, (b) the Lao PDR instead agreed in July 2014 that the accounts should be unfrozen and the funds made fully available to Sanum, (c) contrary to that agreement, the Lao PDR thereafter emptied the accounts without legal basis, and (d) there is no evidence that the funds subsequently were transferred to Macau Legend for value in the sale process, nor were they required to be so transferred by the Asset Purchase Agreement. In these circumstances, the Tribunal is unable to accept the Lao PDR's assertion that Claimants indirectly received back 80% of the value of the drained bank accounts, in consequence of the ultimate distribution of Savan Vegas sale proceeds. Rather, Sanum was harmed to the full value of the drained bank accounts, which it has established was US$ 135,375.76 as of 31 July 2013.

656. The Tribunal finds that the Lao PDR's actions constituted an indirect expropriation without satisfying the conditions for such provided in Article 4 of the China-Lao BIT.

[1167] R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement), Arts. 1.1, 2.1 (emphasis added).

[1168] Respondent's Rejoinder, p. 18 (section heading).

[1169] Respondent's Rejoinder, ¶ 220.

b. The Savan Vegas Cage and Vault Cash

657. Sanum's claim that the Respondent kept US$1.95 million in cash from Savan Vegas' cage and vault is directly resolved by a few core documents in the case.

658. First, the Deed of Settlement provided that the "Gaming Assets" were to be sold to a new buyer, subject to an eventual distribution to SVCC's shareholders in proportion to their respective ownership percentages.[1170] For this purpose, the term "Gaming Assets" was defined to include the Savan Vegas PDA.[1171] That document, in turn, had established SVCC as the joint venture company to hold the various rights related to the Savan Vegas Casino.[1172] Thus, the Deed of Settlement generally envisioned the sale of all of SVCC's assets. As previously discussed, SVCC's assets were subsequently transferred to SVLL in order to implement the sale to a new buyer.

659. The Government then entered into the Macau Legend PDA, which provided for the sale to Macau Legend of certain "Project" assets which were "currently owned and operated" by SVLL.[1173] The Macau Legend PDA defined "Project Assets" broadly to mean "all tangible and intangible assets, property, agreements, Authorizations, rights and interests in respect of the Project." However, the Macau Legend PDA also referred to a specific form of Asset Purchase Agreement attached as Annex B, which provided more detail regarding which assets would transfer.[1174] Importantly, the Asset Purchase Agreement had its *own* definition of "Project Assets," which provided certain qualifications with respect to the issue of "Cash," and cross-referenced its own separate Annex B:

> 'Project Assets' means all intangible and intangible assets, property, rights and interests in respect of the Project (including without limitation the assets listed on Annex B), *but excluding any and all Cash other than Cage Cash*.[1175]

This express exclusion of "any and all Cash other than Cage Cash" was then repeated in the Asset Purchase Agreement's own Annex B, entitled "Project Assets and Assumed Liabilities"; the list separately identified "Cage Cash" as an asset which *was* to transfer to Macau Legend.[1176] This

[1170] R-5, Deed of Settlement, 15 June 2014, Sections 10, 16.

[1171] R-5, Deed of Settlement, 15 June 2014, Section 6.

[1172] C-7, Savan Vegas PDA, 10 August 2007, Article 6(1).

[1173] R-75, Macau Legend PDA, Whereas Clauses 1 and 2.

[1174] R-75, Macau Legend PDA, Article 1.1.

[1175] R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement), Article 1.1 (emphasis added).

[1176] R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement) ("The Project Assets consist of all tangible assets, property, rights and interests in respect of the Project as a going concern that are owned by or in which the

intent to transfer the Cage Cash was spelled out even more clearly in Article 2.6 of the Asset Purchase Agreement, which provided that "[t]he Buyer *shall receive the Cage Cash at Closing* without additional payment."[1177]

660. *Importantly, however*, "Cage Cash" was not an unlimited concept. It was a specifically defined term in the Asset Purchase Agreement, which included its own limitations. "Cage Cash" was said to mean "cash which will be securely retained in the cage and provided to the Buyer with the handover of the Project Assts at the Closing, the amount of which shall not be less than … US$1,000,000[]; provided that *any excess amount shall remain the property of the Seller*."[1178]

661. Taken as a whole, the clear import of these provisions is that SVLL was required to transfer US$1,000,000 in cash to Macau Legend as part of the sale transaction, which amount was already reflected within the overall sale price for the "Project Assets" (note the reference above to "without additional payment").[1179] However, if the Cage contained more than US1,000,000 in cash, the overage would not transfer to Macau Legend.

