IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(I) 10

Originating Summons No 5 of 2020

Between

Lao Holdings NV

… *Plaintiff*

And

The Government of the Lao People's Democratic Republic

… *Defendant*

Originating Summons No 6 of 2020

Between

Sanum Investments Limited

… *Plaintiff*

And

The Government of the Lao People's Democratic Republic

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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v
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Quentin Loh JAD, Vivian Ramsey IJ and Douglas Jones IJ
15, 16 January 2021

10 September 2021 Judgment reserved.

Quentin Loh JAD, Vivian Ramsey IJ and Douglas Jones IJ:

Introduction

1 This case concerns applications by the plaintiffs, Lao Holdings NV ("LH") and its wholly-owned subsidiary, Sanum Investments Limited ("Sanum"), to set aside two arbitral awards made in arbitrations conducted under bilateral investment treaties ("BITs") with the defendant, the Government of the Lao People's Democratic Republic ("GOL").

2 The first arbitration (the "ICSID Arbitration") was conducted by LH under the Agreement on encouragement and reciprocal protection of investments between the Lao People's Democratic Republic and the Kingdom of the Netherlands (16 May 2003), (entered into force 1 May 2005) (the "Laos-Netherlands BIT"). The second arbitration (the "PCA Arbitration") was

conducted by Sanum 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 (31 January 1993), (entered into force 1 June 1993) (the "Laos-PRC BIT").

Background

3 The underlying dispute concerns claims of expropriation and other BIT-related claims in relation to the plaintiffs' investments in the Laotian gaming and hospitality industry. This is an extremely protracted dispute and has been the subject of multiple decisions from the Singapore courts. In the past, the same parties have sought to question the applicability of the Laos-PRC BIT and the interpretation of its dispute resolution article, which resulted in the decisions of *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 ("*GOL v Sanum (HC)*") and *Sanum Investments Ltd v Government of Lao People's Democratic Republic* [2016] 5 SLR 536 ("*Sanum v GOL (CA)*"). The business of developing and operating casinos and slot clubs in Laos has also spawned litigation involving the Laotian entities through which the business was conducted, which resulted in *Sanum Investments Limited v ST Group Co, Ltd and others* [2020] 3 SLR 225 and *ST Group Co Ltd and others v Sanum Investments Ltd and another appeal* [2020] 1 SLR 1. The background facts to the dispute have been canvassed at length in these prior decisions. As such, we only set out the salient facts for the present proceedings.

4 LH is a company incorporated in the Netherlands. Sanum is a company incorporated in Macau and is the wholly-owned subsidiary of LH.[1] John K

[1] John Baldwin's Affidavit dated 6 November 2019 at para 9 (JBOD 24).

Baldwin ("Mr Baldwin") is the owner of 50% of LH and the Chairman of Sanum's board of directors.

5 The plaintiffs partnered with a Laotian conglomerate, ST Group Co Ltd ("ST Group"), and its related entities and individuals from 2007 to 2013 to conduct their business. In partnership with ST Group, the plaintiffs invested in projects including the Savan Vegas Hotel and Casino Complex ("Savan Vegas"), which was built and operated successfully, the Paksong Vegas Hotel and Casino Complex ("Paksong Vegas"), which was never developed, and multiple slot clubs. These slot clubs included the "Lao Bao Club" at the border crossing station between Savannakhet Province and Vietnam, the "Ferry Terminal Club" at the border crossing station with Thailand, the "Thanaleng Club" near the border of Vientiane Prefecture and Thailand, and a slot club at the Paksan Hotel in Bolikhamxay Province (the "Paksan Club").

6 The ICSID and PCA Arbitrations were part of a complex web of disputes. By late 2011, relations between the plaintiffs and ST Group had deteriorated and disputes arose between them. ST Group ceased cooperation with Sanum, initiated litigation against it and shut Sanum out of the Thanaleng Club. The plaintiffs pursued its claims against the ST Group in separate arbitration proceedings at the Singapore International Arbitration Centre (the "ST SIAC Arbitration").

7 Additionally, and relevantly to these proceedings, the plaintiffs claimed that GOL officials began to renege on earlier commitments, and that they had embarked on a series of arbitrary and discriminatory actions designed to enrich GOL officials and ST Group at the plaintiffs' expense. Accordingly, the

plaintiffs each sought relief for GOL's alleged violations of the protection provided to the plaintiffs' investments under the respective BITs.

The arbitration proceedings

8 On 14 August 2012, the plaintiffs initiated two arbitrations against GOL (together, the "BIT Arbitrations"). The ICSID Arbitration was submitted by LH pursuant to Article 9 of the Laos-Netherlands BIT to the International Centre for Settlement for Investment Disputes ("ICSID") under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (the "ICSID Additional Facility Rules"). On the same day, 14 August 2012, Sanum commenced the PCA Arbitration as *ad hoc* proceedings pursuant to Article 8(5) of the Laos-PRC BIT, which was administered by the Permanent Court of Arbitration. These were conducted under the 2010 UNCITRAL Arbitration Rules (the "UNCITRAL Rules").

9 The arbitral tribunal in the ICSID Arbitration (the "ICSID Tribunal") consisted of Professor Bernard Hanotiau, appointed by LH, Professor Brigitte Stern, appointed by GOL, and the Honourable Ian Binnie CC QC as president. The arbitral tribunal in the PCA Arbitration (the "PCA Tribunal") consisted of Professor Bernard Hanotiau, appointed by the Sanum, Professor Brigitte Stern, appointed by GOL, and Dr Andrés Rigo Sureda as presiding arbitrator. We refer to both the ICSID and PCA Tribunals collectively as the "BIT Tribunals".

10 The ICSID Arbitration and the PCA Arbitration were distinct and separate proceedings and were not consolidated. However, they involved significantly overlapping factual matrixes, shared common party-appointed arbitrators (albeit with different presiding arbitrators) and the tribunals reached

substantively the same conclusions. Moreover, the proceedings were largely conducted in parallel and were the subject of joint hearings attended by the two party-appointed arbitrators and the two presiding arbitrators.

11 Sanum's claims in the PCA Arbitration were primarily that:[2]

(a) In October 2008, GOL stripped a joint venture company, Paksong Vegas and Casino Co Ltd ("PV"), of its monopoly rights that had been granted to it under a project development agreement dated 10 August 2007 signed by, *inter alia*, Sanum and GOL ("the PV PDA"). Sanum held 60% of the shares in PV, while GOL and ST held 20% each. After the monopoly rights were stripped, GOL then ordered PV to return a land concession in December 2008, and then terminated the PV PDA in April 2010. This related to Paksong Vegas.

(b) In March 2011, GOL ordered Paksan Club to be shut down following a dispute between Sanum and ST Group over the revenue. This was despite a licence granted to Savan Vegas Co Ltd ("SV"), another joint venture company, to operate the Paksan Club.

(c) In 2011, GOL failed to keep promises to approve a land concession to Sanum in the Laos-Thailand Friendship Bridge III Economic Zone Development, which was intended to be used to build a welcome centre and slot club known as "Thakhaek Club" (also referred to as the "Thakhet" or "Thakhek" Club in the various submissions and documents).

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[2] PWS at para 21.

(d) In 2012, GOL commenced court proceedings which were "arbitrary, discriminatory and fundamentally unjust" to assist ST Group in dispossessing the plaintiffs of their interest in the Thanaleng Club.

12 LH's claims in the ICSID Arbitration concerned allegations relating to Savan Vegas, the Lao Bao Club, the Ferry Terminal Club, and the Thanaleng Club.[3]

13 Against both these claims, GOL raised a threshold defence that the plaintiffs' claims should not be entertained given the evidence of bribery, corruption, and embezzlement.[4] GOL also brought a counterclaim seeking damages due to Sanum's embezzlement of funds from SV ("the Embezzlement Counterclaim"). This counterclaim was not eventually pursued.

14 Given the lengthy procedural history in each of the BIT Arbitrations, we summarise the key events in the following timeline, and provide elaboration subsequently as necessary.

S/N	Date	Event
1.	14 August 2012	LH and Sanum file their respective Notices of Arbitration
2.	9 August 2013	GOL files jurisdictional objection in the PCA Arbitration
3.	13 December 2013	PCA Tribunal finds that it has jurisdiction

[3] PWS at para 22.

[4] GOL's Statement of Defence and Counterclaim filed in the PCA Arbitration at paras 72 to 137 (JBOD at pp 1538–1556).

S/N	Date	Event
4.	10 January 2014	GOL files HC/OS 24/2014 to challenge the PCA Tribunal's ruling on jurisdiction
5.	15 June 2014	The plaintiffs and GOL enter into the Settlement Deed, together with a Side Letter executed on 18 June 2014
6.	19 June 2014	Consent orders are signed by the BIT Tribunals to suspend the BIT Arbitrations
7.	4 July 2014	The plaintiffs file applications in the BIT Arbitrations alleging that GOL had materially breached the Settlement Deed's terms ("the First Material Breach Applications")
8.	20 January 2015	The Singapore High Court releases judgment in HC/OS 24/2014: *GOL v Sanum (HC)*, disagreeing with the PCA Tribunal on its ruling on jurisdiction
9.	10 June 2015	The First Material Breach Application is dismissed by the ICSID Tribunal (the PCA Arbitration was held in abeyance given the High Court's decision in *GOL v Sanum (HC)*)
10.	26 April 2016	LH files a second application in the ICSID Arbitration to revive the proceedings on the basis of GOL's material breaches of the Settlement Deed
11.	29 September 2016	The Singapore Court of Appeal reverses the High Court's decision and reinstates the PCA Tribunal's ruling on jurisdiction: *Sanum v GOL (CA)*. Sanum files a second application in the PCA Arbitration to revive the proceedings on grounds mirroring LH's 26 April 2016 application.

S/N	Date	Event
12.	15 December 2017	The BIT Tribunals (respectively) grant both applications to revive the proceedings. The BIT Arbitrations are revived.
13.	15 May 2018	GOL files a formal application to adduce additional evidence to the BIT Tribunals ("GOL's Application for Additional Evidence")
14.	30 May 2018	The plaintiffs file submissions objecting to GOL's Application for Additional Evidence
15.	25 June 2018	BIT Tribunals decide to admit all the evidence relating to GOL's allegations of bribery, corruption and fraud: PCA Tribunal's Procedural Order No 9 ("PCA PO 9") and ICSID Tribunal's Procedural Order No 11 ("ICSID PO 11")
16.	16 July 2018	The plaintiffs file an application to introduce further material to rebut GOL's newly-admitted evidence ("Application for Rebuttal Evidence")
17.	31 July 2018	BIT Tribunals allow the Application for Rebuttal Evidence in part: PCA Tribunal's Procedural Order No 12 ("PCA PO 12") and ICSID Tribunal's Procedural Order No 14 ("ICSID PO 14")
18.	10 August 2018	GOL applies to introduce, *inter alia*, the witness statement of Mr Angus Roderick Noble ("Noble WS"), owner and CEO of MaxGaming Consulting Services Limited (Macau) ("MaxGaming")
19.	29 August 2018	BIT Tribunals allow the Noble WS to be admitted: PCA Tribunal's Procedural Order No 13 ("PCA PO 13") and ICSID Tribunal's Procedural Order No 15 ("ICSID PO 15")
20.	3–7 September 2018	Merits hearing of the BIT Arbitrations (heard by BIT Tribunals jointly) in Singapore

S/N	Date	Event
21.	17 July 2019	Proceedings in the BIT Arbitrations are declared closed
22.	6 August 2019	BIT Tribunals issue the BIT Awards dismissing the plaintiffs' claims and ordering the plaintiffs to pay costs
23.	6 November 2019	The plaintiffs file the present applications in the Singapore High Court

15 There were other proceedings that are referred to in passing in the parties' submissions. These are: (a) an SIAC arbitration between GOL (as claimant) and the plaintiffs (as respondents) ("GOL SIAC Arbitration") commenced on 11 August 2014; (b) two ICSID arbitrations, *Lao Holdings N.V. v Lao People's Democratic Republic* (ICSID Case No ARB(AF)/16/2) and *Sanum Investments Limited v Lao People's Democratic Republic* (ICSID Case No ADHOC/17/1), referred to by GOL as the "BIT II Arbitrations". There was also an SIAC arbitration brought by Sanum against ST Group in 2016, which we have earlier referred to as the "ST SIAC Arbitration". These do not feature substantively in the present dispute, but are relevant as part of the context and procedural history, and to explain the emergence of certain evidence.

The Settlement Deed

16 The merits hearing for the BIT Arbitrations was scheduled to begin on 17 June 2014. Prior to its commencement, on 15 June 2014, the parties concluded a Deed of Settlement (the "Settlement Deed") together with a Side Letter dated 18 June 2014 (together, "the Settlement"), with the intention of resolving the claims. On 19 June 2014, the PCA Tribunal and the ICSID Tribunal each signed consent orders suspending the respective BIT Arbitrations.

17 Relevantly, Sections 32 and 34 of the Settlement Deed contained the following provisions, should the proceedings be revived by reason of a material breach by GOL:

> 32. The Claimants shall only be permitted to revive the arbitration in the event that Laos is in material breach of Sections 5 – 8, 15, 21 – 23, 25, 27 or 28 above and only after reasonable written notice is given to Laos by the Claimants of such breach and such breach is not remedied within 45 days after receipt of notice of such breach. … In the event there is a dispute as to whether or not Laos is in material breach of Sections 5 – 8, 15, 21 – 23, 25, 27 or 28 above, the Tribunals shall determine whether or not there has been such a material breach and shall only revive the arbitration if they conclude that there has been such a material breach.
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> …
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> 34. In the event that the arbitration is revived pursuant to clause 32 above, neither the Claimants nor Laos shall not be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings.
>
> [emphasis added in underline]

18 It is common ground that the word "not" (as underlined in the quote above) in Section 34 of the Settlement Deed ("Section 34") was included in error and Section 34 should be interpreted as if that word did not appear.

19 The Settlement Deed contemplated the sale of the plaintiffs' remaining gaming assets, which included Savan Vegas, within a ten-month period after 15 June 2014 (the "Sale Deadline"). Failing this, the plaintiffs and GOL would appoint a third party to complete the sale and manage the gaming assets in place of the plaintiffs, pending the completion of the sale.

20 Shortly after the Settlement, however, the plaintiffs applied to the BIT Tribunals to revive the BIT Arbitrations on the basis that GOL had committed

a material breach of its terms (the "First Material Breach Application"). GOL made an objection to jurisdiction which was heard on 14 October 2014 by the BIT Tribunals and dismissed.

21 At the same time, GOL had been pursuing a challenge in the High Court of Singapore to the PCA Tribunal's decision in December 2013 that it had jurisdiction. The High Court held, on 20 January 2015, that the PCA Tribunal did not have jurisdiction: see *GOL v Sanum (HC)*. This decision was subsequently reversed on 29 September 2016 and the PCA Tribunal's jurisdiction was restored: see *Sanum v GOL (CA)*. Over this period, the PCA Arbitration proceedings had been suspended while the ICSID Arbitration proceedings continued. On 10 June 2015, the ICSID Tribunal dismissed the First Material Breach Application on the merits.

22 On 11 August 2014, GOL had filed a Notice of Arbitration with the SIAC initiating separate proceedings against Sanum. It sought a declaration that it was not in material breach of the Settlement Deed and an order directing Sanum to comply with its settlement obligations. This was what we referred to earlier as the "GOL SIAC Arbitration". On 29 June 2017, an award was rendered by the tribunal in favour of GOL, granting a declaration that the plaintiffs committed "fraud on the Tribunal" by repeatedly relying on the Noble Memorandum of Understanding ("Noble MOU") and making assertions of its validity in an attempt to delay the Sale Deadline. The Noble MOU was signed by Mr Angus Noble on behalf of his company MaxGaming, in which MaxGaming purportedly offered to purchase Savan Vegas for US$220m. The SIAC tribunal found that the Noble MOU was not valid or *bona fide* as Mr

Baldwin and Mr Noble never intended for Mr Noble to purchase Savan Vegas.[5] The award in the GOL SIAC Arbitration was enforced by the Singapore High Court on 2 August 2019.

The Revived Proceedings and admission of additional material

23 The plaintiffs submitted another application to revive the BIT Arbitrations to the ICSID Tribunal on 26 April 2016 and to the PCA Tribunal on 23 February 2017 (the "Second Material Breach Application"). From 23 February 2017 onwards, the proceedings were again conducted in parallel. On 15 December 2017, the BIT Tribunals found that there had been a material breach of the Settlement Deed and ordered the revival of the BIT Arbitrations. We refer to the proceedings thereafter as the "Revived Proceedings".

24 On 13 and 15 March 2018, in the course of exchanging drafts for a proposed procedure leading up to the Merits Hearing, GOL indicated that it might make a request to submit newly discovered evidence which became available only after the Settlement Deed was executed. The plaintiffs objected on the basis that Section 34 of the Settlement Deed created a "Frozen Record" as at the time the Settlement Deed was entered into, *ie*, the arbitral record should be frozen as at the time of the Settlement Deed. On 21 March 2018, at the joint pre-hearing conference held before the BIT Tribunals, GOL's intention to apply to admit additional evidence was discussed and the plaintiffs noted their objection.

25 On 29 March 2018, the BIT Tribunals ordered GOL to file its formal application to introduce "additional evidence" by 15 May 2018 and the plaintiffs

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5 SIAC Award dated 29 June 2017 at [190], JBD at Tab 9.

to file their response by 30 May 2018. Accordingly, on 15 May 2018, GOL filed its application ("GOL's Application to Admit Additional Evidence") which sought to introduce three categories of evidence consisting of:

(a) two awards rendered in the ST SIAC Arbitration and the GOL SIAC Arbitration;

(b) documentary evidence and sworn testimony relevant to GOL's defences; and

(c) an accounting report by BDO Financial Services Limited (the "BDO Report") commissioned by GOL after the execution of the Settlement Deed, that was stated to be relevant to the quantification of GOL's Embezzlement Counterclaim.

26 In particular, the second category of evidence purportedly supported GOL's allegations of bribery, corruption and fraud with respect to:

(a) the "Alleged E&Y Bribe", which related to bribes allegedly paid by the plaintiffs to one Madam Sengkeo to stop an audit being conducted by Ernst & Young (the "E&Y Audit") of Savan Vegas;

(b) the "Alleged Thanaleng Bribe", which related to bribes that the plaintiffs had allegedly paid in July 2012 to GOL officials through Mr Anousith Thepsimuong ("Mr Anousith") to advance the plaintiffs' interests with respect to the Thanaleng Club over which they were engaged in a corporate struggle with ST Group;

(c) the "Alleged Witness Bribe", which related to alleged payments made by the plaintiffs to Madam Sengkeo in May 2014 to prevent her from testifying against the plaintiffs in the BIT Arbitrations; and

(d) the "Alleged MaxGaming Fraud", which related to the plaintiffs' allegedly fraudulent scheme in April 2015 to revert control of Savan Vegas from GOL to themselves by presenting a sham offer by MaxGaming in the form of the Noble MOU to purchase Savan Vegas in order to delay the Sale Deadline.

27 GOL argued, *inter alia*, that its application to introduce fresh evidence to the record was justified because: (a) the BIT Tribunals maintained a residual discretion under the relevant treaties even in light of Section 34 of the Settlement Deed; (b) there were significant developments over the four years following the execution of the Settlement Deed, including at least six new proceedings, which constituted compelling circumstances for the BIT Tribunals to exercise their residual discretion; and (c) the plaintiffs' bribery, corruption, illegal and bad faith activities would result in a dismissal of the plaintiffs' claims in the BIT Arbitrations.

28 On 30 May 2018, the plaintiffs filed submissions objecting to the application and highlighted the "mandatory language" of Section 34 of the Settlement Deed, which gave the BIT Tribunals "no discretion" to admit the new evidence. They also submitted that permitting GOL to enlarge the record would require rebuttal evidence to be adduced and new witnesses to be included, which would increase the length of the hearing. In its Reply submitted on 15 June 2018, GOL argued that the BIT Tribunals retained the discretion to control their procedure and that arbitrators had a duty to admit evidence of

corruption which may affect the underlying claims and cannot "turn a blind eye to corrupt activities in the name of procedural minutia".

29 The BIT Tribunals ruled on GOL's Application to Admit Additional Evidence in PCA PO 9 and ICSID PO 11, both dated 25 June 2018, which are identical in all material aspects. The BIT Tribunals considered that they retained a residual discretion and concluded that the record would remain "frozen" unless it was satisfied that there "compelling circumstances" to admit fresh evidence. Having concluded that such circumstances were present, the BIT Tribunals admitted the following new evidence: (a) from the first category of evidence, the award rendered in the ST SIAC Arbitration; (b) the second category of evidence on the basis that as "corruption issues, in general, are of over-riding importance to the rule of law and the integrity of the arbitration process … the Tribunal should have before it all relevant documents to get to the bottom of the allegations";[6] and (c) in respect of the third category, the BDO Report insofar as it dealt with GOL's allegations of bribery and corruption. These were referred to broadly as the "Bribery/Fraud Allegations Material" by the plaintiffs. Thus, 13 additional documents were admitted to the record. The BIT Tribunals also found that there were no compelling reasons to admit the award rendered in the GOL SIAC Arbitration from the first category of evidence.[7]

30 On 16 July 2018, the plaintiffs submitted a request to introduce their own additional evidence to address and rebut GOL's additional evidence, including an expert report by Mr Joshua Kurlantzick (the "Kurlantzick Report")

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6 PCA PO 9 at p 4 (JBOD at p 1915); ICSID PO 11 at p 4 (JBOD at p 1920).

7 PCA PO 9 at p 5 (JBOD at o 1916); ICSID PO 11 at p 5 (JBOD at p 1921).

which the plaintiffs said assessed "the extent of corruption in Laos and in the GOL…and how structural factors in Laotian politics and business facilitate corruption and impact the independence (or lack thereof) of the judiciary from the executive branch and particularly from powerful members of the Politburo, and their families", and "the use of cash in Laos and the reasons for such use".[8]

31 On 31 July 2018, the BIT Tribunals admitted 35 of the proposed 40 new exhibits in PCA PO 12 and ICISD PO 14, which are identical in all material aspects. The Kurlantzick Report was not admitted. The BIT Tribunals concluded that the report was irrelevant to the proceedings because they were not undertaking an inquiry into the "general state of affairs in Laos" which lacked relevance to the issue of whether the plaintiffs' "investments at issue were obtained corruptly". Moreover, the Kurlantzick Report would impermissibly broaden the scope of the controversy in circumstances where the issue of corruption was already in GOL's case from the outset, and a number of factual witnesses spoke to the "cash economy" in Laos. The BIT Tribunals observed that had the plaintiffs thought the Kurlantzick-type Report necessary, they ought not to have waited to act until the rejoinder stage of a fresh evidence application.

32 On 10 August 2018, GOL made a further application to introduce, *inter alia*, the witness statement of Mr Noble dated 8 June 2015 (*ie*, the "Noble WS"), which was related to the Noble MOU and had been submitted in the GOL SIAC Arbitration. On 29 August 2018, GOL's application was granted by the BIT Tribunals in PCA PO 13 and ICSID PO 15 on the basis that extensive fresh evidence was already admitted in relation to the Alleged MaxGaming Fraud.

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8 PWS at para 126; Kurlantzick Report at para 13 (JBOD at p 2820).

Separately, in relation to the BDO Report, the BIT Tribunals granted the plaintiffs' request to exclude the appendix to the Report consisting of 291 additional pages.

The BIT awards and findings

33 The merits hearing was conducted on 3 to 7 September 2018 ("the Merits Hearing") and the parties made their submissions on costs in February and March 2019. The proceedings were declared closed on 17 July 2019. On 6 August 2019, the final awards were rendered by the Tribunals in the ICSID Arbitration ("ICSID Award") and PCA Arbitration ("PCA Award") (together, the "BIT Awards"). The BIT Awards dismissed all of the plaintiffs' claims and awarded costs to GOL.

34 In dealing with GOL's threshold defence that the claims should not be entertained on account of the plaintiffs' illegality, bribery and corruption, the BIT Tribunals made a number of preliminary observations. The Tribunals noted that GOL's allegations pertained to alleged bribery in the making of the initial investment, as well in the course of performing various agreements and initiatives.[9] On the relevance of corruption to LH/Sanum's treaty claims, the BIT Tribunals considered that the United Nations Convention Against Corruption (adopted on 31 October 2003), 2349 UNTS 41 (entered into force 14 December 2005), while applying to States rather than private parties, embodies a principle of customary international law which applies to root out corruption in obtaining, retaining, or conducting business.[10] While the Tribunals

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9 ICSID Award at paras 93–94 (JBOD at pp 100–101); PCA Award at paras 91–92 (JBOD at p 997).

10 ICSID Award at para 105 (JBOD at p 104); PCA Award at para 103 (JBOD at p 1002).

refused to rely on a "generalized doctrine of 'clean hands'", it noted that "serious financial misconduct by [the plaintiffs] incompatible with their good faith obligations as investors in the host country … is not without Treaty consequences", both in relying on protections under the BITs and in terms of their entitlement to relief from an international tribunal.[11] In order to make out a claim of corruption, clear and convincing evidence must exist which points clearly to corruption, although not every element of the allegation of corruption needs to be established by clear and convincing evidence.[12] The BIT Tribunals also observed that GOL's failure to prosecute any of the persons involved in the alleged bribery and the absence of evidence of due diligence in investigations were relevant to assessing the credibility of GOL's allegations.[13]

35 The BIT Tribunal then relevantly made, *inter alia*, four findings (the "Four Findings"):

> (a) On "the lesser standard of a balance of probabilities", the plaintiffs were involved in "serious financial illegalities in respect of the halt of the E&Y audit" ("First Finding"). This related to the Alleged E&Y Bribe.
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> (b) On "the lower 'probabilities' standard", it is "more likely than not a bribe was paid to an unidentified Government official or officials in an unsuccessful effort to advance the [plaintiffs'] agenda at the

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11 ICSID Award at paras 105–106 (JBOD at pp 104–105); PCA Award at paras 103–104 (JBOD at p 1002).

