> to the party claiming revision, always provided that such ignorance was not due to negligence."[42]

177. In similar vein, Article 51(1) of the ICSID Convention provides:

> "Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence."[43]

178. There is a growing body of jurisprudence on the question of revision, notably of the ICJ, most recently in its 2003 judgment in *El Salvador v. Honduras* case.[44] What is clear from this jurisprudence, as well as from a plain reading of the provisions of the ICJ Statute and ICSID Convention set out above, is that the threshold for pursuing such claims is high. There is no credible basis, in my view, on which the Laotian and PRC Notes Verbales of January 2014 could come within the scope of any such principle. I accordingly refrain from addressing this possibility further.

179. Fourth, a subsequent agreement between the parties to a treaty that asserts the non-application of the principal treaty could only properly be forward looking in circumstances in which the treaty in question establishes private rights. Any other approach would raise questions of retroactivity, including as regards principles of fair procedure, acquired rights and legitimate expectations. Professor Chesterman appears to accept this insofar as he observes that Laos and the PRC, by their Notes Verbales, "are not seeking to manipulate proceedings" (Chesterman Report, paragraph 88). This observation comes in response to the extract from Dolzer and Schreuer's *Principles of International Investment Law* initially set out in the Expert Opinion of Professor Shan (at paragraph 50), which Professor Chesterman subsequently sets out in fuller form, including the following passage:

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[42] Statute of the International Court of Justice; http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (Exhibit **Annex 24**).
[43] Convention for the Settlement of Investment Disputes between States and Nationals of Other States; https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (Exhibit **Annex 25**).
[44] *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*, ICJ Reports 2003, p.392.

> "States may strive to issue official interpretations to influence proceedings to which they are parties. However, a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is incompatible with principles of a fair procedure and is hence undesirable."[45]

180. In this regard, I note the discussion of this matter in Professor Shan's Expert Report, at paragraphs 48–51, and in particular his observation that "since the [PRC] Embassy Letter expresses an intent that would deprive international investors in Macau SAR of the protection of the PRC–Laos BIT that they would otherwise enjoy, it amounts to an amendment of the existing treaty language. Such an amendment to a treaty, even if it is agreed between the contracting parties, does not have retroactive effect" (Expert Report of Professor Wenhua Shan, at paragraph 51). I agree with this assessment by Professor Shan and note Professor Chesterman's silence on the point.

181. As it is directly material to a point going to the terms of the PRC/Laos BIT that I have addressed above, I also highlight an extract from one of the arbitration awards cited by Professor Shan in footnote 18 of his Expert Report, namely, the 28 September 2007 award in the case *Sempra Energy International v. Argentine Republic* (ICSID Case No.ARB/02/16). Addressing the issue of subsequent interpretations of a treaty by its parties, the tribunal in that case observed as follows, in terms that are directly germane to the issue here in contemplation:

> "Moreover, even if this interpretation were shared by both parties to the Treaty, it would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries. In fact, Article XIV of the Treaty provides that in case of termination, the investment will continue to be protected under its provisions 'for a further period of ten years.' So too, with reference to rights protected under the Energy Charter Treaty, the tribunal in *Plama* has held that any denial of advantages to which an investor might have rights 'should not have retrospective effect,' as such a situation would result in making legitimate expectations false at a much later date."[46]

[45] Dolzer, R., and Schreuer., C, *Principles of International Investment Law*, Oxford University Press, 2nd., ed., 2012, pp.34–35 (footnotes omitted). Extract set out in the Chesterman Report, at paragraph 87.
[46] *Sempra Energy International v. Argentine Republic*, ICSID Case No.ARB/02/16, Award of 28 September 2007, at p.114, paragraph 386. Attached as Annex 18 to Professor Shan's Expert Report.

182. This analysis is directly pertinent to the issues engaged by the present case, notably having regard to the terms and effect of the legal framework stability clause in Article 12(4) of the PRC/Laos BIT.

183. By way of conclusion on this aspect, some comment is required on Professor Chesterman's reliance on the 2003 Ontario Federal Court of Appeal Judgment in *Edwards v. Canada*,[47] which concerned a question of the application to Hong Kong post-1997 of the Canada–China Income Tax Agreement of 1986. Professor Chesterman relies in the judgment in this case in support of the proposition that diplomatic notes expressing the views of the parties to a treaty were entitled to great weight, citing an extract from the judgment to this effect (Chesterman Report, paragraph 89).

184. With respect, a reading of the judgment in question does not by any stretch sustain the claim for which it is cited. Four points may be briefly made. First, the Judge in that case found that it was apparent from the express terms of the treaty that the treaty did not apply to Hong Kong (Judgment, at paragraphs 22–24). Second, the Judge found that the diplomatic exchanges in issue in the case were consistent with the natural meaning of the treaty (Judgment, at paragraphs 27–28). Third, the Judge found that the evidence indicated a consistent position by the Canadian Government that the treaty in question did not apply to Hong Kong (Judgment, paragraph 28). Fourth, the Judge found that this position "had been known in tax circles and accessible to anyone interested since at least 1997" (Judgment, paragraph 28). The Judge's observations on the issue of the commonly expressed intention of the parties to the treaty, to which Professor Chesterman refers, follows these other findings. Far from supporting Professor Chesterman's analysis, the case stands in support of a considered evaluation of the scope of application of a treaty, consistently with its terms, not unquestioned deference towards post-hoc, unpublished, party-procured communications.

[47] *Edwards v. Canada*, Ontario Federal Court of Appeal, Judgment of 14 October 2003. At Annexe 29 to the Chesterman Report.

Conclusions on the effect of the PRC/Laos Notes Verbales of January 2014 on the question of the application to Macao of the PRC/Laos BIT

185. My conclusions on the effect of the PRC/Laos Notes Verbales of January 2014 on the question of the application to Macao of the PRC/Laos BIT can be briefly stated. I agree with Professor Chesterman that subsequent agreements between the parties to a treaty can properly be taken into account for purposes of assessing the application of the treaty. I agree that an exchange of Notes Verbales between the Laotian Ministry of Foreign Affairs and the Embassy of the PRC in Vientiane can constitute a subsequent agreement of this character, subject to issues of authenticity, authority and admissibility, including critical date considerations (which I emphasise, in the circumstance of this case, is a significant caveat).

186. I do not consider that, as a matter of PIL, the Laotian/PRC Notes Verbales are admissible, on critical date grounds. If they are admissible, I disagree with Professor Chesterman on the weight to be attributed to them. In my view, the Notes Verbales are of questionable evidential relevance and weight in the face of an assessment that the PRC/Laos BIT applied to Macao by straightforward operation of law. They cannot, in my view, alter the legal position applicable from the date of Macao's reversion to the PRC in 1999 by reference to the general rules in Article 29, VCLT and Article 15, VCST. In my view, therefore, the Notes Verbales cannot be relied upon as a subsequent agreement between the parties that displaces the assessment that the PRC/Laos BIT applies to Macao by operation of law.

Conclusions

187. The issue of whether the PRC/Laos BIT applied to Macao from the date of its reversion to the PRC in 1999 is a matter of legal appreciation in the light of all the circumstances and considerations of law. It is not a question of fact that admits of only one possible answer but rather an issue that requires weighing in the balance.

188. As an abstract matter, it is not a necessary and inevitable conclusion of law that the PRC/Laos BIT of 1993 applied to Macao on the date of Macao's reversion to the PRC in 1999. The PRC and Laos could have agreed otherwise, both before Macao's

reversion to the PRC and afterwards. The BIT expressly provides that the parties would periodically review its implementation and, separately, that they could terminate the BIT on one year's written notification before the expiration of the 10 year period of its initial application.

189. No evidence is presented to indicate that the PRC and Laos ever addressed the territorial scope of application of the BIT in any bilateral engagement. Given this, the starting point of any analysis about the territorial scope of application of the PRC/Laos BIT must be the general rules in Article 29, VCLT and Article 15, VCST. By operation of Article 29, VCLT, the PRC/Laos BIT is binding on the PRC in respect of its entire territory, which, from 1999, included Macao, unless there is evidence of intention to the contrary. By operation of Article 15, VCST, the PRC/Laos BIT applied to Macao from 1999 unless to have done so would have been incompatible with its object and purpose or would radically have changed the conditions for its operation.

190. There is no evidence falling within the exceptions in Article 29, VCLT and Article 15, VCST that is sufficiently reliable and sufficiently weighty to displace the assessment that follows from the operation of the general rules in Article 29, VCLT and Article 15, VCST. What is presented are strands of evidence of questionable reliability and weight that do not, either individually or together, raise sufficient doubt to overturn the assessment that the BIT applies to Macao. This assessment in favour of the application of the BIT to Macao is bolstered by corroborating evidence of PRC practice elsewhere.

191. The Laotian and PRC Notes Verbales of January 2014, even if they are admissible and relevant, cannot operate to confirm a position that is not evident by reference to pre-critical date practice. The NV evidence is of questionable quality. It cannot displace the legal position applicable from the date of Macao's reversion to the PRC, i.e., that the PRC/Laos BIT applied to Macao by straightforward operation of law.

192. In my view, the PRC/Laos BIT applied to Macao as of the date of Macao's reversion to the PRC in 1999 and continues to apply to Macao today.

Sir Daniel Bethlehem KCMG QC

20 Essex Street
London WC2R 3AL

2 October 2014

List of Annexures

1. Sir Daniel Bethlehem KCMG QC, Curriculum Vitae & Practicing License

2. Agreement Between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments, signed 31 January 1993

3. Award on Jurisdiction by the Arbitral Tribunal in PCA Case No. 2013-13, dated 13 December 2013

4. Note Verbale from the Ministry of Foreign Affairs of the Lao People's Democratic Republic to the Embassy of the People's Republic of China in Vientiane, dated 7 January 2014

5. Note Verbale from the Embassy of the People's Republic of China in Vientiane to the Ministry of Foreign Affairs of the Lao People's Democratic Republic, dated 9 January 2014

6. Vienna Convention on the Law of Treaties, 1969

7. United Nations Treaty Collection, List of Signatories to the Vienna Convention on the Law of Treaties, available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en

8. Vienna Convention on Succession of States in Respect of Treaties, 1978

9. United Nations Treaty Collection, List of Signatories to the Vienna Convention on Succession of States in Respect of Treaties, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en

10. L Goldie, L.F.E., *The Critical Date*, International and Comparative Law Quarterly, Volume 12(4), October 1963, pp. 1251-1284

11. United Nations Treaty Series, Registration of 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, available at https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800af019

12. United Nations Treaty Collections, PRC Depositary Notifications to the UN Secretary-General, in his capacity as depositary of multilateral treaties, available at https://treaties.un.org/pages/CNs.aspx

13. Corten, O., and Klein, P., *The Vienna Conventions on the Laws of Treaties: A Commentary* (Oxford University Press, 2011), Volume I

14. Dörr, O., and Schmalenbach, K., *Vienna Convention on the Law of Treaties: A Commentary*, (Springer, 2012)

15. United Nations Conference on Succession of States in Respect of Treaties, Official Records, Volume I, Summary records of the plenary meetings and of meetings of the Committee of the Whole, A/CONF.80/16 and Volume III, Documents of the Conference, A/CONF.80/16/Add.2

16. Pietrowski, R., "Evidence in International Arbitration", Arbitration International, 2006, Volume 22, Issue 3, pp.373–410

17. Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao, 1987

18. Notification submitted by the PRC to the UN Secretary-General in relation to treaties deposited with the Secretary-General, 13 December 1999

19. "Memorandum on Application" prepared by the Treaty Section of the UK FCO addressing the interpretation and application of Article 29, Vienna Convention on the Law of Treaties

20. *Contracting States and Measures Taken by them for the Purpose of the Convention*, ICSID/8, February 2014, at ICSID/8-B available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&Measures=True&language=English

21. *Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre*, ICSID/8, February 2014, ICSID/8-D, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&Measures=True&language=English

22. Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, signed 9 November 2006

23. Note Verbale from the Embassy of the United States of America in Madrid to the Ministry of Foreign Affairs of Spain, dated 20 January 2004 and from the Ministry of Foreign Affairs of Spain to the Embassy of the United States of America in Madrid, dated 2 February 2004

24. Statute of the International Court of Justice, 1945

25. Convention for the Settlement of Investment Disputes between States and Nationals of Other States, 1966

ANNEX 1

SIR DANIEL BETHLEHEM KCMG QC

20 ESSEX STREET

Queens Counsel
Date called: 1988 Silk: 2003

Daniel Bethlehem specialises in public international law. He also advises on aspects of national security law and on issues concerning the application of the OECD Guidelines for Multinational Enterprises, including cases before the UK National Contact Point under those guidelines. He accepts instructions as counsel and adviser as well as arbitration and inquiry appointments. From May 2006 to May 2011, he was the principal Legal Adviser of the UK Foreign & Commonwealth Office.

Having practised from chambers from 1990 until his appointment to the FCO in 2006, Daniel has extensive advisory, litigation and arbitration experience representing States, international and non-governmental organisations, corporations and individuals on issues across the full breadth of public international law as well as aspects of European Union law and international and European human rights law. He has appeared frequently before a wide range of international courts and tribunals, from the International Court of Justice to the International Tribunal for the Law of the Sea, WTO and regional trade panels, ad hoc international arbitration panels, and other international dispute settlement mechanisms. He has similarly appeared before all levels of English courts and tribunals, from Employment Tribunals (addressing issues of State immunity) through to the High Court, Court of Appeal and House of Lords / Supreme Court. He has also appeared before the EU courts in Luxembourg and the European Court of Human Rights in Strasbourg. In these roles, he has acted both as counsel and as agent overseeing and guiding the strategic formulation of litigation and dispute settlement policy.

Complementing this experience, Daniel has advised and represented States, international and non-governmental organisations, corporations and individuals in respect of high legal content policy and political matters, ranging from international peace negotiations to arms limitation talks and political representation in such fora as the United Nations, European Union and Council of Europe.

Daniel is currently sitting as presiding arbitrator or arbitrator in a number of investor-State arbitrations cases under the framework of the PCA, ICSID, NAFTA and DRCAFTA. He is a panellist on the WTO indicative list of panellists maintained pursuant to Article 8.4 of the WTO Dispute Settlement Understanding and has previously participated in both NAFTA and ad hoc Canada ? U.S. trade panel proceedings. He was a member of the Court of Arbitration for Sport in the period prior to May 2006 and, in this capacity, sat as arbitrator in various CAS proceedings.

From 2003 to 2006, Daniel was the Director of the Lauterpacht Centre for International Law at the University of Cambridge and before that, from 1998 to 2003, its Deputy Director. He was, throughout this period, a Fellow of Clare Hall, Cambridge. Prior to his move to Cambridge in 1998, he was a lecturer in international law at the London School of Economics from 1992 to 1998. From 1990 to 1992, Daniel practised European Community law in Brussels as counsel associated with the law firm Forrester Norall & Sutton. Before commencing practice at the Bar in 1990, Daniel worked for a number of years in investment banking at Barclays de Zoete Wedd and Nikko Securities in the fields of European equity strategy and corporate finance, observing first hand both the ?Big Bang? deregulation of the London financial markets of 1986 and the stock market crash of 1987.