662. While the Asset Purchase Agreement described the cash overage as "remain[ing] the property of the Seller," this must be understood as between SVLL and Macau Legend – not as establishing any property right for SVLL vis-à-vis SVCC's shareholders, who ultimately had the right to the funds. SVLL was created simply as an interim "newco" to hold the SVCC assets pending their sale to an eventual buyer. Any assets not sold to the new buyer were not properly SVLL's to keep for itself. That SVLL's role following the change of control was essentially that of a steward can be seen from the Deed of Settlement, which specified that the duties of any successor operator were to "(i) step in and manage and operate the Gaming Assets in place of the Claimants until the Sale is completed, and (ii) complete the Sale; provided that such a gaming operator shall have a fiduciary duty to each the Claimants and Laos as interested parties in the Gaming Assets."[1180]

663. Accordingly, any cage or vault cash which was not required to be transferred to Macau Legend, and which had not been factored into the negotiated purchase price which would be shared

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Seller has an interest at the Closing, *excluding any and all Cash other than Cage Cash, but including the following … Cage Cash …*.") (emphasis added).

[1177] R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement), Article 2.6 (emphasis added).

[1178] R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement), Article 1.1 (emphasis added).

[1179] This is further supported by the Government's separate covenant to Macau Legend that the latter would receive "not less than" US$1,000,000 in working capital upon closing. R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement), Article 2.5.

[1180] R-5, Deed of Settlement, 15 June 2014, Section 12.

proportionately between SVCC's shareholders, logically should have been distributed back to the SVCC shareholders in the same proportion.

664. Here, the difficulty is establishing what happened to the excess cash. Sanum has presented evidence that as of when the Government took control of SVCC's assets on 22 April 2015, SVCC had approximately US$ 1.95 million in cash "in the cage and the vault."[1181] In considering this figure, the Tribunal places no significance on the distinction between cash physically located in the "cage" at the casino and cash secured in the casino's "vault"; the Asset Purchase Agreement does not address "vault" cash, and the specific location of the cash seems secondary to the notion that this cash was intended for day-to-day casino operations. By contrast, it appears that when Macau Legend took over on 1 September 2016, "there was approximately US$1 million (HKD$8,066,000) in cash at Savan Vegas," according to Mr. Crawford's citation of Macau Legend's 2016 Annual Report.[1182] The availability of that US$1 million in cash meant that Macau Legend was able to properly receive the amount of cash that that had been agreed under the Asset Purchase Agreement, as part of the negotiated sale price. But there was no longer the additional US$ 950,000 in excess cash available for distribution back to SVCC's shareholders.

665. There is no evidence before the Tribunal as to *why* the cage and vault cash diminished by roughly US$ 950,000 between 22 April 2015 and 1 September 2016. One possibility, albeit unlikely for the reasons developed below, is that this simply represented natural fluctuations of cash reserves in the normal course of casino operations. Mr. Crawford explains that the purpose of keeping "a large amount of currency, or cash equivalents such as casino chips, on hand inside the premises" is "to ensure that there is enough money to cover all the bets being placed."[1183] Depending on the outcome of these bets, it is logical that the cash reserve balance would fluctuate somewhat from day to day.

666. It is illogical, however, that the cash reserves would fluctuate by US$ 950,000 in the ordinary course of business. That is almost as much as the *total* amount that the Government and Macau Legend had agreed was appropriate to ensure the non-disruption of operations when the casino changed hands (US$ 1,000,000). It is also striking that the amount of cash remaining at Savan Vegas at the time of closing was *just* the amount contractually required to transfer to Macau Legend, with no excess remaining at all for distribution to SVCC's shareholders – despite there

[1181] First Crawford Witness Statement, ¶¶ 72, 108 (citing C-175, 23 April 2015 Spreadsheet showing cash balances).

[1182] First Crawford Witness Statement, ¶ 108 (emphasis added; citing C-471, 2016 Annual Report of Macau Legend, n. 37, p. 147); *see also* C-215, Macau Legend August 2016 Circular, pp. 6, 65).

[1183] First Crawford Witness Statement, ¶ 107.

having been a healthy excess (almost twice the required amount) when SVLL took over stewardship of the casino in April 2015. This alignment of the amount *actually* on hand in September 2016 with the amount *required* to be on hand appears too precise, and too convenient for SVLL and the Lao PDR, to have been simply coincidental. Rather, the reduction of the cash reserves by almost 50% – from US$ 1,950,000 to US$ 1,000,000 – suggests deliberate action, outside of the normal course of events.

667. The Tribunal therefore concludes that, more likely than not, the excess cash was removed from the casino prior to the transaction closing, so as to leave on the premises only that amount which was contractually required to transfer to Macau Legend. It is not necessary for the Tribunal to infer any particular motive for this act, which could range from a simple good faith mistake in interpreting the Parties' respective legal rights and obligations to something more nefarious. Either way, the significant reduction in cash available to the casino was not consistent with SVLL's role as a steward of the assets it received from SVCC.

668. The Tribunal finds that this reduction constituted an indirect expropriation of Sanum's right to receive back 80% of any cash on hand that exceeded the agreed US$ 1 million transfer amount. Since the total amount of the excess cash that apparently was removed from the casino was US$ 950,000, the value of Sanum's expropriated 80% interest was US$ 760,000 as of 1 September 2016. This expropriation was in violation of Article 4 of the China-Lao BIT.