12 ICSID Award at para 110 (JBOD at p 107); PCA Award at para 108 (JBOD at p 1004).

13 ICSID Award at para 112 (JBOD at p 108); PCA Award at para 111 (JBOD at p 1005).

Thanaleng Slot Club" ("Second Finding"). This related to the Alleged Thanaleng Bribe.

(c) On "the lower standard of balance of probabilities", "Mr. Baldwin and Madam Sengkeo were involved in channelling funds illicitly to Lao Government officials, and further that [Madam Sengkeo] was paid to secure her loyalty and to avoid her testifying on behalf of the Government, thereby obstructing justice" ("Third Finding"). This related to the Alleged Witness Bribe.

(d) The "MaxGaming offer was indeed a sham" purportedly perpetuated to regain control of Savan Vegas from GOL ("Fourth Finding").

36 On the basis of the Four Findings, the BIT Tribunals found that the evidence "made it clear that the [plaintiffs] dealt in bad faith with [GOL] … from the outset" and the plaintiffs' bad faith "continued further up to its recent efforts to deter Madam Sengkeo's appearance to testify at the merits proceeding and the sham MaxGaming offer to purchase Savan Vegas in April of 2015". Having acted in "manifest bad faith" and having attempted "to compromise the integrity of [the] arbitration", the plaintiffs were entirely disentitled from any treaty reliefs sought. Moreover, it was held that the plaintiffs' claims were not supported by the evidence. The BIT Tribunals noted that the findings of bad faith and attempts to compromise the integrity of the arbitration were "added reasons" to deny the plaintiffs any benefit of treaty protection.

Applications to set aside the BIT Awards

37 LH and Sanum now seek to set aside the ICISID Award and PCA Award respectively, in whole or in part. On 6 November 2019, the plaintiffs filed their applications to set aside the BIT Awards in the Singapore High Court (the "Applications"). On 14 July 2020, the cases were transferred to the Singapore International Commercial Court.

38 Singapore was designated as the seat in both the ICSID and PCA Arbitrations and the Applications are brought under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA").

39 The Applications to set aside the BIT Awards are brought under s 24 of the IAA and/or Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") which is given force of law in Singapore by s 3(1) of the IAA. Section 24 of the IAA adds two additional grounds for setting aside an award, in addition to those under Article 34 of the Model Law:

> **Court may set aside award**
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> 24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> (*a*) the making of the award was induced or affected by fraud or corruption; or
>
> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

40 Section 19B of the IAA provides that the final and binding nature of arbitral awards is subject only to the narrow and limited scope for challenge

available in the IAA and the Model Law:

> **Effect of award**
>
> 19B.— (1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
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> …
>
> (4) This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

Setting aside applications

41 In considering the application for relief, the court must consider the general approach of courts to setting aside applications which is guided by the policy of minimal curial intervention, consistent with international practice (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [59]–[60]). In *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 ("*Zermalt*"), Bingham J (as Lord Bingham then was) stated at [14]:

> As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.

42 These observations have been approved by the Singapore Court of Appeal (*BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*") at [86];

AKN and another v ALC and others and other appeals [2015] 3 SLR 488 ("*AKN*") at [59]).

43 The policy of minimal curial intervention is grounded on a desire to "support, and not to displace, the arbitral process" (*Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [29]) and the courts' recognition that the parties have chosen arbitration as their dispute resolution process who, having accepted the benefits of party autonomy, must accept its consequences (*AKN* at [37]; *ASG v ASH* [2016] 5 SLR 54 at [54]). As the Court of Appeal explained in *Soh Beng Tee* at [65(c)]:

> … To elaborate, minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.

44 As such, courts will not interfere with the merits of the case as the setting aside application is not an opportunity for the applicant to take a "second bite at the cherry". The Court of Appeal stated in *BLC* at [53]:

> … In the context of a setting-aside application, it is crucial for the courts to recognise that these substantive merits are *beyond* its remit notwithstanding its natural inclinations. Put simply, there is no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact. … The setting-aside application is not to be abused by a party who, with the benefit of hindsight, wished he had pleaded or presented his case in a different way before the arbitrator.

> [emphasis in original]

45 Moreover, courts will take a "generous" approach toward reading the arbitral award and will not carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written (*BLC* at [86]; *ASG* at [56]; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [44]; *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139 (TCC) ("*Atkins*") at [36]). The alternative approach of aggressive judicial intervention will inevitably prolong the arbitral process and encourage unmeritorious challenges to the award that cause the incurrence of indeterminate costs, as explained by the Court of Appeal in *Soh Beng Tee* at [62]. The Court of Appeal in *Soh Beng Tee* went on to approve the decision of Stewart J in the Ontario Superior Court of Justice in *Webber v Seltzer* 2005 Can LII 3209 at [12] in which his Honour stated:

> For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.
>
> It is therefore important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the process. If an arbitration is basically fair, courts should not resist the temptation to plunge into detailed complaints about flaws in the arbitration process.

46 Where the application concerns the exercise of the tribunal's procedural discretion, courts will give deference to the tribunal's wide discretion. In the recent case of *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*"), the Court of Appeal

stated at [103] as follows:

> … the court should accord a margin of deference to the tribunal in its exercise of procedural discretion. Deference is accorded in recognition of the fact that (a) the tribunal possesses a wide discretion to determine the arbitral procedure, and (b) that discretion is exercised within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to. It has therefore been said that the court ought not to micromanage the tribunal's procedural decision-making, and will instead give 'substantial deference' to procedural decisions of the tribunal (*On Call Internet Services Ltd v Telus Communications Co* [2013] BCAA 366 at [18]). …

47 The Court continued and held that the threshold for intervention was relatively high. Courts will not intervene simply because it might have done things differently (*Soh Beng Tee* at [59], citing *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 ("*ABB AG*") at [67]). Instead, it must be shown that there is a real basis for alleging that the tribunal has conducted the arbitral process "either irrationally or capriciously" (*Soh Beng Tee* at [65(d)]), or the tribunal's conduct of the proceedings is "so far removed from what could reasonably be expected of the arbitral process that the court would take action" (*Soh Beng Tee* at [91], citing the Departmental Advisory Committee on Arbitration Law Report (February 1996) at para 220 and *ABB AG* at [63]).

The Applications

48 The plaintiffs submitted that the BIT Awards should be set aside on the following three grounds under the Model Law and/or the IAA:

(a) that the BIT Tribunals exceeded their jurisdiction and dealt with matters beyond the express scope of the parties' submission to arbitration, under Art 34(2)(*a*)(iii) of the Model Law;

(b) that the arbitral procedure in the BIT Arbitrations was not in accordance with the parties' express agreement, under Art 34(2)(*a*)(iv) of the Model Law; and/or

(c) that the plaintiffs were not afforded a reasonable opportunity to be heard on determinations made in the BIT Awards, under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA.

49 In relation to these grounds for setting aside, the parties submitted the following agreed list of issues to the court for determination:

(a) Does Section 34 of the Settlement Deed define the scope of matters submitted for arbitration in the Revived Proceedings or is it an agreement on procedure?

(b) Assuming Section 34 of the Settlement Deed defined the scope of matters submitted for arbitration in the Revived Proceedings, whether the BIT Tribunals exceeded their jurisdiction or dealt with matters beyond the scope of parties' submission to arbitration by addressing issues of the Alleged Thanaleng Bribe, the Alleged Witness Bribe, the Alleged MaxGaming Fraud and/or GOL's new evidence (including the Bribery/Fraud Allegations Material and the BDO Report);

(c) What is the consequence, if any, of the BIT Tribunals' alleged failure to adhere to Section 34 of the Settlement Deed by admitting additional evidence into the Revived Proceedings? Did that alleged failure materially impact the BIT Tribunals' Four Findings?

(d) Even if the BIT Tribunals' decisions on the Four Findings were to be set aside, whether the BIT Tribunals' decisions in the Awards to dismiss each and every treaty claim on the merits stand?

(e) Whether any of the following:

(i) the BIT Tribunals' reliance on the BDO Report in making the Four Findings or the finding that the Plaintiffs had acted in "manifest bad faith";

(ii) the BIT Tribunals' refusal to admit the Kurlantzick Report;

(iii) the BIT Tribunals' finding regarding the purported functions of the Laotian National Assembly;

(iv) the BIT Tribunals' reliance on an allegedly erroneous account of the procedural history of the BIT Arbitrations;

(v) the BIT Tribunals' making of the Fourth Finding; and

(vi) the BIT Tribunals' decision that a finding of "manifest bad faith" by the plaintiffs, which did not require allegations of bribery and fraud to be proven to a standard higher than the balance of probabilities, would disentitle the plaintiffs to treaty relief under public international law;

resulted in the denial of the plaintiffs' opportunity to be heard or to present its case and prejudiced the plaintiffs. If the plaintiffs were so prejudiced whether this materially impacted the BIT Tribunals' decision in the Awards to dismiss each and every treaty claim on the merits?

(f) Did the plaintiffs' conduct in the Revived Proceedings constitute a waiver, or otherwise bar the plaintiffs from seeking to set aside the Awards under Arts 34(2)(*a*)(ii), 34(2)(*a*)(iii) and 34(2)(*a*)(iv) of the Model Law?

(g) How does Section 34 of the Settlement Deed interact with public international law principles, rules and/or obligations, including the BIT Tribunals' duty to admit and consider evidence of corruption and/or bad faith and the rulings on 28 March 2018 and 25 June 2018 that (i) their jurisdiction was treaty-based and not derived from the Settlement Deed; (ii) they had "the usual authority under ICSID/PCA rules to determine the admissibility of evidence"; and (iii) "while the Tribunal[s] would normally give effect to the parties' agreement respecting evidentiary matters, the Tribunal[s] retained a residual discretion to chart a different course 'if compelling circumstances were shown to exist'".

(h) In relation to LH's application only, whether the ICSID Tribunal exceeded its jurisdiction or dealt with matters beyond the scope of parties' submission to arbitration in respect of:

(i) Paksong Vegas and Casino Co Ltd;

(ii) the Paksan Club; and

(iii) the Thakhaek Club.

Issues before the court

50 Based on the issues proposed by the parties, it is clear that the central issue in this case is the scope of Section 34 of the Settlement Deed, whether the

BIT Tribunals failed to abide by the parties' agreement, and what the consequences of such a failure, if any, would be.

51 We thus deal with the issues in this Judgment as follows:

(a) the scope of Section 34 and whether the BIT Tribunals had exceeded the scope of submission to arbitration in allowing further evidence to be admitted into the record;

(b) whether the ICSID Tribunal's findings relating to certain projects exceeded the scope of the submission to arbitration;

(c) whether there was a material breach of agreed arbitral procedures warranting the intervention of this court; and

(d) whether the plaintiffs were given the reasonable opportunity to be heard.

Scope of submission to arbitration: Section 34 of the Settlement Deed

52 For convenience, we set out Section 34 here in full:

> In the event that the arbitration is revived pursuant to clause 32 above, neither [the plaintiffs] nor [GOL] shall … be permitted to add any ***new claims or evidence*** to the arbitration nor seek ***any additional reliefs*** not already sought in the proceedings. [emphasis added]

Plaintiffs' position

53 As the plaintiffs' contention here relies on Art 34(2)(*a*)(iii) of the Model Law, they refer to the two-stage inquiry in assessing a claim on this ground as set out in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW*") at [30], citing *PT Asuransi Jasa Indonesia*

(Persero) v Dexia Bank SA [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [40] and [44]. Under that inquiry, the court must first ascertain what matters were within the scope of submission to the tribunal and, secondly, ascertain whether the award involved such matters, or whether it involved a new difference outside the scope of the submission to arbitration and accordingly irrelevant to the issues requiring determination.

54 In relation to the first stage, the plaintiffs argue that Section 34 stipulates that the record shall be "frozen" as of 15 June 2014 and thereby restricts the scope of submission to arbitration in the Revived Proceedings to matters in the "frozen record". Therefore, on the plaintiffs' submission, any new "claims", "reliefs" or "evidence", were precluded from being submitted to the arbitrations for determination, including any new "factual assertions or allegations". They say that the intention of the parties was to "pick up where they left off" and that this is further supported by Section 33 of the Settlement Deed that limits the scope of witness testimony, as was recognised by GOL in its letters.

55 At the second stage, the plaintiffs submit that the BIT Tribunals dealt with new claims and reliefs (*ie*, the Alleged Thanaleng Bribe, Alleged Witness Bribe and Alleged MaxGaming Fraud), as well as new evidence including the Bribery/Fraud Allegations Material and BDO Report which constitute "a new difference" outside the scope of submission to the BIT Arbitrations.

56 The plaintiffs further contend that there is no further requirement to show that the applicant had suffered real or actual prejudice once it is established that the BIT Tribunals had exceeded their jurisdiction by deciding matters that were not submitted to them. Alternatively, it was argued that, if such a requirement existed, it would be satisfied on the facts.

57 Finally, the plaintiffs' position was that they are not precluded from setting aside the BIT Awards on this ground on the basis that they failed to mount a challenge pursuant to Art 16 of the Model Law and s 10(3) of the IAA. The plaintiffs argue they could not have sought recourse under these provisions as the BIT Tribunals did not decide on matters outside the scope of their authority until the BIT Awards were issued. In any event, they say that these provisions do not have a preclusive effect where it was, as in this case, reasonable not to apply to challenge a preliminary ruling that the Tribunals had jurisdiction.

Defendant's position

58 GOL first contends that on proper construction of the Settlement Deed, new allegations were not precluded from being raised in the Revived Proceedings. Only the bringing of new claims, counterclaims and reliefs was prohibited. It was submitted by the GOL that the words "claim" and "relief" should be interpreted strictly. In particular, it is argued that "claim" referred to the parties' causes of action and demands for remedies in the BIT Arbitrations, by reference to its ordinary meaning and Section 27 of the Settlement Deed, which made separate references to claims and factual assertions. Therefore, Section 34 had no application to the Alleged Thanaleng Bribe, Alleged Witness Bribe and Alleged MaxGaming Fraud that were at best new assertions raised in support of the GOL's existing defence of corruption, bribery, illegality and/or bad faith.

59 It is further submitted that Section 34 is only engaged in these proceedings to the extent that it *prima facie* restricts new evidence, as opposed to claims or reliefs. GOL contends that the BIT Tribunals' decision to admit evidence was a procedural matter and does not provide grounds for challenge

under Art 34(2)(*a*)(iii) of the Model Law which is concerned with substantive jurisdiction.

60 GOL submits that Art 34(2)(*a*)(iii) is directed at cases where a valid arbitration agreement existed, but the matters decided by the tribunal either exceeded (a) the scope of the arbitration agreement which is the investment treaty in investment treaty arbitrations; or (b) the scope of issues presented to the tribunal by the parties in the arbitration. It is argued that neither scenario applies in this case. First, the scope of agreement to arbitrate is to be determined with reference to the provisions of the relevant investment treaties, not Section 34. Under the Laos-Netherlands and Laos-PRC BITs, the submission to jurisdiction was very broad. Secondly, the matters decided by the BIT Tribunals fell within issues presented by the parties as GOL had pleaded its defence of corruption, bribery, illegality and bad faith from the outset as a bar to the plaintiffs' claims for relief.

61 GOL submits that courts do not take a narrow interpretation of the issues submitted to arbitration and that the Alleged Thanaleng Bribe, Alleged Witness Bribe and Alleged MaxGaming Fraud were part of its case that had been put to the BIT Tribunals for determination prior to the signing of the Settlement Deed. In addition, these matters were only discovered after the Settlement Deed was signed in 2014 and, as new facts arising after a submission to arbitration and which is known to all parties to the arbitration, were part of the dispute and need not be specifically pleaded. In any event, the plaintiffs must show prejudice, and none was suffered.

62 Moreover, GOL argues that the application should be dismissed on the basis that the plaintiffs did not pursue an appeal under Art 16 of the Model Law

and/or s 10 of the IAA against the allegedly erroneous "jurisdictional ruling[s]" within 30 days after they were issued. The BIT Tribunals issued a positive ruling in PCA PO 9 and ICSID PO 11 that they could admit new evidence notwithstanding Section 34. GOL argues that the plaintiffs' failure to bring any challenge within the 30-day limit has a preclusive effect on the present application to set aside the BIT Awards.

63 GOL also submits that, even if it were a matter of substantive jurisdiction, the BIT Tribunals had the authority to rule on and permit the new evidence which cannot be restrained by parties' private agreement. GOL's defences were expressly premised upon the plaintiffs' corrupt and illegal dealings. Pursuant to public international law principles, the BIT Tribunals had a duty to investigate and rule on the existence and consequences of the alleged conduct in order to resolve the dispute. Moreover, there is a need and importance for investment treaty tribunals to scrutinise issues of illegality, corruption and bribery as they enforce and uphold principles of public international law. It was contended that in Singapore, arbitral awards will be set aside under the public policy ground in Article 34(2)(*b*)(ii) where there are "egregious circumstances such as corruption, bribery or fraud which would violate the most basic notions of morality and justice" (*Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern*") at [48]). It was therefore argued that the BIT Tribunals were performing their duty and function under public international law to ensure that treaties intended to promote and protect legitimate investments are not abused by corrupt investors.

64 In any event, GOL argues, the parties mutually waived Section 34 by their conduct in the Revived Proceedings. Both parties sought to, and did in fact,

adduce additional evidence. In doing so, the plaintiffs had not reserved their rights to rely on Section 34 of the Deed and necessarily affirmed the BIT Tribunals' authority and discretion to admit new evidence.

Our decision

65 The jurisdiction of the BIT Tribunals was derived from the terms of the Laos-Netherlands BIT and the Laos-PRC BIT and the matters submitted to those tribunals. The issue is therefore whether Section 34, by its terms, limited the scope of the matters submitted to those tribunals so as to preclude them from considering the matters which the BIT Tribunals considered in the BIT Awards.

66 The terms of Section 34 provided that neither party "shall be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings". It is therefore necessary to consider what is meant by "claims", "evidence" and "reliefs". The plaintiffs submit that the effect of these three limitations was to impose a limit on the "allegations" which could be made in the Revived Proceedings. GOL submits that Section 34 did not preclude the parties from raising additional allegations or assertions but prohibited the bringing of new claims, counterclaims and reliefs. Further, GOL says that an agreement to limit "evidence" is a matter of procedure, not a matter of jurisdiction.

67 A preliminary matter is how Section 34 is to be interpreted. Although Section 42 of the Settlement Deed states that "[t]his Deed shall be governed by and construed solely in accordance with the laws of New York", neither party has made any argument in these proceedings that New York's approach to contractual interpretation would differ from Singapore's. Hence, in the absence of such a claim and any evidence to support that, this court can apply Singapore

law: see *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [58]. The principles relating to contractual interpretation in Singapore have been set out by the Court of Appeal in the two seminal cases of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193. As succinctly summarised by Coomaraswamy J in *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd* [2020] SGHC 235 at [43]:

> … the objective of contractual interpretation is to interpret the text by which the parties have expressed their bargain in its context in order to ascertain objectively and give effect to the parties' intention, bearing in mind always that the context cannot be used as a pretext to rewrite the text.

This approach has also been applied in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 at [30]–[42], *MS First Capital Insurance Ltd v Smart Automobile Pte Ltd* [2020] SGHC 256 at [76]–[77] and *Tuitiongenius Pte Ltd v Toh Yew Keat and another* [2021] 1 SLR 231 at [42]–[44].

68 We consider that the key words in Section 34, for the purposes of a challenge under Art 34(2)(*a*)(iii) of the Model Law, are "claims" and "reliefs". Those phrases were intended to preclude either party from making new claims or seeking new relief which were outside the scope of the claims and counterclaims already submitted to arbitration in the BIT Arbitrations. Insofar as the plaintiffs' contentions concern the BIT Tribunals' treatment of "evidence" under Section 34, however, we do not consider that the plaintiffs' contentions are capable of coming within the terms of Article 34(2)(*a*)(iii). We accept that, as set out in *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 ("*GD*

Midea") at [56], "[p]arties have the right to define the jurisdiction of the arbitral tribunal at any level of specificity", and an agreed arbitration procedure, such as the Agreed List of Issues ("ALOI") referred to in *GD Midea* can define the scope of the submission to arbitration. In that case the arbitral tribunal decided an issue on the breach of a term of the relevant agreement which was not in the ALOI. However, that does not mean that all agreements on procedure, by their nature, define the scope of the submission to arbitration. That is not the effect of *GD Midea* at [64] where it was stated that:

> … I agreed with Midea that the ALOI constituted a part of the parties' agreed arbitral procedure. The ALOI was prepared and submitted by the parties pursuant to Procedural Order No 1 ('PO1') issued by the Tribunal. PO1 stated (at para 8.5) that '[a]s a general principle, no Party shall be permitted to advance any new factual allegations or any new legal arguments at the Oral Hearing, unless expressly permitted by the Tribunal'. It was clearly envisaged that the dispute would be decided within the framework of the ALOI. The Tribunal's finding on cl 4.2 was a radical departure from the ALOI. …

In this case, we do not consider that the agreement as to evidence can possibly go to the scope of the submission to arbitration, even if Section 34 had the effect which the plaintiffs contend. Questions of evidence are procedural matters and do not go to jurisdiction.

69 So far as Section 34 relates to "claims" and "reliefs", we accept that that could be capable of defining the scope of the submission to arbitration. However, on the facts of the present case, we do not consider that the allegations about the Alleged Thanaleng Bribe, Alleged Witness Bribe and Alleged MaxGaming Fraud can be described as "new claims" or "new relief" when the scope of the BIT Arbitrations is properly considered.

70 These are not "new claims" because they form part of GOL's existing defence of corruption, bribery, illegality and/or bad faith. They are not new causes of action. They are *further allegations* that come within the scope of those existing defences of illegal or bad faith conduct. Nor are they "new reliefs". GOL always sought a dismissal of the plaintiffs' claims. We find that this follows from the ordinary meaning of those terms in the context of formal dispute resolution procedures like arbitration.

71 As a result, we reject the plaintiffs' case to set aside the BIT Awards based on based on Art 34(2)(*a*)(iii) of the Model Law. The allegations relating to new evidence are procedural matters that do not engage Art 34(2)(*a*)(iii), and the further allegations of illegal or bad faith conduct which form part of GOL's defences are not new claims which go to the scope of the submission to arbitration nor do they give rise to any new relief.

72 There are, in any event, two further matters which we must consider as they may, in any event, have precluded the plaintiffs from seeking relief under Art 34(2)(*a*)(iii) of the Model Law. In the light of our primary finding, we can deal with these more briefly.

73 First, as set out above at [64], the plaintiffs did not at the time of GOL's Application to Admit Additional Evidence raise a jurisdictional objection. The plaintiffs made submissions and participated in the decision on the meaning of Section 34 without protest and subsequently made an application to admit further evidence based on the BIT Tribunals' decision. In acting as they did, the plaintiffs *de facto* gave the BIT Tribunals jurisdiction to decide on whether new evidence could be admitted. If we had found that the "new evidence" was properly a matter that could be raised under Art 34(2)(*a*)(iii), we would have

found that the plaintiffs did not raise any issue of jurisdiction and did not protest that jurisdiction or the decision. To the contrary, they relied on that decision. On that basis, we would have found that any jurisdictional challenge under Art 34(2)(*a*)(iii) based on new evidence was not open to the plaintiffs and had been waived.

74 Secondly, GOL contends that the plaintiffs are precluded from arguing that the BIT Tribunals acted in excess of their jurisdiction because they failed to make the necessary application under Art 16(3) and are therefore precluded from challenging the BIT Awards under Art 34(2)(*a*)(iii) (as above at [62]). However, we do not consider that the plaintiffs were precluded from raising a jurisdictional challenge to the Tribunal's findings in the BIT Awards in relation to the Alleged Thanaleng Bribe, Alleged Witness Bribe and Alleged MaxGaming Fraud, had there been grounds for such a challenge.

75 Article 16 of the Model Law reads as follows:

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal

> may, in either case, admit a later plea if it considers the delay justified.
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

76 Whilst we consider that Art 16(3) could, in principle, have been capable of applying to a claim to set aside the award on the basis of the plaintiffs' plea that the BIT Tribunals exceeded the scope of their authority, the BIT Tribunals did not in fact rule on the issue of jurisdiction raised by the plaintiffs in respect of the Alleged Thanaleng Bribe, Alleged Witness Bribe and Alleged MaxGaming Fraud, as a preliminary question.

77 In the present case, the objection based on Section 34 was made in response to GOL's Application for Additional Evidence and the BIT Tribunals decided that the new evidence could be introduced by GOL. However, PCA PO 9 and ICSID PO 11 dealt with the entitlement to admit the new *evidence*. It was only in the BIT Awards that the BIT Tribunals made decisions on the Alleged Thanaleng Bribe, Alleged Witness Bribe and Alleged MaxGaming Fraud based on that new evidence. Therefore, we do not consider that Art 16(3) would otherwise have precluded the plaintiffs from raising its case under Art 34(2)(*a*)(iii) based on those new allegations.

78 Accordingly, for the reasons set out above we dismiss the plaintiffs' application to set aside the BIT Awards on the basis of Art 34(2)(*a*)(iii) of the Model Law arising from issues relating to Section 34.

Scope of submission to arbitration: issues outside the ICSID Arbitration

Plaintiffs' position

79 The next point pertains only to LH's application to set aside the ICSID Award. The plaintiffs submit that the ICSID Tribunal made findings or rulings in respect of expropriation claims relating to Paksong Vegas, the Paksan Club and the Thakhaek Club, which were not advanced by LH or pleaded by any of the parties in the ICSID Arbitration. Those expropriation claims were only pursued by Sanum in the PCA Arbitration, as they arose before LH wholly acquired Sanum in January 2012 and so LH could not pursue those claims and LH's only expropriation claim in the ICSID Arbitration concerned the Thanaleng Club.

80 The plaintiffs submit that neither the allegations constituting those expropriation claims nor the expropriation claims were pleaded by parties in the ICSID Arbitration. They say that facts concerning the expropriation claims were merely mentioned in passing at paras 52 to 59 of LH's ICSID Memorial, purely as part of the background narrative to the plaintiffs' investment in GOL. Consequently, GOL did not respond to any of those expropriation claims nor to paras 52 to 59 of the ICSID Memorial.