In parallel with his Bar practice, Daniel is also actively engaged in the foreign policy advisory field, as Director of Legal Policy International Ltd. (LP). He is a member of the Advisory Council of the British Institute of International and Comparative Law, the Advisory Committee of the Lauterpacht Centre for International Law, and a Counsellor of the Executive Council of the American Society of International Law. He has previously been a member of the Council of the British Branch of the International Law Association and of the Advisory Council the Institute of Advanced Legal Studies. He has a long-standing affiliation with Columbia Law School in New York where he has, annually since 2011, been a Visiting Professor of Law.

Daniel is a Consulting Senior Fellow for Law and Strategy at The International Institute for Strategic Studies (IISS).

In November 2013, Daniel joined the Board of Palantir Technologies UK Ltd.

Daniel has published, taught and lectured widely on topics across the range of public international law from the use of force and economic sanctions to trade, human rights and refugee law, and the place and role of law in international dispute settlement.

Daniel is a Bencher of Middle Temple. He was knighted in the Queen's Birthday Honours List in June 2010.

Key public appointments:

- Joined the Board of Palantir Technologies UK Ltd., November 2013
- Member of the Advisory Council, Restatement Fourth of the Foreign Relations Law of the United States (from October 2012)
- Appointed a member of the U.S. Department of State?s Advisory Committee on International Law, May 2012
- Appointed to the UK Foreign Secretary?s ?Locarno Group? of external advisers on UK foreign policy issues, November 2011
- Member of the Search Committee for the Prosecutor of the International Criminal Court

Personal and Academic Background

Born in London in 1960, Daniel grew up in South Africa, studying Political Science and International Relations at the University of the Witwatersrand in Johannesburg, obtaining a BA degree in 1981. Returning to the UK thereafter, he studied law at Bristol University (LLB, 1985) and in Cambridge (Queens' College, LLM, 1990). He is an experienced Master scuba diver and has trekked to Everest base camp, climbed Kilimanjaro and scaled glaciers in Patagonia.

Principal cases, appointments, publications and lectures up to September 2011

Principal cases, appointments and publications in the public domain since September 2011 (updated details available on request).

For further information, see www.danielbethlehem.com

Attachment	Size
DB - Cases and Publications (to Sept 2011).pdf	123.99 KB
Bethlehem - cases, appointments and publications since September 2011 (July 2014).pdf	117.06 KB

Sir Daniel Bethlehem KCMG QC

Supplementary CV Information – Principal Cases, Appointments and Publications since September 2011

(as of July 2014)

Cases and appointments

The following list of cases and appointments reflects information in the public domain save in circumstances in which it is possible to provide more generalised information in respect of non-public matters that does not breach confidentiality obligations. This list does not otherwise include cases or matters that are not in the public domain or in respect of which confidential advice was provided or some other non-public engagement took place. Insofar as any such involvement might require appropriate conflicts of interests disclosures or recusals in connection with any proposed instructions or appointments, this would be addressed on an ad hoc basis as required.

Arbitration appointments

- Arbitrator, *Le Chèque Déjeuner and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35)
- Arbitrator, *Eli Lilly and Company v. Canada* (ICSID Case No. UNCT/14/2)
- Presiding Arbitrator, *Spence International Investments et al. v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2)
- Presiding Arbitrator, BIT case administered by the Permanent Court of Arbitration

Counsel / Adviser

- *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, International Court of Justice, counsel to the United Kingdom
- Counsel / Adviser to Italy in the matter of the two Italian marines detained in India
- *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, International Court of Justice, counsel to Chile
- Counsel / Adviser in various matters concerning bulk data interception
- Counsel / Adviser in various matters complaints submitted to the UK National Contact Point under the OECD Guidelines for Multinational Enterprises
- Counsel in a number of cases concerning State and diplomatic immunity
- Counsel in an inter-State boundary mediation

- Adviser in a number of matters concerning maritime boundary delimitation
- *Nolan v. United States*, counsel to the United States in proceedings before the English Court of Appeal
- *Case A/15 (II:A), Iran v. United States*, counsel to the United States in proceedings before the Iran – U.S. Claims Tribunal
- Adviser in a matter concerning a US FCPA LIBOR investigation
- Counsel in proceedings before the English Courts concerning the enforcement of an international arbitral award
- Adviser in proceedings before the International Criminal Court
- Adviser in a matter concerning an International Seabed Authority exploration licence
- External Legal Counsel to the Government of Bahrain on the implementation of the recommendations of the Bahrain Independent Commission of Inquiry
- *Mobile TeleSystems Finance SA v. Nomihold Securities Inc.* – proceedings before the English Court of Appeal and Supreme Court concerning the challenge to an LCIA arbitration award

Publications and Parliamentary Evidence

The following is a list of publications and publicly available written evidence to UK Parliamentary committees and inquiries in the period from September 2011 (with the exception of the last item on the list, which dates from June 2011 but is included for reason of completeness). The list does not include reference to public lectures or other public comments for which there is no written text or citation. Insofar as it would be appropriate to draw attention to any such lecture or comment for purposes of conflicts of interests disclosures or recusals in connection with any proposed instructions or appointments, this would be addressed on an ad hoc basis as required.

- "The End of Geography: The Changing Nature of the International System and the Challenge to International Law", European Journal of International Law (2014), Vol.25(1), 9-24
- "Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention", EJIL: *Talk!*, 12 September 2013
- "Principles of Self-Defense – A Brief Response", 107 American Journal of International Law 579 (2013)
- "The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", 2(2) Cambridge Journal of International and Comparative Law 180 (2013)
- Written evidence to the UK Parliamentary Joint Committee on Human Rights on the Justice and Security Bill, 15 October 2012
- "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors", 106 American Journal of International Law 769 (2012)

- "The Secret Life of International Law", 1(1) Cambridge Journal of International and Comparative Law 23 (2012)
- "After the Arab Spring – Part II", YaleGlobal Online, September 2011
- "Mopping Up the Last War or Stumbling Into the Next", Harvard National Security Law Journal, October 2011
- Written evidence to the (Chilcot) Iraq Inquiry, 24 June 2011

Sir Daniel Bethlehem KCMG QC

Supplementary CV Information – Principal Cases and Publications
(as of 1 September 2011)

Principal Cases

From May 2006 to May 2011, in his capacity as principal Legal Adviser of the UK Foreign & Commonwealth Office, Daniel Bethlehem had a close involvement in (a) litigation involving the UK Government, or engaging UK Government interests, before the English courts involving questions of public international law, as well as aspects of European and international human rights law and European Union law, (b) litigation engaging UK interests before foreign domestic courts, and (c) litigation involving the UK, or engaging UK interests, before international courts and tribunals. With the exception of the International Court of Justice advisory opinion proceedings on the declaration of independence of Kosovo, such cases are not listed below.

The list below refers to principal cases or matters that are the public domain. It does not include, for example, all cases before the European Union courts or cases not engaging issues of public international law. It does not, additionally, include cases or matters that are not in the public domain or in respect of which confidential advice was provided or some other non-public engagement took place. Insofar as any such involvement might require appropriate conflicts of interests disclosures or recusals as regards any proposed instructions or appointments, this would be addressed on an ad hoc basis as required.

Case C-298/89, Government of Gibraltar v. EC Council (1991–1993), counsel to the Government of Gibraltar in proceedings before the European Court of Justice

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1993–1996), counsel to the United Kingdom in advisory opinion proceedings before the International Court of Justice

Case C-55/94, Gebhard (1994–1995), counsel to the United Kingdom in proceedings before the European Court of Justice

Legality of the Threat or Use of Nuclear Weapons (1994–1996), counsel to the United Kingdom in advisory opinion proceedings before the International Court of Justice

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (1992–2003), counsel to the United Kingdom in proceedings before the International Court of Justice

EC–Restrictions on Butter Products (1997–1998), counsel to New Zealand in WTO panel proceedings

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (1998–1999), counsel to Malaysia in advisory opinion proceedings before the International Court of Justice

Legality of Use of Force (Yugoslavia v. Belgium) (1999–2004), counsel to Belgium in proceedings before the International Court of Justice

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (2000–2002), counsel to Belgium in proceedings before the International Court of Justice

Mitchell Committee of Inquiry (2000–2001), counsel to Israel in respect of its submissions to an *ad hoc* committee of inquiry into the violence between Israel and the Palestinians

Cook v. United States of America (2001), counsel to the United States of America in proceedings before the English Employment Tribunal

Emin v. Yeldag (2001), counsel to the HM Foreign Secretary and Attorney-General, intervening, in proceedings before the English High Court

MOX Plant Case (*Ireland v. United Kingdom)* (2001–2003), counsel to the United Kingdom in proceedings before the International Tribunal for the Law of the Sea

Ireland v. United Kingdom (2001–2003), counsel to the United Kingdom in *ad hoc* proceedings under the OSPAR Convention

MOX Plant Case (Ireland v. United Kingdom) (2001–2008), counsel to the United Kingdom in *ad hoc* arbitration proceedings under the UN Convention on the Law of the Sea

R v. Lyons and Others (2002), counsel to the Crown in proceedings before the House of Lords

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2003–2004), counsel to Israel in advisory opinion proceedings before the International Court of Justice *(written phase only)*

Case Concerning Sovereignty Over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (2003–2006), counsel to Malaysia in proceedings before the International Court of Justice *(written phase only)*

Mechan v. Khalifa and others (2004-2005), counsel to Bahrain and other defendants in proceedings before the English District Court

Xenides-Arestis v. Turkey (2004–2005), counsel to Turkey in proceedings before the European Court of Human Rights

Case B/61, Iran v. United States (2005–2006), counsel to the United States in proceedings before the Iran–US Claims Tribunal

Ecuador v. OEPC (2005–2006), counsel to Ecuador in proceedings before the English High Court challenging an international arbitral award

Channel Tunnel Group v. Secretary of State for Transport (2005–2007), counsel to the United Kingdom in *ad hoc* proceedings under the Eurotunnel Concession Agreement and Treaty *(written phase only)*

Accordance with international law of the unilateral declaration of independence in respect of Kosovo (2008–2010), representative of, and counsel to, the United Kingdom in advisory opinion proceedings before the International Court of Justice

Arbitration Appointments and Cases

Panellist on the WTO Indicative List of Panellists maintained by the WTO Secretariat in accordance with Article 8.4 of the WTO Dispute Settlement Understanding

Arbitrator of the Court of Arbitration for Sport – various cases *(not involving any question of public international law)*

US v. Canada (Agricultural Tariffs) (1996-1997), Assistant to the Chairman of the Panel in proceedings under Chapter Twenty of the NAFTA

US v. Canada (Softwood Lumber) (1999-2000), Assistant to the Chairman of the Panel in *ad hoc* proceedings under the Canada–US Softwood Lumber Agreement

Principal Publications

Books

The Oxford Handbook of International Trade Law (2008), Ed., with McRae, Neufeld and van Damme

International Environmental Law Reports (5 Vols.), Ed., Cairo Robb; Gen. Ed., with Crawford and Sands

The 'Yugoslav' Crisis in International Law: General Issues, Part I (1997), Ed., with Weller

The Kuwait Crisis: Sanctions and Their Economic Consequences (1991), 2 Vols., Ed.

The Kuwait Crisis: Basic Documents (1991), Ed., with Lauterpacht, Greenwood and Weller

Articles / Chapters *(illustrative)*

"The methodological framework of the Study", in *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007), Eds., Wilmshurst and Breau

"Domestic Implementation of Security Council Sanctions Decisions: A Comparative Approach – The European Union", in *Domestic Implementation of Security Council Sanctions Decisions: A Comparative Approach* (2004), Ed., Gowlland-Debbas

"The scope and content of the principle of *non-refoulement*: Opinion", with Sir Elihu Lauterpacht QC, in *Refugee Protection in International Law* (2003), Eds., Feller, Türk and Nicholson

"Regional Interface Between Security Council Decisions and Member States Implementation: The Example of the European Union", in *United Nations Sanctions and International Law* (2001), Ed., Gowlland-Debbas

"Submissions on Points of Fact and Law: Written and Oral Pleadings Before the International Court of Justice", in *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts & Tribunals* (2000), Ed., Weiss

"International Law, European Community Law and National Law: Three Systems in Search of a Framework", in *Legal Aspects of the European Union* (1997), Ed., Koskenniemi

Parliamentary Evidence (in a private capacity)

"International Law and the Use of Force: The Law as it is and as it Should Be", evidence to the House of Commons, Foreign Affairs Committee, Foreign Policy Aspects of the War against Terrorism (Seventh Report of Session 2003–04; Vol.II, pp.100–116)

Notable Published Lectures / Commentaries

"The End of Geography?", a comment on the address by Professor Andrew Hurrell, Montague Burton Professor of International Relations at Oxford University, to the Biennial Conference of the European Society of International Law, Cambridge, 2 September 2010

"A Transatlantic View of International Law and Lawyers: Cooperation and Conflict in Hard Times" Annual Meeting of the American Society of International Law, Washington DC, 28 March 2009

"Aspects of Dispute Resolution in the International World", Middle Temple King James Lecture, 25 February 2008

"The Principle of Distinction", Second Commonwealth Red Cross and Red Crescent Conference on International Humanitarian Law, Wellington, New Zealand, 30 August 2007

"The ICRC Customary Law Study: An Assessment", Chatham House Conference on *The Law of Armed Conflict: Problems and Prospects*, 18 April 2005

"Is There a Role for Law in the Middle East Peace Process?", Annual Meeting of the American Society of International Law, Washington DC, 1 April 2005

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ANNEX 2

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

The Government of the People's Republic of China and the Government of the Lao People's Democratic Republic(hereinafter referred to as Contracting States),

Desiring to encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States,

Have agreed as follows:

Article 1

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.
2. The term "investors" means:
   in respect of both Contracting States:
   (a) natural persons who have nationality of each Contracting State;
   (b) economic entities established in accordance with the laws and regulations of each contracting State.

3. The term "return" means the amounts yielded by investments, such as profits, dividends, interests, royalties or other legitimate income.

Article 2

1. Each Contracting State shall encourage investors of the other Contracting State to make investments in its territory and admit such investments in accordance with its laws and regulations.
2. Each contracting State shall grant assistance in and provide facilities for obtaining visas and work permits to nationals of the other Contracting State to or in the territory of the Former in connection with activities associated with such investments.

Article 3

1. Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.
2. The treatment and protection as mentioned in Paragraphs 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.
3. The treatment and protection as mentioned in paragraphs 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting State to investments of investors of a third State based on customs union, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade.

Article 4

1. 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:
    a. as necessitated by the public interest;
    b. in accordance with domestic legal procedures;
    c. without discrimination;
    d. against appropriate and effective compensation;

2. The compensation mentioned in paragraph 1 (d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.
3. Investors of one Contracting State who suffer losses in respect of their investments in the territory of the other Contracting State owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting State, if it takes relevant measures, treatment not less favorable than that accorded to investors of a third State.