G. THE THAKHEK AND SAVANNAKHET PROPERTIES

(1) The Claim Asserted

669. Sanum argues that the Respondent transferred title to certain properties in Thakhek and Savannakhet from SVCC to SVLL. By this conduct, the Respondent allegedly expropriated Sanum's investment in breach of Article 4 of the China-Lao BIT.[1184]

[1184] LHNV presents an equivalent claim about expropriation in breach of Article 6 of the Lao-Netherlands BIT. It also claims that the Respondent violated Article 3(4) of the BIT, the "umbrella clause," by failing to comply with local law, in particular Articles 61 and 64 of the 2016 Law on Investment Promotion and Articles 15 and 16 of the Lao Constitution. *See* Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.I; Claimants' Reply, Section IV.G.

(2) The Parties' Positions

a. Claimants' Position

670. Sanum maintains that in on around February 2016, the Respondent transferred title to the Thakhek shophouses as well as the Savannakhet River House and Guard Houses from SVCC, in which Sanum held an 80% ownership share, to SVLL where it remains today.[1185] This conduct violated the Respondent's treaty obligations.

(i) Expropriation

671. Sanum submits that these properties were "expropriated outright" without compensation or due process and in violation of Article 4 of the China-Lao BIT as well as customary international law.[1186]

(ii) Response to the Respondent's Defenses

672. Sanum reiterates that this claim was not before the SIAC Tribunal, as the Respondent suggests, and therefore cannot be precluded by the 2017 SIAC Award.[1187] Moreover, because the Respondent's argument that the properties were sold to Macau Legend is "flatly contradicted by the only title deeds in the record," and makes no other arguments in its Counter-Memorial in response to this claim, Sanum contends that its position remains uncontroverted.[1188]

b. Respondent's Position

673. The Respondent argues that Sanum's claim arising out of the Thakhek and Savannakhet properties must fail on the merits because the properties were included in the sale price to Macau Legend.[1189] Before the sale, the properties were transferred from SVCC to SVLL pursuant to Declaration No. 2325/MPI.IPD.[1190]

674. The valuation of the properties, which was carried out in preparation for the sale to Macau Legend, states that "all land in Lao PDR belongs to the 'people' and is controlled by the State … Foreigners

[1185] Claimants' Memorial, ¶ 445.

[1186] Claimants' Memorial, ¶ 448.

[1187] Claimants' Reply, ¶ 468.

[1188] Claimants' Reply, ¶ 469.

[1189] Respondent's Rejoinder, Section XII, ¶ 223.

[1190] Respondent's Rejoinder, ¶ 224, citing R-69, Ministry of Finance Declaration by Dr. Bounthavy Sisouphanthong, Vice Minister of Planning and Investment, re: Sale of Gaming and Related Assets of Savan Vegas Entertainment Hotel and Casino, 28 September 2015.

may lease concession land … At the end of the lease contract, the land including all structures must be returned to the owner [the State]."[1191] Meanwhile, the Asset Purchase Agreement provides that Macau Legend obtained all commercial and residential lease agreements.[1192] Thus, the Respondent submits that Sanum's claim of the alleged taking of the properties fails on the merits.

(3) The Tribunal's Analysis

675. Most of the facts related to the Thakhek and Savannakhet properties are undisputed.

676. First, it is undisputed that SVCC held legal interests in these properties, prior to the Government acts that are challenged in this case. Although Sanum's witnesses insist that the Thakhek shophouses and the Guard House properties were purchased with Sanum's funds, they admit that the land titles were registered in SVCC's name.[1193] The same is true for the River House properties, which Sanum's witnesses admit were purchased with SVCC's funds.[1194] In any event, the origin of capital is irrelevant to the question of which entity held the property rights. The legal interests with respect to these lands were held by SVCC. The land titles were registered in its name, first in 2009 for the Thakhek shophouses; then in 2010 for the Guard House properties; and respectively in 2010 and 2012 for the River House properties.[1195]

677. Second, it is undisputed that in late September 2015, the Lao PDR declared that all SVCC assets would be transferred to SVLL for purposes of implementing the sale contemplated by the Deed of Settlement. The relevant Declaration announced that the "new company" would be formed "to hold the assets of the casino *and related operations*" of SVCC, "of whatever type and denomination, and whether constituting real or contractual or other personal property." These were defined

[1191] Respondent's Rejoinder, ¶ 224, citing R-252, Project: Savannakhet Savan Vegas Land Valuation, 10 September 2015.

[1192] Respondent's Rejoinder, ¶ 224; citing R-75, Macau Legend PDA, at Annex B: Asset Purchase Agreement.

[1193] First Baldwin Statement, ¶¶ 101 & n. 73, 104; First Crawford Statement, ¶ 96; *see also* Claimants' Memorial, ¶ 444.

[1194] First Baldwin Statement, ¶¶ 102- 103.