81 As a result, the plaintiffs submit that the findings made in respect of the expropriation claims and allegations were outside the scope of the submission to arbitration and should be set aside under Art 34(2)(*a*)(iii).

82 The plaintiffs say that there is no basis for GOL's contentions that both sides had asked the ICSID Tribunal to address Sanum and LH's factual allegations in totality to determine the claims and defences in the ICSID

Arbitration or that the ICSID Tribunal had dealt with the findings on the expropriation claims to the extent necessary to determine the bad faith issues.

83 The plaintiffs say that it was an undisputed fact that the expropriation claims and allegations were not advanced by LH or pleaded by parties in the ICSID Arbitration. GOL's reliance on the plaintiffs' 26 March 2018 letter to the BIT Tribunals, referred to at para 74 of the ICSID Award, is misplaced as the express purpose of that letter was to inform the BIT Tribunals of the claims for which LH and Sanum would no longer seek specific relief. The letter stated that LH would not be pursuing its expropriation claims regarding Savan Vegas, the Ferry Terminal and Lao Bao Clubs and claims regarding GOL's seizure of its bank accounts. The plaintiffs say that the expropriation claims were not included in those claims, because the expropriation claims had never been raised by LH in the first place.

84 It was in the context of dropping the claims that the plaintiffs stated that they wished to make clear that they were not withdrawing any factual allegations as the totality of the facts remained relevant to certain treaty breaches for which the plaintiffs still sought relief, as cited at para 74 of the ICSID Award. The plaintiffs submit that all that statement meant was that the facts underlying the claims which LH dropped could nonetheless be considered to the extent they were relevant to LH's other subsisting claims. They submit that this did not give the ICSID Tribunal licence to make determinations on claims that were not part of the dropped claims and which LH never advanced.

85 The plaintiffs say that the ICSID Tribunal's statement at para 74 of the ICSID Award that GOL would conjoin its "clean hands" defence to all claims by both plaintiffs was also problematic as it is unclear what was meant by that

statement. The plaintiffs, however, say that what was clear was that throughout the BIT Arbitrations, GOL itself never made any statement in those terms and GOL has been unable to point to any such statement. In any event, the plaintiffs say that GOL could not have meant that it would be responding to the expropriation claims in the ICSID Arbitration in the same manner as it did in the PCA Arbitration, when the expropriation claims were not even pleaded or advanced in the ICSID Arbitration.

Defendant's position

86 GOL submits that the plaintiffs' position is untenable. It says that the ICSID Tribunal expressly acknowledged in paras 3 and 6 of the ICSID Award that Sanum was not a claimant in the ICSID Arbitration and that LH's claims were in respect of Savan Vegas, the Thanaleng Club and the slot clubs at Lao Bao and Ferry Terminal. The ICSID Tribunal also made it clear that there was a division between Sanum and LH's respective claims in para 74 of the ICSID Award, as it identified that the plaintiffs had notionally divided and separated their surviving claims concerning LH (the Thanaleng Club, Savan Vegas and the Ferry Terminal and Lao Bao Clubs) and Sanum (the Thanaleng, Paksan, and Thakhaek Clubs and Paksong Vegas).

87 Whilst the issue of expropriation was not before the ICSID Tribunal, GOL submits that the issue of the plaintiffs' illegal and/or bad faith conduct regarding Paksong Vegas, the Paksan Club and the Thakhaek Club was presented to the ICSID Tribunal. It says that both LH and GOL had alleged unlawful conduct and/or bad faith against each other in respect of these investments.

88 Contrary to Mr Baldwin's supporting affidavit filed on behalf of LH, GOL says that matters of illegality and/or bad faith concerning Paksong Vegas, Paksan Club and the Thakhaek Club were pleaded in the ICSID Arbitration and Mr Baldwin himself addressed them in his witness statement in the ICSID Arbitration.

89 In GOL's Counter-Memorial in the ICSID Arbitration, GOL pleaded the plaintiffs' unlawful acts in respect of Paksong Vegas, the Paksan Club and the Thakhaek Club as part of its defence that LH's claims should be dismissed because of its illegal conduct.

90 With respect to Paksong Vegas, under the PV PDA, a hotel, casino and golf resort were to be built and operated in the Paksong district of Champasak Province. GOL pleaded that Mr Baldwin did not want to build the project in Paksong and thus, Savan Vegas offered a bribe of $80,000 to the Governor of Champasak Province to obtain approval to build the project at Chong Mek instead.

91 Regarding the Paksan Club, GOL pleaded two bribes: (a) Madam Sengkeo was paid in respect of a bribe so that the club could be opened; and (b) an employee of the plaintiffs told Mr Yingling to bribe the Governor with a sum of monies to stop the Prime Minister's Office ("PMO") from closing the club.

92 As regards the Thakhaek Club, GOL pleaded that Savan Vegas paid a bribe of $25,000 to obtain a slot licence for the Thakhaek Club.

93 GOL says that in LH's Reply and Opposition to GOL's Counterclaims, LH responded to deny GOL's allegations of illegality and/or bad faith.

Subsequently, in GOL's Rejoinder, GOL pleaded further circumstances relating to the plaintiffs' bribes in respect of the Thakhaek Club and Paksong Vegas.

94 In his witness statement in the ICSID Arbitration, GOL says that Mr Baldwin knew that the alleged bribes were an issue and tried to address them by claiming that no monies were sent and that monies were paid for other purposes.

95 It is clear, GOL submits, from the pleadings and witness statement that the issues of whether LH had engaged in unlawful and/or bad faith conduct in respect of Paksong Vegas, the Paksan Club and the Thakhaek Club were presented to the ICSID Tribunal as part of GOL's pleaded defence that LH was not entitled to treaty protection because of its conduct.

96 GOL says that this was acknowledged by the ICSID Tribunal in its award at paras 191, 207 and 215 as follows:

> **7.2 Paksong Vegas Hotel and Casino**
>
> 191. Although the [plaintiffs] have in this instance put their focus on Sanum's contractual rights, [LH] is also involved as Sanum's parent, and is equally subject to the [GOL's] defence of lack of good faith and lack of clean hands in both the ICSID and PCA proceedings, sufficient to disqualify the Claimants or either of them from any Treaty remedy…
>
> …
>
> **7.3 Paksan Slot Club**
>
> 207. Although the [plaintiffs'] primary focus is on Sanum in respect of Paksan, [LH] is also implicated as Sanum's parent, and the Paksan episode is relevant to the [GOL's] allegation that the entirety of the [plaintiffs'] investments in Laos was tainted from first to last by bad faith.
>
> …

> **7.4 [Thakhaek] Casino and Hotel Resort**
>
> 215. In this situation, as well, the [plaintiffs] and the [GOL] accuse each other of bad faith. Mr. Baldwin, the directing mind of both [plaintiffs], testified at length about the bad faith treatment he received from the [GOL] in respect of [Thakhaek]. The GOL, on the other hand, presents [Thakhaek] as further proof that Mr. Baldwin and [LH] were bad faith investors who are not entitled to treaty protection. These cross allegations are relevant to [LH's] Treaty claims.
>
> [emphasis in original in bold]

97 Accordingly, GOL submits that, to the extent that paras 191 to 225 of the ICSID Award deal with the issues of Paksong Vegas, Paksan Club and the Thakhaek Club, this was to determine the bad faith issues and for that purpose alone. It refers to paras 206, 214 and 225 of the ICSID Award:

> 206. … Accordingly, while the issue of the expropriation of the Paksong Vegas investment is not before this Tribunal as such, and this Tribunal does not purport to decide any issue which is not before it, nevertheless the underlying facts of the Paksong Vegas venture reinforce the [GOL's] general defence that Mr. Baldwin's relationship with Laos was throughout characterized by bad faith. To the extent necessary to determine the bad faith issues, and for that purpose alone, the Tribunal finds on a careful review of the facts that not only has [LH] failed to demonstrate any lack of good faith on the part of the [GOL] in respect of Paksong Vegas but, on the contrary, concludes that Mr. Baldwin negotiated throughout his dealings with the [GOL] in bad faith and that such bad faith is to be attributed to [LH] on the basis that as the directing mind of [LH], the parent of Sanum, Mr. Baldwin's conduct was and is its conduct.
>
> …
>
> 214. … The Tribunal accordingly concludes, as with the Paksong Vegas expropriation claim, that while the Paksan slot club expropriation claim is not before this Tribunal as such, the underlying facts bear directly on the allegations of bad faith on the part of the [GOL] asserted before this Tribunal by the Claimant, [LH]. The Tribunal finds on a careful review of the facts that [LH] has failed to demonstrate any lack of good faith on the part of the Respondent in respect to Paksan, but on the contrary that Mr. Baldwin's bad faith activity is to be attributed

> to [LH], Sanum's parent, on the basis that Mr. Baldwin is the directing mind of [LH] and his conduct is attributable to [LH].
>
> …
>
> 225. The Tribunal concludes that there is insufficient evidence of bad faith on either side in respect of [Thakhaek]. It was simply a commercial possibility that never reached the stage of agreement.

98 Moreover, GOL submits that the BIT Arbitrations involved significant overlaps in the facts, issues and evidence and it had, as stated in para 74 of the ICSID Award, "conjoined its 'clean hands' defence to all claims by both [plaintiffs] at issue in the ICSID and PCA proceedings involving Mr John Baldwin and the various interrelated allegations of bribery and corruption". GOL also submits that the plaintiffs had, themselves, also submitted to the BIT Tribunals that the totality of the facts was relevant to the plaintiffs' claims of treaty breaches and it refers to the ICSID Award at paras 3, 68 and 74 as follows:

> 3. … Sanum is not a claimant before this Tribunal, and the Tribunal does not purport to address its claims. However, much of the evidence of Mr. John Baldwin is related to both companies, and as he was the directing mind of both companies, and their principal witness, references will be made to Sanum from time to time … as part of the background to the disposition of the [LH] claims. Moreover, counsel for the [plaintiff] advised that it did not withdraw 'any factual allegations, as the **totality of the facts remain relevant to certain treaty breaches** for which the [plaintiffs] will seek relief.'
>
> …
>
> 68. While the proceedings before the two Tribunals are distinct and separate, the proceedings were the subject to joint Hearings in Singapore and elsewhere. Accordingly, for ease of reference only, [LH] and Sanum will be referred to as 'the Claimants', as the facts of the cases are intermingled. This terminology is not to suggest, however, that the two arbitral proceedings are consolidated or otherwise conjoined.
>
> …

> 74. The [plaintiffs'] letter of 26 March 2018 notionally divided and separated their surviving claims concerning [LH] (Thanaleng, Savan Vegas and the Ferry Terminal and Lao Bao slots) and Sanum (Thanaleng, Paksan, [Thakhaek] and Paksong Vegas Hotel and Casino). As mentioned, however, counsel for the [plaintiffs] asserted in the same letter that 'the totality of the facts remain relevant to certain treaty breaches for which the [plaintiffs] will seek relief.' Equally, [GOL] conjoined its 'clean hands' defence to all claims by both [plaintiffs] at issue in the ICSID and PCA proceedings involving Mr. John Baldwin and the various interrelated allegations of bribery and corruption. Accordingly, it will be necessary for the Tribunal to address 'the totality' of the factual circumstances of the listed projects of both plaintiffs insofar as they are relevant to the position of [LH].
>
> [emphasis in original]

99 GOL refers to paras 68 and 74 of the ICSID Award and submits that the claims and defences in the ICSID Arbitration and PCA Arbitration had many commonalities and that all the circumstances had to be considered in determining LH's claims for reliefs for the alleged treaty breaches committed by GOL, including a consideration of GOL's allegations of LH's unlawful and/or bad faith conduct that would bar treaty protection.

100 GOL also relies on the plaintiffs' letter to the BIT Tribunals dated 26 March 2018, in which the plaintiffs had stated that they were "not withdrawing any factual allegations, as the totality of the facts remain relevant to certain treaty breaches for which [plaintiffs] will still seek relief". The plaintiffs stated that LH would be dropping its expropriation claims in respect of Savan Vegas, the Ferry Terminal and Lao Bao slot clubs and the claims regarding GOL's seizure of its bank accounts.

101 GOL says that, despite taking the position in the 26 March 2018 letter that the "totality of the facts remain relevant to certain treaty breaches", LH now contends that this only related to the facts underlying the claims which they had

dropped. GOL submits that nowhere in the 26 March 2018 letter did LH state that the "totality of the facts" relevant to the dispute were limited to the facts underlying the claims it dropped, nor would such a convoluted statement have made any sense. In any case, GOL submits that its position, as noted by the ICSID Tribunal at para 74 of the ICSID Award, was that all the facts were relevant to its "clean hands" defence.

102 GOL therefore submits that the ICSID Tribunal did not deal with matters beyond the scope of submission by making findings on the allegations of illegality and/or bad faith regarding Paksong Vegas, Paksan Club and the Thakhaek Club, which were relevant to GOL's defence and therefore there is no basis to set aside paras 191 to 225 of the ICSID Award under Art 34(2)(*a*)(iii) of the Model Law.

Our decision

103 We have reviewed the ICSID Tribunal's findings in the ICSID Award in relation to each of the three projects. As we raised at the hearing, the way in which these two BIT Arbitrations proceeded had some unusual features. Whilst there were separate pleadings, the Merits Hearing in September 2018 proceeded as a combined hearing before both BIT Tribunals. The parties had appointed the same arbitrators in both BIT Arbitrations and so only the presiding arbitrators differed. There were therefore four arbitrators present at the hearing. The parties were also represented by the same counsel at the hearing. This meant that *de facto* the witness evidence was called and examined in a hearing which involved *both* BIT Arbitrations.

104 Whilst the expropriation claims for the three projects were only made in the PCA Arbitration, it is evident that issues of illegality and bad faith relating

to the three projects were raised in the ICSID Arbitration, both in the pleadings and in the evidence. We have read Mr Baldwin's sixth witness statement in the ICSID Arbitration at paras 30 to 35 where he deals with the bribery allegations pleaded in that arbitration and denies those allegations in respect of Paksong Vegas, the Paksan Club and the Thakhaek Club. Therefore, issues of illegal and bad faith conduct relating to Paksong Vegas, Paksan Club and the Thakhaek Club were matters raised in GOL's defence and formed part of the issues in the ICSID Arbitration.

105 We also note the ICSID Tribunal's reference to the letter of 26 March 2018 at para 74 of the ICSID Award. Whilst the plaintiffs say that the BIT Tribunals misconstrued that letter, the Tribunal was entitled to find that the totality of the facts remained relevant, particularly given the way in which the case was pleaded, and evidence heard.

106 It is evident that the ICSID Tribunal had well in mind that it did not have jurisdiction to decide the issue of expropriation raised by Paksong Vegas, the Paksan Club and the Thakhaek Club. This much is clear from para 206 of the ICSID Award, which has been quoted above at [97].

107 In relation to Paksan Club there are similar comments at para 214 of the ICSID Award. At para 225 in relation to Thakhaek, the ICSID Tribunal found that there was insufficient evidence of bad faith.

108 Accordingly, we find that the ICSID Tribunal was entitled to consider and make findings on the issues of illegality and bad faith relating to the Paksong Vegas, Paksan Club and the Thakhaek Club as those were issue within its jurisdiction relating to the ICSID Arbitration. We therefore reject this ground

and dismiss the plaintiffs' application to set aside the ICSID Award on the basis of Art 34(2)(*a*)(iii) of the Model Law.

Material breach of agreed arbitration procedure

Plaintiffs' overall position

109 The plaintiffs submit that the arbitral procedure in the BIT Arbitrations was not in accordance with the parties' express agreement, expressed in mandatory language, to limit the evidence which could be considered in the Revived Proceedings as established in Section 34. They say that the BIT Tribunals admitted GOL's new evidence in contravention of the agreed procedure in Section 34.

110 The plaintiffs deny that there has been any waiver by the parties' conduct. They rely on Sections 44 and 45 of the Settlement Deed and say that these provisions prohibit variations other than by way of signed written agreements to that effect and that no signed agreement was made to dispense with Section 34. Further, the plaintiffs say that they maintained a continuing objection to the admission of post-settlement evidence.

111 The plaintiffs says that the grounds under Art 34(2)(*a*)(iv) of the Model Law are established as "the arbitral procedure was not in accordance with the agreement of the parties" and there was no basis for the exceptions to apply. Further, the plaintiffs contend that the awards should be set aside because the procedural breach was "serious" or "material", as the breach was not merely technical or minor, and it refers to the decision in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*") at [54], [64]–[66].

112 In addition, the plaintiffs say that they have been prejudiced. They submit that the test for prejudice is not high and involves a demonstration of "actual" (rather than "substantial") prejudice which requires only that the procedural breach "could reasonably have made a difference to the [final outcome of arbitral proceedings], rather than whether it would necessarily have done so". They again refer to *Triulzi* at [64]–[66] to support their contention.

113 They say that the exclusion of the new evidence would have reasonably made a difference to the final outcome of the proceedings because the new evidence was integral to the making of the Four Findings, which then led to the conclusion that the plaintiffs were not entitled to treaty relief on the basis of acting in "manifest bad faith". But for the admission of the new evidence, the plaintiffs submit that the BIT Tribunals could reasonably have reached a different outcome for each of the Four Findings. They say that there was no other evidence supporting these findings and there was contrary evidence.

114 Moreover, the plaintiffs also contend that they were prejudiced because the BIT Tribunals' assessment of the treaty claims substantially relied on or was tainted by the additional evidence. First, they say that great importance was accorded to the finding of "manifest bad faith", which was premised on the Four Findings and did not arise from separate analysis. Secondly, they say that a negative perception of Mr Baldwin's credibility and honesty was based on the additional evidence. Mr Baldwin's credibility was critical to the merits of the plaintiffs' claims and they say that the tainted view of his truthfulness and accuracy resulted in his evidence being accorded little or no regard. In relation to LH's other non-expropriation claims, the plaintiffs contend that the finding of "manifest bad faith" tainted the analysis of its claims and therefore substantially affected the conclusion that there were no merits to its claims.

115 Finally, the plaintiffs submit that the BIT Tribunals were not under any duty to consider all evidence of bribery and corruption. Moreover, even if such a duty existed, the plaintiffs contend that, in accordance with the principle of party autonomy, the duty would have been subject to the parties' agreement on the arbitral procedure. Thus, the agreement to limit new evidence under Section 34 would prevail over any such duty.

Defendant's overall position

116 GOL contends that Art 34(2)(*a*)(iv) is not engaged as there was no breach of procedural agreement. The parties submitted their procedural agreement in Section 34 to the BIT Tribunals for interpretation. Having considered the meaning and scope of the provision, the BIT Tribunals held the restriction was subject to exceptional circumstances, and such circumstances were present on the facts before them. In any event, the plaintiffs had waived any breach of Section 34.

117 GOL further submits that there are limits on party autonomy in deciding arbitration procedure. Investment treaty tribunals exercise a public function and it says that Singapore's *lex arbitri* should recognise that (a) tribunals have the discretion to admit evidence of corruption, bribery and illegality; and (b) that this discretion cannot be fettered or excluded by parties' procedural agreement. Moreover, any agreement on procedure remains subject to the *lex arbitri* and public policy of the seat and they submit that the plaintiffs' interpretation of Section 34 would conflict with the public policy of Singapore by forcing the BIT Tribunals to shut their eyes to evidence of bribery and corruption.

118 In any event, GOL submits that the plaintiffs suffered no actual prejudice. Even if Article 34(2)(*a*)(iv) were to be engaged, the exclusion of the

new evidence would not have reasonably made a difference to the making of the Four Findings nor the conclusion of the merits of the plaintiffs' claims. GOL submits that the Four Findings were supported by other pieces of evidence and that it cannot be shown that the Four Findings would not have been made but for the additional evidence.

119 In addition and in any case, GOL contends that the claims were also dismissed on the merits separately and irrespective of the Four Findings. It says that the plaintiffs' contention that the BIT Tribunal's findings in relation to the GOL's threshold defence of bribery and corruption could have "seeped into and infected" the analysis on the merits, is speculative and conjecture. It says that no connection or dependency between the substantive dismissal of the treaty claims and the Four Findings has been shown. Instead, the BIT Tribunals reached their conclusions on the merits without depending on the plaintiffs' acts of corruption or bad faith.

The issues in relation to the agreed procedure

120 Based on the foregoing, three issues arise to be decided in relation to the plaintiffs' claims under Art 34(2)(*a*)(iv) of the Model Law:

(a) whether the admission of new evidence was not in accordance with the agreement of the parties;

(b) if the admission of new evidence was not in accordance with the parties' agreement, whether there had nonetheless been a waiver of the breach of Section 34 by way of the plaintiffs' conduct; and

(c) whether, in any event, prejudice had been suffered by the plaintiffs.

The admission of further evidence

121 The starting point for this ground is the provision in Section 34 that neither party "shall be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings".

The approach of this court

122 There is a threshold question as to what approach we should take to determining whether the BIT Tribunals adopted an arbitral procedure which was not in accordance with the agreement of the parties, so as to engage Art 34(2)(*a*)(iv) of the Model Law. In determining that question it is necessary to decide the meaning of Section 34 in the context of the BIT Arbitrations.

123 There may be cases where there is an agreed procedure and where no issue arises during the arbitration on the meaning or effect of that agreed procedure but where a party contends, upon receiving an award, that the arbitral procedure adopted was not in accordance with that agreed procedure. In such a case, it will be necessary for the court, on an application under Art 34(2)(*a*)(iv), to determine the meaning and effect of the agreed procedure for itself and decide whether the procedure adopted complied with that procedure.

124 However, there will be other cases, such as this, where an issue arises during the course of the arbitration on the meaning and effect of an agreed procedure. In such circumstances, the arbitral tribunal will have to make a decision on the meaning and effect of that procedure in order to determine how to proceed. In doing so, it will make a finding of fact and law based on the submissions of the parties. In such circumstances, the question is whether this

court should ignore the findings of fact and law and proceed to make its own determination of the meaning and effect of the procedure or whether the determination by the arbitral tribunal should be respected as determinative or, at least, accorded some role in the decision of whether the arbitral procedure adopted was not in accordance with that agreed procedure.

125 In the present case, as set out above, the BIT Tribunals, had to decide on the meaning and effect of the agreed procedure in Section 34 in the context of GOL's Application to Adduce Additional Evidence. The identical rulings in ICSID PO 11 and PCA PO 9 are as follows (quoting from PCA PO 9):

> While initially [GOL] argued that the Tribunals' jurisdiction to hear the merits scheduled for 3 to 7 September 2018 derived from the Settlement Agreement, it now concedes that the Tribunals' jurisdiction is 'treaty-based.' The Tribunal hearings were suspended by the parties' 15 June 2014 Settlement, but have now reverted to the *status quo ante*, with the usual authority under the ICSID\PCA rules to determine the admissibility of evidence.
>
> Nevertheless, in general, the Tribunal will defer to what the parties agreed in clause 34. [GOL] recalls the 3 April 2017 ruling of the [ICSID] Tribunal (at a time when the proceedings of this Tribunal were suspended) that while the ICSID Tribunal would normally give effect to the parties' agreement respecting evidentiary matters, the ICSID Tribunal retained a residual discretion to chart a different course 'if compelling circumstances were shown to exist.' In that instance, the ICSID Tribunal declined to find 'compelling circumstances.' A similar approach was taken in *Vivendi v Argentina* ICSID ARB(AF)/12/6, quoted by [GOL] at paragraphs 11 to 13 of its Reply.
>
> In the result, the Tribunal concludes that the 2014 record should remain 'frozen' as provided in clause 34 unless satisfied that there are 'compelling circumstances' to, exceptionally, admit fresh material. (Notwithstanding [GOL]'s objection to terminology, the proffered evidence is characterized as 'fresh' because its admission would post-date by four years the Settlement wherein the parties, by agreement, froze the record.) The principle guiding this approach is party autonomy and the

> parties' freely negotiated bargain of which clause 34 of the Settlement is an important and inextricable element.
>
> [emphasis in original in italics]

126 It can be seen that the BIT Tribunals referred to their usual authority under the applicable arbitration rules to determine the admissibility of evidence. Adopting a prior finding by the ICSID Tribunal supported by the decision another tribunal in *Vivendi v Argentina* ICSID Case No ARB(AF)/12/6, they concluded that, while the BIT Tribunals would normally give effect to the parties' agreement respecting evidentiary matters, the Tribunals retained a residual discretion to chart a different course "if compelling circumstances were shown to exist." On this basis, the BIT Tribunals concluded that the 2014 record should remain "frozen" as provided in Section 34 unless satisfied that there are "compelling circumstances" to, exceptionally, admit fresh material.

127 Further, the Settlement Deed contained a dispute resolution provision in Section 42 which provided as follows:

> ***Governing Law***
>
> 42. This Deed shall be governed by and construed solely in accordance with the laws of New York. Any dispute arising out of or in connection with this Deed, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre for the time being in force, including its emergency arbitration rules. The seat of the arbitration shall be Singapore. …

128 Although the parties could have referred the question of the construction of Section 34 to an SIAC arbitration, they evidently submitted that question to the BIT Tribunals in the context of GOL's Application to Admit Additional Evidence. Indeed, the BIT Tribunals could not deal with that application without deciding the question of construction of Section 34. Had the parties referred the

question of construction of Section 34 to an SIAC arbitration and the BIT Tribunals had then applied that finding to GOL's Application to Admit Additional Evidence, there could be no ground for contending that the BIT Awards should be set aside under Art 34(2)(*a*)(iv) because the arbitral procedure was not in accordance with the agreement of the parties. In principle, it is difficult to distinguish that case from a case where, as here, the parties referred the construction of Section 34 to the BIT Tribunals rather than an SIAC arbitration.

129 The BIT Tribunals' conclusions regarding the effect of Section 34 constitute, in our view, a necessary interpretation of that agreement, something which the parties had agreed that the BIT Tribunals would undertake and on which they each provided detailed submissions. No issue was raised about the jurisdiction of the BIT Tribunals to decide that issue and there was no protest to the Tribunal making a decision on GOL's Application to Admit Additional Evidence. Questions such as the existence of discretion, the interpretation of Section 34, whether Section 34 excluded any discretion and whether the parties had eliminated the possibility of the BIT Tribunals exercising a discretion in relation to evidence unknown to one party at the time of the Settlement Deed or evidence in respect of events occurring after the Settlement Deed were all matters which involved an interpretation of the Settlement Deed and, in particular, Section 34.