Article 5

1. Each Contracting State shall, subject to its laws and regulations, guarantee investors of the other Contracting State the transfer of their investments and returns held in the territory of the one Contracting State, including :
   (a) profits, dividends, interests and other legitimate income;
   (b) amounts from total or partial liquidation of investments;
   (c) payments made pursuant to a loan agreement in connection with investment;
   (d) royalties resulting from Article 1;
   (e) payments of technical assistance or technical service fee; management fee;
   (f) payments in connection with projects on contract;
   (g) earnings of nationals of the other Contracting State who work in connection with an investment in the territory of the one Contracting State.
2. The transfer mentioned above shall be made at the prevailing exchange rate of the Contracting State accepting investment on the date of transfer.

Article 6

If a Contracting State or its Agency makes payment to an investor under a guarantee it has granted to an investments of such investor in the territory of the other Contracting State, such other Contrating State shall recognize the transfer of any right or claim of such investor to the former Contracting State of its Agency and recognize the subrogation of the former Contracting State of its Agency to such right or claim. The subrogated right or claim shall not be greater than the original right or claim of the said investor.

Article 7

1. Any dispute between the Contracting States concerning the interpretation or application of this Agreement shall, as far as possible, be settled by consultation through diplomatic channel.
2. If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting State, be submitted to an ad hoc arbitral tribunal.
3. Such tribunal shall be comprised of three arbitrators. Within two months from the date on which either Contracting State receives a written notice requesting arbitration from the other Contracting State, each Contracting State shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a third arbitrator who is a national of a third State which has diplomatic relations with both Contracting States. The third arbitrator shall be appointed by the two Contracting States as Chairman of the arbitral tribunal.
4. If the arbitral tribunal has not been constituted within four months from the date of the receipt of a written notice for arbitration, either Contracting State may, in the absence of any agreement, invite the President of the International Court of Justice to appoint the arbitrator(s) who has or have not yet been appointed. If the President is a national of either Contracting State or is otherwise prevented from discharging the said function, the next most senior member of the International Court of Justice who is not a national of either Contracting State shall be invited to make the necessary appointment(s).
5. The arbitral tribunal shall determine its own procedure. The tribunal shall reach its award in accordance with the provisions of this Agreement and the principles of international law recognized by both Contracting States.
6. The tribunal shall reach its award by a majority of votes. Such award shall be final and binding on both Contracting States. The tribunal shall, upon the request of either Contracting Sate, explain the reasons of its award.
7. Each Contracting State shall bear the cost of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and the tribunal shall be borne in equal parts by the Contracting States. The tribunal may, however, in its decision, direct that a higher proportion of costs shall be borne by one of the two Contracting States.

Article 8

1. Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.
2. If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
3. If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.
4. Such an arbitral tribunal shall be constituted for each individual case in the following way : each party to the dispute shall appoint an arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting States as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite the Secretary General of the International Center for Settlement of Investment Disputes to make the necessary appointments.
5. The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center for Settlement of Investment Disputes.
6. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both Contracting States shall commit themselves to the enforcement of the decision in accordance with their respective domestic laws.
7. The tribunal shall adjudicate the dispute in accordance with the law of the Contracting State accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepted by both Contracting States.

8. 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.

Article 9

If the treatment to be accorded by one Contracting State in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other Contracting State is more favorable than the treatment provided for in this Agreement. the more favorable treatment shall be applicable.

Article 10

This Agreement shall apply to investments which are made prior to or after its entry into force by investors of either Contracting State. Such investments shall be approved in accordance with the laws and regulations of the Contracting State in the territory of the Latter.

Article 11

1. The representatives of the two Contracting States shall hold meeting from time to time for the purpose of;
   (a) reviewing the implementation of this Agreement;
   (b) exchanging legal information and investment opportunities;
   (c) resolving dispute arising out of investments;
   (d) forwarding proposals on promotion of in vestment;
   (e) studying other issues in connection with investments.

2. Where either Contracting State requests consultation on any matters under paragraph 1 of this Article, the other Contracting State shall give prompt response and the consultation shall be held alternatively in Beijing and in Vientiane.

Article 12

1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting States have notified each other in writing that their respective

internal legal procedures have been fulfilled, and shall remain in force for a period of ten years.

2. This Agreement shall continue in force if either contracting State fails to give a written notice to the other Contracting State to terminate this Agreement one year before the expiration specified in paragraph 1 of this Article.
3. After the expiration of the initial ten-year period, either Contracting State may at any time thereafter terminate this Agreement by giving at least one year's written notice to the other Contracting State.
4. With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 11 shall continue to be effective for a further period of ten years from such date of termination.

IN WITNESS WHEREOF, the duly authorized representatives of their respective Governments have signed this Agreement.

Done in duplicate at Vientiane on January 31, 1993 in the Lao, Chinese and English languages, the three texts being equally authentic. In case of divergency, the English text shall prevail.

For the Government of the People's Republic of China

For the Government of the Lao People's Democratic Republic

ANNEX 3

PCA Case No. 2013-13

IN THE MATTER OF AN ARBITRATION 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 DATED 31 JANUARY 1993 AND THE 2010 UNCITRAL ARBITRATION RULES

- between -

SANUM INVESTMENTS LIMITED

"Claimant"

- and -

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

("Respondent," and together with Claimant, the "Parties")

AWARD ON JURISDICTION

ARBITRAL TRIBUNAL:
Professor Bernard Hanotiau
Professor Brigitte Stern
Dr. Andrés Rigo Sureda (Presiding Arbitrator)

Registry:
The Permanent Court of Arbitration

Tribunal Secretary:
Ms. Sarah Grimmer

13 December 2013

TABLE OF CONTENTS

I. THE PARTIES AND THEIR REPRESENTATIVES

1. The Claimant is Sanum Investments Limited ("**Sanum**" or **"Claimant**"), an entity incorporated in the Macao Special Administrative Region of the People's Republic of China ("**PRC**") ("**Macao SAR**" or "**Macao**"). The Claimant is represented by Mr. David W. Rivkin and Ms. Catherine M. Amirfar (Debevoise & Plimpton LLP, New York); Mr. Christopher K. Tahbaz (Debevoise & Plimpton LLP, Hong Kong); and Mr. Todd Weiler (Barrister & Solicitor, London, Ontario, Canada).

2. The Respondent is the Government of the Lao People's Democratic Republic ("**Laos**" or "**Respondent**"). The Respondent is represented by the Laos Ministry of Foreign Affairs, Mr. David Branson (King Branson LLC, Washington, D.C.), Ms. Jane Willems, Ms. Teresa Cheng S.C. (De Voeux Chambers, Hong Kong), Professor George A. Bermann (Columbia University School of Law, New York) and L.S. Horizon (Vientiane).

II. PROCEDURAL HISTORY

3. The Claimant commenced these proceedings by a Notice of Arbitration ("**Notice**") dated 14 August 2013 pursuant to 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 dated 31 January 1993 (**"PRC/Laos Treaty**", "**BIT**", "**Treaty**").[1]

4. On 8 May 2013, the Tribunal and the Parties attended a first procedural conference in London.

5. On 21 May 2013, after consultation with the Parties, the Tribunal issued Procedural Order No. 1, which designated: (a) Singapore as the place of arbitration; (b) the Permanent Court of Arbitration ("**PCA**") as Registry; and (c) the 2010 UNCITRAL Arbitration Rules as the applicable procedural rules. Procedural Order No. 1 also set forth the timetable of the proceedings.

6. On 7 June 2013, the Claimant filed an Amended Notice of Arbitration ("**Amended Notice**").

7. On 9 August 2013, the Respondent filed its Memorial on Jurisdiction with exhibits RE-01 to RE-18 and legal authorities RA-01 to RA-25.

[1] PRC/Laos Treaty (Ex. D to Claimant's Amended Notice of Arbitration).

8. On 1 October 2013, the Claimant filed its Statement of Claim and Response on Jurisdiction with (a) witness statements of Mr. John Baldwin, Mr. Clay Crawford, Mr. Richard A. Pipes; (b) expert reports of Mr. Joseph P. Kalt, Ph.D. (with Appendices A to C) and the Innovation Group (with Appendices A to G); (c) exhibits C-1 to C-421; and (d) legal authorities CLA-1 to CLA-118.

9. On 8 October 2013, the Tribunal held a pre-hearing telephone conference call with the Parties.

10. On 11 October 2013, the Presiding Arbitrator issued Procedural Order No. 2 on behalf of the Tribunal.

11. On 17 October 2013, the Respondent submitted its Reply in Support of its Objection to Jurisdiction with exhibits RE-19 to RE-23 and legal authorities RA-27 to RA-34.

12. On 31 October 2013, the Claimant filed its Rejoinder on Jurisdiction accompanied by exhibit C-422 and legal authorities CLA-119 to CLA-125.

13. On 6 November 2013, a hearing on jurisdiction was held in Singapore ("**Hearing on Jurisdiction**").[2] The attendees for the Claimant were Mr. John Baldwin, Mr. Shawn Scott, Mr. David Rivkin, Ms. Catherine M. Amirfar, Ms. Samantha J. Rowe, Dr. Todd Weiler, and Ms. Swee Yen Koh. The attendees for the Respondent were Ms. Jane Willems, Mr. David Branson, Mr. Werner Tsu, Mr. Kongphanh Santivong, Prof. Dr. Bountiem Phissamay, Mr. Ket Kiettisak, Mr. Khampheth Viraphondet, Mr. Sith Siripraphanh, Mr. Outakeo Keodouangsingh and Mr. Phoukong Sisoulath.

14. At the conclusion of the Hearing on Jurisdiction, the Tribunal requested the Parties to file further submissions on (a) the respective roles, if any, of Article 29 of the 1969 Vienna Convention on the Law of Treaties ("**VCLT**") and Article 15 of the 1978 Convention on the Succession of States in Respect of Treaties ("**VCST**"), in relation to the application or non-application of the PRC/Laos Treaty to the Macao SAR; and (b) an analysis of the texts of the PRC/Portugal, PRC/Netherlands, Macao/Portugal, Macao/Netherlands bilateral investment treaties to determine whether there exists any relationship between the treaties entered into by Macao and those entered into by the PRC.[3]

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[2] In advance of the Hearing on Jurisdiction, the Parties provided the Tribunal with an agreed core hearing bundle of exhibits and legal authorities.

[3] Hearing Transcript, pp. 175-176; Agreement between the Kingdom of the Netherlands and the Macao SAR of the PRC on Encouragement and Reciprocal Protection of Investments, signed 22 May 2008

15. On 15 November 2013, the Respondent submitted its Post-Hearing Submission in Support of its Objection to Jurisdiction accompanied by Tables 1 to 4 and exhibits RE-24 to RE-46 and legal authorities RA-35 to RA-53 ("**Respondent's Post-Hearing Submission**"), and the Claimant submitted its Response to the Tribunal's Questions on Jurisdiction accompanied by legal authorities CLA-126 to CLA-150 ("**Claimant's Response**").

16. Following several e-mails from the Parties on 17 and 18 November 2013, on behalf of the Tribunal, the Presiding Arbitrator directed the Parties to refrain from providing additional submissions unless invited to do so by the Tribunal.

17. In Procedural Order No. 1, the Tribunal undertook to its decision on jurisdiction in a brief statement to the Parties indicating whether the jurisdictional objections were upheld or denied as soon as possible and not later than 15 December 2013. Such statement was to be followed by a fully reasoned decision of the Tribunal. This Award on Jurisdiction constitutes the fully reasoned decision of the Tribunal and thus obviates the need for a brief statement.

III. FACTUAL BACKGROUND

18. Prior to 1999, Macao was considered a "Chinese territory" over which Portugal exercised administrative power.[4] After the handover of Macao by Portugal in 1999, the PRC resumed sovereignty over Macao and established it as a special administrative region ("**SAR**") under Article 31 of the Constitution of the PRC and the Basic Law of the Macao SAR ("**Macao SAR Basic Law**").[5]

19. On 13 December 1999, the PRC filed a Notification regarding the Macao SAR with the Secretary-General of the United Nations ("**UN**") ("**1999 Notification**")[6] that is recorded in a

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("**Macao/Netherlands BIT**") (CLA-128); Agreement between the Portuguese Republic and the SAR of Macao of the PRC Regarding the Reciprocal Promotion and Protection of Investments, signed 17 May 2000 ("**Macao/Portugal BIT**") (CLA-129); Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the PRC and the Government of the Kingdom of the Netherlands, signed 26 November 2001 ("**PRC/Netherlands BIT**") (CLA-130); Agreement between the Portuguese Republic and the PRC on the Encouragement and Reciprocal Protection of Investments, signed 10 December 2005 ("**PRC/Portugal BIT**") (CLA-131).

4 Respondent's Memorial on Jurisdiction, ¶ 23 referring to Articles 5(4) and 292 of the 1976 Constitution of Portugal, 2 April 1976 (RE-10); and Article 1 of the Joint Declaration of the Government of the PRC and the Government of the Republic of Portugal on the Question of Macao, 13 April 1987 ("**Joint Declaration**") (RE-11).

5 Respondent's Memorial on Jurisdiction, ¶¶ 25, 73; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 227. .

6 1999 Notification (RE-08).

UN document entitled *Multilateral Treaties Deposited with the Secretary-General: Status as at 1 April 2009*.[7]

20. Sanum was established on 14 July 2005 under the laws of the Macao SAR.

21. In the spring of 2007, Mr. John Baldwin, Chairman of the Board of Sanum, travelled to Laos to explore possibilities for investing in Laos upon learning that a locally incorporated entity involved in the resort and gaming business—the ST Group ("**ST**")—was in need of financing to develop its gaming business.[8]

22. According to the Claimant, Mr. Baldwin subsequently met with individuals, attorneys, representatives of ST, and high-ranking government officials to discuss cooperation in the development of gaming enterprises in Laos.[9] Sanum eventually became involved in the operation and development of two casinos and five slot clubs in Laos.

23. The Claimant alleges that, prior to its investment, its representatives were assured by Laos government officials, including the Prime Minister, that Laos had favorable conditions for foreign investors,[10] strongly respected the rule of law,[11] and that Sanum would be accorded an ongoing majority control of its investment and long-term protection and security for those investments and their returns,[12] as well as a favorable and certain tax regime.[13] Sanum submits that the Prime Minister personally assured it that partnering with ST would be beneficial to it,[14] and that Laos would protect Sanum's investment.[15] Sanum further alleges that other officials of the Respondent also assured Sanum representatives that they would support Sanum for as long as it lived up to its commitments.[16]

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7 United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 1 April 2009* (2009), Historical Information, China, Note 3, at VIII ("**UN Status of Multilateral Treaties**") (CLA-115/RE-18).

8 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 44.

9 Amended Notice, ¶¶ 18-19; Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 45-48.

10 Amended Notice, ¶ 20.

11 Amended Notice, ¶ 24; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 52.

12 Amended Notice, ¶ 20.

13 Amended Notice, ¶ 21; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 52.

14 Amended Notice, ¶ 22.

15 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 53.