[1195] *See*, for the Thakhek shophouses, C-103, Title Deed No. 12.001.0032 – Thakhek Shophouses, 17 August 2009; for the Guard House properties, C-107, Title Deed No. 1301.022.01.102.0102 – Guard Houses – Red Roof, 30 December 2010, and C-108, Title Deed No. 1301.022.02.110.0260 – Guard Houses – Blue Roof, 30 December 2010; and for the River House properties, C-105, Title Deed No. 1301.022.01.006.0006 – River House Primary Parcel, 9 September 2010, and C-106, Title Deed No. 1301.022.23.045.1145 – River House Adjacent Parcel, 17 February 2012.

"collectively" as the "Assets," and the Declaration stated that the Government would then cause SVLL "to sell the Assets in an open and orderly process …."[1196]

678. One might pause here to question whether the definition of "Assets" reflected in the Government's September 2015 Declaration was coextensive with, or broader than, the definition of "Gaming Assets" that had been agreed in the Deed of Settlement in June 2014. The latter definition was itself imprecise, referring to the Savan Vegas PDA but not attaching any inventory of specific legal instruments subsequently issued in furtherance of that PDA.[1197] It appears the Government decided that all SVCC assets which were ancillary to gaming activities (*i.e.*, constituted "related operations") could be transferred to SVLL for purposes of implementing the sale.

679. Be that as it may, Sanum's core complaint is not that the Thakhek and Savannakhet properties should have fallen outside the scope of the Deed of Settlement. Rather, it is that Sanum allegedly was dispossessed of these properties *without obtaining value* for them through the eventual sale. As to the threshold dispossession, the record is clear: the transfer of land titles to each of these properties was implemented in early 2016. First, SVLL applied to retitle the property documents in its name, and then the revised documents were issued pursuant to its request.[1198]

680. With respect to the valuation of the properties, notably there were certain efforts made in late 2015, at least for the River House and Guard House properties. In September 2015, a land valuation report was prepared which covered "the Target Properties … located in Nakae Village," namely the River House and Guard House properties.[1199] The same month, a spreadsheet was prepared showing "[p]reliminary" valuations for "[n]et assets to Newco" which were to be transferred "from Oldco." Given the timing of this document, the Tribunal interprets the "Newco" and "Oldco" references to

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[1196] R-69, Ministry of Planning and Investment Declaration by Dr. Bounthavy Sisouphanthong, Vice Minister of Planning and Investment, re: Sale of Gaming and Related Assets of Savan Vegas Entertainment Hotel and Casino, 28 September 2015 (emphasis added).

[1197] R-5, Deed of Settlement, 15 June 2014, Section 6.

[1198] *See*, for the Thakhek shophouses, C-110.3, Application to Change Name on Title Deed – Thakhek Shophouse (SVCC to SVLL), 11 February 2016, and C-111, Title Deed No. 1201.032.06.020.0270 – Thakhek Shophouses, 5 January 2016; for the River House properties, C-110.2, Application to Change Name on Title Deed – River House (SVCC to SVLL), 11 February 2016, C-113, Title Deed No. 1301.022.23.045.1145 – River House Adjacent parcel, 22 February 2016, and C-115, Title Deed No. 1301.022.01.006.0006, River House Main, 23 February 2016; and for the Guard House properties, C-110.1, Application to Change Name on Title Deed – Guard House (SVCC to SVLL), 11 February 2016, C-112, Title Deed No. 1301.022.03.002.0102 – Guard House – Red Roof, 22 February 2016, and C-114, Title Deed No. 1301.022.06.010.0260 – Guard House Blue Roof, 23 February 2016.

[1199] R-252, Project: Savannakhet Savan Vegas Land Valuation, 10 September 2015, pp. 3-4. The land title documents appended as Annex B to this report correspond to C-105 and C-106 cited above (for the River House properties) and C-107 and C-108 (for the Guard House properties).

relate to SVLL and SVCC, respectively. The first item listed in the spreadsheet relates to two lots of land in "Nakea Village."[1200]

681. The core disputed issue involves what happened later: were these properties actually included in the eventual sale to Macau Legend, or not? The Lao PDR contends that they were, like all other SVCC assets transferred to SVLL in anticipation of a sale pursuant to the Deed of Settlement. Therefore, it says, the Tribunal may infer that the *value* of these properties was factored into the overall sale price that SVLL received from Macau Legend, which subsequently was distributed to SVCC's shareholders. Sanum contends otherwise, saying that the properties were never sold on to Macau Legend, but rather remain in the possession of SVLL. According to Sanum, this constitutes an expropriation of the properties by the Government without any compensation.

682. As a threshold matter, the Tribunal notes that there is no evidence in the record as to whether the September 2015 land valuation (or any other valuations of the Thakhek and Savannakhet properties) were ever shared with Macau Legend. Nor has the Tribunal been provided with any correspondence between SVLL and Macau Legend which would shed light on negotiations (if any) regarding these particular properties.