130 We therefore hold that the parties, by referring the issue of the interpretation of Section 34 to the BIT Tribunals as a necessary part of their decision on GOL's Application to Admit Additional Evidence gave the BIT Tribunals jurisdiction to decide that matter. On that basis, the BIT Tribunals'

decision on the issue of interpretation of Section 34 would not be a matter which, *de novo*, this court could consider.

131 If, however, this court could, in principle, consider the interpretation of Section 34, despite the decision of the BIT Tribunals, we are not persuaded that in the circumstances of this case, we should do so.

132 As noted above, the Settlement Deed and, in particular, Section 34 is to be governed by and construed solely in accordance with the laws of New York. The BIT Tribunals heard submissions on New York law in addition to Singapore law which is the law of the seat of arbitration in the BIT Arbitrations. The BIT Tribunals stated that "[b]oth parties cite[d] U.S. court cases. New York law is relevant because clause 34 is in the Settlement [Deed] and the parties agreed the interpretation of the Settlement [Deed] would be governed by New York law." Although the BIT Tribunals found the decisions on New York law largely inapplicable and that, following the suspension under the Settlement, the Tribunal hearings had "now reverted to the *status quo ante* with the usual authority under the ICSID or PCA rules to determine the admissibility of evidence", the Tribunal stated that, in general, it "would defer to what the parties agreed in clause 34". It therefore had to decide on the meaning and effect of Section 34 as a matter of New York law.

133 GOL submits that Art 34(2)(*a*)(iv) is not engaged where the real dispute concerns the correctness of the tribunal's interpretation of the parties' agreement and it refers to *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 ("*Quarella*"). In that case there was a dispute about the parties' choice of law clause which provided that "[t]his Agreement shall be governed by the Uniform Law for International Sales under the United Nations

Convention of April 11, 1980 (Vienna) and where not applicable by Italian law". The arbitral tribunal interpreted that clause and determined the specific dispute according to Italian law.

134 The plaintiff applied to set aside the award under, among other provisions, Art 34(2)(*a*)(iv) of the Model law. It contended that by failing to apply the CISG and by applying Italian law, the tribunal had failed to comply with Art 17 of the ICC Rules of Arbitration, as to choice of law and therefore the arbitral procedure was not in accordance with the agreement of the parties.

135 At [37] of *Quarella*, the court considered various textbooks and held that:

> … The facts of the present case did not take it within the situation referred to by the learned authors where there is a failure to apply the choice of law clause or an express refusal to apply the said clause. The Tribunal in this case respected the choice of law clause chosen by the parties, interpreted the law so chosen and came to the conclusion that the CISG did not apply and Italian law applied. In the Award, the Tribunal took pains to explain the process by which he derived the applicable law. …

136 The conclusion of the court at [40] was that:

> Accordingly, the Tribunal did, pursuant to Art 17 of the ICC Rules, *respect* the choice of law clause set out in the contract. Parties did agree on the rules of law to be applied to the dispute, and the Tribunal did apply the chosen rules of law to the dispute. The real point of dispute was that Quarella considered that the Tribunal applied the chosen law wrongly. That dispute was not one that engaged Art 34(2)(a)(iv) of the Model Law. … [emphasis in original]

137 GOL also referred to the decision of the Court of Appeal in *AJU v AJT* [2011] 4 SLR 739 ("*AJU*") in which the arbitral tribunal in a SIAC arbitration had to consider whether an agreement ("the Concluding Agreement"), governed

by Singapore law, was null and void on the grounds of duress, undue influence and illegality. The arbitral tribunal decided that the Concluding Agreement was valid and enforceable. The plaintiff then applied to set aside the award contending that the award was contrary to Singapore public policy because the Concluding Agreement was illegal under Singapore law (the governing law) and Thai law (the place of performance).

138 On that application, the High Court reopened the findings of the arbitral tribunal and set aside the award. On appeal, the Court of Appeal considered whether the judge was correct in going behind the award and reopening the tribunal's finding that the Concluding Agreement was valid and enforceable.

139 The Court of Appeal held that the judge was not entitled to reject and substitute the tribunal's findings with his own findings. It referred to s 19B(1) of the IAA which provides that an IAA award is final and binding on the parties, subject only to narrow grounds for curial intervention. This meant that findings of fact made in an IAA award were binding on the parties and could not be reopened except where there was fraud, breach of natural justice or some other recognised vitiating factor.

140 In dealing with that issue, the Court of Appeal considered conflicting English authorities and decided that the approach taken in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, HC by Colman J and by the majority of the English Court of Appeal (*Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] 1 QB 288, CA ("*Westacre (CA)*")) was to be preferred to the more liberal and "interventionist" approach taken in *Soleimany v Soleimany* [1999] QB 785 and by Waller LJ in the minority in the Court of Appeal in *Westacre (CA)*. The Court of Appeal, at [60] of *AJU*, said

that this preferred approach was "consonant with the legislative policy of the IAA of giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards (whether foreign arbitral awards or IAA awards)."

141 At [70] of *AJU*, the Court of Appeal concluded, as follows, in the context of the issues in that case:

> To summarise our ruling on Issue (a), the Tribunal's findings in the present case as to the intention of the Appellant and the Respondent when they signed the Concluding Agreement, which intention was reflected in cl 1 thereof, are findings of fact which are not correctable as they are final and binding on both parties. Public policy, based on the alleged illegality of the Concluding Agreement, was not engaged by such findings of fact. Hence, the Judge should not have reopened the Tribunal's findings.

142 In the present case, the BIT Tribunals, in deciding whether to admit additional evidence, had to construe the terms of Section 34 which was governed by New York law. So far as this Singapore court is concerned, findings of New York law are findings of fact as to a foreign law. For the reasons set out in *AJU*, those findings of fact made by the arbitral tribunal are final and binding and there is nothing to vitiate those findings.

143 Accordingly, based on the approach in both *Quarella* and *AJU* we do not consider that this court should, in the particular circumstances of this case, seek to reopen the findings of the BIT Tribunals as to its ability to admit additional evidence.

The meaning of Section 34

144 If, contrary to that finding, we were persuaded that it is open to us to determine the meaning and effect of Section 34 and we should do so, we would

have found that the BIT Tribunals retained a residual power to admit additional evidence in exceptional circumstances, notwithstanding Section 34.

145 In relation to "new evidence" then, as was observed in argument, the reference to "new claims or evidence" in Section 34 cannot have been intended to exclude all "new evidence". The procedure for the BIT Arbitrations, if they were revived, included hearings at which witnesses would be heard and cross-examined. That would necessarily have led to "new evidence" which the parties obviously intended the Tribunals to hear. Therefore, the parties intended to add some new evidence to the arbitration despite what the plaintiffs contend were the mandatory terms of Section 34. Given that position, we do not consider that Section 34 was an absolute exclusion of new evidence.

146 Further, arbitral tribunals have a general power to determine what evidence is adduced in an arbitration. That power was derived in the ICSID Arbitration from the terms of the Laos-Netherlands BIT and in the PCA Arbitration from the Laos-PRC BIT. The ICSID Arbitration was conducted, pursuant to Art 9 of the Laos-Netherlands BIT, under the ICSID Additional Facility Rules and the PCA Arbitration was conducted under the UNCITRAL Rules. Both of those sets of rules constituted an agreed procedure.

147 For the ICSID Arbitration, it is provided at Art 12(6) of the Laos-Netherlands BIT that "[u]nless the parties decide otherwise, the Tribunal shall determine its own procedure". The ICSID Additional Facility Rules Art 28(2) provided that "[i]n the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, which is not inconsistent with any provisions of the Additional Facility Rules ..." Those Rules also stated at Arts 41(1) and 41(2) that:

> (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
>
> (2) The Tribunal may if it deems it necessary at any stage of the proceeding call upon the parties to produce documents, witnesses and experts.

148 The PCA Arbitration provided at Arts 7(5) and 8(5) of the Laos-PRC BIT that "[t]he arbitral tribunal shall determine its own procedure". The UNCITRAL Rules at Art 27(4) provided that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

149 It is therefore clear that both under the BITs and the applicable procedural rules, the BIT Tribunals had the power to determine their own procedure and to determine the admissibility of any evidence. The terms of the Settlement Deed and Section 34, in particular, did not seek to and could not amend the terms of the BITs or seek to remove the BIT Tribunals' power to determine their own procedure and the admissibility of evidence under the applicable procedural rules.

150 In determining their own procedure, the BIT Tribunals would have to take into account the provisions of Section 34 in determining the extent to which they would allow additional evidence. The Tribunals have rightly considered that by virtue of parties' agreement, the record remains frozen to a large extent. But the parties' agreement cannot be an absolute bar on the Tribunals' power to determine their own procedure. Hence, we consider that the BIT Tribunals were entitled to decide that the record should remain "frozen" as provided in Section 34 "unless satisfied that there were compelling circumstances to, exceptionally, admit fresh evidence."

151 We would therefore have come to the same decision as the BIT Tribunals if it were open to us to deal with the matter *de novo* and appropriate for us to do so.

Evidence relating to corruption

152 We turn to the alternative argument that, in any case, the BIT Tribunals had the authority and discretion to admit and review evidence of the plaintiffs' illegality, corruption, bribery and/or fraud, even if Section 34 had otherwise precluded the BIT Tribunals from doing so. GOL referred to *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666, *Bariven S.A. v Wells Ultimate Service LLC* (ECLI:NL:GHDHA:2019:2677), *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, *Metal-Tech v Uzbekistan* ICSID Case No ARB/103 ("*Metal-Tech*"), *Belokon v Kyrgyzsta*n (Paris Court of Appeals, RG No 15/01650, 21 February 2017) and *Sui Southern*. In addition, they referred to Vladimir Khvalei, "Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption" (2013) 24 ICC International Court of Arbitration Bulletin Extract (Special Supplemental) 15 and Michael Hwang & Kevin Lim, "Corruption in Arbitration – Law and Reality" (2012) 8 Asian International Arbitration Journal 1.

153 In each of the cited cases, the court or tribunal recognised that arbitral tribunals and particularly arbitral tribunals dealing with investor-State disputes, have a duty to consider corruption, which includes illegal conduct, bribery and fraud. That duty arises not only where the arbitral tribunal has to deal with allegations of corruption in the dispute between the parties, but also where the evidence in the case indicates possible corruption. This shows that, as with national courts, arbitral tribunals have a pro-active role and cannot simply

ignore evidence of corruption. Where, therefore, a party seeks to put before an arbitral tribunal evidence of corruption, we are of the clear view that no agreement between the parties can prevent the arbitral tribunal from reviewing and, where appropriate, admitting that evidence. This is consistent with the commentaries cited by GOL and with the public duty which, we find, applies as much to arbitrators as it does to judges. Otherwise parties could enter into procedural agreements deliberately or unintentionally precluding evidence of corruption and arbitral tribunals might make awards supporting or enforcing that corruption.

154 As a result even if, *prima facie*, the terms of Section 34 had precluded the BIT Tribunals from admitting new evidence despite the terms of the BITs and the applicable procedural rules, we would have held that the BIT Tribunals had a duty, in those circumstances, to review and, as appropriate, admit evidence of corruption.

155 There are two further matters raised by GOL which, it says, means that Art 34(2)(*a*)(iv) would not have been engaged, in any event: waiver and lack of prejudice. We now consider those contentions.

Waiver

Defendant's position

156 First, GOL contends that Art 34(2)(*a*)(iv) of the Model Law was not engaged on the basis that the plaintiffs had, in any event, waived Section 34 by conduct. As illustrated by the decision in *AAY and others v AAZ* [2011] 1 SLR 1093, concerning breach of a confidentiality provision, a term of

an agreement inserted for the mutual benefit of both parties can be waived by the conduct of the parties.

157 Article 4 of the Model Law also reflects that position where it states that:

> A party who knows that … any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay … shall be deemed to have waived his right to object.

Here the plaintiffs allege that the BIT Tribunals, contrary to a requirement under the arbitration agreement, failed to comply with Section 34. However, GOL says that on the facts, after initially objecting to the admission of the additional evidence, the plaintiffs proceeded with the arbitration and, far from objecting to the alleged non-compliance, then conducted themselves on the basis that the BIT Tribunals could thereafter act in the manner alleged to be non-compliant.

158 GOL says that the plaintiff had agreed to waive Section 34 through their conduct in the Revived Proceedings. First, after GOL made its Application to Admit Additional Evidence, the plaintiffs themselves adduced four new exhibits to rebut GOL's allegations of corruption in their Response to GOL's Application for Additional Evidence.

159 Secondly, when the BIT Tribunals made their decision on GOL's Application to Admit Additional Evidence on 25 June 2018, the plaintiffs did not raise an objection on the basis that the BIT Tribunals had made a decision which meant (on their case) that the arbitration procedure was not in accordance with the agreement of the parties. Instead the plaintiffs accepted the decision of the BIT Tribunals as being a procedural decision properly made by the BIT Tribunals.

160 On 16 July 2018 the plaintiffs then submitted a list of fresh evidence to rebut GOL's additional evidence which the BIT Tribunals had admitted. This followed from a direction at the Pre-Hearing Teleconference on 21 March 2018[14] when the plaintiffs requested a deadline for the submission of any rebuttal evidence should the Tribunals allow any new evidence from GOL. The submission on 16 July 2018 was described as "fresh evidence to rebut the fresh evidence that the Tribunal[s] allowed [GOL] to submit after briefing over the 'frozen record' provision of the Settlement Deed."[15] That proceeded on the basis that the BIT Tribunals had been entitled to admit GOL's additional evidence and that the plaintiffs were entitled to submit additional evidence and the Tribunal was entitled to admit that additional evidence, contrary to their contention in these proceedings that to do so was not in accordance with the agreement of the parties.

161 Thirdly, GOL applied to introduce two exhibits, LHRE-164 and LHRE-165 and on 29 August 2018 in ICSID PO 15 and PCA PO 13, the Tribunal recorded that the plaintiffs did not object to LHRE-165 being admitted and only objected to LHRE-164, *ie*, the Noble WS, alleging that it was irrelevant to the case. The plaintiffs therefore made no objection on the basis that, in admitting those documents, the BIT Tribunals would not be acting in accordance with the agreement of the parties.

162 Fourthly, at the merits hearing, the plaintiffs made a fresh evidence application on 3 September 2018 which was consented to by GOL and on 5 September 2018 both parties sought to add additional documents and

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14 Transcript at p 14 ln 13 (JBOD 6101).

15 JBOD 6270.

consented to each other's applications. Again, there was no objection on the basis that, in admitting those documents, the BIT Tribunals would not be acting in accordance with the agreement of the parties.

163 In each of these instances, GOL submits that the plaintiffs' conduct was consistent only with a waiver of Section 34. GOL refers to the decision of the Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*First Media*"). In that case, the parties agreed that the legal conditions which must be met in order to establish a waiver of rights were those set out in Lord Goff of Chieveley's guidance in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 ("*The Kanchenjunga*"). That guidance was approved in Singapore in *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 at [33] and was set out, as follows in *The Kanchenjunga*, at 398:

> … In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly … It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms …

164 In *First Media* at [202] the Court of Appeal stated:

> The party asserting that otherwise actionable rights have been waived must therefore meet a high threshold of demonstrating that the adversely affected party's conduct is *only* consistent with waiver and that the purported waiver had been

> communicated in clear and unequivocal terms. [emphasis in original]

165 GOL submits that from the time of PCA PO 9 and ICSID PO 11, the parties, by their conduct, had mutually waived Section 34 insofar as it was a restriction on additional evidence. Despite the plaintiffs' initial position that Section 34 "froze" the record and prevented parties from adding new evidence, the plaintiffs on more than one occasion tried to and did add further evidence and did so without seeking to reserve any rights. On the contrary, GOL submits that the plaintiffs explicitly acknowledged during the pre-hearing conference on 21 March 2018 that there was "a process in place for dealing with the frozen record" and that if GOL was allowed to add further evidence, they would also proceed to submit rebuttal evidence.

Plaintiffs' position

166 The plaintiffs submit that there was no waiver. They say that, immediately after GOL indicated on 13 March 2018 that it intended to admit additional evidence they wrote to GOL on 15 March 2018 to object on the basis that Section 34 barred GOL from so doing, and that the BIT Tribunals accordingly had no discretion to admit any additional evidence. Then the plaintiffs say that they made their position clear to the BIT Tribunals on 19 March 2018 when they registered their objection to the admission of additional evidence.

167 At the Pre-Hearing Teleconference on 21 March 2018, the plaintiffs say that they reiterated their position that the introduction of any new evidence/allegation would be a breach of Section 34, what they term the "Frozen Record Agreement", and that they intended to resist any such introduction. They say that in response to GOL's Application to Admit Additional Evidence, their

unequivocal position was that the BIT Tribunals had no discretion to admit GOL's new evidence and were required by Section 34 to dismiss GOL's application.

168 After the BIT Tribunals ruled against the plaintiffs and admitted GOL's new evidence, the plaintiffs submit that they maintained a continuing objection to the admission of further evidence, and continued to rely on Section 34. They say that when GOL applied on 10 August 2018 to admit further evidence in the form of the Noble WS, they sent an email to the BIT Tribunals on 17 August 2018, stating that they "have a continuing objection to the introduction of any testimony of Gus Noble concerning 2015 events… as irrelevant, even considering the Tribunals' general ruling regarding [GOL's] post Settlement Deed evidence". They say that this position was reiterated in their email to the BIT Tribunals dated 20 August 2018, where they stated that "[GOL] has inserted [Mr Angus Noble] into the case with respect to 2015 and later matters, and demands, over [the plaintiffs'] objection, to cross-examine him".

169 In response to GOL's assertion that their position in the 17 August 2018 email was "equivocal" because they did not object to the admission of Mr Baldwin's 8 June Witness Statement, but objected only to the Noble WS, which they claimed was irrelevant, they say that their *ad hoc* consent to admit a single piece of evidence was plainly not an agreement to discard the Frozen Record Agreement in Section 34 entirely. Moreover, in the 17 August 2018 email, the plaintiffs say that they expressly indicated that they had a "continuing objection" to the introduction of post-settlement evidence despite the BIT Tribunals' "general ruling regarding [GOL's] post Settlement Deed evidence". In any event, they say that GOL's contention that the plaintiffs' position was

"equivocal" does not rise to the high threshold of "clear and unequivocal" conduct required for a waiver.

170 The plaintiffs also submit that GOL clearly recognised and acknowledged, at the material time, that the plaintiffs had a continuing objection to the admission of new evidence and so there was no "mutual waiver". They say that on 22 August 2018, GOL wrote to the BIT Tribunals acknowledging that the plaintiffs were maintaining a "continuing objection to the introduction of any testimony of Gus Noble" on the basis of a "complaint about the Tribunals' prior decision to admit additional evidence" and asked the BIT Tribunals to "disregard" the plaintiffs' continuing objection.

171 The plaintiffs submit that their continuing objection was maintained right up to the September 2018 Merits Hearing. They say that in the lead-up to that hearing, GOL requested the attendance of Mr Angus Noble for cross-examination in relation to the Noble WS and on the first day of hearing their counsel reiterated their objection to having Mr Noble testify on such matters.

172 The plaintiffs also say that, on the fifth day, when the BIT Tribunals queried the relevance of Mr Noble's testimony, the plaintiffs responded that the testimony was of no relevance to the proceedings because it "entirely concerns events after the frozen record". They say that GOL's counsel also agreed that Mr Noble's testimony was irrelevant "to the present claims and/or defences considering his involvement post-date the settlement".

173 The plaintiffs say that GOL has not addressed these matters apart from the 17 August 2018 email. Instead, GOL's argument was only that the plaintiffs had agreed to waive the Frozen Record Agreement because they (a) "adduced

four new exhibits" in their Response to GOL's Application for Additional Evidence; (b) introduced additional rebuttal evidence by way of their Application for Rebuttal Evidence; (c) did not object to the introduction of selected paragraphs of Mr Baldwin's witness statement in the GOL SIAC Arbitration; and (d) applied to adduce further evidence during the September 2018 Merits Hearing.

174 In response, the plaintiffs first say that the contention that they had sought to admit "four new exhibits" (*ie*, C-1224, C-1225, C-1226, and C-1227) is misleading as these exhibits were only referred to in support of their arguments in response to GOL's Application for Additional Evidence, and were not admitted into the record simply by virtue of them being cited in argument. C-1226 and C-1227 were only admitted as evidence upon their Application for Rebuttal Evidence and C-1224 and C-1225 did not constitute evidence as C-1224 was the transcript of the Pre-Hearing Teleconference on 28 March 2018 and C-1225 was an index of the new evidence GOL sought admission of pursuant to its Application for Additional Evidence.

175 In relation to their Application for Rebuttal Evidence, the plaintiffs say that this did not evince an intention to waive the Frozen Record Agreement but, rather, they were forced to mitigate their position in the face of a breach of the Frozen Record Agreement. They submit that it is not reasonable to suggest that they should not have sought to respond to the new evidence introduced by GOL, as this would only have prejudiced them further. If they had intended to waive the Frozen Record Agreement, the plaintiffs say that they could have presented their new post-settlement claims and/or evidence to the BIT Tribunals, rather than having to do so by way of separate ICSID arbitrations as a result of the Frozen Record Agreement.

176 In relation to making no objection to the introduction of selected paragraphs of Mr Baldwin's witness statement in the GOL SIAC Arbitration, the plaintiffs submit that they clearly reserved their continuing objection notwithstanding their consent to the admission of a single piece of evidence and they say that GOL recognised the existence of their continuing objection, as described above.

177 In respect of GOL's reference to applications to adduce further evidence during the September 2018 Merits Hearing, the plaintiffs say that no objection was raised by GOL during the Merits Hearing that the plaintiffs' applications to adduce further evidence contradicted their continuing objection maintained up to the that hearing. The plaintiffs say that GOL simply consented to their applications so that the additional evidence was admitted by consent and they submit that an *ad hoc* agreement to admit select pieces of evidence cannot amount to a waiver of the Frozen Record Agreement in its entirety.

178 In the circumstances, the plaintiffs submit that GOL cannot establish that their conduct was consistent only with a waiver of the Frozen Record Agreement or that the plaintiffs, by their conduct, agreed to disregard the Frozen Record Agreement. The plaintiffs say that they duly stated their objections to the admission of new evidence in contravention of Section 34 and maintained those objections right up to the conclusion of the BIT Arbitrations and nothing further could reasonably have been expected of them.

Our decision

179 The underlying issue is whether the plaintiffs, in any event, waived Section 34 because they acted in a manner which is consistent only with Section 34 not precluding the admission of additional evidence into the proceedings of

the BIT Arbitrations. As set out in *First Media* and *The Kanchenjunga*, any purported waiver has to be communicated in clear and unequivocal terms. We have not found it easy to come to an agreed answer to the issue of waiver on the facts of this case.

180 In favour of there being a waiver is the fact that, whilst the plaintiffs contended that Section 34 had that effect on GOL's Application to Admit Additional Evidence, they indicated at the Pre-Hearing Teleconference on 21 March 2018 that, if the BIT Tribunals decided that Section 34 did not preclude the admission of additional evidence, they would themselves seek the admission of additional evidence.

181 As stated in *China Machine* at [102], "[t]he doctrine of waiver only becomes relevant after the relevant non-compliance has been established; the question then is whether the complainant has waived its right to complain about the non-compliance." There is therefore a need to concentrate on the conduct following the BIT Tribunals' decisions to admit the additional evidence in PCA PO 9 and ICSID PO 11. After the BIT Tribunals made their decisions to admit GOL's additional evidence, the plaintiffs made that application to admit additional evidence to rebut GOL's additional evidence. In doing so, it can be said in favour of waiver, that such conduct was clearly inconsistent with Section 34 precluding the BIT Tribunals from admitting additional evidence and was consistent only with the BIT Tribunals being able to admit additional evidence despite Section 34.

182 In particular, as noted above, the plaintiffs did not seek to assert that the BIT Tribunals did not have jurisdiction to decide that Section 34 did not preclude them from admitting additional evidence. Instead, they took the

position that if the BIT Tribunals decided to admit additional evidence, they would apply to admit additional evidence. They did not contend that they were doing so under protest because either the BIT Tribunals did not have jurisdiction or did not have power to admit additional evidence.

183 In addition to applying to admit additional evidence both to rebut GOL's additional evidence and during the hearing, the plaintiffs later only argued grounds of relevance, not preclusion under Section 34, when GOL sought the admission of further evidence in the form of Mr Noble's evidence in LHRE-164, *ie*, the Noble WS.

184 Whilst the plaintiffs submit that they continued to object that the evidence was being admitted contrary to Section 34, it can be said that the support for this submission is weak and there was no protest or assertion that the BIT Tribunals had been wrong. In relation to LHRE-164, the plaintiffs said in the email of 17 August 2018 that they "do have a continuing objection to the introduction of any testimony of Gus Noble concerning 2015 events (including LHRE-164) as *irrelevant*, even considering the Tribunals' general ruling regarding [GOL's] post Settlement Deed evidence" [emphasis added].

185 The plaintiffs also rely on the following passage in the letter of 22 August 2018 by which GOL responded to the email of 17 August 2018:[16]

> In opposition to the admission of [the Noble WS], [plaintiffs] offer nothing more than a single sentence with reference to a 'continuing objection to the introduction of any testimony of Gus Noble'. This 'continuing objection' stems from [plaintiffs'] original opposition to the admission of bribery evidence related to the circumstances surrounding the June 2015 Noble MOU. These Tribunals have already admitted that evidence over the

16 JBOD 8505.

> [plaintiffs'] objection. These Tribunals have also admitted [plaintiffs'] rebuttal evidence (much of it with the consent of [GOL]) on the topic of the 2015 Noble MOU. Because [plaintiffs'] objection does not purport to offer any new or specific reasons why this document should not be admitted, the Tribunals should disregard [plaintiffs'] 'continuing objection'.