16 Amended Notice, ¶ 23.

Conclusion of the Master Agreement

24. Sanum and ST formalized their relationship in a Master Agreement dated 30 May 2007, which would govern all of the joint ventures in which the parties would participate.[17] Specifically, ST promised Sanum 60% of each of its existing (and all future) gaming ventures, and Sanum promised to make payments to ST (*e.g.* US$1.5 million upon signing the Master Agreement and US$2 million upon receiving the government approvals to be arranged by ST) and to finance the development of their planned ventures.[18] According to the Respondent, the Master Agreement was not intended to be a definitive agreement, but an "agreement to agree."[19]

25. The Master Agreement envisaged the creation of three joint ventures: (1) the Savan Vegas Hotel and Casino ("**Savan Vegas**"), for which ST already held a concession; (2) the Paksong Vegas Hotel and Casino ("**Paksong Vegas**"), for which ST already held a concession; and (3) three slot clubs: the Vientiane Friendship Bridge Slot Club, also known as the Thanaleng Slot Club ("**Thanaleng**"); the Lao Bao Slot Club ("**Lao Bao**"); and the Ferry Terminal Slot Club, also known as Daensavan Slot Club ("**Ferry Terminal**").[20]

26. Sanum's investment and ownership in all of the joint ventures were contingent upon Government acceptance and approval.[21]

27. The Master Agreement provided that the gaming rights would be exclusively those of the joint ventures.[22]

Project Development Agreements

28. On 10 August 2007, two project development agreements ("**PDAs**") were concluded.[23]

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17 Amended Notice, ¶ 26; Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 49-51; Respondent's Memorial on Jurisdiction, ¶ 4.

18 Amended Notice, ¶ 26; Claimant's Statement of Claim and Response on Jurisdiction, ¶ 49.

19 Respondent's Memorial on Jurisdiction, ¶ 4.

20 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 50; Respondent's Memorial on Jurisdiction, ¶ 5.

21 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 51; Respondent's Memorial on Jurisdiction, ¶ 6.

22 Respondent's Memorial on Jurisdiction, ¶ 6.

23 Respondent's Memorial on Jurisdiction, ¶ 7.

29. The first was concluded between Laos on the one hand and Sanum, Xaya Construction Co. Ltd. (a Laotian company), and Mr. Xaysana Xaysoulivong, on the other hand, with respect to Savan Vegas ("**Savan Vegas PDA**").[24] Therein, it was agreed that a joint venture—Savan Vegas and Casino Co. Ltd.—would be established under the laws of Laos to implement the Savan Vegas PDA ("**Savan Vegas JVC**").[25] The share ownership was divided as follows: Laos would own 20%, Sanum 60%, Xaya Construction Co. Ltd. 10%, and Mr. Xaysoulivong 10%.[26]

30. The second PDA was concluded between Laos on the one hand and Sanum, Nouansavanh Construction Co. Ltd. (a Laotian company), and Mr. Sittixay Xaysana, on the other hand, with respect to Paksong Vegas ("**Paksong Vegas PDA**").[27] Therein, it was agreed that a joint venture—Paksong Vegas and Casino Co. Ltd.—would be established under the laws of Laos to implement the Paksong Vegas PDA ("**Paksong Vegas JVC**").[28] The share ownership was divided as follows: Laos would own 20%, Sanum 60%, Nouansavanh Construction Co. Ltd. 10%, and Mr. Xaysana 10%.[29]

31. Both PDAs provided for dispute settlement by arbitration before the Economic Dispute Organization in Singapore.[30]

32. The Claimant submits that, through the PDAs, the Government agreed to an "Investment Incentive Policy" pursuant to which the joint ventures would be exempt from certain taxes.[31] According to the Claimant, the Government subsequently entered into a Flat Tax Agreement ("**FTA**") with Savan Vegas that capped annual taxes through the end of 2013.[32]

33. On 31 October 2007, the Government, Sanum, and ST executed Shareholders' Agreements for Savan Vegas and Paksong Vegas.[33]

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24 Respondent's Memorial on Jurisdiction, ¶ 7; Savan Vegas PDA (RE-03).

25 Respondent's Memorial on Jurisdiction, ¶ 7.

26 Respondent's Memorial on Jurisdiction, ¶ 7.

27 Respondent's Memorial on Jurisdiction, ¶ 7; Paksong Vegas PDA (RE-04).

28 Respondent's Memorial on Jurisdiction, ¶ 7.

29 Respondent's Memorial on Jurisdiction, ¶ 7.

30 Article 22 of the Savan Vegas PDA (RE-03) and Paksong Vegas PDA (RE-04).

31 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 7

32 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 7

33 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 57; Shareholders' Agreement between the Lao Government, Sanum, Xaya Construction Co., Ltd., Xaysana Xaysoulivong, and Savan Vegas, dated 31 October 2007 ("**Savan Vegas Shareholders' Agreement**") (C-056); Shareholders' Agreement

The Slot Clubs

34. According to the Claimant, negotiations over the future ownership and management of ST's three existing slot clubs—Thanaleng, Lao Bao, and Ferry Terminal—also proceeded in 2007 and 2008.[34]

35. On 6 August 2007, Sanum and ST entered into a Participation Agreement concerning the Lao Bao and Ferry Terminal Slot Clubs according to which Sanum would supply and maintain certain gaming machines in exchange for a percentage share in the revenue generated (60%).[35] Sanum and ST also entered into additional agreements concerning the Lao Bao and Ferry Terminal Slot Clubs, which granted Sanum management control of the clubs and protection of its 60% stake.[36]

36. On 4 October 2008, Sanum and ST entered into a Participation Agreement concerning the Thanaleng Slot Club, pursuant to which Sanum would supply and maintain certain gaming machines in exchange for revenue share.[37]

37. Sanum claims that it also invested in new slot club ventures in the provinces in which the Government had granted its investments monopoly gaming rights. On 25 October 2009, Savan Vegas opened a new slot club in Paksan. It also began exploring the possibility of having Savan Vegas open a slot club and international welcome center in Thakhaek.[38]

38. The Claimant describes its investment in Laos as follows:

> Sanum has made substantial investments […], including capital investments in its various Lao enterprises and projects exceeding US$85 million. It is a majority shareholder in both Savan Vegas and Paksong Vegas, which have been granted fifty-year land and development concessions and enjoy valuable monopoly gaming rights in five provinces pursuant to several agreements with the Lao Government, including the [PDAs] for each casino project. Sanum has ownership stakes in the Thanaleng, Lao Bao, and Ferry

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between the Lao Government, Sanum, Nouansavanh Construction Co., Ltd., and Lao River Mining Sole Co., Ltd., and Paksong Vegas, dated 31 October 2007 ("**Paksong Vegas Shareholders' Agreement**") (C-057).

34 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59.

35 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59; Lao Bao and Ferry Terminal Participation Agreement, dated 6 August 2007 (C-051).

36 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59; Ancillary Agreement between ST and Sanum, dated 1 September 2009 (C-063); Assignment of Lease, Ferry Terminal slot club, dated 1 September 2009 (C-064); Assignment of Leases, Lao Bao Slot Club, dated 1 September 2009 (C-065).

37 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 59.

38 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 60.

> Terminal slot clubs, and is entitled to a share of their revenues. Sanum also brought in highly experienced slot and casino managers to assist in running Savan Vegas, and it has leveraged its extensive knowledge of the gaming industry to introduce new multistation games at Thanaleng, which proved very popular and contributed to the club's success. Such industry expertise and business know-how has generated considerable returns for Sanum's businesses, which have operated pursuant to the required licenses issued by the Lao Government.[39]

The Claimant's Claims

39. It is the Claimant's case that its investments, once operational, were successful, but that the Government of Laos, including its courts and provincial authorities, conducted itself in such a way as to breach multiple obligations under the Treaty; namely, breach of (a) the fair and equitable treatment obligation under Article 3(1); (b) the expropriation provision in Article 4; (c) the guarantee of transfer of payments provision in Article 5; and (d) the obligation under Article 3(2) to provide an investor no less favorable treatment than that provided to investors of third States.[40]

The Respondent's Limited Response on the Facts

40. The Respondent makes limited submissions on the facts at this stage of the proceedings.[41] It submits that (a) the investors have not made any capital investments but rather claim (without providing documentary evidence) to have loaned approximately US$65 million to the casino;[42] (b) over the first four years of casino operations, Savan Vegas reported gambling revenues increased to US$74 million per year but, according to Savan Vegas, every year the casino made a loss, relieving it of its obligation to pay out to its shareholders;[43] (c) there are concerns over the legitimacy of claimed expenses on the casino's books and loans apparently paid by Mr. Baldwin with respect to which he has been receiving interest payments.[44] The Respondent intimates that it will file a counterclaim seeking to terminate all of the relevant agreements with the Claimant.[45]

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39 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 273; Hearing Transcript, p. 66.

40 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 313.

41 Respondent's Reply on Jurisdiction, ¶¶ 54-57.

42 Respondent's Reply on Jurisdiction, ¶ 55.

43 Respondent's Reply on Jurisdiction, ¶ 56.

44 Respondent's Reply on Jurisdiction, ¶ 56.

45 Respondent's Reply on Jurisdiction, ¶ 57.

Related Proceedings

41. On the same day that the present arbitration was commenced, Lao Holdings N.V. ("**Lao Holdings**"), a company formed in Aruba, the Netherlands, and the 100% owner of Sanum, also commenced arbitration proceedings against Laos pursuant to the bilateral investment treaty concluded between the Netherlands and Laos in 2005 ("**Lao Holdings Arbitration**").[46]

42. In April 2013, Lao Holdings requested provisional measures from the tribunal in the related proceedings.[47] On 17 September 2013, the tribunal in the Lao Holdings Arbitration awarded provisional measures to the claimant ordering the parties to maintain the *status quo* with respect to investments subject to that arbitration.[48]

IV. RELEVANT LEGAL PROVISIONS

43. The Preamble to the Treaty provides, in relevant part:

> The Government of the People's Republic of China and the Government of the Lao People's Democratic Republic (hereinafter referred to as Contracting States),
> Desiring to encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States […]

44. Article 1(1) of the Treaty provides, in relevant part:

> 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.

45. Article 1(2)(b) of the Treaty provides, in relevant part:

> The term "investors" means:
> In respect of both Contracting States: […]
> (b) economic entities established in accordance with the laws and regulations of each contracting State.

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46 Respondent's Memorial on Jurisdiction, ¶ 2(iii).

47 Respondent's Memorial on Jurisdiction, ¶ 10.

48 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 24.

46. Article 3(1) and 3(2) of the Treaty provide:

> (1) Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.
>
> (2) The treatment and protection as mentioned in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.

47. Article 4(1) and 4(2) of the Treaty provide:

> (1) 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:
> (a) as necessitated by the public interest;
> (b) in accordance with domestic legal procedures;
> (c) without discrimination;
> (d) against appropriate and effective compensation.
>
> (2) The compensation mentioned in paragraph 1(d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.

48. Article 8(1), 8(2), and 8(3) of the Treaty provide:

> (1) Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.
>
> (2) If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
>
> (3) If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.

49. Article 29 of the VCLT states:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

50. Article 15 of the VCST provides:

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

a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and

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

V. SUMMARIES OF THE PARTIES' ARGUMENTS

A. WHETHER THE CLAIMANT IS COVERED BY THE BIT

1. Whether the BIT extends to the Macao SAR

(a) The Respondent's Position

51. The Respondent argues that the BIT does not provide protection to the Claimant because the BIT does not extend to cover the Macao SAR.[49]

52. The Respondent notes that the PRC resumed the exercise of sovereignty over Macao in 1999, and established Macao as an SAR pursuant to Article 31 of the PRC Constitution and the Macao SAR Basic Law.[50] The Respondent alleges that the Macao SAR Basic Law establishes the capacity of Macao to enter into international trade arrangements on its own behalf[51] and to adopt its own policies and laws on the protection and development of industry and commerce,[52] which includes the power to execute bilateral investment treaties.[53] It further contends that the Macao SAR Basic Law provides that international agreements to which the PRC is a party would not apply automatically in the Macao SAR but must instead be decided by the Central Government of the PRC.[54]

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49 Respondent's Memorial on Jurisdiction, ¶¶ 32-37.

50 Respondent's Memorial on Jurisdiction, ¶¶ 25, 71.

51 Respondent's Memorial on Jurisdiction, ¶ 27; Articles 106 and 112 of the Basic Law of the Macao SAR (RE-09).

52 Respondent's Memorial on Jurisdiction, ¶ 28; Article 114 of the Basic Law of the Macao SAR (RE-09).

53 Respondent's Memorial on Jurisdiction, ¶¶ 29-30; Articles 22 and Article 136 of the Basic Law of the Macao SAR (RE-09).

54 Respondent's Memorial on Jurisdiction, ¶ 31; Article 138 of the Basic Law of the Macao SAR (RE-09).

53. According to the Respondent, it is common ground that Article 29 of the VCLT, which contains the customary international law rule of "moving treaty frontiers", is operative in this case because Laos and the PRC are both signatories to the VCLT.[55]

54. The Respondent further submits that Article 15 of the VCST is an expression of customary international law.[56] According to the Respondent, the rule is "commonly understood to have two aspects, one negative (treaties of the predecessor State cease to be in force in the portion of territory in question, except for certain types of treaties or specific circumstances) and one positive (treaties of the successor State become in force in the portion of territory in question, except for certain types of treaties or specific circumstances)."[57] The Respondent specifies that the "rule formulated in Article 15 of the [VCST] in its negative and positive aspects and the exceptions applicable to the rule in both aspects are well grounded in customary international law."[58]

55. The Respondent submits that both Articles 29 of the VCLT and Article 15 of the VCST co-exist, are "very closely connected" and compatible.[59]

56. It is the Respondent's case that the Treaty does not extend to the Macao SAR because it falls within the exceptions to Article 29 of the VCLT[60] and the exceptions to Article 15 of the VCST.[61]

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55 Respondent's Post-Hearing Submission, ¶ 2.

56 Respondent's Post-Hearing Submission, ¶¶ 2-12, referring to, *inter alia*, Cahier, "Quelques aspects de la Convention de 1978 sur la succession d'Etats en matière de traités", in Dutoit and Grisel (eds), *Mélanges Georges Perrin* (Lausanne: Payot, 1984), pp. 73-74 ("**Cahier**") (RA-39). In an e-mail dated 17 November 2013, the Claimant submitted that the Respondent's reference to Cahier:

> "misleadingly implies that Cahier was discussing the exceptions in Article 15 as being custom, when it is clear from an even cursory review that he was instead describing the customary moving treaty frontiers rule – *and not* the exceptions that were added to Article 15 by the International Law Commission. (The full, brief discussion by Cahier of Article 15 was the following: 'Article 15 provides that when part of a State's territory becomes part of the territory of another State, the predecessor's treaties cease to apply and the successor's treaties become applicable to it. This rule is the corollary of the principle announced in Article 29 of the VCLT, according to which a treaty is binding upon each party with regard to its entire territory. This provision corresponds to State practice, it was adopted without amendment at the Conference and it simply codifies a customary rule.')." (Claimant's emphasis)

See also Hearing Transcript, pp. 54, 57.