683. The Tribunal does, however, have two key documents which allow it to draw certain conclusions.

684. The first is the final "Solicitation of Interest" which was prepared by SVLL in September 2015 for potential buyers of the "Savan Vegas Hotel & Entertainment Complex." The first page of that document provides a "Concession Overview," which states that "[t]he concession will include a land lease concession *for approximately 50 hectares of land on which the property is located in the Nongdeune Village* in … Savannakhet Province."[1201] There is no mention in the document of any additional properties located outside Nongdeune Village, such as properties in Nakae Village (where the River and Guard House properties were situated) or in Thakhek, a separate province altogether. Accordingly, when the document promises on the next page that "[t]he successful purchaser … will receive full ownership of all real property and improvements *situated on the land*, as well as all rights associated with Savan Vegas business as a going concern," including *inter alia*

[1200] R-168, Preliminary asset transfer list, 3 September 2015.

[1201] C-90, Savan Vegas Solicitation of Interest Summary – Final, 26 September 2015, p. 4 (emphasis added).

"[a]ll rights under leases," the Tribunal interprets this as relating only to land lease deeds relevant to the Nongdeune Village plots.[1202]

685. This background is useful for understanding the Asset Purchase Agreement that SVLL later concluded with Macau Legend. That Agreement defined the "Project" by reference to the same geographic footprint as had the earlier Solicitation of Interest: the "Project" was "[t]he Savan Vegas Hotel and Entertainment Complex … *located in Nongdeune Village* …."[1203] The "Project Area" in turn was defined as meaning "the area consisting of the approximately 50 hectares of land *located in Nongdeune Village* …."[1204] This geographic designation necessarily informs the otherwise broad definition of "Project Assets," as meaning "all tangible and intangible assets, property, rights and interests *in respect of the Project* (including without limitation the assets listed on Annex B) …."[1205] And it also informs the further definition of "Project Assets" set out in Annex B, which included "[r]ights under … leases" (both "[c]ommercial lease agreements" and "[r]esidential lease agreements") as among the "tangible and intangible assets, property, rights and interests *in respect of the Project* as a going concern that are owned by or in which the Seller has an interest at the Closing…."[1206] Put simply: the reference to lease rights as among the transferring assets cannot be isolated from the definition of the "Project" to which those leases relate, or from the geographic limitation that is built directly into that definition.

686. For these reasons, the Tribunal agrees with Sanum that the Asset Purchase Agreement "includes no property in Thakhek or Savannakhet's Nakae Village."[1207] The River House and Guard Houses are located approximately four miles from the 50-hectare plot referenced in the Asset Purchase Agreement, in a different village. The Thakhek shophouses are located 79 miles from the "Project Area," in a different province.[1208]

687. Finally, the Lao PDR had the opportunity to prove through other documents, besides the Asset Purchase Agreement, that Macau Legend had obtained rights to the properties in question. During

[1202] C-90, Savan Vegas Solicitation of Interest Summary – Final, 26 September 2015, p. 5.

[1203] R-75, Macau Legend PDA, Whereas Clause 1 (emphasis added).

[1204] R-75, Macau Legend PDA, Article 1.1 (emphasis added). The definition of "Land" in turn refers back to "the Project Area described as the approximately fifth (50) hectares of land located in Nongdeune Village …." *Id.*, Annex B (Asset Pruchase Agreement), Article 1.

[1205] R-75, Macau Legend PDA, Article 1.1 (emphasis added).

[1206] R-75, Macau Legend PDA, Annex B (Asset Purchase Agreement) ("Project Assets and Assumed Liabilities") (emphasis added).

[1207] Claimants' Opening Presentation, Slide 242.

[1208] Claimants' Opening Presentation, Slide 244.

the document production phase of this arbitration, the Tribunal ordered the Respondent to produce "documents sufficient to show the current legal ownership of the subject properties."[1209] No documents were produced showing a change in land title from SVLL to Macau Legend. The land title documents to which the Lao PDR points in this case were simply the ones from January and February 2016, which predated the Macau Legend transaction and showed title at that point resting in SVLL.

688. On this basis, the Tribunal finds that (a) Sanum has met its burden of proving that the properties were transferred from SVCC's possession to SVLL, under Government control, but (b) the Lao PDR has not demonstrated that SVLL later sold the properties to Macau Legend. There is therefore no basis for inferring that the purchase price Macau Legend paid included an element of added value for these properties, and therefore that Sanum received any consideration for the loss of its 80% share of that value. This constitutes an expropriation without compensation in violation of Article 4 of the China-Lao BIT.

689. Given this finding, there is no need for the Tribunal to examine Sanum's alternative argument that the judicial order in Case 48 "would have had the same result" of divesting Sanum of its interests in the properties, had the title not already been transferred from SVCC to SVLL earlier the same year.[1210] Regardless of what might have happened in other scenarios, the properties *were* transferred from SVCC to SVLL in early 2016, and it has not been shown that Sanum received any compensation for the loss of these rights, as should have occurred.