186 The plaintiffs submit that this position was reiterated in their letter of 20 August 2018 concerning the allocation of cross-examination time at the Merits Hearing, in which they referred to GOL having "inserted Gus Noble into the case with respect to 2015 and later matters, and demands, over [plaintiffs'] objection, to cross-examine him". At the Merits Hearing, the plaintiffs' counsel made the following statement concerning Mr Noble's evidence:

> The only administrative matter is to put a placeholder in that we have a continuing objection to Mr Noble testifying. He would testify only about events long subsequent to the [Settlement Deed], so we believe it is outside of the frozen record. I understand the tribunal had ruled, I just wanted to note it.

187 In support of there being a waiver, it can be said that a continued objection expressed in the manner described above to the evidence of Mr Noble is, in the light of the plaintiffs' conduct in seeking the admission of additional evidence themselves, completely insufficient to prevent a waiver arising from that conduct. At most, the reservation in relation to Mr Noble's evidence, on its own and without the clear and unequivocal conduct by the plaintiffs, might have been sufficient to prevent a waiver in respect of that evidence.

188 On the other hand, in support of there not being a waiver it can be said that the authorities set a high threshold for establishing waiver which is not met by the conduct of the plaintiffs in this case. It is clear from the decision in *First Media* that the party asserting that there has been a waiver "must therefore meet a high threshold of demonstrating that the adversely affected party's conduct is *only* consistent with waiver and that the purported waiver had been

communicated in clear and unequivocal terms" [emphasis in original] (at [202]). The justification for this high threshold was explained in *The Kanchenjunga* at 398:

> … though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms …

189 Before turning to consider the facts, it should be noted that, although the conduct to look at is that following the alleged breach, the conduct forming the basis of a purported waiver cannot be divorced from its context. Thus, it is important to also consider the context in which the plaintiffs had proceeded to seek to adduce new evidence.

190 It is clear that the plaintiffs objected to the admission of evidence outside of the Frozen Record at the beginning on the basis that the BIT Tribunals lacked discretion to do so pursuant to Section 34. When GOL indicated its intention to apply to admit additional evidence, the plaintiffs communicated its objection to the admission of that evidence to GOL on 15 March 2018 and to the BIT Tribunals on 19 March 2018. They maintained that objection at the Pre-Hearing Teleconference on 21 March 2018 and further filed written submissions setting out its position that Section 34 explicitly barred the admission of additional evidence in mandatory terms which signalled an absence of discretion and required the BIT Tribunals to deny GOL's Application to Admit Additional Evidence.

191 It can be said that the mere fact that the plaintiffs, too, sought to introduce new evidence subsequent to PCA PO 9 and ICSID PO 11 is, in those circumstances, insufficient to establish waiver. After the BIT Tribunals ruled

against the plaintiffs' objection to GOL's Application, the plaintiffs were met with the reality of having to protect their position in the BIT Arbitrations in the face of GOL's new evidence now forming part of the record. It can be argued that it would be unreasonable to expect the plaintiffs not to seek to introduce new evidence to rebut GOL's additional evidence when the BIT Tribunals were clearly of the view that they did have discretion to admit such evidence and in fact admitted GOL's new evidence. On that basis, it could be said that the plaintiffs did not resile from their initial objection and they could and did maintain their objection that Section 34 precluded the BIT Tribunals from admitting evidence outside of the Frozen Record whilst taking practical steps to mitigate their position in the proceedings.

192 Moreover, it can be said that it was not necessary for the plaintiffs to have expressly reserved their position (in order to avoid a finding of waiver) when they subsequently sought to introduce new evidence. Prior to PCA PO 9 and ICSID PO 11, the plaintiffs had communicated to GOL and the BIT Tribunals that, in the event that the BIT Tribunals were to decide that Section 34 did not preclude the admission of additional evidence, they intended to introduce new evidence to protect their position. On 19 March 2018, the plaintiffs wrote to the Tribunal:

> With regard to [GOL]'s request to submit new evidence, *if [GOL]'s proposal were accepted, which it should not be,* [the plaintiffs] would request that [GOL] be required to provide notice of proposed new evidence by March 26, 2018, and that [Sanum/LH] be permitted to oppose by April 23, 2018, and, if the Tribunals allow [GOL] to submit any new evidence, that [the plaintiffs] be permitted to provide notice of rebuttal evidence within 21 days of the Tribunals' admission of any new evidence from [GOL]. [emphasis in original omitted; emphasis added in italics]

193 This position was again set out at the Pre-Hearing Teleconference on 21 March 2018 and the plaintiffs made an application to admit additional evidence to rebut GOL's additional evidence when the BIT Tribunals decided to admit GOL's additional evidence. In this context, seeking to introduce additional information and a failure to expressly reserve their rights when doing so can be said to be insufficient to communicate an election by the plaintiffs to waive their rights in clear and unequivocal terms. Even if their conduct might be consistent with the BIT Tribunals being able to admit additional evidence despite Section 34, it can also be said that it was consistent with the plaintiffs seeking to reasonably protect their position with respect to the matters to be decided by the BIT Tribunals who now had before them GOL's additional evidence, admitted against the objection of the plaintiffs.

194 On this basis, there would be no waiver because the plaintiffs cannot be held to have waived their rights in respect of Section 34 absent clear and unequivocal communication of their election to GOL to that effect. Instead, it would be said that, taken in context, the plaintiffs' conduct subsequent to PCA PO 9 and ICSID PO 11 was consistent with the plaintiffs taking a practical approach to protecting their interests in the proceedings and, therefore, was not only consistent with a waiver of Section 34 which would need to be communicated in clear and unequivocal terms.

195 On those arguments, we are not able to come to a unanimous decision. Two members of the court consider that there was a waiver because the conduct of the plaintiffs was clearly and unequivocally inconsistent with Section 34 precluding the BIT Tribunals from admitting additional evidence and was consistent only with the BIT Tribunals being able to admit additional evidence despite Section 34. The other member of the court considers that there was no

waiver because the conduct was consistent with the plaintiffs protecting their interests, subsequent to the BIT Tribunals' decision to admit additional evidence and therefore did not amount to a waiver of Section 34 in clear and unequivocal terms.

196 The court therefore concludes, by a majority, that the plaintiffs' conduct amounted, in any event, to a waiver of Section 34.

197 The plaintiffs also submit that no waiver could arise, in any event, under the terms of the Settlement Deed. They refer to the terms of Sections 44 and 45 of the Settlement Deed and submit that these prohibit variations other than by way of signed written agreements to that effect. Those provisions state:

> ***Entire Agreement***
>
> 44. This Deed embodies the entire agreement between the Parties relating to the subject matter herein, whether written or oral, and there are no other representations, warranties or agreements between the Parties not contained or referenced in this Deed. This Deed may be amended, supplemented or modified only by a written instrument duly executed by or on behalf of every Party hereto which specifically refers to this Deed.
>
> ***Variation***
>
> 45. No variation of this Deed shall be effective unless made in writing and signed by the Parties. Unless expressly agreed, no variation shall constitute a general waiver of any provisions of this Deed, nor shall it affect any rights, obligations or liabilities under or pursuant to this Deed which have already accrued up to the date of variation, and the rights and obligations of each Party under or pursuant to this Deed shall remain in full force and effect, except and only to the extent that they are so varied.

198 On that basis, the plaintiffs submit that, as there was no signed agreement in writing to dispense with Section 34, there can be no waiver of that provision.

199 We do not consider that Sections 44 and 45 are relevant to the position on waiver. First, Section 44 initially contains an entire agreement clause and there is no suggestion that this part of the provision applies. Nor is there a contention that the terms of Section 34 were amended, supplemented or modified so as to require a written instrument as required by the second part of Section 44. Secondly, Section 45 applies to a variation to the Settlement Deed. Again, there is no suggestion that the terms of Section 34 were varied. It is only if there has been a variation to the Settlement Deed that Section 45 states that "[u]nless expressly agreed, no variation shall constitute a general waiver of any provisions of this Deed…". Section 45 is dealing with a case where there has been a variation in the form of a written agreement and in that case the variation is not, unless agreed, to constitute a general waiver of any provisions of the Deed. That provision does not say that there cannot, by the operation of law, be a waiver of the terms of the Settlement Deed, including Section 34.

200 Accordingly, we do not consider that the terms of Sections 44 and 45 of the Settlement Deed prevent GOL from relying on a mutual waiver of Section 34, which, by a majority, we find occurred from the conduct of the parties.

Prejudice

201 As the plaintiffs accept, to set aside the BIT Awards under Art 34(2)(*a*)(iv), they would have had to have shown that they had suffered prejudice because of the admission of the additional evidence, if there had been a breach of the agreed arbitral procedure. On the facts of this case, even if we had found that there was a breach, we would have found that the plaintiffs have not established the necessary prejudice to justify setting aside the BIT Awards.

202 As set out in *Triulzi* at [54] and [64]–[66] and *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 at [51], an award will be set aside under Art 34(2)(*a*)(iv) only if the procedural breach in question is "serious" or "material". In assessing the seriousness and materiality of the breach, a "relevant factor" in the materiality enquiry is that of "prejudice": see *Triulzi* at [64]–[66].

203 In explaining the test for prejudice, the Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure*") at [54] stated (in relation to breaches of natural justice) that:

> … Nevertheless, it is important to bear in mind that it is never in the interest of the court, much less its role, to assume the function of the arbitral tribunal. To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (*cf Soh Beng Tee* at [86]). [emphasis in original]

204 That statement has been applied to cases of breaches of arbitral procedure in *AMZ v AXX* [2016] 1 SLR 549 at [103]–[104] where it was stated at [105]:

> It is therefore for the party seeking to set aside the award on each of these grounds to show not only that the award is tainted in a particular respect by a procedural defect, but that it has also suffered actual prejudice by reason of that particular procedural defect because the tribunal *could reasonably have* arrived at a different result if not for that defect. [emphasis in original]

205 The plaintiffs submit that the exclusion of GOL's additional evidence would and not just could have reasonably made a difference to the outcome in the BIT Awards. It says first that the BIT Tribunals relied heavily, if not exclusively, on GOL's additional evidence in making the Four Findings which led in turn to their conclusion that the plaintiffs acted in manifest bad faith and were not entitled to treaty relief. Secondly, the plaintiffs also submit that the BIT Tribunals substantially relied on GOL's additional evidence to conclude that the plaintiffs' claims lacked merit.

206 GOL submits that the plaintiffs have failed to demonstrate, on the requisite three levels, that the additional evidence could reasonably have made a difference to the outcome. First, in respect of each of the Four Findings, the plaintiffs have not properly addressed the effect of the other evidence on each of the Four Findings and demonstrated that the BIT Tribunals could reasonably have arrived at different conclusions without the additional evidence. Second, the plaintiffs have not shown that the BIT Tribunals, based on the surviving findings, could reasonably have reached a different finding on whether the plaintiffs acted in manifest bad faith or, third, that the BIT Tribunals could reasonably have changed their mind on the merits. In the following, we address the arguments in relation to the Four Findings and the Tribunals' findings of manifest bad faith, before turning to the Tribunals' decision on the merits.

The Four Findings

(1) The First Finding: The Alleged E&Y Bribe

207 The plaintiffs refer to the BIT Tribunals' analysis at paras 127–138 of the PCA Award and paras 128–139 of the ICSID Award. They submit that the First Finding relied heavily on the BDO Report. They say that it was the basis for the BIT Tribunals' findings of a motive to stop the E&Y Audit, which underpinned the First Finding. They contend that the BIT Tribunals found support for these solely by reference to unspecified parts of the BDO Report, as apparent from para 135 of the PCA Award and para 136 of ICSID Award. They say that, otherwise, there was no evidence to contradict the assertion that the Alleged E&Y Bribe was in fact a loan, consistent with the fact that a US$15,000 portion of the sum paid to Madam Sengkeo had been repaid.

208 The plaintiffs say that there was evidence that they were glad that an audit was being done by E&Y and wanted it to continue. They refer to a letter dated 12 July 2012 sent by Mr Clay Crawford on Savan Vegas's behalf to 11 of GOL's highest level officials (including, the Head of the PMO, the Minister of Finance, the Minister of Planning and Investments, and the Head of the State Audit Organization) to protest the early termination of the E&Y Audit and to demand its reactivation. They also refer to Mr Clay Crawford's oral evidence that he and Mr Baldwin were pleased that there was an audit being done by E&Y, and that they wanted the E&Y Audit to continue, which corroborated Mr Baldwin's evidence. The plaintiffs say that, even before the E&Y Audit was called at the behest of the Government, Sanum had written to ST Group indicating its willingness for E&Y to meet with Savan Vegas's auditors to verify the accounting practices at Savan Vegas, as set out in a 9 November 2011 letter from Sanum to ST Group.

209 The plaintiffs also refer to Mr Baldwin's evidence that the US$300,000 paid to Madam Sengkeo was a loan. They also refer to para 296 of the Reply in the PCA Arbitration and para 293 of the Reply in the ICSID Arbitration which summarise the documentary evidence contradicting GOL's case on the Alleged E&Y Bribe.

210 The plaintiffs say that GOL officials at all levels knew about the E&Y Audit, the fact that it stopped and the particular official who stopped it. Had the E&Y Audit been stopped by virtue of the Alleged E&Y Bribe, the plaintiffs submit that GOL could and would have promptly restarted it and pursued the official who instructed E&Y to stop the audit, but it did not. The plaintiffs say that GOL was not happy with the interim report E&Y had prepared as it did not support the GOL tax department's lawsuit.

211 The plaintiffs say that the BIT Tribunals decided to rely solely on unspecified parts of the BDO Report to come to their conclusions on motive which indicates the weight placed on it and disregarded, without mentioning, the two rebuttal reports, the Navigant and Duff & Phelps Reports, that the plaintiffs had submitted in the separate GOL SIAC Arbitration, contradicting key conclusions reached in the BDO Report and admitted pursuant to PCA PO 12 and ICSID PO 14.

212 Even on GOL's own view, the plaintiffs say that the state of the pleadings and evidence prior to the Settlement was merely that Mr Baldwin had directed the transfer of US$300,000 to Madam Sengkeo and that E&Y had informed the GOL committee overseeing the E&Y Audit that it was ordered to refrain from receiving any additional information and/or documents from Savan Vegas.

213 Those facts alone, the plaintiffs submit, would not have supported the First Finding as they were consistent with the plaintiffs' position that Mr Baldwin had transferred the sums to Madam Sengkeo as a loan due to her need for funds. Indeed, the BIT Tribunals noted that there was no evidence to contradict Mr Baldwin's evidence of Madam Sengkeo's need for funds.

214 GOL submits that it had already thoroughly canvassed in its pleadings the issue of the E&Y Bribe, being a $300,000 bribe paid to Madam Sengkeo to stop the E&Y Audit and a further US$29,400 for Madam Sengkeo's facilitation of the Alleged E&Y Bribe. It refers to its Statement of Defense and Counterclaims at paras 76–78:

> 76. On July 12, 2012, three men walked into the ANZ bank on Lane Xang Avenue in Vientiane. One was carrying a suitcase. The first is Bruce Bentley Douglas. Mr. Douglas is shown on the Savan Vegas payroll records from early 2012 through December 2012. Mr. Baldwin copied him in the email of March 22, 2012, which [plaintiffs] introduced at the recent Paris hearing. …
>
> 77. The suitcase these men carried into the ANZ bank contained $300,000 in cash notes. These bank notes were deposited into the ANZ bank account of Ms. Sengkeo Phimmasone. Bruce B Douglas signed the deposit slip.
>
> 78. Over the next month in July and August 2012, Ms. Sengkeo withdrew the $300,000 in cash in varying amounts. She also wired $29,400 to her own account in New York. Her first two $10,000 transfers were made on July 12 and July 13.

215 GOL also refers to exhibits which included evidence that (a) Mr Douglas was employed by Mr Baldwin; (b) that the ANZ bank deposit slip was signed by Mr Douglas showing that Mr Douglas deposited the US$300,000 into Madam Sengkeo's bank account; and (c) by Madam Sengkeo's bank statement for July 2012, that she thereafter withdrew the US$300,000 in various amounts, including US$29,000 or 10% which was transferred to her own bank account in New York.

216 GOL therefore submits that there was already ample evidence of the Alleged E&Y Bribe in the record before the introduction of the BDO Report.

217 Further, GOL submits that the BIT Tribunals' reasoning in relation to First Finding focused on "Mr. Baldwin's explanation of the US$300,000 payment to the Madam Sengkeo" simply being "not credible". They further explained that it was "clear on the evidence that Mr. Baldwin and his CFO, Mr. Clay Crawford, were concerned about the threat to Sanum's business posed by the E&Y audit", and that it was "simply not plausible, as the [plaintiffs] argue, that the E&Y audit was stopped because [GOL] officials had concluded that E&Y had failed to find incriminating evidence". The BIT Tribunals also cited the hearing transcripts as reflecting Mr Baldwin's failure and complete inability to explain why a payment of US$300,000 was paid to Madam Sengkeo. In contrast, there was only a passing mention to the BDO Report in the BIT Tribunals' analysis.

218 GOL therefore submits that the First Finding was based on the lack of any credibility in Mr Baldwin's testimonies and not on the BDO Report.

219 We have reviewed those contentions and the terms of BIT Tribunals' findings and consider that GOL is correct in its contentions. It is evident that the main basis of the finding on the Alleged E&Y Bribe was the evidence of the payments and the circumstances in which they were made. Whilst the BDO Report provided support for a reason why the bribe was made, we do not consider that the BIT Tribunals could or would reasonably have arrived at a different result absent the BDO Report, given the other overwhelming evidence.

(2) Second Finding: The Alleged Thanaleng Bribe

220 The plaintiffs say that the sole document which the BIT Tribunals relied on to arrive at the Second Finding was a statement of Mr Anousith's ANZ bank account dated 25 August 2016 ("Mr Anousith's Bank Statement") which GOL introduced as part of the Bribery/Fraud Allegations Material in the Revived Proceedings. They also say that GOL accepts that the Second Finding was arrived at in reliance on Mr Anousith's Bank Statement, as well as transcripts of the 26 January 2017 hearing in the GOL SIAC Arbitration ("the GOL SIAC Transcripts") containing Mr Baldwin's evidence of his dealings with Mr Anousith which was introduced into the record after the Settlement Deed was entered into.

221 GOL submits that the issue of the Thanaleng Bribe was canvassed thoroughly on cross-examination of Mr Baldwin during the Merits Hearing and the BIT Tribunals found that there was no explanation of the work for which almost US$200,000 was paid to Mr Anousith and deposited in his personal bank account. In particular, Mr Baldwin testified on cross-examination that he "didn't tell [Mr Anousith] to do anything with that money … it's his money to do with as he wishes". GOL says that it was on this basis and the fact that there was no documentation of any alleged consultancy, that the BIT Tribunals reached the Second Finding. Thus, it says that the plaintiffs cannot be said to have been prejudiced by GOL's introduction of Mr Anousith's Bank Statement.

222 In our view, Mr Anousith's Bank Statement was an important factor on which the BIT Tribunals based their conclusions on the Thanaleng Bribe and therefore conclude that the BIT Tribunals could reasonably have arrived at a different result on this contention if not for the admission of Mr Anousith's Bank Statement.

(3) Third Finding: The Alleged Witness Bribe

223 The plaintiffs says that the BIT Tribunals relied on the First Finding to arrive at the Third Finding, on the basis that they found that the US$575,000 payment to Madam Sengkeo in May 2014 bristled with red flags, given that it came on top of the previous loan for the Alleged E&Y Bribe. They also found that the coincidence of the timing of "loans" of US$875,000 (less one repayment of US$15,000) to Madam Sengkeo and the plaintiffs' urgent need for GOL's intervention on its behalf at critical junctures of its business (the termination of the E&Y Audit and the attempt to shut down the Thanaleng Club) compelled an inference of Mr Baldwin's unlawful conduct and through Mr Baldwin, the culpability and bad faith of both plaintiffs, on whose behalf he acted.

224 The BIT Tribunals also based the Third Finding on its finding that Mr Baldwin intended to sidestep the Tribunals' denial of permission to advance a loan to Madam Sengkeo by arranging for the Witness Bribe from a third party. This, in the BIT Tribunals' mind, resulted in Madam Sengkeo not appearing to testify for the Government at a hearing on the merits in Singapore in June 2014.

225 The plaintiffs submit that all of this came from the record of GOL's counsel's cross-examination of Mr Baldwin in GOL SIAC Transcripts, which the BIT Tribunals allowed GOL to admit as additional evidence.

226 The BIT Tribunals had in their BIT Awards referred to their recollection that, at a pre-hearing conference on 14 May 2014, the plaintiffs applied to the Tribunals to allow Mr Baldwin to make a personal loan to Madam Sengkeo, which request the Tribunals denied and their further recollection that Madam Sengkeo subsequently failed to attend to testify for GOL when the initial hearing on the merits proceeded in Singapore in June 2014. The plaintiffs

submit that these recollections came from extracts from the GOL SIAC Transcripts. The plaintiffs say, further, that those recollections were wrong and that at a provisional measures hearing before the ICSID (not the PCA) Tribunal in London (not in Singapore), the ICSID Tribunal declined to take any decision on a request by Mr Baldwin to guarantee certain loans to Madam Sengkeo and GOL confirmed that Madam Sengkeo had already refused to provide the testimony GOL sought and that GOL was no longer seeking her testimony.

227 The plaintiffs say that Mr Baldwin was only cross-examined on the Alleged Witness Bribe because GOL was allowed to admit evidence relating to the Bribe and his evidence was only referred to by the BIT Tribunals as part of its recitation of the Respondent's Argument. They submit that what was ultimately dispositive as to the BIT Tribunals' findings concerning the Third Finding was not Mr Baldwin's evidence but the First Finding and the BIT Tribunals' erroneous recollections of its own proceedings and rulings, based on the GOL SIAC Transcripts.

228 GOL says that, whilst the BIT Awards may have included an incorrect date, the hearing where the ICSID Tribunal declined to allow Mr Baldwin to make a "personal loan" to Madam Sengkeo took place before the ICSID Tribunal on 12 May 2014. The plaintiffs made a request to allow Mr Baldwin to facilitate a loan to Madam Sengkeo of US$575,000 which the ICSID Tribunal declined. As explained in the ICSID Award at para 150 and the PCA Award at para 149, the ICSID Tribunal denied permission for the US$575,000 loan given the "importance and sensitivity of Madam Sengkeo's evidence potentially to be given at the merits hearing". GOL says that the BIT Tribunals' recollection that Madam Sengkeo subsequently failed to attend to testify for GOL when the initial hearing on the merits proceeded in Singapore in June 2014 was briefly

mentioned only in the narrative sections of the BIT Awards and was not part of the BIT Tribunals' reasoning for the Third Finding.

229 GOL says that the plaintiffs' assertion that Mr Baldwin was only cross-examined on the Alleged Witness Bribe because GOL was allowed to admit evidence relating to that bribe is wrong as GOL had placed the issue of the Alleged Witness Bribe before the BIT Tribunals in its Rejoinders dated 4 June 2014 before the Settlement Deed, where it argued, *inter alia*, that Mr Baldwin was paying Madam Sengkeo US$575,000 to remain silent and that paying a material witness was the crime of witness tampering.

230 We have already found that the BIT Tribunals could not reasonably have arrived at a different result on the First Finding absent the BDO Report and so that finding cannot affect this finding. In relation to the GOL SIAC Transcripts, we have reviewed the Tribunal's findings and find no basis for saying that the BIT Tribunals could reasonably have arrived at a different result but for those transcripts. The matter had been raised before the Settlement Deed and there was clear evidence for the BIT Tribunals to come to their conclusion without those transcripts.

(4) Fourth Finding: The Alleged MaxGaming Fraud

231 The plaintiffs submit that the BIT Tribunals' finding concerning the Alleged MaxGaming Fraud was only raised by GOL in the Revived Proceedings and was entirely based on the additional evidence, including unspecified parts of the BDO Report and the testimony of Mr Angus Noble.

232 The plaintiffs say that the BIT Tribunals, at para 165 of the ICSID Award and para 164 of the PCA Award, accepted GOL's contention that the

MaxGaming offer was a fraudulent scheme perpetrated by the plaintiffs in order to regain control of Savan Vegas from GOL and that the plaintiffs had an interest in doing so to put a halt to GOL's access to the books of Savan Vegas and records which were the target of a GOL audit into alleged wrongdoing at Savan Vegas including money laundering and embezzlement.

233 GOL says that the plaintiffs had ample opportunity to address the issues concerning the Alleged MaxGaming Fraud by way of their Application to Adduce Fresh Evidence dated 30 May 2018 and their Application to Admit Additional Evidence dated 16 July 2018. It therefore submits that the Plaintiffs were not prejudiced by the introduction of the evidence relating to the Alleged MaxGaming Fraud.

234 We have reviewed the BIT Tribunals' findings and conclude that the BIT Tribunals could reasonably have arrived at a different result on the Fourth Finding, in the absence of the additional evidence admitted by the BIT Tribunals.

235 Accordingly, it is our view that the BIT Tribunals could reasonably have reached a different conclusion on two of the Four Findings. However, we consider that the BIT Tribunals, could not have reasonably arrived at a different conclusion on the plaintiffs' conduct in terms of illegality, corruption, bribery and/or fraud in the face of the First and Third Findings.

Findings on the merits

(1) Plaintiffs' position

236 The plaintiffs also contend that the BIT Tribunals' assessment of the merits of their treaty claims was made with substantial reliance on GOL's new

evidence or was tainted by the Four Findings and their finding of manifest bad faith on the plaintiffs' part.

237 First, they submit that it is clear that the BIT Tribunals accorded importance to the Four Findings and the finding of manifest bad faith in relation to the plaintiffs' treaty claims. They also say that the BIT Tribunals also devoted a substantial portion of the BIT Awards to discussing the Four Findings and the finding of manifest bad faith.