57 Respondent's Post-Hearing Submission, ¶ 4.

58 Respondent's Post-Hearing Submission, ¶ 12.

59 Respondent's Post-Hearing Submission, ¶¶ 15-16, 22.

60 Respondent's Memorial on Jurisdiction, ¶¶ 35-37; Hearing Transcript, p. 16.

57. The Respondent contends that the 1999 Notification filed by the PRC with the UN Secretary-General as depositary operates as a reservation to the territorial application of the BIT to the Macao SAR.[62] The Respondent emphasizes that the 1999 Notification *specifically* provided for the application of the treaties listed in its Annexes I and II to the Macao SAR,[63] and that the BIT was not listed in either of these two Annexes.[64]

58. The Respondent cites paragraph IV of the 1999 Notification, which states that the PRC "will go through separately the necessary formalities for [the] application [of treaties that are not listed in the Annexes to this Note] to the Macao [SAR] if it so decided."[65] The Respondent argues that Laos would have had to have been notified separately if the BIT were to be extended to the Macao SAR and it was not.[66] The Respondent also notes that Article 138 of the Macao SAR Basic Law requires consultation with the Macao SAR before a decision regarding treaty application, and points to the absence of evidence in this case that the Macao SAR has indeed been consulted.[67]

59. The Respondent rejects the argument of the Claimant that the 1999 Notification relates only to multilateral treaties by stating that: (a) the Overview of the UN Treaty Collection ("**UNTC**") does not distinguish between the different locations as to where the 1999 Notification is deposited; (b) the UNTC covers both multilateral and bilateral treaties; (c) the capacity of the UN to register, file and record treaties is not distinct as between bilateral and multilateral treaties; (d) Article 102 of the UN Charter requires "treaties" and "international agreements" to be registered with the Secretariat before parties to such treaties or agreements can invoke them before an organ of the UN, and, while neither the UN Charter nor the regulations define either term, the Secretariat defers to the definition of Member States submitting such instruments for registration; and (e) there is no distinction with regard to the depositary practice for bilateral and multilateral treaties.[68] The Respondent further notes that the requirements for the deposit of

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61 Respondent's Memorial on Jurisdiction, ¶ 32; Hearing Transcript, pp. 15-16.

62 Hearing Transcript, pp. 20, 148-149.

63 Respondent's Memorial on Jurisdiction, ¶ 41.

64 Respondent's Memorial on Jurisdiction, ¶ 42; Hearing Transcript, pp. 18-19.

65 Respondent's Memorial on Jurisdiction, ¶¶ 41, 43; Hearing Transcript, p. 19.

66 Respondent's Memorial on Jurisdiction, ¶¶ 43, 53(5); Hearing Transcript, p. 26.

67 Respondent's Memorial on Jurisdiction, ¶¶ 43, 53(6), 78; Hearing Transcript, pp. 59-60.

68 Respondent's Reply on Jurisdiction, ¶ 42, referring to the UNTC at http://treaties.un.org; UN Charter: Chapter XVI: Miscellaneous Provisions (RA-28); Definition key terms used in the UNTC at http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements (RA-29); Notes verbales from the Legal Counsel relating to the depositary practice and the registration of treaties

instruments does not limit the UN Secretary-General to acting as depositary for multilateral treaties alone (in spite of the focus on multilateral treaties by the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties[69]) as evidenced by the phrase "deposit of binding instruments."[70]

60. Further, the Respondent submits that the reference to "multilateral treaties" in the UN document containing the 1999 Notification does not change the *effect* of the PRC's notification in which the PRC expressly refers to international agreements, and draws no distinction between multilateral or bilateral treaties.[71] The Respondent also argues that the Claimant's submission that the notification only applies to treaties that are to be deposited with the Secretary-General as depositary is irrelevant because that is an external reference and what should be considered is the intent of the PRC as expressed in the 1999 Notification, *i.e.*, that the Treaty is not listed as one that extends to the Macao SAR.[72]

61. In the Respondent's view, there exists an important body of practice as well as authority regarding the qualification of the rule of automatic succession (or extension) of treaties when it comes to certain types of treaties or circumstances, *e.g.*, "personal" or "bilateral" treaties.[73] According to the Respondent, the 1999 Notification drew a distinction between (a) treaties that apply to Macao by virtue of the application to the entire Chinese territory (including Macao) as a result of their character (*e.g.*, treaties concerning foreign affairs or defense); and (b) treaties that applied to Macao before 20 December 1999, the date of transfer of sovereign rights.[74] To determine whether treaties concluded by the PRC but not included in the 1999 Notification

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pursuant to Article 102 of the UN Charter, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements (RA-30).

69 *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev. 1, United Nations, New York, 1999, ¶¶ 277, 285 (1999) ("**Summary of UNSG Depositary Practice**") (RA-03).

70 Respondent's Reply on Jurisdiction, ¶ 43, referring to the Communication from the Legal Counsel of the United Nations in relation to the requirements for the deposit of instruments of ratification, acceptance, approval, accession and the like with the Secretary-General dated 11 March 2002 (Ref: LA41TR/221/1) (RA-31); see also Summary of UNSG Depositary Practice (RA-03).

71 Hearing Transcript, pp. 149, 155-156.

72 Hearing Transcript, pp. 149-150.

73 Respondent's Post-Hearing Submission, ¶¶ 17-19.

74 Respondent's Post-Hearing Submission, ¶ 20.

extend to Macao, the Respondent considers that it is necessary to refer to the treaty-making powers of Macao under the Joint Declaration and the Macao SAR Basic Law.[75]

62. The Respondent emphasizes the fact that both instruments recognize Macao's treaty-making powers in economic and cultural matters.[76] The Respondent argues that "[u]nder these conditions, there can be no doubt that bilateral investment treaties and other commercial treaties concluded by China with third countries do not automatically apply to Macao under the positive aspect of the basic rule [of Article 15] but are instead the object of an exception to such rule."[77]

63. The Respondent cites Article 20(5) of the VCLT which states that a State is deemed to have accepted a reservation if it has raised no objection within twelve months after either being notified of the reservation or expressing consent to the treaty, whichever is later.[78] The Respondent notes that Laos did not object to the 1999 Notification within the stipulated twelve months.[79]

64. The Respondent stresses that a state's unilateral declaration can create legal obligations,[80] regardless of the declaration's form.[81] The Respondent contends that good faith binds States to international obligations that are created by a unilateral declaration and that interested States are entitled to demand that such obligations be respected.[82] The Respondent argues that paragraph

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75 Respondent's Post-Hearing Submission, ¶ 20; Joint Declaration (RE-11); Basic Law of the Macao SAR (RE-09).

76 Respondent's Post-Hearing Submission, ¶ 20; Respondent's Memorial on Jurisdiction, ¶ 27; Articles 106 and 112 of the Basic Law of the Macao SAR (RE-09); Joint Declaration (RE-11); Hearing Transcript, pp. 147-148

77 Respondent's Post-Hearing Submission, ¶ 21.

78 Respondent's Memorial on Jurisdiction, ¶ 44, referring to Article 20(5) of the VCLT (RE-07), which provides:

> "[…] unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

79 Respondent's Memorial on Jurisdiction, ¶ 44, referring to Article 20(5) of the VCLT (RE-07); Hearing Transcript, p. 27.

80 Respondent's Memorial on Jurisdiction, ¶¶ 49-51, referring to the *Nuclear Tests Case (New Zealand v. France*), Judgment, I.C.J. Reports 1974 (20 Dec. 1974) ¶¶ 43, 45-47 ("***Nuclear Tests Case***") (RA-05) and Summary of Judgment in the *Nuclear Tests Case*, p. 99 (RA-06); Mr. Victor R. Cedeño, "First Report on Unilateral Acts of States," (A/CN.4/486), (1998) 2 YBILC (Part One), p. 327, ¶¶ 59, 86, 89 ("**Cedeño**") (RA-07); Hearing Transcript, pp. 24-25.

81 Respondent's Memorial on Jurisdiction, ¶ 52, referring to Cedeño, ¶ 85 (RA-07).

82 Respondent's Memorial on Jurisdiction, ¶ 54, referring to the *Nuclear Tests Case*, at ¶ 54 (RA-05); Hearing Transcript, p. 25.

IV of the 1999 Notification entitles Laos to rely on the PRC's unilateral declaration and supports its legitimate expectation that the BIT not be extended to the Macao SAR until the PRC made a notification to this effect.[83]

65. The Respondent notes that Laos accepted the position of the PRC by not objecting to it or otherwise taking any action with regard to it over the years.[84] From the above, the Respondent contends that the Contracting Parties had effectively established a different intention from the customary rule in Article 29 of the VCLT.[85]

66. The Respondent clarifies that, contrary to the contention of the Claimant, reservations can apply in the bilateral context and are not explicitly excluded by the VCLT.[86] It also distinguishes the present case from those cited by the Claimant, by noting that those cases involved reservations being proposed prior to or during the signing of the bilateral treaties.[87] Respondent stresses in any case that it relies on the reservation as a unilateral declaration that gives rise to legitimate expectations on the part of the other party and, correspondingly, to legal implications such as estoppel by convention.[88] The Respondent also argues that, under public international law, the unilateral declaration of a state can amount to a reservation and satisfy the "otherwise established" exception contained in Article 29 of the VCLT.[89]

67. The Respondent points out that the BIT entered into force in 1993 at a time when Macao was a dependent territory of Portugal. In 1999, when the PRC assumed sovereignty over Macao and established the Macao SAR, the PRC could not have extended the application of the BIT to Macao because the governmental powers of the Macao SAR were established in the Macao SAR Basic Law.[90] It further notes that trade and investment policy operate separately as

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83 Respondent's Memorial on Jurisdiction, ¶¶ 53, 60-64, referring to the *Nuclear Tests Case*, ¶ 57 (RA-05); Hearing Transcript, p. 26.

84 Respondent's Memorial on Jurisdiction, ¶¶ 56-57; Respondent's Reply on Jurisdiction, ¶ 31.

85 Respondent's Reply on Jurisdiction, ¶ 31.

86 Respondent's Reply on Jurisdiction, ¶ 29, referring to Dörr & Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (2012), p. 241 ("**Dörr and Schmalenbach**") (RA-26).

87 Respondent's Reply on Jurisdiction, ¶ 29.

88 Respondent's Reply on Jurisdiction, ¶ 29.

89 Respondent's Memorial on Jurisdiction, ¶¶ 45-47, referring to Dörr and Schmalenbach, pp. 493-494 (RA-26); Summary of UNSG Depositary Practice, ¶¶ 277, 285 (1999) (RA-03); Corten & Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) (Oxford University Press), p. 738 ("**Corten & Klein**") (RA-04); see also Hearing Transcript, pp. 20, 22-24, referring to Dörr and Schmalenbach, pp. 500-501.

90 Respondent's Memorial on Jurisdiction, ¶¶ 71-72.

between Mainland China and the Macao SAR.[91] This is illustrated, the Respondent contends, by the fact that the Macao SAR entered into separate BITs with the Netherlands and Portugal after 1999.[92]

68. The Respondent clarifies that the issue of the territorial application of the BIT to the Macao SAR involves and is intended to involve consideration of the PRC Constitution and the Macao SAR Basic Law, as established by legal authority and references in the BIT to municipal law.[93] The Respondent notes that Article 18 of the Macao SAR Basic Law provides that PRC national laws must be listed in Annex III if they are to be incorporated in the laws of the Macao SAR.[94] On this basis, the BIT has never been extended to the Macao SAR and therefore can only have effect in Mainland China.[95]

69. In response to the argument of the Claimant that the PRC could have prevented the default application of the "moving treaty frontiers" rule by expressly excluding Macao from the territorial scope of the BIT when it was executed in 1993, as the PRC and Portugal had already entered into the Joint Declaration on the issue of Macao at that time, the Respondent states that: (a) in 1993, the PRC did not have the jurisdiction to state the position of Macao; and (b) the Joint Declaration of the PRC and Portugal entered into in 1987 contains provisions—namely, Articles 3, 4, and 5 and Annex II—regarding the autonomy of Macao that were still being negotiated and had not yet been finalized in 1993, making it impossible to ascertain the effect of this Joint Declaration at that time.[96] Moreover, the Claimant contends that the Joint Declarations entered into by the PRC for Macao and Hong Kong with Portugal and the United Kingdom respectively oblige it to maintain their capitalist systems and respect their autonomy.[97]

70. The Respondent also notes that the Claimant relies on the exception in the Agreement between the Government of the Russian Federation and the PRC on the Promotion and Reciprocal Protection of Investments ("**PRC/Russia BIT**") concerning its application to the Macao SAR.[98] The Respondent argues that, in that case, the PRC merely reiterated its position as enunciated in

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91 Respondent's Memorial on Jurisdiction, ¶¶ 73-75.

92 Respondent's Memorial on Jurisdiction, ¶¶ 73-75.

93 Respondent's Memorial on Jurisdiction, ¶¶ 67-70, referring to Corten & Klein, pp. 737-738 (RA-04), the Preamble and Articles 7 and 12 of the Treaty.

94 Respondent's Memorial on Jurisdiction, ¶ 76.

95 Respondent's Memorial on Jurisdiction, ¶ 76.

96 Respondent's Reply on Jurisdiction, ¶ 26, referring to the Joint Declaration (RE-11).

97 Respondent's Reply on Jurisdiction, ¶ 41.

98 PRC/Russia BIT, signed 9 November 2006 (CLA-90).

the 1999 Notification; it chose to create the exception in the text of the treaty itself.[99] The Respondent asserts that this does not undermine or nullify the legal effect of the 1999 Notification,[100] and is "consistent with the position adopted by China since the resumption of sovereignty over Hong Kong and Macao in 1997 and 1999, respectively."[101]

71. In response to the argument of the Claimant that the Respondent's interpretation of the BIT would be contrary to the purpose of the investment treaty regime, in that it would deny Hong Kong and Macao investors the protection available to other Chinese investors, the Respondent submits that by the provisions of the Macao SAR Basic Law, Macao is given full autonomy of its economic affairs, including the power to enter into agreements with other States in the field of economics and trade (Articles 136 and 138 of the Macao SAR Basic Law).[102] This internal arrangement, the Respondent claims, evidences the intention of the PRC, enunciated in the 1999 Notification, to preclude the automatic application of the "moving treaty frontiers" rule in relation to both the PRC's bilateral and multilateral treaties entered into before the handover.[103] This is not inconsistent with the purposes of the investment treaty regime, the Respondent argues, because the economic structure and development of the PRC and Macao was indisputably different in 1999.[104]

72. In response to the Claimant's argument that the Respondent's interpretation would have a wide impact as it would be applicable to all Chinese BITs, the Respondent submits that the *Claimant's* interpretation would have the effect of rendering over 130 BITs automatically applicable to Hong Kong and Macao; something that was never contemplated.[105] This number exceeds the number of BITs each SAR has entered into in its history.[106] It also brings the application of the BIT under an exception to Article 15 of the VCST by radically changing the condition of its operation.[107] The Respondent points out that the Macao SAR has the autonomy

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99 Respondent's Reply on Jurisdiction, ¶ 40.