H. NON-PAYMENT OF ICSID COSTS

(1) The Claims Asserted

690. Finally, Sanum argues that by failing to pay its share of the costs associated with this arbitration, the Respondent has violated the BIT's arbitration clause as well as Articles 28(1)(f) and 58 of the ICSID Additional Facility Rules, as well as ICSID Administrative and Financial Regulation 14 and the Tribunal's PO1, ¶ 10.[1211]

[1209] Procedural Order No. 5, Annex B, Ruling on Claimants' Disclosure Requests, No. 56.

[1210] Claimants' Memorial, ¶ 450.

[1211] Letter from Claimants to Tribunal, 24 June 2019; Claimants' Memorial, Section IV.J; Claimants' Reply, Section IV.J. Sanum presents an equivalent claim, invoking in addition article 8(8) of the China-Lao BIT.

(2) The Parties' Positions

691. Sanum maintains that the Respondent's refusal to "cover the costs of its appointed arbitrator's fees, plus half of the costs of the presiding arbitrator's fees," constitutes a violation of its treaty obligations.[1212] In support of its position, Sanum cites the *Champion Holding* tribunal's conclusion that defaulting on the payment of a requested fee deposit constitutes a breach of the State's international obligations under the ICSID Convention.[1213]

692. The Respondent did not take a position with respect to this claim. Sanum argues that this decision not to respond to the claim results in the claim being uncontroverted.[1214]

(3) The Tribunal's Analysis

693. Sanum's attempt to assert a standalone claim for BIT violation on account of the Lao PDR's failure to contribute funds towards the cost of the arbitration rests on two embedded contentions: first, that the BIT imposes substantive obligations to contribute to advances on costs, and second, that the BIT vests jurisdiction in an arbitral tribunal to hear claims for breach of such obligation.

694. The first issue – the existence of a substantive obligation – is potentially tenable. The China-Lao BIT is somewhat unusual in that it specifically addresses the issue of contribution to costs in investor-State proceedings. In many other treaties, that is not the case. For example, the Lao-Netherlands BIT that is applicable in the *LHNV* case delineates in clear text the Contracting States' substantive obligations, by including the word "shall" in each of its Articles 2 through 8, but its Article 9 on investor-State dispute resolution does not impose any specific obligations on the Contracting Parties. Rather, it grants an entitlement to the investor to pursue a procedural remedy for the purpose of resolving "any legal dispute … concerning an investment," and provides that each Contracting Party "hereby consents" to the submission of the dispute to ICSID.[1215] While the Lao-Netherlands BIT thus records the Contracting Parties' "consent[]" to this submission to arbitration, it does not command any particular level of participation by them in the arbitral process; there is no mandate that the respondent State do anything at all with respect to the proceedings. There is certainly no suggestion in Article 9 of the Lao-Netherlands BIT that a State's conduct with

[1212] Claimants' Memorial, ¶ 455.

[1213] Claimants' Memorial, ¶ 454, citing CL-107, *Champion Holding Company et al v. Egypt*, ICSID Case No. ARB/16/2, Procedural Order No. 2, 27 March 2017 ("*Champion Holding* PO2"), ¶¶ 88-90.

[1214] Claimants' Reply, ¶ 484.

[1215] CL-18, Lao-Netherlands BIT, Article 8.

regard to such proceedings (such as its decision not to pay advances on costs) could give rise to an additional claim for breach of its *substantive* duties towards an investor or its investment.

695. For this reason, the Tribunal in the accompanying *LHNV* case found that the Lao-Netherlands BIT does not create any standalone cause of action related to the conduct of dispute resolution procedures. It considered that, while Article 9 of that BIT provides recourse for the investor to pursue claims for a State's breach of one or more of the obligations mandated by the *prior* substantive Articles of the BIT, it does not, by its terms, impose obligations on the Contracting Parties regarding the arbitral process. In these circumstances, it would be bootstrapping to imply into Article 9 of the Lao-Netherlands BIT certain affirmative duties by the Contracting Parties, the breach of which then would become actionable through a standalone claim for damages. Nothing in that BIT suggests an intent to elevate potential misconduct in arbitral proceedings into a new type of substantive treaty violation, separate from the other treaty standards carefully delineated in its terms.[1216] The Tribunal in the *LHNV* case thus concluded that LHNV had erred in asserting a *substantive* (merits) claim for non-payment of ICSID costs. It observed that while tribunals have certain inherent authority to sanction misbehaviour in the arbitral process, the main remedy for this generally is in the allocation of costs.[1217] The remedy does not lie in recognizing a new cause of action under either the BIT or the applicable procedural rules, ostensibly capable of giving rise to a distinct claim in damages.