238 Secondly, the plaintiffs submit that the BIT Tribunals' rulings on the merits of their claims were negatively and materially affected by the BIT Tribunals' inappropriate conclusions concerning Mr Baldwin's credibility and honesty based on the additional evidence admitted contrary to Section 34. They say that GOL does not dispute that this evidence did undermine Mr Baldwin's credibility and honesty but wrongly seeks to suggest that Mr Baldwin's credibility had nothing to do with the merits of the plaintiffs' claims. They submit that Mr Baldwin was their key witness on the merits and that it must follow from the BIT Tribunals' negative perception of Mr Baldwin's credibility and honesty that they paid little or no regard to his evidence, as in fact happened. They say that this contrasts with GOL's Application for Additional Evidence where GOL stated that Bribery/Fraud Allegations Materials should be admitted as they were relevant and material not only to the claims and defences of the parties, but to the accuracy and truthfulness of Mr Baldwin's testimony on issues across the spectrum of claims before these Tribunals. The plaintiffs refer to a number of claims to establish this point.

(A) THANALENG CLUB

239 The plaintiffs say that the BIT Tribunals concluded that their claim for expropriation of the Thanaleng Club lacked merit based on its finding that the evidence did not establish any improper interference by GOL in the Lao court proceedings and, in doing so, entirely disregarded Mr Baldwin's evidence on that issue. In failing to acknowledge or credit Mr Baldwin's evidence, the plaintiffs say that the BIT Tribunals were influenced by negative conclusions regarding Mr Baldwin's good faith and honesty based on the additional evidence.

(B) PAKSONG VEGAS

240 The plaintiffs submit that the PCA Tribunal dismissed Sanum's claim for expropriation in respect of the Paksong Vegas project, as it found that Sanum had lost its rights under the PV PDA because it breached its terms, which required Sanum to build and operate a US$25m hotel casino and golf resort in the Paksong district, that is Paksong Vegas. They say that the finding that Sanum breached the terms of the PV PDA was in turn based on its findings which were however influenced by the PCA Tribunal's perception that Sanum was acting in manifest bad faith which, in turn, was a consequence of GOL's additional evidence. They refer to paras 247–248 of the PCA Award and say that the findings also disregarded Mr Baldwin's evidence. Again, they submit that, in failing to acknowledge or credit Mr Baldwin's testimony on the issue, the PCA Tribunal evidently and unavoidably was influenced by its negative conclusions regarding Mr Baldwin's good faith and honesty based on GOL's additional evidence.

(C) PAKSAN CLUB

241 The plaintiffs say that the PCA Tribunal concluded that GOL's order on 11 March 2011 directing the closure of the Paksan Club in three days did not constitute an unlawful taking as there was no documentary evidence that GOL had created any legitimate expectation in the plaintiffs that the licence in respect of the Paksan Club would be renewed or that it may operate *de facto* as if it had such a licence.

242 They say that this completely disregarded Mr Baldwin's evidence about repeated assurances by a number of GOL officials in the months preceding 11 March 2011 that Sanum could continue operating the Paksan Club without the need to do anything further, which assurances were made following Sanum's receipt of notices from the Bolikhamxay provincial government to shut down the Paksan Club until the requisite licences were obtained.

(D) THAKHAEK CLUB

243 The plaintiffs also say that the PCA Tribunal concluded that GOL's act of revocation on 2 March 2011 of the licence which the Ministry of Information and Culture ("MIC") had granted Sanum on 21 February 2011 to open a slot club was not an act of expropriation of the Thakhaek investment but was instead done with good and sufficient cause. They submit that the findings made were however linked to the Tribunal's perception of the plaintiffs as bad faith investors, premised on the Four Findings and made in disregard of Mr Baldwin's evidence that Sanum was not aware in 2011 that only the PMO and not the MIC had the authority to grant licences.

(E) LH'S OTHER NON-EXPROPRIATION CLAIMS

244 The plaintiffs say that the ICSID Tribunal's dismissal of LH's other non-expropriation claims was based on its finding that LH had exhibited manifest bad faith and they refer to paras 233–238 and 278–280 of the ICSID Award.

245 The plaintiffs therefore submit that this shows that it is not possible to separate GOL's threshold defence of bribery, corruption and bad faith from the merits of the plaintiffs' treaty claims and assert that the BIT Tribunals had independently determined these without reliance on the Four Findings and the finding that the plaintiffs were guilty of manifest bad faith. Nor, submit the plaintiffs, can reliance be placed on the plaintiffs' ability to introduce an additional 35 rebuttal exhibits to reduce the material impact of GOL's additional evidence.

(2) Defendant's position

246 GOL rejects the plaintiffs' contention that they were also prejudiced by the BIT Tribunals' admission of GOL's additional evidence because it negatively impacted the BIT Tribunals' assessment and decision to dismiss the treaty claims on the merits. GOL submits that this was not the basis of the BIT Tribunals' reasoning in the BIT Awards.

247 First, GOL refers to the plaintiffs' reliance on para 104 of the PCA Award and para 106 of the ICSID Award and submits that, when read with the preceding paragraphs, the BIT Tribunals were dealing with the parties' dispute on GOL's threshold defence on the plaintiffs' bribery, corruption and bad faith and not the BIT Tribunals' substantive reasoning on the treaty claims. Further, GOL refers to their reliance on para 171 of the PCA Award and para 232 of the

ICSID Award and submits that this was an accurate summary of the plaintiffs' position but does not show that the BIT Tribunals used findings made on GOL's threshold defence to dismiss the treaty claims on the merits.

248 In relation to para 7 of the ICSID Award, GOL says that the plaintiffs cite only part of that paragraph and that the ICSID Tribunal clearly held that LH failed to prove its claims when it said that "[LH] has failed to demonstrate any legitimate expectations or establish other violations of the BIT including fair and equitable treatment." At paras 8 and 9 of the ICSID Award, GOL says that the ICSID Tribunal concluded unequivocally that in "all instances [LH] has failed to meet its burden of proof" and thus dismissed its claims. Having failed in all instances to prove its claims, GOL submits that it is wrong for the plaintiffs to contend that the claims only failed because of the further evidence adduced by GOL for its threshold defence.

249 As for the paragraphs of the ICSID Award on Paksong Vegas and the Paksan Club, GOL submits that the plaintiffs wrongly characterised the findings as a dismissal of LH's expropriation claims when the findings were made for the purpose of GOL's threshold defence. GOL also says that the plaintiffs' reliance on para 191 and 207 of the ICSID Award is also misplaced.

250 Secondly, in response to the plaintiffs' contention that the BIT Tribunals' rulings were affected because GOL's new evidence made Mr Baldwin appear dishonest and/or lacking in credibility, GOL submits that there is no basis for contending that because they did not accept Mr Baldwin's answers in relation to GOL's new evidence, they were unable to assess and evaluate his evidence on other points relating to the substantive treaty claims independently of that evidence.

251 GOL refers to the PCA Award at para 173 and the ICSID Award at para 235 and says that the BIT Tribunals also found that Mr Baldwin was an "argumentative witness" and that his testimony was not credible, on the following basis:

> The Tribunal listened carefully to the testimony of Mr. John Baldwin and found him to be an argumentative witness who preferred evasion to candour. Much of his testimony was simply not credible. He proceeded in bad faith from the outset in assuring the Government that he intended to invest US $25 million at the Paksong site, which by his own account was likely to be highly unprofitable.

252 GOL submits that the BIT Tribunals carefully considered Mr Baldwin's evidence and decided that they could place little or no weight on it. It submits that it cannot be said that but for GOL's additional evidence, the BIT Tribunals could have found Mr Baldwin to be a credible witness and that the plaintiffs would have established their treaty claims.

253 Thirdly, GOL submits that the plaintiffs' assertion that the BIT Tribunals "disregarded" or failed to "acknowledge or credit" Mr Baldwin's testimony is a thinly disguised attempt to argue that the BIT Tribunals made errors of fact. In addition, it submits that the BIT Tribunals did not simply "disregard" Mr Baldwin's testimony but considered and tested his evidence against the other documentary evidence.

(A) THANALENG CLUB

254 In relation to the plaintiffs' contention that the BIT Tribunals disregarded Mr Baldwin's testimony that GOL's Justice Minister Chaleune Yiapaoheu admitted to him that GOL had interfered in the private Laotian legal proceedings between ST Group and Sanum, GOL submits that there is no

documentary evidence to support Mr Baldwin's testimony. Rather, GOL says that Sanum did avail itself of the four-step dispute resolution mechanism under the Master Agreement between itself and ST Group, and prevailed in an SIAC arbitration against ST Group. Therefore it says that the BIT Tribunals rightly concluded that there was no persuasive evidence that the alleged interference of GOL in the proceeding of a lower court interfered with the steps taken by the plaintiffs to exercise their rights under the Master Agreement and, in particular, their recourse to SIAC arbitration.

(B) PAKSONG VEGAS

255 GOL refers to the plaintiffs' reliance on paras 171 and 247–248 of the PCA Award to contend that the dismissal of the Paksong Vegas claim was influenced by the PCA Tribunal's perception that Sanum was acting in manifest bad faith but submits that those paragraphs do not contain the PCA Tribunal's analysis on Paksong Vegas.

256 GOL refers to Sanum's claim in the PCA Arbitration that GOL expropriated its investment in Paksong Vegas by terminating the PV PDA. GOL says that its position was that Sanum delayed the project and did not build the promised hotel and casino at Paksong as Sanum wanted to do so at another site (Chong Mek) which Sanum thought would be more profitable. GOL says that, at paras 210–218 of the PCA Award, the PCA Tribunal carefully assessed Mr Baldwin's evidence and at para 212 held that:

> … As confirmed by Mr. Baldwin's testimony at the Hearing, Mr. Baldwin wanted to develop a site at Chong Mek. He agreed that the monopoly rights were limited to the Paksong development area and did not include Chong Mek, 'unless the government agreed to modify this. The way it's written right now, it does not include Chong Mek but it doesn't say we can't ask for modifications.' Mr. Baldwin also confirmed that he really knew

> that the Government policy was not to approve a move to Chong Mek.

257 GOL submits that the PCA Tribunal tested Mr Baldwin's testimony against the documentary evidence, particularly the minutes of a meeting that was held on 30 January 2009 and at paras 215–218 of the PCA Award found that the plaintiffs lost their rights under the PV PDA because it breached its terms and, by its own admission, the Paksong site could not be developed. GOL says that the 30 January 2009 minutes of meeting was a contemporaneous document that contained Paksong Vegas's admissions, which corroborated Mr Baldwin's concessions. That evidence undermined Mr Baldwin's evidence that Sanum was willing to and did work on Paksong Vegas and GOL says that the PCA Tribunal rightly dismissed this claim on the merits.

(C) PAKSAN CLUB

258 GOL says that the PCA Tribunal held that there was no documentary evidence that GOL "had created any legitimate expectation" that the Paksan Club licence would be renewed or that the plaintiffs could continue to operate based on the alleged *de facto* licence. All the plaintiffs could point to, submits GOL, was Mr Baldwin's evidence that certain GOL's officials had given him assurances that GOL could continue operating the slot club without a licence, which was not supported by any documentary evidence. In those circumstances, GOL submits that the incontrovertible and undisputed evidence was that Sanum continued to operate the Paksan Club "beyond the term of its license" and Sanum had failed to show that "Savan Vegas had a right to the license renewal or even that it attempted to renew the license". On that basis, GOL submits that the claims were correctly dismissed on the merits.

(D) THAKHAEK CLUB

259 GOL says that the plaintiffs selectively cite from the PCA Award to contend that the PCA Tribunal dismissed the claim based on the PCA Tribunal's perception of the plaintiffs as bad faith investors and in disregard of Mr Baldwin's evidence. However, GOL submits that it is evident from paras 243–246 and 249–250 of the PCA Award that Sanum's claims failed because Sanum acquired no rights in respect of the Thakhaek Club. The PCA Tribunal found that the "investment" was merely a "commercial possibility that never reached the stage of agreement" and, since the investment never came into legal existence, there was no expropriation.

(E) LH'S OTHER NON-EXPROPRIATION CLAIMS

260 GOL submits that the ICSID Tribunal dismissed LH's non-expropriation claims on the merits and the plaintiffs' bad faith was merely an additional reason to justify the dismissal. GOL refers to the ICSID Tribunal's conclusion at para 269 that LH had not established any breach of contractual (or Treaty) obligations in respect of Savan Vegas by GOL. It says that this conclusion was clearly not dependent on LH's acts of corruption and bribery. It also refers to para 280 of the ICSID Award and says that this makes it clear that the ICSID Tribunal would have dismissed LH's claims on the merits in any case, and the findings on the plaintiffs' bad faith were simply further reasons to deny reliefs under the treaties. That paragraph states:

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

261 GOL therefore submits that the plaintiffs are wrong to contend that the BIT Tribunals' decision to admit GOL's additional evidence, amounting to 14 documents in proceedings with over 1,100 factual exhibits, caused the failure of the plaintiffs' case and should be rejected.

(3) Our decision

262 We do not consider that there is any basis for the plaintiffs' contention that the BIT Tribunals' conclusions on the merits were made on the basis of substantial reliance on GOL's new evidence or was tainted by the Four Findings and the BIT Tribunals' finding of manifest bad faith on the plaintiffs' part.

263 First, the passages in the BIT Awards relied on by the plaintiffs do not establish their contention that the BIT Tribunals' assessment of the merits of their treaty claims was made with substantial reliance on GOL's new evidence or was tainted by the Four Findings and their finding of manifest bad faith on the plaintiffs' part.

264 On a proper reading of the BIT Awards, the passages on which the plaintiffs rely reveal that the BIT Tribunals were in fact dealing with the parties' dispute on GOL's defence based on the plaintiffs' bribery, corruption and bad faith and not on the BIT Tribunals' substantive reasoning on the treaty claims. The BIT Tribunals made separate and independent findings regarding the conduct of the plaintiffs and the merits of the treaty claims. In our view there is no basis for the contention that the BIT Tribunals made findings, on the merits of the claims, other than properly considering those claims on the merits.

265 Secondly, we do not accept that the BIT Tribunals' rulings on the merits of the claims were negatively and materially affected by the BIT Tribunals'

conclusions concerning Mr Baldwin's credibility and honesty, based on GOL's additional evidence. As shown by the particular matters relied on by the plaintiffs, the BIT Tribunals assessed Mr Baldwin's evidence by considering its consistency with or support from the documentary or other evidence and the inherent credibility or lack of credibility of that evidence.

266 In relation to the Thanaleng Club, the BIT Tribunals found that the evidence did not establish any improper interference by GOL in the Lao court proceedings. Mr Baldwin's testimony that GOL's Justice Minister Chaleune Yiapaoheu admitted to him that the Government had interfered in the private Laotian legal proceedings between ST and Sanum was not supported by any documentary evidence. Further, as GOL points out, Sanum did avail itself of the four-step dispute resolution mechanism under the Master Agreement and prevailed in a SIAC arbitration against ST Group.

267 The BIT Tribunals' conclusion that there was no persuasive evidence that the alleged interference of GOL in the proceeding of a lower court was supported by the steps taken by the plaintiffs to exercise their rights under the Master Agreement and, in particular, their recourse to SIAC arbitration. The BIT Tribunals' conclusion was clearly not based on or influenced by negative conclusions regarding Mr Baldwin's good faith and honesty based on the additional evidence.

268 In relation to the Paksong Vegas project, the PCA Tribunal dismissed Sanum's claim for expropriation as it found that Sanum had lost its rights under the PV PDA because it breached its terms. We do not consider that there is any basis for saying that the finding that Sanum breached the terms of the PV PDA

was influenced by the PCA Tribunal's perception that Sanum was acting in manifest bad faith based on GOL's additional evidence.

269 Whilst the plaintiffs say that the findings disregarded Mr Baldwin's evidence, in fact the PCA Tribunal accepted Mr Baldwin's evidence that he wanted to develop a site at Chong Mek and that the monopoly rights were limited to the Paksong development area and did not include Chong Mek. That evidence was supported by minutes of a meeting on 30 January 2009. Based on that evidence, which undermined Sanum's case that it was willing to and did work on Paksong Vegas, the PCA Tribunal found that Sanum delayed the project and did not build the promised hotel and casino at Paksong as Sanum wanted to do so at Chong Mek because Sanum thought that would be more profitable. Therefore, there is no basis for the plaintiffs' contention that the decision on the merits was influenced by the PCA Tribunal's findings of manifest bad faith based on GOL's additional evidence.

270 In relation to the Paksan Club, the PCA Tribunal concluded that GOL's order on 11 March 2011 directing the closure of the Paksan Club in three days did not constitute an unlawful taking as there was no documentary evidence that GOL had created any legitimate expectation in the plaintiffs that the licence in respect of the Paksan Club would be renewed or that it may operate *de facto* as if it had such a licence. There was undisputed evidence that Sanum continued to operate the Paksan Club beyond the term of its licence and Sanum failed to show that Savan Vegas had a right to the licence renewal or even that it attempted to renew the licence.

271 Whilst Mr Baldwin's evidence was that certain GOL's officials had given him assurances that GOL could continue operating the Paksan Club

without a licence, this was not supported by any documentary evidence. Given the undisputed facts, the finding of the PCA Tribunal was evidently based on the usual basis of assessing Mr Baldwin's evidence and there is no basis for the plaintiffs to contend that the PCA Tribunal was influenced by its conclusions regarding Mr Baldwin's good faith and honesty based on GOL's additional evidence.

272 In relation to the Thakhaek Investment the PCA Tribunal found that GOL's act of revocation of the licence which the MIC had granted Sanum in 2011 to open a slot club was not an act of expropriation of the Thakhaek investment but was done with good and sufficient cause. The plaintiffs say that this finding was made in disregard of Mr Baldwin's evidence that Sanum was not aware in 2011 that only the PMO and not the MIC had the authority to grant licences. We have considered the relevant parts of the BIT Awards and find that GOL is correct.

273 The basis of the BIT Tribunals' findings was that Sanum acquired no rights in Thakhaek and the investment was, in fact, merely a commercial possibility that never reached the stage of agreement so there was no expropriation. On that basis, we reject the plaintiffs' submission that the BIT Tribunals' finding was linked to the Tribunals' perception of the plaintiffs as bad faith investors, premised on the Four Findings and therefore made in disregard of Mr Baldwin's evidence.

274 In relation to LH's other non-expropriation claims, the plaintiffs say these were dismissed on the basis of the finding that LH had exhibited manifest bad faith. Whilst the passages in the ICSID Award referred to by the plaintiffs contain the ICSID Tribunal's findings on good faith, it is clear from paras 269

and 280 that the ICSID Tribunal dismissed LH's non-expropriation claims on the merits and the plaintiffs' bad faith was merely an additional reason to justify the dismissal.

275 The ICSID Tribunal found that LH had not established any breach of contractual (or Treaty) obligations in respect of Savan Vegas by the GOL and it is clear that the ICSID Tribunal dismissed LH's claims on the merits and the findings on bad faith were further reasons to deny relief under the Treaties.

276 We therefore reject the plaintiffs' contentions that the BIT Tribunals' determinations of the merits of the plaintiffs' treaty claims were affected by the Four Findings and the finding that the plaintiffs were guilty of manifest bad faith.

Conclusion on prejudice

277 Based on the above conclusions, we have come to the conclusion that, even if the BIT Tribunals did not, contrary to our conclusions, have the power to admit additional evidence in the light of Section 34, the plaintiffs have not established that the admission of that additional evidence caused prejudice.

278 We have concluded that the BIT Tribunals could not reasonably have arrived at a different overall result, without the additional evidence admitted by them.

279 First, in relation to the Four Findings, whilst we have held that in respect of the Second and Fourth Findings the BIT Tribunals could reasonably have arrived at a different finding without the additional evidence, it is impossible to come to the conclusion that the BIT Tribunals could have arrived at a different

conclusion on the broader question of the plaintiffs' conduct in terms of illegality, corruption, bribery and/or fraud, without those two findings. The other evidence, including the First and Third Findings, clearly established that conduct and that evidence would not have been any the less persuasive in the absence of the Second and Fourth Findings relating to the Alleged Thanaleng Bribe and the Alleged MaxGaming Fraud.

280 Secondly, in relation to the findings of the merits, the BIT Tribunals reached conclusions on the merits independently of the findings on GOL's defence based on the plaintiffs' conduct in terms of illegality, corruption, bribery and/or fraud.

281 Thirdly, the findings which the BIT Tribunals made in relation to the evidence of Mr Baldwin were, on analysis, based on the BIT Tribunals' assessment of his evidence by considering its consistency with or support from the documentary or other evidence and the inherent credibility or lack of credibility of that evidence. In any event, even if the BIT Tribunals had been influenced by the plaintiffs' conduct in terms of illegality, corruption, bribery and/or fraud, it cannot be concluded that the BIT Tribunals could have reached different conclusions without GOL's additional evidence.

Conclusion on Art 34(2)(a)(iv) of the Model Law

282 For the reasons set out above, we therefore conclude that the parties, including the plaintiffs, gave the BIT Tribunals jurisdiction to determine the interpretation of Section 34 of the Settlement Deed and the plaintiffs cannot now seek to set aside the BIT Awards on the basis that the procedure followed by the BIT Tribunals (based on their interpretation of Section 34) was not in accordance with the agreement of the parties. Even if this court could, on this

application under Art 34(2)(*a*)(iv) of the Model Law, consider the interpretation of Section 34, the BIT Tribunals' findings on the meaning of Section 34 under New York Law were findings of fact which would be binding on this court. Further, if this court had to determine the matter *de novo*, we would have come to the same conclusion as the BIT Tribunals on the basis of either construing the ICSID Additional Facility and UNCITRAL Rules and Section 34, or the broader duty of arbitral tribunals in relation to evidence pertaining to illegality, corruption, bribery and/or fraud.

283 We therefore conclude that the BIT Tribunals were entitled to admit the additional evidence in deciding on GOL's Application to Admit Additional Evidence. In any event, by a majority, we find that the plaintiffs by their conduct waived any failure by the BIT Tribunals to comply with the agreed arbitral procedure. We are unanimously of the view, however, that the provisions of Section 44 and 45 of the Settlement Deed do not prevent that waiver.

284 Finally, even if the BIT Tribunals had breached an agreed procedure by admitting GOL's additional evidence, we would have found that the plaintiffs failed to establish any prejudice which would be necessary for the breach to have been material.

285 Accordingly, we dismiss the plaintiffs' application to set aside the BIT Awards under Art 34(2)(*a*)(iv) of the Model Law based on their contention that the arbitral procedure was not in accordance with the agreement of the parties.

Reasonable opportunity to be heard

Plaintiffs' overall position

286 The plaintiffs submit that they were not afforded a reasonable opportunity to be heard on determinations made in the BIT Awards as provided by Art 34(2)(*a*)(ii) Model Law and/or s 24(*b*) of the IAA. Article 34(2)(*a*)(ii) of the Model Law states:

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> > (*a*) the party making the application furnishes proof that:
> >
> > > …
> > >
> > > (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was *otherwise unable to present his case*; …
>
> [emphasis added]

287 Section 24(*b*) IAA provides additional grounds for setting aside an arbitral award where:

> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

288 The plaintiffs contend that a breach of the rules of natural justice and a deprivation for a party's right to be heard occurs where a tribunal decides a case on a basis that has not been raised or contemplated by the parties and it refers to *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [30]. Thus, it submits that arbitrators should not base their decisions on matters not submitted or argued before them, or take an unreasonable initiative without the parties' involvement, citing *Soh Beng Tee* at

[65(a)]. Nor can tribunals adopt a chain of reasoning which one party has not been given a reasonable opportunity to address and it cites *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro*") at [147].

289 The plaintiffs contend that they were not afforded a reasonable opportunity to present their case on six grounds:

(a) The plaintiffs did not have reasonable notice of the BIT Tribunals' intention to rely on the BDO Report as disclosing "serious financial illegalities" and as evidence of a "powerful motive" on the part of the plaintiffs to stop the E&Y Audit in circumstances where this did not form part of GOL's case. Thus, the plaintiffs did not have a reasonable opportunity to fully address the BDO Report or cross-examine its maker and suffered actual prejudice.

(b) The BIT Tribunal's refusal to admit the Kurlantzick Report impaired the plaintiffs' ability to respond to the new Bribery/Fraud Allegations Material.

(c) The BIT Tribunals surprisingly attributed to GOL arguments on the functions of the Laotian National Assembly which had never been made and then relied on these arguments to arrive at the Second Finding on the Alleged Thanaleng Bribe, which prejudiced the plaintiffs.

(d) The BIT Tribunals made a surprise finding that Madam Sengkeo had been bribed into not testifying for GOL, having relied on the GOL SIAC Transcripts which contained erroneous procedural history.

(e) A surprise finding was made in relation to the Alleged MaxGaming Fraud in reliance of Mr Noble's testimony, in contravention of the parties' agreed position that it was irrelevant.

(f) GOL never argued that "bad faith" alone could disentitle the plaintiffs from treaty relief. Thus, the BIT Tribunals' conclusion that a finding of bad faith alone, established on a balance of probabilities, could disentitle the plaintiffs from relief was reached without consulting the parties on the proper legal position and thereby depriving the plaintiffs of the opportunity to submit that such a proposition was unsupported in law.

290 We elaborate further below on the arguments raised in relation to each of the specific grounds.

Defendant's overall position

291 GOL submits that the rule of natural justice that parties must be given a reasonable opportunity to be heard, which the plaintiffs rely on, is "not an unqualified right to present any and all submissions and evidence at any time of a party's choosing no matter what" and it refers to *China Machine* at [103]. It contends that, contrary to the plaintiffs' submission, the threshold to establish a breach of natural justice is a high one and that it was not met in relation to the plaintiffs' arguments that the BIT Tribunals (a) ignored issues; and (b) did not give any notice that they might rely on certain evidence in a manner that was not based on either side's case or in contradiction to the evidence in the record.