100 Respondent's Reply on Jurisdiction, ¶ 40.

101 Respondent's Post-Hearing Submission, ¶ 26.

102 Respondent's Reply on Jurisdiction, ¶ 26.

103 Respondent's Reply on Jurisdiction, ¶ 26.

104 Respondent's Reply on Jurisdiction, ¶ 26.

105 Respondent's Reply on Jurisdiction, ¶ 39; Hearing Transcript, pp. 58-59.

106 Respondent's Reply on Jurisdiction, ¶ 39.

107 Hearing Transcript, pp. 58, 147-148.

to enter into its own BITs with other States,[108] and, like Hong Kong, it *has* entered into its own BITs with other States.[109]

73. With reference to BITs with third states concluded by both the PRC and Macao as well as BITs with third States entered into by the PRC and Hong Kong, the Respondent notes that none contain an express provision extending them to the Macao or Hong Kong SARs, respectively.[110] The Respondent places particular emphasis on the PRC/Netherlands BIT in which the Netherlands expressly extended it to cover the Netherlands Antilles and Aruba whereas the PRC did not similarly extend it to cover Macao or Hong Kong.[111]

74. The Respondent also submits that (a) before and after the resumption of sovereignty, the PRC, Hong Kong, and Macao have each entered into BITs with the *same* third States; (b) the territorial definition in the BITs clearly indicates that Macao and the Hong Kong SARs have the power to enter into BITs to cover their own territory notwithstanding that the PRC has also entered into BITs with the same third States. This indicates that the territorial limit of the PRC BITs are confined to Mainland China.[112] The Respondent also points out that different forms of dispute resolution provisions have been resorted to by the PRC, Hong Kong and Macao.[113]

75. It is the Respondent's submission that, if the PRC BITs would, by reason of the "moving treaty frontiers" rule, automatically extend to Macao and Hong Kong after the resumption of sovereignty, the PRC would not allow the SARs to enter into BITs with the same third States with which it has concluded treaties.[114] Nor would that be necessary.[115] It would lead to "legal chaos" for foreign investors in the PRC, Macao and Hong Kong.[116]

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108 Respondent's Reply on Jurisdiction, ¶ 26.

109 Respondent's Reply on Jurisdiction, ¶ 39.

110 Respondent's Post-Hearing Submission, ¶ 25; Macao/Netherlands BIT (CLA-128); Macao/Portugal BIT (CLA-129); PRC/Netherlands BIT (CLA-130); PRC/Portugal BIT (CLA-131).

111 Respondent's Post-Hearing Submission, ¶ 25.

112 See Respondent's Post-Hearing Submission, ¶¶ 31-34 for the territorial definitions contained in the PRC, Hong Kong and Macao BITs, which the Respondent claims, show that irrespective of the timing of the BITs into which it has entered, the PRC has chosen to maintain the position set forth in the two Notifications and not to extend any BITs to Macao or Hong Kong.

113 Respondent's Post-Hearing Submission, ¶ 27.

114 Respondent's Post-Hearing Submission, ¶ 30.

115 Respondent's Post-Hearing Submission, ¶ 30.

116 Respondent's Post-Hearing Submission, ¶ 30.

76. The Respondent further argues that its interpretation of the 1999 Notification is consistent with the PRC's "one country, two systems" policy in that it aligns with the economic and legal independence of the Macao SAR from Mainland China.[117] It contends, furthermore, that it is the position of the Claimant that contradicts this policy and would, in the long run, adversely affect the economic development of the SARs.[118] The Respondent submits that the interests of Laos would not be affected by its position because Macao and Laos did not have a treaty prior to the handover in 1999.[119]

77. The Respondent rebuts the Claimant's reliance on Gallagher & Shan for its interpretation on the grounds that: (a) the passage cited by the Claimant refers to the issue of "treaty coverage on persons (and entities)" which is different from the territorial coverage of a treaty; (b) the passage is based on the ICSID case of *Tza Yap Shum v. The Republic of Peru*, which stands for the proposition that investors should not be denied protection under Chinese BITs if the term "autonomy" in the Macao SAR Basic Law is properly construed, which under the circumstances of this case, supports the Respondent's position on the exception to the automatic extension of treaties; and (c) the decision in *Tza Yap Shum*—which it notes has been severely criticized—is distinguishable because it dealt with the issue of the nationality of a *natural* person, which is not an issue in the present case.[120]

78. The Respondent notes that the PRC is a unitary state and therefore the "federal clause" exception, whereby treaties entered into by individual federated States do not automatically bind the entire federation, is not applicable to it.[121] The Respondent nevertheless likens the PRC to a federation, as its three territorial units (namely the Mainland, the Hong Kong SAR, and the Macao SAR) have their own legal, economic, and judicial systems.[122] The SARs are largely

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117 Respondent's Reply on Jurisdiction, ¶ 26.

118 Respondent's Reply on Jurisdiction, ¶ 35.

119 Respondent's Reply on Jurisdiction, ¶ 36.

120 Respondent's Reply on Jurisdiction, ¶ 37, referring to the Journal of World Investment & Trade, Volume 10, Number 6, December 2009, "Queries to the Recent ICSID Decision on Jurisdiction *Upon the Case of Tza Yap Shum v. Republic of Peru*: Should the PRC-Peru BIT 1994 be Applied to Hong Kong SAR under the 'One Country Two Systems' Policy", Chen An; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, February 12, 2009 ("***Tza Yap Shum***") (CLA-70/RA-10).

121 Respondent's Memorial on Jurisdiction, ¶¶ 79-81, referring to *Oppenheim's International Law*, 9th ed. (1992) Vol. 1, ¶ 76 (RA-11); Corten & Klein, p. 746 (RA-12).

122 Respondent's Memorial on Jurisdiction, ¶ 82.

autonomous from the Mainland and have the right to be consulted before treaties to which the PRC is a party are extended to them.[123]

79. The Respondent also argues that, prior to the handover to the PRC, Portugal treated Macao as a dependent territory. The International Law Commission ("**ILC**") noted that the "moving treaty frontiers" rule does not necessarily apply to the case of a dependent territory.[124]

(b) The Claimant's Position

80. The Claimant notes that it is uncontested that Macao became part of the territory of the PRC following the handover from Portugal on 1 January 1999.[125] It notes that the decision of the PRC to structure its governance of Macao as an SAR is a matter of domestic law, distinct from and irrelevant to the international law issue of whether Macao falls within the sovereignty of the PRC.[126]

81. The Claimant contends that whether the PRC/Laos BIT extends to Macao requires an application of the "moving treaty frontiers" rule, enshrined in Article 29 of the VCLT,[127] according to which, unless a different intention is established, a treaty must be understood as applicable automatically and of its own force in respect of any territory newly acquired by one of its parties.[128] It is the Claimant's case that the PRC treaties in force as of the date of the handover of Macao automatically apply to the entirety of the territory over which the PRC exercised its sovereignty, including Macao, absent any indication from the PRC to the contrary.[129]

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123 Respondent's Memorial on Jurisdiction, ¶ 82.

124 Respondent's Memorial on Jurisdiction, ¶¶ 83-84, referring to the Report of the International Law Commission on the work of its twenty-sixth session, 6 May-26 July 1974, reproduced in A/9610/Rev. 1, *Yearbook of the International Law Commission,* 1974, vol. II (Part One), 157, p. 208 ("**ILC Commentary 1974**") (RA-13).

125 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 227.

126 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 227.

127 Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 228-229, referring to the VCLT (RE-07); Odendahl, "Article 29: Territorial Scope of Treaties", in Dörr and Schmalenbach, p. 498 (CLA-102); ILC Commentary 1974, p. 208 ("**Odendahl**") (RA-13); Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009), pp. 392, 393 ("**Villiger**") (CLA-116).

128 Claimant's Response, ¶ 4; see also Hearing Transcript, pp. 157-160.

129 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 230.

82. The Claimant submits that Article 29 of the VCLT represents an applicable rule of customary international law.[130] The Claimant notes that Laos and the PRC are parties to the VCLT.[131] The Claimant also points out that Laos accepts that the exceptions contained in Article 29 of the VCLT are those that apply to this case.[132]

83. According to the Claimant, the rule in Article 29 of the VCLT is reflected, in part, in Article 15 of the VCST.[133] However, the Claimant contends that there is no evidence of the requisite consistent State practice or *opinio juris* to support the notion that all of the VCST's provisions reflect customary international law.[134] In particular, the Claimant argues that the exceptions to the rule in Article 15 of the VCST that differ from the customary rule reflected in Article 29 of the VCLT cannot be considered to reflect customary international law.[135] The Claimant notes that Laos and the PRC have not ratified the VCST.[136]

84. The Claimant states that even if the exceptions under Article 15 of the VCST applied as a matter of customary international law, which it denies, they would not preclude the automatic extension of the BIT to Macao in 1999.[137] Article 15 looks only to the language and application of the Treaty and not to the internal constitutional arrangements in a given State.[138] Moreover, the threshold for establishing the exceptions is a high one.[139]

85. Concerning the first exception, the Claimant argues that the Treaty contains no territorial limits; nor does it limit the category or territorial origin of investors entitled to its protection.[140]

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130 Claimant's Response, ¶¶ 9-13; Hearing Transcript, pp. 71, 168. The Claimant emphasizes that it is not the case that the customary rule in Article 29 of the VCLT applied only at the time the BIT was executed in 1993, and that its application is supplanted by Article 15 of the VCST for the purposes of determining the BIT's territorial scope in 1999 and thereafter. Rather, the Claimant asserts that the principle in Article 29 means generally that, *at any given time*, a State is bound by a treaty in respect of any territory of which it is sovereign. The application of the customary rule in Article 29 means that a territorial change after the entry into force of a treaty alters the treaty's frontiers going forward. (Claimant's Response, ¶¶ 14-18)

131 Claimant's Response, ¶ 3.

132 Claimant's Response, ¶¶ 26.

133 Claimant's Response, ¶¶ 20-25.

134 Claimant's Response, ¶ 3; Hearing Transcript, pp. 73-74, 98, 161.

135 Claimant's Response, ¶¶ 3, 28-32.

136 Claimant's Response, ¶ 3; Hearing Transcript, p. 74.

137 Claimant's Response, ¶ 44.

138 Claimant's Response, ¶ 35.

139 Claimant's Response, ¶ 36; Hearing Transcript, pp. 71-72.

140 Claimant's Response, ¶ 37.

86. Concerning the second exception, the Claimant submits that the extension of the BIT to the Macao SAR is not incompatible with its object and purpose which is to "encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contacting State[.]"[141] In the Claimant's view, allowing Macanese investors to benefit from the protections of the BIT is fundamentally compatible with the object and purpose as is extending the protections of the BIT to foreign investors who have invested in what is indisputably part of the territory of the PRC.[142]

87. Third, the Claimant argues that including Macao within the scope of application of the BIT does not radically change the conditions for the Treaty's operation, because (a) the only change effected is that Laos must provide investors from Macao the same protection and guarantees required for investors from Mainland China;[143] (b) this kind of change is simply the normal consequence of the application of the "moving treaty frontiers" rule and as such cannot constitute a "radical change"; if mere expansion were enough to constitute a "radical change", the exception would "swallow" the rule;[144] (c) this applies also in the case of bilateral treaties which are not distinguished from multilateral treaties in Articles 29 of the VCLT or Article 15 of the VCST; the PRC was Laos's treaty partner before 1999, and it remains so afterwards.[145]

88. According to the Claimant, it is uncontested between the Parties that there are two exceptions to Article 29 of the VCLT; namely that a "different intention" with regard to the territorial scope of the BIT "appears from the Treaty" or "is otherwise established".[146] The Claimant argues that the Respondent carries the evidentiary burden of establishing the PRC's "different intention",[147]

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141 Claimant's Response, ¶ 38, citing the Preamble of the Treaty.

142 Claimant's Response, ¶ 38.

143 Claimant's Response, ¶ 39.

144 Claimant's Response, ¶ 40; Hearing Transcript, p. 162.

145 Claimant's Response, ¶¶ 42-43. The Claimant distinguishes the present situation from that under the context of Article 34 of the VCST which deals with the case of "Succession of States in Cases of Separation of Parts of a State" and includes the same "radical change of conditions for the operation of the treaty proviso as found in Article 15. There, the Claimant notes that "the question is whether one or more completely new States will succeed, in whole or in part, to the predecessor's treaty obligations. In contrast, Article 15 applies where territory has been transferred from one State to another; accordingly, the States in question remain the same at all times, with the only change being that their territory is either enlarged or contracted. […] Where there is the creation of a new State 'very different from itself,' the 'personal nature' of a bilateral treaty may very well be an issue, because continuity of the treaty obligations would force the treaty partner into a reciprocal relationship with the successor, a completely new entity to which it has not agreed to be bound. In contrast, in the Article 15 paradigm, the identity of both bilateral treaty parties remains the same at all time." (Claimant's emphasis).

146 Claimant's Rejoinder on Jurisdiction, ¶ 12.

147 Claimant's Rejoinder on Jurisdiction, ¶ 12.

which must be established by evidence providing a "sufficient degree of certainty" that would overcome the default position.[148]

89. The Claimant asserts that the Treaty does not provide for the territorial limitation of its application or otherwise express a "different intention" or an intention to depart from the default customary rule.[149]

90. The Claimant rejects the Respondent's contention that the Preamble, Articles 7, 11 or 12 of the Treaty can be invoked to establish the first exception.[150] It disputes the Respondent's position that the reference to domestic law in Article 12 of the Treaty is relevant to the territorial scope of the Treaty;[151] Article 12 refers to "internal legal procedures" solely in the context of the entry into force of the Treaty but is silent on the application of the Treaty once effective, as well as on its territorial scope.[152]

91. Although the BIT was signed in 1993, or six years prior to the handover of Macao from Portugal to the PRC, the Claimant contends that both Parties to the BIT were aware—during both the negotiation and the conclusion of the BIT—that the PRC would resume the exercise of its sovereignty over Macao in 1999.[153] On this basis, the Claimant notes that either Party could have expressly excluded Macao from the scope of the BIT.[154]

92. The Claimant relies upon the explicit exclusion of Hong Kong and Macao from the PRC/Russia BIT to show that the PRC adopts express language excluding its SARs from the territorial scope of treaties if it in fact has the intention to do so, which was not the case here.[155]

93. The Claimant contests the argument of the Respondent that the PRC did not have the jurisdiction to state the position of Macao at the time of concluding the Treaty, as it was signed

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148 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 231, referring to Karagiannis, "Article 29, Convention of 1969" in Corten & Klein ("**Karagiannis**") (CLA-100).

149 Claimant's Rejoinder on Jurisdiction, ¶ 13; Hearing Transcript, p. 77.

150 Hearing Transcript, p. 77.

151 Hearing Transcript, p. 78.

152 Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 235-236, referring to Respondent's Memorial on Jurisdiction, ¶¶ 69-70; Hearing Transcript, p. 78.

153 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 237, referring to the Basic Law of the Macao SAR, Preamble (RE-09).

154 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 237.