696. The China-Lao BIT is, however, quite different in its terms. Its Article 8 on investor-State dispute resolution expressly addresses responsibility for certain categories of costs, and it does so using the

[1216] The Tribunal in the accompanying *LHNV* case also found that neither the ICSID Convention nor the ICSID Additional Facility Rules cross-referenced in that BIT compel any degree of participation, much less suggest that a respondent's (expressly contemplated) choice not to participate would create the basis for an additional substantive claim. Indeed, under both types of proceedings, the rules expressly contemplate the possibility that a respondent may choose not to participate at all. The Rules assure an investor that its claim may proceed even in the face of such a default, but they do not suggest a default would create the basis for an additional substantive claim, *i.e.* for violation of some international treaty duty of due participation in an arbitral procedure.

[1217] Specifically, the *LHNV* tribunal explained as follows: "This is not to say that there are no potential consequences for a party declining to pay its share of the requested advances on costs. This decision, like any other instance of procedural rule violations or other poor behavior by a party during the arbitral proceeding, may be considered by the tribunal in the context of evaluating the ultimate allocation of costs in the case. In appropriate cases, procedural misconduct – and the unnecessary additional burdens created by that misconduct for the other disputing party, the tribunal or the proceedings as a whole – may have cost consequences that weigh just as significantly in the balance as the outcome of particular substantive claims or objections. But factoring such matters into an ultimate cost award – which the Tribunal may well consider appropriate at the conclusion of these proceedings – is different in kind from recognizing a jurisdictional basis for the assertion of a standalone substantive claim for damages."

imperative word "*shall*." Specifically, Article 8(8) provides that for disputes brought to an *ad hoc* arbitral tribunal:

> Each party to the dispute *shall bear* the cost of its appointed member of the tribunal and of its representation in the proceedings. The cost of the appointed Chairman and the remaining costs *shall be borne* in equal parts by the parties to the dispute. The tribunal may, however, in its decision, direct that higher proportion of costs shall be borne by one of the two parties.[1218]

697. Notably, the word "shall" used in Article 8(8) is the same imperative word that is used in the China-Lao BIT's Articles 2 through 6, which establish the substantive obligations of the Contracting Parties in connection with investments. There is no textual reason to interpret the same word "shall" as imposing any less of a substantive obligation in the context of Article 8(8).

698. At the same time, Article 8(8) is ambiguous about the *timing* at which this substantive obligation attaches. It is not clear that the provision commands a contribution to tribunal costs *in advance* of an arbitral award,[1219] or simply sets a presumptive standard for the tribunal's allocation of costs in its decision, while commanding that the parties bear such costs *in the ultimate event*. Both interpretation are arguably tenable.

699. Ultimately, however, the Tribunal need not decide that issue. That is because even if, *arguendo*, Article 8(8) of the China-Lao BIT creates a substantive obligation for a Contracting Party to contribute to the advances intended to cover tribunal costs in an arbitration proceeding, it does not vest jurisdiction in the Tribunal to hear claims for breach of that obligation. The Tribunal's jurisdiction under the China-Lao BIT is expressly limited by Article 8(3) to a "dispute involving the amount of compensation for expropriation." All other disputes between an investor and the State, including those for violation of the BIT's other substantive obligations – such as fair and equitable treatment, transfers of capital, etc. – are directed under Article 8(2) to "the competent court of the Contracting State accepting the investment."[1220]

700. The Tribunal is thus a body of limited jurisdiction. It is entitled to hear Sanum's expropriation claims, but no other claims for breach of substantive obligations of the BIT. And while the Parties

[1218] CL-49, China-Lao BIT, Article 8(8) (emphasis added).

[1219] It is also not clear if Article 8(8) addresses solely the fees and expenses of the members of a tribunal, or also the broader category of arbitration costs covered by advances to ICSID, which include institution fees, costs of hearing facilities, and costs of associated support personnel such as the court reporter and interpreters.

[1220] CL-49, China-Lao BIT, Articles 8(1)-8(3).

may have additional obligations under the BIT in connection with the conduct of that arbitration – for example, each Party "shall" appoint an arbitrator,[1221] "shall" commit to enforce an award,[1222] and "shall bear" the cost of its appointed tribunal member and half of the costs of the presiding arbitrator[1223] – none of those additional obligations fall within the limited scope of the Tribunal's jurisdiction to adjudicate.

701. Sanum attempts a solution to this dilemma by arguing, in its Memorial, that where an illegal expropriation has been found, "damages for full reparations must include the costs of proceedings necessary to obtain relief," and "[t]hus, a dispute over non-payment of the specified costs of arbitration must be judiciable in any proceeding" brought about expropriation under Article 8(3).[1224] But there is a difference between considering appropriate damages for an expropriation and accepting jurisdiction over a distinct claim for breach of a non-expropriation article of the BIT.

702. Accordingly, the Tribunal rejects, on the basis of lack of jurisdiction, Sanum's standalone claim for breach of Article 8(8) with respect to covering the costs of the arbitral tribunal. This finding is without prejudice to the Tribunal's considering arguments in due course about the proper measure of damages from the specific expropriations it has found, and about the proper allocation of costs for this proceeding as a whole.