292 In relation to the first argument, GOL submits that the inference must be clear and virtually inescapable before a court will conclude that the arbitral

tribunal failed to consider an important issue. No breach of natural justice is suffered if the arbitral tribunal merely misunderstood the party's case, chose not to deal with a particular point because it was deemed unnecessary, simply preferred the other party's case, or arrived at a decision on it without articulating its reasoning. With respect to the second argument, even if it were determined that a certain issue was not alive during the arbitration, that *per se* is insufficient to lead to the conclusion that there was a breach of natural justice. It is a question of degree as to how unforeseen the impugned decision was, such that it could persuasively be said that the parties were truly deprived of an opportunity to argue it. Further, GOL contends that the plaintiffs have not shown that they suffered prejudice by reason of the breach. Actual or real prejudice is not suffered where there is evidence that "there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight" and it refers to *L W Infrastructure* at [54].

293 In GOL's submission, none of the six bases or issues identified by the plaintiffs demonstrate a denial of a reasonable opportunity to be heard nor that prejudice was suffered:

> (a) The plaintiffs were aware that the BDO Report was relevant to the allegations of illegal, bad faith and fraudulent conduct and had successfully asked to adduce four new exhibits for the sole purpose of challenging the BDO Report on its conclusions that the Savan Vegas was financially corrupt. The BIT Tribunals had put the plaintiffs on clear and express notice that they would consider the BDO Report insofar as it related to the allegation of bribery and corruption in PCA PO 9 and ICSID PO 11 dated 25 June 2018. In any event, the plaintiffs had not shown prejudice as cross-examining the maker of the BDO Report

would have made no difference in circumstances where his testimony and cross-examination from the GOL SIAC Arbitration had been put before the BIT Tribunals.

(b) The plaintiffs' argument with respect to the Kurlantzick Report was merely that the BIT Tribunals were wrong to assess the report as irrelevant, which is not a ground for setting aside.

(c) The BIT Tribunals' finding in relation to the functions of the Laotian National Assembly was the result of their conclusion that the plaintiffs did not establish that Mr Anousith had a mandate to lobby the National Assembly. It was not a simple adoption of GOL's assertions on this issue, which were not referenced in the BIT Tribunals' reasoning.

(d) The BIT Tribunals' Third Finding on the Alleged Witness Bribe was made on the facts properly put before them. In arriving at the Third Finding, the BIT Tribunals did not rely on nor refer to any failure by Madam Sengkeo to attend the initial hearings on the merits scheduled in 2014.

(e) There was no agreement between the parties that Mr Noble's testimony was irrelevant. GOL's position was only that his testimony by way of witness statements in the GOL SIAC Arbitration was irrelevant because the BIT Tribunals had heard for themselves Mr Noble's cross-examination during the Merits Hearing.

(f) GOL submitted that it had explicitly pleaded in its defence that illegality, bribery, fraud and bad faith would wholly disentitle the plaintiffs to relief. The plaintiffs had the full opportunity to respond, and did in fact respond, to those arguments.

294 As with the plaintiffs' arguments, we elaborate further below on the specific arguments raised in relation to each ground.

295 In addition, GOL contends that the BIT Tribunals had assessed the plaintiffs' treaty claims and determined that the claims were not supported by the evidence. As the BIT Tribunals' reasoning was separate and independent from the Four Findings, no prejudice was suffered by the plaintiffs.

296 We now turn to consider the grounds relied on by the plaintiffs.

BDO Report

Plaintiffs' arguments

297 In relation to the BDO Report, the plaintiffs submit that, after the BDO Report was admitted as a result of GOL's Application for Additional Evidence, the BIT Tribunals relied on it in a manner different from that by GOL during the BIT Arbitrations. They say that the BIT Tribunals relied on the BDO Report to come to the conclusion that the plaintiffs had acted in "manifest bad faith" and that the BDO Report disclosed "serious financial illegalities" in Savan Vegas's books, which gave the plaintiffs a "powerful motive" to stop the E&Y Audit by bribing government officials.

298 The BDO Report was however, the plaintiffs say, only introduced by GOL in aid of its Embezzlement Counterclaim and, in particular, to establish the quantum of that Counterclaim.

299 The plaintiffs also say that GOL did not clarify whether it intended to rely on the BDO Report to advance its numerous allegations of bribery/corruption following the BIT Tribunals' admission of the BDO Report.

In PCA PO 9 and ICSID PO 11, the plaintiffs say, the BIT Tribunals vaguely admitted the BDO Report "insofar as it deals with the subject matter or otherwise assists in the resolution of [GOL's] allegations of bribery and corruption but is otherwise excluded from the record for the purposes of the Singapore hearing commencing 3 September 2018 [*ie*, the Merits Hearing]". They say that it was never GOL's case that the BDO Report was to deal with "the subject matter of bribery and corruption". As GOL did not explain how it would rely on the BDO Report, the plaintiffs say they understood that the BDO Report was not being used to advance any allegation of bribery/corruption in the BIT Arbitrations.

300 During oral submissions and cross-examination at the Merits Hearing, GOL did not once refer to the BDO Report and that this was unsurprising as it confirmed it would not pursue the Embezzlement Counterclaim. In those circumstances, the plaintiffs say that they did not fully address the BIT Tribunals on the BDO Report during the Merits Hearing but the BIT Tribunals unilaterally held that the BDO Report was evidence of a "powerful motive" on the part of the plaintiffs to stop the E&Y Audit.

301 Had the plaintiffs been on notice that the BIT Tribunals were intending to rely on the BDO Report in this manner, they say that they would have (a) reminded the BIT Tribunals that such an argument did not form part of GOL's case; (b) sought leave to file written submissions addressing the BDO Report in greater detail; and/or (c) sought permission to cross-examine the maker of the BDO Report, one Mr Yeo, at the Merits Hearing in September 2018. They submit that such steps would reasonably have made a difference to the outcome of the BIT Arbitrations, given that the BDO Report was undermined in cross-

examination in another set of treaty arbitrations concerning the plaintiffs and GOL.

302 In the circumstances, given that it has never been part of GOL's case in the BIT Arbitrations that the BDO Report could be relied on to evidence its numerous allegations of bribery/corruption, the plaintiffs say that there was no need for them to take any further steps to address the BDO Report when it was adduced for the specific purpose of GOL's Counterclaim which was later abandoned.

303 The plaintiffs also contest GOL's assertion that Mr Yeo's testimony in the GOL SIAC Arbitration was admitted as evidence. They say that those transcripts were not part of the record in the BIT Arbitrations, having been introduced by neither party. They say that the BDO Report was undermined in cross-examination in the subsequent treaty arbitrations and, in particular, it was shown that Mr Yeo did not independently verify the credibility of sources for the BDO Report.

Defendant's arguments

304 GOL contests the plaintiffs' contentions. It says, first, that BDO was retained by it to conduct a forensic audit of Savan Vegas in 2016 and later to offer expert testimony related to findings from that audit, as disclosed to the plaintiffs. Secondly, GOL says that the plaintiffs were put on notice that GOL had intended to rely on the BDO Report to establish the plaintiffs' engagement in fraudulent activities in their operation of Savan Vegas and it refers to paras 52 to 53 of its Application for Additional Evidence where it stated that the BDO Report "establishes in detail the outrageous financial practices used by [the

plaintiffs] to bilk Savan Vegas of profit over the course of many years in a clearly fraudulent effort to steal from the minority shareholders".

305 GOL therefore submits that the plaintiffs cannot assert that the BDO Report did not strictly concern any of the allegations of bribery and fraud as they knew that the BDO Report was relevant to the plaintiffs' illegal, bad faith and fraudulent conduct.

306 Further, GOL says that the plaintiffs did address the BIT Tribunals on the BDO Report and successfully asked to admit four new exhibits in its Response to GOL's Application to Adduce Fresh Evidence, for the purpose of challenging the BDO Report on its conclusions that the plaintiffs' operation of Savan Vegas was financially corrupt.

307 In relation to the plaintiffs' contention that GOL had sought to introduce the BDO Report in support of the quantum its counterclaims, GOL says that the BIT Tribunals had put the plaintiffs on notice that they would consider the BDO Report in relation to the GOL's allegations of bribery and corruption, in PCA PO 9 and ICSID PO 11 admitting the BDO Report when they stated:

> … Apart from the bribery allegations, there is no compelling justification for admission into the Record of the BDO 'forensic audit' in the face of clause 34. Accordingly, the BDO forensic audit will be *admitted insofar as it deals with the subject matter or otherwise assists in the resolution of the Government's allegations of bribery and corruption but is otherwise excluded from the record* for purposes of the Singapore hearing commencing 3 September 2018. [emphasis added]

308 GOL says that the BIT Tribunals' conclusion that there were "financial skeletons in the Savan Vegas books later uncovered by the BDO audit" was based on GOL's case that the BDO Report would establish "the outrageous

financial practices used by Mr Baldwin and Sanum to bilk Savan Vegas of profit over the course of many years in a clearly fraudulent effort to steal from the minority shareholders".

309 In relation to the plaintiffs' complaint that the BDO Report did not concern any of GOL's bribery/fraud allegations and therefore the plaintiffs were not put on notice as to how the BIT Tribunals might view the report, GOL submits that, even if the plaintiffs had previously thought that GOL was only relying on the BDO Report to establish the quantum of its Embezzlement Counterclaim, the plaintiffs were fully aware by 25 June 2018 that the BIT Tribunals were admitting and considering the BDO Report solely for their analysis of GOL's bribery and corruption allegations.

310 In relation to the plaintiffs' contention that they were denied the right to cross-examine its maker, Mr Yeo, GOL says that the plaintiffs raised no objection to the form of the BDO Report nor did they ask to cross-examine Mr Yeo, although they could have done so. GOL disputes the plaintiffs' assertion that the BDO Report was subsequently undermined. In any event, GOL says that the plaintiffs cross-examined Mr Yeo in January 2017 in the GOL SIAC Arbitration on his expert report which was substantially similar to his report adduced in the BIT Arbitrations and that evidence was also admitted as evidence during GOL's Application to Admit Additional Evidence and was before the BIT Tribunals during the Merits Hearing.

Our decision

311 We consider that GOL is substantially correct in its contentions. Whilst GOL's Application to Admit Additional Evidence referred to the BDO Report as being relevant to GOL's Counterclaim, it was clear that it was also relevant

to GOL's case on the plaintiffs' fraudulent conduct. Any doubt that the plaintiffs might have had would have been dispelled by the clear basis on which the BIT Tribunals admitted the BDO Report "insofar as it deals with the subject matter or otherwise assists in the resolution of [GOL's] allegations of bribery and corruption but is otherwise excluded… for purposes of the Singapore hearing …" (see above at [307]).

312 Given that unequivocal statement, the plaintiffs cannot contend that the BIT Tribunals' reliance on the BDO Report was unexpected. They were clearly on notice before the Merits Hearing of the relevance of the BDO Report and cannot now complain that the tactical decisions they took in relation to that evidence, including not calling the author of the BDO Report, now led to prejudice when it was used for the very purpose for which it was admitted. The plaintiffs were permitted to put in documents to rebut the BDO Report and did so. Having seen the evidence given by Mr Yeo in the other arbitration, we do not consider that that evidence was undermined or that Mr Yeo's evidence could have made any difference to the BIT Tribunal's conclusion. We therefore reject the plaintiffs' ground based on the BDO Report.

Kurlantzick Report

Plaintiffs' arguments

313 The plaintiffs contend that the BIT Tribunals unreasonably curtailed their ability to present expert evidence in support of their case by refusing to admit the Kurlantzick Report into the record. That report was an expert opinion commissioned by the plaintiffs to provide a non-partisan opinion, as the report itself states at [13] that it provides:

> … [An] expert assessment of extent of corruption in Laos and in the GOL … and how structural factors in Laotian politics and business facilitate corruption and impact the independence (or lack thereof) of the judiciary from the executive branch and particularly from powerful members of the Politburo, and their families. I was also asked to explain the use of cash in Laos and the reason for such use.

314 GOL was permitted to introduce additional evidence in relation to allegations of bribery, corruption and fraud on the part of the plaintiffs and the plaintiffs say that they therefore applied to admit the Kurlantzick Report as being directly relevant to those allegations and an understanding of the corrupt nature of the Lao Government, the lack of the rule of law in Laos and the environment in which the plaintiffs were forced to conduct business, including tolerance of corruption in Laos.

315 However, the BIT Tribunals refused to admit the report, saying:

> The Tribunal repeats that it is not conducting an inquiry into the general state of affairs in Laos. The issue is whether the [plaintiffs'] investments at issue in the Arbitration were obtained corruptly. The Report of Mr Kurlantzick would add a set of broad controversies beyond the permitted Exceptional Issues. If the Kurlantzick Report is admitted, the [GOL] would be entitled to respond with its own report, and perhaps rejoinders etc. after that. The corruption issue has been part of the [GOL's] case throughout the arbitration. A number of the fact witnesses can speak to the 'cash economy' issue. If the [plaintiffs] thought an expert Kurlantzick-type Report was necessary it ought not to have waited to act until the rejoinder stage of a fresh evidence application little more than a month before the hearing on the merits. The Kurlantzick Report is not admitted.

316 The plaintiffs submit that the BIT Tribunals' refusal to admit the Kurlantzick Report adversely affected their ability to respond to GOL's additional evidence concerning allegations of bribery and corruption introduced

by GOL. They say that the BIT Tribunals should have admitted the report at that stage after admitting the additional evidence by GOL.

317 While GOL contends that the Kurlantzick Report offered no opinions as to the facts before the BIT Tribunals and the plaintiffs had already introduced some 30 exhibits on the same subject, the plaintiffs submit that evidence of commercial practice in Laos by an expert would have a higher level of persuasiveness. They submit that such expert evidence could have made a difference in explaining that it was GOL who was attempting to intimidate Madam Sengkeo into giving evidence and that there was nothing suspicious about cash payments to the plaintiffs' consultants, Madam Sengkeo and Mr Anousith, so as to countervail allegations of bribery or corruption by the plaintiffs.

318 In response to GOL's contention that the BIT Tribunal's gave the plaintiffs a fair hearing on the issue of whether to admit the Kurlantzick Report, the plaintiffs submit that an arbitral tribunal's decision is not immune to scrutiny simply because the arbitral tribunal had considered a procedural issue and preferred one party's case. They refer to *CBP v CBS* [2020] SGHC 23 where the court set aside an award on the basis that the arbitral tribunal denied a party its right of a fair opportunity to present its case by preventing it from calling witnesses, even though the parties had addressed the tribunal on the issue of whether witnesses should be called and the tribunal had ruled against a party.

Defendant's arguments

319 GOL submits that this alleged "breach of natural justice" is simply a contention that the BIT Tribunals were wrong to disagree with the plaintiffs and assess the Kurlantzick Report as irrelevant. It says that the BIT Tribunals

applied their minds to the issue of whether the plaintiffs should be allowed to introduce the Kurlantzick Report and concluded that it was not relevant to the proceedings. The plaintiffs had a full opportunity to present their case on why the Kurlantzick Report should be included as evidence in the proceedings.

320 GOL had objected to the admission of the Kurlantzick Report on the basis that it lacked credibility, being written by an individual with no discernible experience in Laos and that it was irrelevant, because Mr Kurlantzick offered only a general opinion of corruption in Laos, without knowledge of the facts and disputes in the BIT Arbitrations. The plaintiffs were then able to and did respond to GOL's submissions. Whilst the plaintiffs may be dissatisfied that the BIT Tribunals agreed with GOL's submissions and decided not to allow the Kurlantzick Report into evidence, GOL submits that there is no breach of natural justice where an arbitral tribunal had simply preferred one party's case.

321 In any event, GOL contends that the plaintiffs did not suffer any prejudice as the Kurlantzick Report was irrelevant and immaterial and the 30 exhibits made no difference to the outcome.

Our decision

322 This is not a case where there was any breach of the rules of natural justice as the plaintiffs were given a proper opportunity to make submissions on whether the BIT Tribunals should admit the Kurlantzick Report and it was decided that, for the reasons given, it should not be admitted. That decision is not open to challenge.

323 Whilst there may be cases where the decision of an arbitral tribunal means that a party is unable to present its case, that is not the case here. The

Kurlantzick Report provided general evidence and we see no basis on which it could have made a difference to the outcome of the case. The examples given by the plaintiffs are wholly unpersuasive. In no way did the absence of the Kurlantzick Report mean that the plaintiffs could not present their case. We therefore reject the plaintiffs' ground based on the Kurlantzick Report.

Functions of the Laotian National Assembly

Plaintiffs' arguments

324 The plaintiffs submit that an arbitral tribunal has to grant each party reasonable notice of the case to which it is expected to respond and cannot adopt a chain of reasoning which one party has not been given a reasonable opportunity to address. They refer to *JVL Agro* at [147]. They say that they were not given reasonable notice of the case which they were expected to meet because the BIT Tribunals attributed arguments to GOL which had never been made and then relied on these arguments to arrive at the Second Finding on the Alleged Thanaleng Bribe.

325 The plaintiffs' case was that Mr Anousith was not paid to bribe but was paid to lobby the Laotian National Assembly. In finding that such an argument was "far-fetched", the plaintiffs submit that the BIT Tribunals relied on arguments that the Laotian National Assembly had no executive function and that only a Government Minister would have operational authority to issue a stop order against the Thanaleng Club. The plaintiffs say that no such argument was raised by GOL at any time during the course of the BIT Arbitrations.

326 In his opening statement, GOL's counsel made the assertion that the Laotian National Assembly could not shut down a slot club but did not say that

this was because the Laotian National Assembly had no authority to do so and, in any event, the plaintiffs say that this assertion was not backed by any evidence.

327 The plaintiffs dispute GOL's contention that they ought to have objected to GOL's counsel's bare assertions. They say they could not have known that the BIT Tribunals would rely on the remarks made by GOL's counsel in their decisions, much less for a point which was not contended for. They refer to the fact that the BIT Tribunals confirmed at the Merits Hearing, that any evidence from the Bar would not be accepted.

328 The plaintiffs submit that, if the BIT Tribunals had given them an opportunity to address the issue of whether the Laotian National Assembly had executive function and the operational authority to issue a stop order against the Thanaleng Club, they could have made submissions and adduced further authorities or expert testimony on this point and, at the very least, could reasonably have persuaded the BIT Tribunals to desist from making such a finding, which it then relied on to address the Alleged Thanaleng Bribe.

329 The plaintiffs dispute GOL's contention that they were not prejudiced because the BIT Tribunals made the Second Finding, that the Alleged Thanaleng Bribe was "more likely than not" made, on the basis that the plaintiffs had no documentary support besides bare allegations. Although there was no documentation of any consultancy in relation to Mr Anousith's engagement, the BIT Tribunals accepted that it was not unusual for consultants to insist on a success fee as part of their remuneration notwithstanding that there was no agreement to that effect.

330 Contrary to GOL's contention that they had the opportunity to be heard in relation to the functions of the Laotian National Assembly after the first day of the Merits Hearing, the plaintiffs submit that they did not have an opportunity to be heard because GOL never argued that the Laotian National Assembly had no authority to shut down a slot club.

331 The plaintiffs also say that, contrary to GOL's submission, the lack of documentation or explanation of Mr Anousith's work was not determinative. As the BIT Tribunals observed, despite the alleged payment of bribes, the Thanaleng Club was not shut down. The plaintiffs say that it could only have been the BIT Tribunals' consideration of the functions of the Laotian National Assembly, and not an alleged lack of documentary evidence or explanation, which tipped the scales against them.

Defendant's arguments

332 GOL says that, in the first place, the BIT Tribunals did not simply adopt GOL's bare assertions that the Laotian National Assembly has no executive function. In fact, GOL submits that the BIT Tribunals rejected the plaintiffs' case because that case was nothing but a bare assertion which they failed to establish. GOL refers to Mr Baldwin's evidence where he acknowledged at the Merits Hearing that he could not explain how or why the Laotian National Assembly would get involved in such an executive action. GOL submits that it was upon consideration of Mr Baldwin's testimony and the fact that there was no documentation of any consultancy and no explanation of the work for which almost US$200,000 were paid to Mr Anousith and deposited in his personal bank account, that the BIT Tribunals concluded that the plaintiffs' contention about a mandate to lobby the Laotian National Assembly seemed far-fetched.

333 GOL also submits that, in any case, the plaintiffs' supporting affidavits filed in these proceedings recognise that they had the opportunity to present contrary evidence and authorities on record. In that affidavit, the plaintiffs say that they would have taken steps to address the BIT Tribunals "including by *reminding* the Tribunals of the contrary evidence and authorities on record" [emphasis added]. Consequently, GOL submits that it is difficult to see how the plaintiffs can credibly assert that they had no opportunity to be heard on this issue. In particular, in relation to the statements of GOL's counsel as to the functions of the Laotian National Assembly, GOL says that the plaintiffs had the opportunity to object or respond to GOL's assertions over the course of the rest of the hearing, whether by reminding the BIT Tribunals of the contrary evidence and authorities on record or otherwise. However, the plaintiffs never did.

334 In any event, GOL submits that the position that the Laotian National Assembly had no executive function and only a Government Minister would have operational authority to issue a stop order against the Thanaleng Club was not determinative of BIT Tribunals' Second Finding that it was more likely than not that a bribe was paid to an unidentified Government official or officials in an unsuccessful effort to advance the plaintiffs' agenda at the Thanaleng Club.

335 GOL says that it is clear from the BIT Tribunals' reasoning that they relied heavily on the fact that there was no documentation of any consultancy and no explanation of Mr Anousith's work. The BIT Tribunals further reasoned that the "mandate to lobby the 'National Assembly' seems far-fetched". GOL submits that it was the plaintiffs' failure to support its assertion that Mr Anousith received fees to lobby the Laotian National Assembly that led to the Second

Finding and it refers to the PCA Award at para 147 and the ICSID Award at para 148 where it was stated:

> Once again, the payment to Mr. Anousith is deeply suspicious. There is no documentation of any consultancy. There is no explanation of the work for which almost $200,000 were paid to him and deposited in his personal bank account. The mandate to lobby the 'National Assembly' seems far-fetched. Moreover, despite the alleged payment of bribes, the Thanaleng Slot Club was not shut down. In the circumstances, the Tribunal is unable to find 'clear and convincing evidence' that a bribe was made or even offered through Mr. Anousith. However, on the lower 'probabilities' standard, the Tribunal concludes that it is more likely than not that a bribe was paid to an unidentified Government official or officials in an unsuccessful effort to advance the Claimants' agenda at the Thanaleng Slot Club.

336 In the circumstances, irrespective of whether the plaintiffs had the opportunity to address GOL's position that the Laotian National Assembly had no executive function, GOL submits that the plaintiffs did not suffer any prejudice as the main premise of the BIT Tribunals' Second Finding regarding the Alleged Thanaleng Bribe was the plaintiffs' inability to satisfactorily explain and substantiate the US$200,000 payment to Mr Anousith.

Our decision

337 We have considered the BIT Tribunals' decision and find that there was clearly an issue in the proceedings as to what the payment to Mr Anousith was for and how a payment to lobby the Laotian National Assembly would lead to a stop order being issued against the Thanaleng Club. Mr Baldwin was wholly unable to explain what the National Assembly would do, and we are not surprised that the BIT Tribunals came to the conclusion that the mandate to lobby the National Assembly seemed far-fetched.

338 We do not agree with the plaintiffs' submissions that it could only have been the BIT Tribunals' consideration of the functions of the Laotian National Assembly and not an alleged lack of documentary evidence or explanation, which tipped the scales against them. Whilst the BIT Tribunals referred to GOL's submission that the "National Assembly had no executive function" and that "only a Government Minister would have operational authority to issue a stop order against the Thanaleng Slot Club", that was not the basis for their decision.

339 Rather, they found Mr Baldwin's evidence that the US$190,000 was paid to Mr Anousith under a mandate to lobby the Laotian National Assembly "far-fetched". That was not because of the functions of the National Assembly or the authority of a Government Minister. It was because they found that the payment to Mr Anousith was "deeply suspicious", there was no documentation of any consultancy, and there was no explanation of the work for which almost US$200,000 was paid to him and deposited in his personal bank account.

340 In any event, the plaintiffs were evidently aware of the need for an explanation of what lobbying the Laotian National Assembly could achieve in the context of Mr Baldwin's evidence that the money was paid for that purpose. Therefore, even if the BIT Tribunals had based their decision on the unlikelihood of the National Assembly rather than a Government Minister being able to issue a stop order, the plaintiffs could not complain that any such conclusion by the BIT Tribunals was outside the scope of the issues which the plaintiffs could have been expected to deal with. There would have been no breach of the rules of natural justice even if the BIT Tribunals had come to a conclusion on that issue. We therefore reject the plaintiffs' ground based on the functions of the Laotian National Assembly.

Erroneous procedural history

Plaintiffs' arguments

341 The plaintiffs submit that BIT Tribunals' finding that Madam Sengkeo had been bribed into absenting herself as a witness was based on a non-existent procedural history. They say that the BIT Tribunals arrived at the Third Finding concerning the Alleged Witness Bribe by reference to their "recollection" that at a pre-hearing conference on 14 May 2014 the plaintiffs applied to allow Mr Baldwin to make a "personal loan" to Madam Sengkeo, which request the BIT Tribunals "declined" and "denied" and their further "recollection" that Madam Sengkeo subsequently failed to attend to testify for GOL when the "initial hearing on the merits proceeded in Singapore in June 2014" and therefore that "Mr Baldwin clearly intended to sidestep the Tribunal's denial of permission by arranging for the [Alleged Witness Bribe] from a third party".

342 As already set out at [226] above, the plaintiffs submit that all of these recollections were entirely fictional. They say that had they known that the BIT Tribunals might rely on the GOL SIAC Transcripts in disregard of the actual procedural history, they would have taken steps to correct the BIT Tribunals' erroneous recollections.

343 The plaintiffs submit that, even if Madam Sengkeo's failure to attend the non-existent "hearing on the merits scheduled in 2014" was only in the narrative sections, this does not mean that it did not form part of the BIT Tribunals' chain of reasoning. Indeed, the plaintiffs submit that the BIT Tribunals' reliance on Madam Sengkeo's purported failure to attend is implicit in its reasoning because, if Madam Sengkeo had appeared to give evidence on behalf of GOL, the purpose of the bribe for Madam Sengkeo not to testify would

not have been fulfilled and the making of the Third Finding would not have been at all possible. The plaintiffs submit that this could reasonably have made a difference to the BIT Awards.