155 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 238, referring to Protocol to the PRC/Russia BIT (CLA-90); Claimant's Rejoinder on Jurisdiction, ¶ 13; Hearing Transcript, pp. 80, 163.

before the handover.[156] It contends that the PRC had the jurisdiction to state its *own* position on the future territorial scope of the Treaty.[157] In response to the Respondent's argument that the Parties could not know in 1993 how the Joint Declaration would be effected as the negotiations relating to the handover were still being conducted at that time, the Claimant notes that the Joint Declaration had been in effect since 1987 and the parties knew that Chinese sovereignty would resume over Macao in 1993, which means that the PRC could have already provided for an exception to the "moving treaty frontiers" rule in the Treaty.[158]

94. The Claimant contends that Laos has provided no evidence establishing the intention to exclude Macao from the scope of the BIT, or to demonstrate that a "different intention" has been "otherwise established."[159]

95. The Claimant rejects the Respondent's characterization of the 1999 Notification as a unilateral declaration that prevents the BIT from applying to Macao.[160]

96. First, the Claimant notes that the 1999 Notification applies only to multilateral treaties for which the UN Secretary-General is depositary.[161] The PRC/Laos Treaty is a bilateral treaty that does not involve the UN Secretary-General in any capacity. Therefore, it is not surprising that it is not included in the list annexed to the 1999 Notification—no bilateral investment treaties are included on the list—,[162] and the formalities for the application of a treaty to Macao as set out in Paragraph IV of the 1999 Notification do not apply to the Treaty.[163] The Claimant contends that a contrary interpretation would effectively deny all investors from Macao and Hong Kong the protections enjoyed by their PRC counterparts, which would be incompatible with the purposes of both the investment treaty regime and the "one country, two systems" policy of the PRC.[164]

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156 Claimant's Rejoinder on Jurisdiction, ¶ 14.

157 Claimant's Rejoinder on Jurisdiction, ¶ 14; Hearing Transcript, p. 81.

158 Claimant's Rejoinder on Jurisdiction, ¶ 15; Hearing Transcript, pp. 81-82.

159 Claimant's Rejoinder on Jurisdiction, ¶ 24.

160 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 241, referring to Respondent's Memorial on Jurisdiction, ¶¶ 38-59.

161 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 242, referring to UN Status of Multilateral Treaties (CLA-115); Hearing Transcript, p. 84.

162 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 242, referring to UN Status of Multilateral Treaties (CLA-115); Hearing Transcript, p. 84.

163 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 243; Hearing Transcript, pp. 85-86.

164 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 244, referring to Gallagher & Shan, *Chinese Investment Treaties, Policies and Practice* (2009) ("**Gallagher & Shan**") (CLA-99).

97. The Claimant rejects the Respondent's argument that the Treaty was deposited with the UN Secretary-General and contends that the Respondent is confusing (a) the registration function of the UN Secretariat (pursuant to Article 102 of the UN Charter, which requires all UN members to register treaties to which they are a party with the UN Secretariat), which covers both multilateral and bilateral treaties[165] and (b) the treaty depository function of the UN Secretary-General, which is open only to multilateral and regional treaties but not to bilateral treaties.[166] In other words, "[t]he fact that the Treaty is included in the UNTC is simply a function of the Treaty having been *registered* with the United Nations, not of the Secretary-General's *depository* function."[167] In this case, the 1999 Notification referred only to treaties that were deposited with the Secretary-General, a category that necessarily excludes the Treaty by virtue of it being a bilateral treaty.[168]

98. In response to the Respondent's argument that the manner in which the 1999 Notification is treated by the UN does not change its effect, the Claimant argues that to accept this, the Tribunal would effectively have to find that the UN somehow misrepresented the context of the PRC's communication.[169] In any event, the Claimant submits that even within the text of the PRC's notification, reference is made to the UN Secretary-General's depositary function, which applies to multilateral instruments.[170]

99. Second, the Claimant contends that reservations do not apply to bilateral agreements since any valid reservation would necessarily modify the treaty for both parties.[171] Thus, the alleged failure by Laos to object to the 1999 Notification is irrelevant.[172] But even if reservations could apply to bilateral agreements, the Claimant notes that the 1999 Notification did not refer to the Treaty it purported to modify, and was not communicated directly to Laos, the other

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165 Claimant's Rejoinder on Jurisdiction, ¶ 20, referring to UN Charter, Article 102 (RA-28); Hearing Transcript, p. 86.

166 Claimant's Rejoinder on Jurisdiction, ¶ 21; Hearing Transcript, pp. 86-87.

167 Claimant's Rejoinder on Jurisdiction, ¶ 22 (Claimant's emphasis); Hearing Transcript, pp. 86-87.

168 Claimant's Rejoinder on Jurisdiction, ¶ 23.

169 Hearing Transcript, pp. 163-164.

170 Hearing Transcript, pp. 164-165.

171 Claimant's Rejoinder on Jurisdiction, ¶ 25; Hearing Transcript, pp. 87-88.

172 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 245, referring to Aust, *Modern Treaty Law and Practice* (2008) (Cambridge University Press), pp. 131-132 (CLA-94); Respondent's Memorial on Jurisdiction, ¶ 43; Hearing Transcript, pp. 88, 90.

Contracting State.[173] According to the Claimant, these are fundamental requirements attaching to treaty reservations under international law.[174]

100. Third, the Claimant contends that the 1999 Notification does not qualify as a "unilateral declaration" that limited the territorial scope of the Treaty because, as explained above, the 1999 Notification does not apply to bilateral treaties.[175] The Claimant further notes that, as the 1999 Notification does not even refer to the Treaty, the intention of the PRC to bind itself through the alleged unilateral declaration could not have been "clearly established."[176]

101. Therefore, it could not have been assumed that the 1999 Notification would limit the territorial scope of the Treaty.[177]

102. The Claimant dismisses the Respondent's reliance on domestic law provisions on the basis that international law takes precedence over domestic law in determining the application of treaties and, correspondingly, that domestic laws do not affect the international obligations of a State.[178] On the same basis, the Claimant disputes the Respondent's argument that the internal arrangements between the PRC and the Macao SAR encompassed in the Macao SAR Basic Law establish the PRC's intention as regards the scope of the Treaty (*i.e.*, that Macao has full autonomy to manage its economic affairs and thus the automatic application of the "moving treaty frontiers" rule is excluded).[179] The Claimant stresses that the PRC never expressed such an intention on the international plane, and reliance on a State's internal structure cannot

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173 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 246, referring to the VCLT, Article 23(1) (RE-07); UN Guide to Practice on Reservations to Treaties (2011), § 3.1.5.2 (CLA-112); UN International Law Commission, Draft Articles of the Law of Treaties with Commentary (1966) ("**ILC Commentary 1966**"), Commentary on Article 18, notes 3 & 4, p. 208 (CLA-114); Article 23(1) of the VCLT (RE-07); Claimant's Rejoinder on Jurisdiction, ¶ 25.

174 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 246, referring to the VCLT, Art. 2(1)(d) (RE-07); United Nations Guide to Practice on Reservations to Treaties (2011), § 3.1.5.2 (CLA-112); ILC Commentary 1966 (CLA-114); Article 23(1) of the VCLT (RE-07); Claimant's Rejoinder on Jurisdiction, ¶ 25.

175 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 247, referring to the *Nuclear Tests Case*, ¶ 53 (RA-05); Hearing Transcript, pp. 87-88.

176 Claimant's Rejoinder on Jurisdiction, ¶ 26

177 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 247.

178 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 248, referring to Schaus, "Article 27, Convention of 1969," in Corten & Klein, p. 700 ("**Schaus**") (CLA-105); Hearing Transcript, p. 91.

179 Claimant's Rejoinder on Jurisdiction, ¶ 28.

demonstrate to the requisite high degree of certainty that a State's intention to exclude the operation of the "moving treaty frontiers" rule has been "otherwise established."[180]

103. On this point, the Claimant stresses that the Respondent's position has the effect of making the territorial scope of treaties dependent on internal governmental organization and subject to shifts therein.[181] It notes that this would also have the effect of equating the delegation of economic autonomy and autonomy in entering into agreements with foreign states to automatic exceptions under the "moving treaty frontiers" rule, which it contends is an untenable result.[182] In any case, the Claimant notes that the Macao SAR Basic Law does not, on its face, provide for the exclusion of Macao from the bilateral treaties of the PRC that were in force at the moment of the handover.[183]

104. The Claimant defends its reliance on Gallagher & Shan by stating that (a) paragraph 2.48 of this source applies to "entities" incorporated in the SARs, as applicable here; (b) paragraph 2.45 is not premised on *Tza Yap Shum*; and (c) paragraph 2.45 refers to the SAR "investors" generally and is not limited to investors who are natural persons.[184]

105. The Claimant argues that the fact that the PRC and Macao entered into two bilateral agreements with the same third States almost a decade after the BIT entered into force, cannot impact the application of the "moving treaty frontiers" rule to the BIT as of 1999.[185] It is the Claimant's position that there is no evidence to suggest that the four treaties in question—PRC/Portugal BIT (2005), PRC/Netherlands BIT (2001), Macao/Portugal BIT (2000), Macao/Netherlands BIT (2008)—conflict or are mutually exclusive; to the contrary, the Claimant argues that they establish a complementary regime.[186] The PRC treaties do not contain language referring to or carving out Macao and the later treaties do not contain language superseding the former

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180 Claimant's Rejoinder on Jurisdiction, ¶ 28, referring to Karagiannis, p. 737 (CLA-100); Hearing Transcript, pp. 91-92.

181 Claimant's Rejoinder on Jurisdiction, ¶ 29; Hearing Transcript, p. 92.

182 Claimant's Rejoinder on Jurisdiction, ¶ 29.

183 Claimant's Rejoinder on Jurisdiction, ¶ 30.

184 Claimant's Rejoinder on Jurisdiction, ¶ 32 n. 52.

185 Claimant's Response, ¶ 46; the Netherlands/Macao BIT (2008) (CLA-128); Portugal/Macao BIT (2000) (CLA-129); Netherlands/PRC BIT (2001) (CLA-130); Portugal/PRC BIT (2005) (CLA-131).

186 Claimant's Response, ¶ 47; see also Hearing Transcript, pp. 94-96.

treaties.[187] This contrasts with the explicit carve-out contained in the PRC/Russia BIT with regard to the Macao and Hong Kong SARs. [188]

106. The Claimant characterizes the Macao/Netherlands and Macao/Portugal BITs as supplemental agreements that apply only in the territory of the Macao SAR.[189] The only consequence of this supplemental regime is that Macanese investors can file for arbitration under the PRC or Macao treaty.[190] Dutch or Portuguese investors complaining of breaches in Macao, however, can only bring claims against the PRC under the PRC treaties and against Macao under the Macao treaties.[191] The same does not apply with respect to bringing claims against Macao under the PRC/Laos Treaty because there is no supplemental Laos treaty with Macao.[192]

107. The Claimant also submits that the existence of supplemental Macao treaties does not conflict with the object and purpose of the PRC treaties: extending the PRC treaties to Macao ensures that Macanese investors enjoy dual sets of protection.[193] By contrast, not extending the PRC treaties to Macao would deny Macanese investors the protection of 130 BITs concluded by the PRC, leaving them the protection of only two BITs concluded by Macao,[194] and undermining the "one country, two systems" policy.[195]

108. The Claimant relies on the *Tza Yap Shum* decision in which the tribunal, after hearing evidence on the topic of the Hong Kong SAR's power to conclude investment treaties, found that there was nothing inconsistent between the parallel treaty regimes of Hong Kong and the PRC.[196]

109. The Claimant contends that the Respondent's admission that the "federal clause exception" does not apply here resolves this issue.[197] Alternatively, it contends that the rationale behind the

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187 Claimant's Response, ¶ 47.

188 Claimant's Response, ¶ 47.

189 Claimant's Response, ¶ 48.

190 Claimant's Response, ¶ 49; Claimant's Rejoinder on Jurisdiction, ¶ 31.

191 Claimant's Response, ¶ 49.

192 Claimant's Response, ¶ 49.

193 Claimant's Response, ¶ 50; Claimant's Rejoinder on Jurisdiction, ¶ 32.

194 Claimant's Response, ¶ 50; the Claimant notes that there is a serious question over the ability of the SARs to conclude international agreements under international law that has yet to be tested. Accordingly, by denying investors from the SARs access to protection under the PRC treaties, SAR investors could be deprived of all protections (Claimant's Response, ¶ 51).

195 Claimant's Rejoinder on Jurisdiction, ¶ 32.

196 Claimant's Response, ¶ 51; Hearing Transcript, p. 96.

"federal clause exception" is irrelevant to this case because this Treaty does not have a federal clause provision, thereby requiring the Tribunal to resort to the default rule of customary international law.[198]

110. The Claimant rejects the Respondent's characterization of the 1999 handover as a transfer of a dependent territory from one administrative power to another. According to the Claimant, the handover in fact represented the resumption by the PRC of the exercise of its sovereignty over Macao.[199] But even were the Respondent's characterization of the 1999 handover accurate, which the Claimant denies, it states that the "moving treaty frontiers" rule would continue to apply by analogy.[200]

B. WHETHER SANUM QUALIFIES AS AN INVESTOR UNDER THE TREATY

1. Whether the Claimant is established under the municipal laws of the PRC

(a) The Respondent's Position

111. The Respondent notes that Article 1(2) of the BIT requires an investor that is a juridical person to be "established in accordance with the laws and regulations of each contracting State,"[201] which it says is indisputably the PRC in this case.[202] The Respondent contends that the Claimant is established in accordance with the laws and regulations of the Macao SAR and not the PRC.[203] As a result, the Claimant does not meet the definition of "investor" in the BIT and thus, the Tribunal lacks jurisdiction *ratione personae*.[204]

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197 Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 251-252, referring to Respondent's Memorial on Jurisdiction, ¶ 81 where it states that "[b]ecause the PRC is a unitary state, the principles pertaining to the 'federal clause' exception, as traditionally understood, are not applicable."; Hearing Transcript, pp. 92-93.

198 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 253, referring to Respondent's Memorial on Jurisdiction, ¶ 79; Karagiannis, p. 748 (CLA-100); ILC Commentary 1966, Commentary on Article 25, note 4, p. 213 (CLA-114).

199 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 254, referring to Respondent's Memorial on Jurisdiction, ¶¶ 25, 85.

200 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 254, referring to the ILC Commentary 1974, p. 209 (RA-14).