VII. NEXT STEPS

703. As previously discussed, the Tribunal agreed in PO2 to resolve the jurisdictional, admissibility and liability issues in this case before any further proceedings with respect to quantum, if needed.

704. The Tribunal has now resolved those predicate issues. It has rejected most of Sanum's claims, but accepted those claims (*i.e.,* found liability on the part of the Lao PDR) in the following limited respects:

a. Expropriation of the funds in Sanum's bank accounts, which held US$ 135,375.76 as of 31 July 2013, but at some point in 2015 were withdrawn by a representative of SVLL, without legal basis (see Section VI.F.3.a above);

[1221] CL-49, China-Lao BIT, Article 8(4).
[1222] CL-49, China-Lao BIT, Article 8(6).
[1223] CL-49, China-Lao BIT, Article 8(6).
[1224] Claimants' Memorial, ¶ 457.

b. Expropriation of Sanum's right to receive back US$ 760,000 of the Savan Vegas cage cash, following the closing of the sale to Macau Legend (see Section VI.F.3.b above); and

c. Expropriation of the Thakhek shophouses and the Savannakhet Guard House and River House properties (see Section VI.G.3 above).

705. The remaining issues of quantum should be extremely narrow:

a. For the bank account and cage cash claims, all that remains is for the Parties to brief the Tribunal on appropriate interest rates and calculations.

b. For the Thakhek and Savannakhet properties, the Parties will need to make submissions on valuation, but these should be assisted by the valuation work already performed previously. This includes the land valuation for the Savannakhet properties which was prepared in September 2015,[1225] as well as whatever internal analysis was prepared for purposes of the "preliminary asset transfer list" spreadsheet prepared the same month.[1226] It also includes the VPC expert report from August 2017, which Sanum submitted with its Memorial. Naturally, both Parties may wish to revisit these documents, or perhaps prepare substitute analyses which employ different methodology or take into account subsequent events.

c. The Parties of course will wish an opportunity to comment on each other's submissions as to these limited outstanding issues. At the same time, the narrow scope of the open issues should permit briefing to be completed on an expedited basis.

706. The Tribunal directs the Parties to confer regarding a potential procedural schedule for an expedited quantum phase on the issues above, and to submit their joint or separate proposals to the Tribunal **three weeks** from the issuance of this Decision, or such other time as may be agreed. The proposals should also build in the possibility of a short (possibly one-day) quantum hearing to enable the Parties to examine any witnesses or experts relevant to quantum issues. The Tribunal suggests that any hearing should proceed by remote means, so as not to impose additional costs of travel and time that would be disproportionate given the narrowness of the quantum issues and the modest amounts involved.

[1225] R-252, Project: Savannakhet Savan Vegas Land Valuation, 10 September 2015.

[1226] R-168, Preliminary asset transfer list, 3 September 2015.

707. Finally, the Parties' joint or separate proposals for the procedural schedule should also incorporate proposed dates for cost submissions, along with any proposals regarding format and page limits. The Tribunal does not require a rehashing of the long history of the Parties' many disputes, and for its part would be content to receive simple schedules of costs, without argument, or very short submissions addressing specific factors the Tribunal should bear in mind in exercising its plenary authority to allocate costs as between the Parties.

708. Following receipt of the Parties' proposed procedural schedules, the Tribunal will determine if a short case management conference would be helpful to discuss any areas on which the Parties have not reached agreement.

VIII. DECISION

709. For the reasons set forth above, the Tribunal unanimously decides as follows:

(1) DENIES each of the Lao PDR's objections to jurisdiction and admissibility;

(2) DENIES Sanum's claims for breach of the China-Lao BIT, with respect to (a) recognition of the 2016 ST SIAC Award, (b) seizure and sale of the Savan Vegas Casino, (c) taxation; (d) non-payment of the CFA Loans; (e) seizure and closure of the Ferry Terminal Slot Club, (f) the Thakhek concession; and (g) non-payment of advances on costs to ICSID;

(3) GRANTS Sanum's claims for breach of Article 4 of the China-Lao BIT, related to (a) the Sanum bank accounts; (b) the Savan Vegas cage and vault cash; and (c) the Thakhek and Savanakhet properties; and

(4) DIRECTS the Parties to confer and propose a procedural schedule for further proceedings related to quantum with respect to the limited claims on which the Tribunal has found liability.

[Signed]

Mr. Klaus Reichert, SC
Arbitrator

Professor Laurence Boisson de Chazournes
Arbitrator

Ms. Jean E. Kalicki
President

[Signed]

Mr. Klaus Reichert, SC
Arbitrator

Professor Laurence Boisson de Chazournes
Arbitrator

Ms. Jean E. Kalicki
President

Mr. Klaus Reichert, SC
Arbitrator

Professor Laurence Boisson de Chazournes
Arbitrator

[Signed]

Ms. Jean E. Kalicki
President