201 Respondent's Memorial on Jurisdiction, ¶¶ 88-89; Hearing Transcript, p. 28.

202 Respondent's Memorial on Jurisdiction, ¶ 89.

203 Respondent's Memorial on Jurisdiction, ¶ 86.

204 Respondent's Memorial on Jurisdiction, ¶ 86.

112. The Respondent clarifies that Mainland China applies PRC laws while the Macao SAR applies Macanese laws.[205] It then notes that the Claimant was not incorporated in accordance with the applicable PRC Company Law,[206] which does not apply to the SARs of Hong Kong and Macao.[207] For PRC law to be applicable to the Macao SAR, the Government of the PRC would have to have listed this law in Annex III to the Macao SAR Basic Law, which it did not do.[208]

113. The Respondent also argues that the Macao SAR Basic Law, which was promulgated by the PRC Congress on 31 March 1993, provided for a legal system applicable to the Macao SAR different and separate from the PRC legal system.[209] In conjunction with the aforementioned PRC Company Law, the Macao SAR Basic Law evidences that the PRC and the Macao SAR have different laws with regard to the incorporation of a company.[210]

114. The Respondent further maintains that the international community recognizes the separate legal systems of the PRC—specifically, PRC law as applicable to Mainland China and Macanese laws as applicable to the Macao SAR, as well as Hong Kong laws applicable to the Hong Kong SAR.[211] The Respondent gives the example of commercial arbitrations, where parties who choose either Hong Kong law or Macao law as the governing law do not expect their choice to translate to PRC law.[212]

(b) The Claimant's Position

115. The Claimant notes that the Parties agree that Sanum was established pursuant to the laws of the Macao SAR on 14 July 2005.[213]

116. The Claimant notes that SARs are jurisdictions separate from the PRC, but contends that their laws form part of PRC law for the purposes of the Treaty.[214] It argues that a contrary view

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205 Respondent's Memorial on Jurisdiction, ¶ 91.

206 Respondent's Memorial on Jurisdiction, ¶¶ 92-93.

207 Respondent's Memorial on Jurisdiction, ¶¶ 92-93.

208 Respondent's Memorial on Jurisdiction, ¶ 98.

209 Respondent's Memorial on Jurisdiction, ¶ 94.

210 Respondent's Memorial on Jurisdiction, ¶ 95; Hearing Transcript, pp. 29-30, 61-62.

211 Respondent's Memorial on Jurisdiction, ¶ 96; Hearing Transcript, p. 30.

212 Respondent's Memorial on Jurisdiction, ¶ 96.

213 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 265, referring to Claimant's Amended Notice, ¶ 15; Exhibit A to Claimant's Amended Notice; Respondent's Memorial on Jurisdiction ¶ 87; Hearing Transcript, p. 103.

would effectively exclude Macao and Hong Kong investors from the protection of BITs worded similarly to the Treaty.[215]

117. The Claimant maintains that the term "laws and regulations" of the PRC, as referred to in the Treaty, refers to a State comprised of autonomous regions with their own legal regimes and must be taken to include the laws of all such sub-units falling within the entire territory over which that State exercises its sovereignty, unless a different intention is apparent or established.[216] The Claimant highlights that the laws of the separate jurisdictions apply within the territory over which the PRC exercises its sovereignty and the absence of a legal or factual basis to impose a more restrictive definition to such laws.[217]

118. The Claimant also argues that, contrary to the intention expressed in the Preamble to the Treaty, a more restrictive interpretation of the Treaty would lead to an imbalance in the territorial scope of the protections offered by the host States, in that Laotian investors would receive Treaty protection in the SARs of Hong Kong and Macao, while Hong Kong and Macao investors would be denied similar coverage in Laos.[218]

2. Whether the Claimant is an "economic entity"

(a) The Respondent's Position

119. The Respondent contends that the Claimant does not meet the requirement of being an "economic entity," as set forth in Article 1(2) of the BIT for the following reasons: (a) an "economic entity" must have economic or commercial activities within the PRC; (b) the BIT was not intended to protect shell companies like the Claimant; (c) the nationality of the "economic entity" is to be determined by whether its management seat and control are located

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214 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 266, referring to Gallagher & Shan, ¶ 2.76 (2009) (CLA-99); Hearing Transcript, pp. 103-104.

215 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 267.

216 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 268, referring to the ILC Commentary 1966, Commentary on Article 25, note 4, p. 213; notes 1-3, p. 213 (CLA-114); Hearing Transcript, pp. 104-105.

217 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 269, referring to Respondent's Memorial on Jurisdiction, ¶ 91.

218 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 270, referring to the Preamble of the PRC/Laos Treaty (Ex. D to Amended Notice); Hearing Transcript, pp. 75, 162-163.

within the PRC; and alternatively, (d) the BIT is not intended to protect the investments of non-Contracting States.[219]

120. The Respondent first notes that the requirement in the Treaty that an "investor" be an "economic entity" means that an entity must have economic activities related to the investment that is the subject of a claim in order to qualify as an investor. This evidences an intention to exclude mere shell companies from the definition of an "investor."[220]

121. Concerning the nationality of the "economic entity", the Respondent first contends that, subject to the wording and interpretation of the Treaty, there are three criteria by which the nationality of a company can typically be determined: (a) place of incorporation; (b) seat or *siège social*; and (c) place of effective control.[221]

122. The Respondent submits that the second criterion—the seat or *siège social*—pertains to the description of "economic entity."[222] According to the Respondent, this means that the place in which the economic activities are conducted must be the State in which the company is incorporated.[223] It further argues that to allow a shell corporation to conduct its economic activities in third States and yet avail itself of the BIT protections of the State in which it is merely incorporated would be tantamount to treaty shopping, which the Contracting Parties did not intend to permit under the Treaty.[224] Moreover, the economic activities must pertain to the investment that is the subject of the claim in question under the Treaty.[225]

123. The Respondent disagrees with the majority in *Tokios Tokelès v. Ukraine* which adopted a purposive interpretation of the BIT and meaning of "investor" under Article 1(2) of that treaty.[226] The majority concluded that the treaty "extended its protections to entities incorporated in third countries using the nationality of the individuals who controlled the enterprise (or the management seat of the entity that controlled the enterprise) to determine the

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219 Respondent's Memorial on Jurisdiction, ¶ 101.

220 Respondent's Memorial on Jurisdiction, ¶¶ 102-105.

221 Respondent's Memorial on Jurisdiction, ¶¶ 106-107.

222 Respondent's Memorial on Jurisdiction, ¶ 108.

223 Respondent's Memorial on Jurisdiction, ¶ 109.

224 Respondent's Memorial on Jurisdiction, ¶ 109.

225 Respondent's Memorial on Jurisdiction, ¶ 110.

226 Respondent's Memorial on Jurisdiction, ¶ 111, referring to *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004 ("***Tokios Tokelès***") (RA-14).

nationality of the claimant."[227] The Respondent notes that in construing the BIT preamble of that case, the tribunal found that the BIT was intended to "create and maintain favourable conditions for the investment of investors of one state in the territory of the other,"[228] which shows that the tribunal did not limit its consideration to the place of incorporation.[229] The Respondent argues that considering only the place of incorporation would be even less appropriate in this case, as the "investor" is defined as an "economic entity."[230]

124. The Respondent notes that the majority of the *Tokios Tokelès* tribunal declined to impose the "origin of capital" requirement.[231] The Respondent observes that the dissent in that case characterized this position as contrary to the object and purpose of the ICSID Convention and system.[232] Here, the Respondent notes that even if the BIT contains no "origin of capital" requirement, the reference to an "economic activity" evidences that the object and purpose of the BIT is to protect investments belonging to a national of a Contracting State only and not those belonging to the national of a third State that has established a shell company in a Contracting State.[233]

125. The Respondent reiterates that international law determines the nationality of an investor by more than the place of incorporation and considers other factors such as the seat of management and the financial control of the corporation.[234]

(b) The Claimant's Position

126. The Claimant contends that Sanum clearly falls within the broad definition of "economic entity."[235] The Claimant rejects the contention of the Respondent that the term "economic

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227 Respondent's Memorial on Jurisdiction, ¶ 111.

228 Respondent's Memorial on Jurisdiction, ¶ 111, referring to *Tokios Tokelès*, ¶ 31 (RA-14).

229 Respondent's Memorial on Jurisdiction, ¶ 112, referring to *Autopista v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, September 27, 2001, ¶ 107 ("***Autopista***").

230 Respondent's Memorial on Jurisdiction, ¶ 112, referring to *Autopista*, ¶ 107.

231 Respondent's Memorial on Jurisdiction, ¶ 113, referring to *Tokios Tokelès*, ¶ 77 (RA-14).

232 Respondent's Memorial on Jurisdiction, ¶ 114, referring to *Tokios Tokelès*, ¶ 6 of Dissenting Opinion of Professor Prosper Weil (RA-14).

233 Respondent's Memorial on Jurisdiction, ¶ 115.

234 Respondent's Memorial on Jurisdiction, ¶¶ 119-120, referring to the International Law Commission, Fifty-eighth Session, Draft articles on Diplomatic Protection Adopted by the Drafting Commission on second reading, Art. 9, A/CAN/L.684 (2006) (RA-16); OECD Benchmark Definition of Foreign Investment (Draft) – 4th Edition, DAF/INV/STAT2006)2/REV.3, 2007 (RA-17).

235 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 264.

entity" in Article 1(2) was intended to exclude "entities that are mere shell companies" from the coverage of the Treaty.[236]

127. First, the Claimant contends that the fundamental rule of treaty interpretation—that the text is to be construed "in accordance with the *ordinary meaning* to be given to the terms"—applies when there is no indication that the parties intended to assign a special meaning to a treaty term.[237] As applied to this case, Sanum therefore meets the definition of an "economic entity," as it is a private company that was incorporated to pursue investment opportunities and participate in all commercial and industrial sectors allowed by law.[238]

128. Second, the Claimant notes that the BIT does not expressly indicate an origin of capital requirement, and submits that the Respondent has provided neither evidence nor authority for its contention that the Contracting States intended to restrict the definition of protected investors.[239] The Claimant contends that tribunals cannot impose extra-textual limits on the scope of BITs[240] but should strictly adhere to the treaty terms.[241] The Claimant notes that the BIT in this case only requires that an economic entity be established pursuant to the laws of a Contracting State, which means that the inquiry ends once the State of incorporation is ascertained.[242]

129. The Claimant contests the reliance of the Respondent on the dissenting opinion in *Tokios Tokelės* on the basis that this opinion relied heavily on the facts of that case and the purpose of ICSID arbitration, considerations which are not present in this case.[243] The Claimant also

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236 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 257, referring to Respondent's Memorial on Jurisdiction, ¶ 105.

237 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 258, referring to Article 31(1) and (4) of the VCLT (RE-07) (Claimant's emphasis).

238 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 259, referring to *Economic Definition*, Oxford English Dictionary (CLA-96); *Entity Definition*, Oxford Dictionaries (CLA-97); Exhibit A to Amended Notice, Article 2; Hearing Transcript, pp. 106-107.

239 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 260, referring to Respondent's Memorial on Jurisdiction, ¶¶ 101-110, 115; Hearing Transcript, p. 107.

240 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 260, referring to *Tokios Tokelės*, ¶ 36.

241 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 261, referring to *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, ¶ 109 (CLA-76); *Saluka Investments BV v. The Czech Republic*, Partial Award (UNCITRAL, 17 March 2006), ¶¶ 197, 239, 241 (CLA-66); Hearing Transcript, pp. 108-109.

242 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 260, referring to *ADC Affiliate Limited and ADC & ADMCA Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 357 (CLA-3).

243 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 262, referring to *Tokios Tokelės*, ¶¶ 5, 9, 23, 27 of Dissenting Opinion of Professor Prosper Weil (CLA-77); Hearing Transcript, pp. 107-108.

dismisses the reliance of the Respondent on cases potentially dealing with piercing the corporate veil because such issue is irrelevant to this case.[244]

130. Finally, the Claimant contends that the term "economic entities" was intended to broaden the scope of treaty coverage, in view of the more general requirement in investment treaties that investors be "natural and legal persons" and the fact that the PRC laws do not actually assign legal personality to all entities, even if they are established for business purposes.[245]

C. WHETHER SANUM BRINGS INVESTMENT-RELATED CLAIMS UNDER THE BIT

(a) The Respondent's Position

131. The Respondent submits that Article 8(1) and 8(3) of the BIT require that a dispute involving the quantification of the compensation for expropriation arises in connection with an investment in the territory of a Contracting State.[246]

132. The Respondent notes that the Claimant has only submitted the articles of association of Savan Vegas and Paksong Vegas (Laos companies in which Sanum has a 60% ownership and Laos has a 20% ownership) as evidence of its investment in Laos.[247] The Respondent notes that the contribution of the Claimant for its shares takes the form of loans that are being repaid annually from casino proceeds. It contends that this contribution does not meet the requirement of Article 1(1)(b) of the BIT, which includes "shares in companies or other forms of interest in such companies" in its definition of investment.[248]

133. The Respondent rejects the Claimant's submission that its investment consists of "investing in real property; employing its know-how and acquiring other tangible assets in order to establish and maintain gaming facilities described above, and in obtaining concession[s] from the

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244 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 263, referring to Respondent's Memorial on Jurisdiction, ¶ 116 (referring to *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970 (RA-15)).

245 Claimant's Statement of Claim and Response on Jurisdiction, ¶ 264, referring to Gallagher & Shan, ¶¶ 2.72, 2.80 (CLA-99); Hearing Transcript, p. 109.

246 Respondent's Memorial on Jurisdiction, ¶ 123.

247 Respondent's Memorial on Jurisdiction, ¶ 123.

248 Respondent's Memorial on Jurisdiction, ¶ 122.

[R]espondent which accorded its investment enterprises exclusive rights to operate gaming facilities in five provinces."[249]

134. The Respondent first contests the Claimant's argument that it has invested in movable or immovable property assets in the territory of Laos, pursuant to Article 1(1)(a) of the BIT, on the grounds that the said property rights belong not to Sanum but to the local companies that are to operate the gaming facilities.[250]

135. Second, the Respondent notes that it cannot identify any "know-how of Sanum employed in Lao PDR" or "other tangible assets" that would meet the definition of an investment, and further notes that the "concessions" to which Sanum refers were actually accorded to its investment enterprise—namely, Savan Vegas and Paksong Vegas, and not to it.[251]

136. Last, the Respondent contends that the two PDAs do not qualify as investments, because they replace existing PDAs (concluded on 11 April 2006 and amended on 26 July 2006) to which Sanum is not a party and from which Sanum cannot derive rights.[252] Moreover, the Respondent notes that "[n]o specific right was granted to Sanum under the PDAs," as the PDAs merely (a) express the intention of the Parties to cooperate on project development (Article 4, PDAs); (b) involve Laos granting development rights to both Sanum and ST (Article 2, PDAs); and (c) provide that the development project area is to be considered as part of the PDA "after the company has completely developed the land area of 50 hectares allowed by the Government." (Article 2(2), PDAs).[253]

137. The Respondent also notes that the PDAs only contemplate the conclusion of future contracts upon the establishment of a joint venture (Article 6, PDAs) or a lease agreement for the concession area (Article 4(4), PDAs).[254] It contends that the shareholders' rights, the gaming license, and lease agreement were granted not to the Claimant but to Savan Vegas and Paksong Vegas, the local vehicles.[255]

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249 Respondent's Memorial on Jurisdiction, ¶ 124, referring to Amended Notice, ¶ 115.

250 Respondent's Memorial on Jurisdiction, ¶¶ 124-125, referring to Amended Notice, ¶ 115.

251 Respondent's Memorial on Jurisdiction, ¶ 126, referring to Amended Notice, ¶ 115.

252 Respondent's Memorial on Jurisdiction, ¶ 127.

253 Respondent's Memorial on Jurisdiction, ¶ 127.

254 Respondent's Memorial on Jurisdiction, ¶ 127.

255 Respondent's Memorial on Jurisdiction, ¶ 127.