Defendant's arguments

344 GOL submits that the plaintiffs' position is incorrect. GOL says that the 14 May 2014 pre-hearing conference was not "entirely fictional" as alleged by the plaintiffs. Whilst the narrative sections of the BIT Awards included an incorrect date, the hearing was not a fiction. The hearing did in fact take place before the ICSID Tribunal on 12 May 2014, when Sanum made a request to allow Mr Baldwin to facilitate a loan to Madam Sengkeo of US$575,000 and they refer to the transcript of the May 2014 hearing.

345 GOL says that at the 12 May 2014 hearing, Sanum's counsel stated that Sanum and LH suspected that GOL wanted Madam Sengkeo to sign a witness statement admitting to the payments and that they were intended for bribes. As outlined in the BIT Awards, GOL says that the ICSID Tribunal declined to give its permission for a US$575,000 loan from Mr Baldwin to Madam Sengkeo given the "importance and sensitivity of Madam Sengkeo's evidence potentially to be given at the merits hearing". After the 12 May 2014 hearing, GOL says that it again placed this issue before the BIT Tribunals in its Rejoinders, both dated 4 June 2014. GOL therefore submits that this issue was squarely before the BIT Tribunals during the merits phase in 2014 and within the scope of cross-examination of Mr Baldwin during the September 2018 Merits Hearing. During that cross-examination, Mr Baldwin testified, as he had in the prior GOL SIAC Arbitration merits hearing in January 2017, that despite the ICSID Tribunal's denial of his request to facilitate a "loan" to a potential witness, he had arranged a payment of US$575,000 to Madam Sengkeo in 2014. Mr Baldwin had also

testified there was no loan documentation whatsoever and no repayments between September 2014 and September 2018.

346 GOL says that the BIT Tribunals concluded that, on the facts properly put before them and on a balance of probabilities, the payment of US$575,000 was not a legitimate loan. There were no loan documents of any kind and no evidence of any loan repayments more than four years after the "loan" was made to Madam Sengkeo. GOL submits that it was well within the BIT Tribunals' mandates to conclude on a balance of probabilities that Madam Sengkeo "was paid to secure her loyalty and to avoid testifying on behalf of the Government, thereby obstructing justice".

347 Contrary to the plaintiffs' case, GOL says that, in arriving at the Third Finding, the BIT Tribunals did not rely on nor refer to any failure by Madam Sengkeo to attend the initial hearings on the merits scheduled in 2014. It was mentioned briefly only in the narrative sections of the BIT Awards, but not in the Tribunals' reasoning and, it submits, was irrelevant to the BIT Tribunals' reasoning for the Third Finding.

348 Even if the BIT Tribunals had misapprehended material facts and relied on incorrect facts in their reasoning, GOL submits that this would go towards the correctness of their findings and would not be a ground for the courts to set aside an arbitral award.

349 In any event, GOL says that the GOL SIAC Transcripts were admitted into the record in May, June and July 2018, with the plaintiffs' knowledge and they had some months before the Merits Hearing in September 2018 to review the transcripts and address the BIT Tribunals on any alleged erroneous

procedural history in the GOL SIAC Transcripts. They did not do so, and GOL submits that any factual mistakes could not be breaches of natural justice.

Our decision

350 We cannot find any breach of the rules of natural justice or any basis for a challenge to the BIT Awards based on the BIT Tribunals' findings. Whilst the BIT Tribunals may have inserted the wrong conclusion on the date for the 12 May 2014 hearing where a request to make a loan to Madam Sengkeo was made, neither that nor the facts stated by the BIT Tribunals can give rise to grounds to set aside the award.

351 In any event, the BIT Tribunals' conclusions on the bribe to Madam Sengkeo were clearly based on contentions which were well-rehearsed in the evidence and we see no basis for the plaintiffs to contend that they were unable to correct any recollections which they considered erroneous. Finally, we do not consider that, even if they had done so, that could have made a difference to the BIT Tribunals' findings based on the clear evidence. We therefore reject the plaintiffs' ground based on the alleged erroneous procedural history concerning the Alleged Witness Bribe.

Alleged MaxGaming Fraud

Plaintiffs' arguments

352 The plaintiffs submit that an award can be set aside where the arbitral tribunal made a finding in the award which was inconsistent with the agreed position taken by the parties and they refer to *GD Midea* at [44].

353 In this case, the plaintiffs say that they were deprived of an opportunity to be heard when the BIT Tribunals made the Fourth Finding in relation to the Alleged MaxGaming Fraud in reliance on Mr Noble's evidence, in contravention of parties' agreed position that such evidence was in fact irrelevant.

354 By the time of the parties' oral closing submissions, the plaintiffs say that it was the agreed position that Mr Noble's testimony was in fact of no relevance to the case but, despite that, the BIT Tribunals took it upon themselves to rely on Mr Noble's testimony for the purposes of making the Fourth Finding. The plaintiffs say that they were deprived of the opportunity to fairly address issues concerning the Alleged MaxGaming Fraud, for example by highlighting that the BIT Tribunals were not entitled to consider Mr Noble's testimony and explaining why Mr Noble's testimony was irrelevant, as it concerned conduct that post-dated all of the claims in the BIT Arbitrations.

Defendant's arguments

355 GOL disputes the plaintiffs' contention that the BIT Awards' conclusion that the Noble MOU was a sham came as a surprise. First, it says that there was nothing surprising or unforeseeable about the fact that the Noble MOU was held to be a sham by the BIT Tribunals as the same issue had been extensively argued by the parties before the tribunal in the GOL SIAC Arbitration, which concluded in its award dated 29 June 2017 that the Noble MOU was fraudulent. GOL says that the plaintiffs knew perfectly well that GOL's position was that the Noble MOU was a sham document.

356 Secondly, GOL says that the plaintiffs are incorrect when they say that it was parties' common position during oral closing submissions that Mr

Noble's testimony was of no relevance to the case. GOL's position was that his testimony given by way of witness statements in the prior GOL SIAC Arbitration in 2017 was irrelevant. GOL says that the plaintiffs had introduced Mr Noble's witness statements filed in the prior GOL SIAC Arbitration as additional evidence in the Revived Proceedings in an attempt to prove that the Noble MOU was created in good faith and was not fraudulent. However, GOL's position was that those *witness statements* were irrelevant as the BIT Tribunals had heard for themselves Mr Noble's cross-examination during the Merits Hearing. GOL says that the BIT Tribunals concluded that the Noble MOU was a sham having heard Mr Noble's evidence in the BIT Arbitrations.

357 Thirdly, GOL submits that the plaintiffs were given ample notice that the fraudulent Noble MOU was a live issue in the BIT Arbitrations and they refer to GOL's Application for Additional Evidence where GOL had requested the inclusion of evidence relating to the fraudulent Noble MOU. Further, GOL says that the plaintiffs were given an opportunity to respond and did respond to GOL's contentions in their Response to Respondent's Application to Adduce Fresh Evidence. The BIT Tribunals allowed additional evidence and the plaintiffs then extensively examined Mr Noble as a witness during the Merits Hearing, attempting to persuade the BIT Tribunals that, *inter alia*, Mr Noble's witness statement in the GOL SIAC Arbitration was true and accurate. GOL says that the plaintiffs failed to do so and the BIT Tribunals concluded that, having heard Mr Noble's evidence, the MaxGaming offer was a sham.

358 Notably, GOL submits that the plaintiffs have not explained what opportunity to present their case was denied to them by the BIT Tribunals. GOL says that the plaintiffs had sought to explain that the Noble MOU was not fraudulent. They had adduced additional evidence and called Mr Noble as a

witness and examined him extensively before the BIT Tribunals and GOL submits that there was no breach of natural justice when the BIT Tribunals concluded that the Noble MOU was a sham.

Our decision

359 It is clear that Mr Noble's evidence given during the Merits Hearing was relevant and that the issue of whether the MaxGaming transaction was a sham was a live issue on which he gave evidence. We accept GOL's submission that it was not common ground that Mr Noble's evidence was irrelevant but that GOL considered his evidence in the prior GOL SIAC Arbitration in 2017 to be irrelevant. The BIT Tribunals summarised the plaintiffs' position as being that "Mr Noble genuinely believed he could orchestrate the purchase, which he testified was, for him, 'the chance of a lifetime'", which was based at least in part on the plaintiffs' reliance on Mr Noble's evidence in the GOL SIAC Arbitration. It was therefore entirely appropriate and understandable for GOL to take the position that that evidence, but not the other aspects of Mr Noble's evidence before the BIT Tribunals, was irrelevant.

360 In those circumstances, the BIT Tribunals' conclusions raise no issues of breach of natural justice and we reject the plaintiffs' ground based on Mr Noble's evidence on the Alleged MaxGaming Fraud.

Bad faith and standard of proof

Plaintiffs' arguments

361 The plaintiffs refer to the BIT Tribunals' finding that bad faith conduct by them, established on a balance of probabilities, was sufficient to deny their claims for treaty relief. The plaintiffs contend that the BIT Tribunals were never

addressed on the legal issue of whether an arbitral tribunal may disentitle an investor to substantive treaty relief on the basis of bad faith alone, established on a balance of probabilities as opposed to the higher standard of "clear and convincing evidence", even though this fell short of illegality concerning the investment.

362 The plaintiffs submit that GOL's pleaded defence was that of illegality, alleging that the plaintiffs had engaged in bribery and corruption in the initiation of and during the course of their investment. They refer to paras 27 to 44 of GOL's Defence and Counterclaim in the PCA Arbitration where GOL stated its case and concluded by saying: "[i]n this case, the alleged investment was tainted by fraud, bad faith, misconduct and illegality both in its inception and during the course of its performance." The plaintiffs also refer to paras 22 to 39 of GOL's Counter-Memorial in the ICSID Arbitration which repeat the same point.

363 While there were references to "good faith" in the above extracts, the plaintiffs submit that it was clear that GOL did not consider bad faith to be an independent ground of denying the plaintiffs treaty relief. Instead, they say that GOL's argument was that alleged illegality on the part of the plaintiffs in the form of bribery, corruption, money laundering and embezzlement disentitled the plaintiffs to treaty relief. They say that none of the parts of the arbitration record cited by GOL show that bad faith constituted a standalone substantive defence advanced by GOL.

364 GOL also advanced a defence of "unclean hands", alleging that "apart from the Tribunal's inherent power to dismiss claims for misconduct that corrupts the integrity of the arbitral process, a claimant's criminal misconduct

may also bar its claims under the doctrine of 'unclean hands'", and also that the unclean hands doctrine "closes the doors of a [tribunal] to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behaviour of the defendant." However, the plaintiffs say that this argument was dismissed by the BIT Tribunals, on the basis that the "[i]ncorporation of such a general doctrine into investor-State law without careful boundaries would risk opening investment disputes to an open-ended, vague and ultimately unmanageable principle."

365 Because GOL did not argue that the plaintiffs' "bad faith" alone disentitled them to treaty relief, the plaintiffs say that they did not address the BIT Tribunals on whether they could have dismissed their claims on this ground. Instead the plaintiffs say that they argued that first, that illegal conduct in the form of fraud, bribery and corruption could only result in dismissal when it was undertaken in the initiation of the investment, which did not apply on the facts of this case and, secondly, that GOL had to establish such allegations on a standard higher than a balance of probabilities which GOL could not and did not do.

366 The plaintiffs say that the parties did not address the BIT Tribunals on whether bad faith established on a balance of probabilities was a ground for dismissal of treaty claims. They say that in opening remarks at the Merits Hearing, the plaintiffs' counsel stated that corruption had to be proven with clear and convincing evidence. In the plaintiffs' closing remarks, they say that their counsel addressed the BIT Tribunals on whether there was any basis to dismiss claims for allegations of general corruption and the plaintiffs argued that GOL had the burden of proving its allegations of corruption with clear and convincing evidence.

367 The plaintiffs also say that GOL's counsel did not address the BIT Tribunals on the permissibility of a bad faith defence. Instead, GOL's argument was that corruption ought to be inferred from the existence of "red flags" and whether these red flags would lead the Tribunals to conclude there was sufficient evidence of corruption.

368 In the BIT Awards, the plaintiffs submit, the BIT Tribunals agreed with them that illegality/corruption allegations needed to be established to a clear and convincing standard higher than a balance of probabilities and that GOL had failed to do so. The plaintiffs submit that the matter should have ended there but the BIT Tribunals went on to find that bad faith conduct by the plaintiffs, established on a balance of probabilities, was sufficient to deny their treaty relief. The plaintiffs submit that this finding was made without consulting the parties on the proper legal position. In doing so, the plaintiffs submit that they were deprived of the opportunity to submit to the BIT Tribunals that such a proposition was unsupported in law and could not justify the dismissal of the plaintiffs' treaty claims.

Defendant's arguments

369 GOL submits that the plaintiffs' contention is entirely without basis. GOL says that it explicitly pleaded in its defence that the plaintiffs' illegality, bribery, fraud and bad faith would disentitle them to treaty relief. Both sides made extensive arguments on this point, which had to be considered and determined by the BIT Tribunals. GOL says that the plaintiffs cannot contend that they had to be informed or reminded to address GOL's defence. GOL submits that the plaintiffs' belated assertion that they would have dedicated more effort to addressing GOL's defence if they had known that the latter would

find favour with the BIT Tribunals cannot give rise to a claim for breach of natural justice.

370 From the outset GOL says that it had made submissions to both BIT Tribunals on its position that the plaintiffs' investments were "tainted by fraud, bad faith, misconduct and illegality" and that the unclean hands doctrine "closes the doors of a [tribunal] to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief" and it refers to its Statement of Defense and Counterclaims at [44] and [60] and its Counter-Memorial. GOL also refers to paras 29, 66 and 68 of its Statement of Defense and Counterclaims, which state:

> 29. Indeed, even in the absence of a legality clause in the applicable BIT, many international arbitral tribunals have held that only investments that meet requirements of legality and the 'international principle of good faith' qualify for protection under an investment treaty. It has been held that '[g]ood faith is a supreme principle, which governs legal relations in all of their aspects and content.'
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> …
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> 66. Sanum's pattern of illegal conduct leads only to one conclusion: Sanum's investment does not qualify for protections afforded in the Laos-PRC BIT, because those protections are only available to *bona fide* investments that comply with Laos laws and regulations. This Tribunal therefore must dismiss the case for pervasive illegalities involving violation of Laos laws, the BIT, international public policy and the principle of good faith, as enunciated and applied by numerous tribunals as described above.
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> …
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> 68. … [GOL] presents proof that Sanum has engaged in a persistent pattern of unlawful conduct, repeatedly bribing Lao officials to obtain licenses or other benefits and to conceal its other acts of wrongdoing; embezzling funds from the Savan Vegas casino to deprive the Lao Government of its share of profits; and laundering gambling proceeds through Thai banks. Those egregious, repeated acts of criminal misconduct are more than sufficient grounds to warrant dismissal of Sanum's claims

> in this case as they violate the legality clause of the BIT as well as international public policy and the principle of good faith.

371 GOL says that the plaintiffs' characterisation of GOL's references to good faith as "oblique" is incorrect as GOL had explicitly and extensively referred to the principle of good faith and the implications it had on the plaintiffs' entitlement to treaty relief.

372 GOL says that the plaintiffs mounted an extensive and direct response to GOL's pleaded positions in their Reply and Opposition to Respondent's Counterclaims. In particular, the plaintiffs argued, *inter alia*, that GOL's allegations of wrongful conduct would not support a "global dismissal" of the plaintiffs' claims and that GOL's case for bad faith fell short of the standard of proof of "clear and convincing evidence". GOL refers to Sanum's Reply and Opposition to Respondent's Counterclaims at paras 253, 274 and 285, which state:

> 253. … [GOL] … argues for a global dismissal of [plaintiff]'s claims, as a result of alleged illegal conduct that had nothing to do with the actions of [GOL] that [the plaintiff] challenges in this arbitration. Yet, neither the Treaty, nor general principles of international law as applied by other investor-treaty tribunals, supports such an outcome.
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> …
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> 274. [GOL]'s case on the facts falls far short of the heightened standard of proof imposed by international law when a party seeks to establish fraud and other illegal or bad faith conduct, namely 'clear and convincing evidence.' Indeed, [GOL] does not prevail even if a balance of probabilities test is employed or indeed any other standard that requires evidence beyond speculation and unjustified suspicion.
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> …
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> 285. The Tribunal noted, in its Order dated 16 April, that '[i]n the next phase of these hearings . . . the party alleging facts will be expected to prove them on a balance of probabilities.' This standard certainly is appropriate for [plaintiff]'s claims against

> [GOL], as well as for any factual defense that [GOL] seeks to raise that is not based on the allegations of illegal conduct. However, the 'balance of probabilities' standard is not an appropriate measure of proof in cases where allegations concern fraudulent or otherwise illegal conduct. When international courts and tribunals have considered similar allegations, they have instead required the party who seeks to establish another's culpability for fraudulent, criminal, or bad faith conduct to provide clear and convincing evidence in order to sustain each such allegation. If 'reasonable doubts remain, such an allegation cannot be deemed to be established.'

373 In response, GOL says that it reiterated its position in its Rejoinders in the BIT Arbitrations at paras 37 to 38 that "[a]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud or deceitful conduct", citing the case of *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No ARB/07/24.

374 GOL submits that the plaintiffs were aware that GOL was relying on the plaintiffs' bribery, corruption, illegality and bad faith as a basis for the wholesale dismissal of their claims and that they had full opportunity to respond and did respond to GOL's contentions. On that basis, GOL submits that the plaintiffs are wrong to assert that the BIT Tribunals concluded that the plaintiffs' manifest bad faith would disentitle them to treaty relief "without the Tribunals having been addressed on whether wholesale dismissal of claims on such basis was permissible".

375 GOL also says that its pleaded position was maintained in the Revived Proceedings. Nearly four months before the Merits Hearing, GOL reiterated in para 25 of its Application for Additional Evidence that GOL's defences in both BIT Arbitrations included a request for dismissal on the grounds of "illegality, bad faith, unclean hands and abuse of process".

376 Further, in GOL's Reply in Support of Application for Additional Evidence at paras 35, 36 and 39, GOL says it reiterated its position when it stated that "[i]n treaty-based cases, evidence of bribery and/or corruption is a basis for dismissal of the claim based on international public policy" and cited multiple authorities where "investments will not be protected if it had been created in violation of national or international principles of good faith". GOL also said that "these Tribunals must admit the Government's additional evidence because it could warrant dismissal of Sanum's claims in their entirety."

377 GOL also refers to PCA PO 9 and ICSID PO 11 where they stated that GOL "now offers additional evidence and arbitral authority … for the proposition that investor/state arbitration panels are obligated to delve into allegations of corruption which, if established, will disentitle the [plaintiffs] to any relief at all". The BIT Tribunals also stated that "[w]ithout in any way pre-judging the merits of the [GOL]'s allegations, the [BIT Tribunal] is of the view that corruption issues, in general, are of over-riding importance to the rule of law and the integrity of the arbitration process", and therefore the BIT Tribunals "should have before it all relevant documents to get to the bottom of the allegations".

378 After the Merits Hearing, having heard all parties on this issue, the BIT Tribunals held in the BIT Awards that the parties had a duty to "arbitrate in good faith" and that "[i]t is well established that the bad faith conduct of the investor is relevant to the grant of relief under an investment treaty".

379 In those circumstances, GOL submits that the plaintiffs knew the BIT Tribunals would be deciding if there was a legal and factual basis to GOL's

argument that bribery, corruption, illegality and bad faith which would disentitle them to any treaty relief. There was therefore no cause for surprise and the plaintiffs had the opportunity to address and did address GOL's defence. There was therefore no breach of natural justice.

380 GOL disputes the plaintiffs' contention that its defence of "unclean hands", which GOL submitted would close the doors of a tribunal to one tainted with bad faith, was dismissed by the BIT Tribunals. Whilst the BIT Tribunals expressed reservations on the "incorporation of such a general doctrine into investor-State law", the BIT Tribunals held in the PCA Award at para 104 and the ICSID Award at para 106 that:

> …putting aside the label [of the doctrine of 'clean hands'], serious financial misconduct by the [plaintiffs] incompatible with their good faith obligations as investors in the host country (such as criminality in defrauding the host Government in respect of an investment) is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal.

GOL therefore says that the BIT Tribunals' finding that bad faith alone would disentitle the plaintiffs from treaty relief was based directly on GOL's explicitly pleaded defence, regardless of the label assigned to any such defence.

381 GOL also disputes the plaintiffs' contention that parties did not address the BIT Tribunals on whether it could dismiss the plaintiffs' claims on the ground of bad faith and that the parties also did not address the BIT Tribunals on whether bad faith established on a balance of probabilities, as opposed to clear and convincing standard, was a ground for dismissal of treaty claims.

382 GOL says that it submitted, in its Statement of Defense and Counterclaims at para 30, that the principle of good faith was imposed as a generally accepted rule or standard, citing the case of *Inceysa Vallisoletana SL v Republic of El Salvador* ICSID Case No ARB/03/26. The plaintiffs then responded in their Reply and Opposition to Respondent's Counterclaims, which GOL refers to specifically. In particular, the plaintiffs contended in those submissions that GOL's allegations of wrongful conduct would not support a "global dismissal" of their claims and that GOL's case for bad faith fell short of the standard of proof of "clear and convincing evidence".

383 Even if the focus of GOL's pleadings had been on the plaintiffs' illegal conduct, GOL submits that it is clear from the above that they were well aware that GOL was also relying on the plaintiffs' bad faith conduct as a basis for the wholesale dismissal of the plaintiffs' claims and had full opportunity to respond, and did in fact respond, to GOL's arguments.

Our decision

384 We consider that, as developed at the hearing before us, there are two issues which are raised on this ground. First, there is an issue of whether GOL relied on a separate defence based on the plaintiffs' bad faith and, secondly, if so, whether the parties were given the opportunity to make submissions on the standard of proof, which the BIT Tribunals held to be the standard of the "balance of probabilities".

385 First, in relation to whether GOL relied on a separate defence based on bad faith, we consider that it is clear that they did and also that the plaintiffs were aware of this.

386 In the Counter-Memorial in the ICSID Arbitration and in the Statement of Defense and Counterclaims in the PCA Arbitration, GOL put their case on the basis of the "unclean hands" doctrine which, it argued, closes the doors of a tribunal to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief. GOL submitted that when an investor engages in significant corruption or other illicit conduct, the unclean hands doctrine precludes him from bringing claims in relation to that tainted investment. GOL then referred to the plaintiffs' pattern of illegal conduct. It then concluded that the plaintiffs had engaged in the persistent pattern of unlawful conduct in terms of the various allegations of bribery, embezzlement and money-laundering and that those egregious, repeated acts of criminal misconduct were more than sufficient grounds to warrant dismissal of the plaintiffs' claims as they violated the legality clause of the BITs as well as international public policy and the principle of good faith.

387 In their Reply and Opposition to Respondent's Counterclaims dated 9 May 2014, the plaintiffs dealt with their case that neither the BITs nor international law required dismissal of their claims on grounds of alleged illegal conduct. Then they dealt with their contention that there was no other basis for dismissal of the claims. They said that GOL's appeal to the doctrine of unclean hands was likewise unavailing. They also said that GOL could cite no case in which a tribunal relied on this doctrine to sanction bad behaviour which takes place after the investment was made or established with a full dismissal of the claimant's case.

388 The BIT Tribunals dealt with these arguments in the ICSID Award at paras 90 to 106 and, after dealing with the evidence of corruption, came to the

conclusion at paras 278 to 280. In the PCA Arbitration the relevant paragraphs are paras 88 to 104 and 171 to 177.

389 We have considered the parties' pleaded cases and accept GOL's submissions that GOL pleaded, and the plaintiffs understood GOL to have pleaded, a case *both* on illegality and on bad faith. Whilst the acts relied on were the same for the illegality and the bad faith defences, the two defences were treated as being distinct.

390 The use of the phrase "clean hands" was criticised by the BIT Tribunals but, contrary to the plaintiffs' submission, the doctrine was not dismissed by the BIT Tribunals. They identified, correctly, that in addition to illegality, GOL also relied on the "clean hands" doctrine and they were, understandably, cautious of introducing equitable relief in common law jurisdictions into investor-State law. However, the BIT Tribunals went on to conclude (at para 106 of the ICSID Award and para 104 of the PCA Award) that:

> … putting aside the label, serious financial misconduct by the [plaintiffs] incompatible with their good faith obligations as investors in the host country (such as criminality and defrauding the host government in respect of an investment) is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal.

They then went on to find that allegations of illegality had not been made out, but allegations of bad faith had been established.

391 On that basis, we consider that the plaintiffs had a proper opportunity to and did deal with the alternative bad faith ground for dismissing their claims.

We therefore reject the plaintiffs' contentions based on a breach of the rules of natural justice in respect of the bad faith defence.

392 Secondly, in relation to the standard of proof, we consider that it is equally clear that the parties had the opportunity of making submissions on the standard of proof and did so.

393 The issue of the standard of proof had been raised by the BIT Tribunals in a letter of 16 April 2014, cited in the plaintiffs' Reply and Opposition to Counterclaims, at para 285 for the ICSID Arbitration and para 282 for the PCA Arbitration. The BIT Tribunals had stated "in the next phase of these hearings ... the party alleging facts will be expected to prove them on a balance of probabilities."

394 The plaintiffs then submitted that:

> … This standard certainly is appropriate for [plaintiffs'] claims against [GOL], as well as for any factual defense that [GOL] seeks to raise that is not based on the allegations of illegal conduct. However, the 'balance of probabilities' standard is not an appropriate measure of proof in cases where allegations concern fraudulent or otherwise illegal conduct. When international courts and tribunals have considered similar allegations, they have instead required the party who seeks to establish another's culpability for fraudulent, criminal, or bad faith conduct to provide clear and convincing evidence in order to sustain each such allegation. If 'reasonable doubts remain, such an allegation cannot be deemed to be established.'

395 The plaintiffs then argued that, in any event, on any standard of proof, GOL's defence on the basis of bribery would fail (at para 288 for the ICSID Arbitration and para 285 for the PCA Arbitration):

> As allegations of bribery, which [GOL] does not dispute that it must establish, the applicable standard of proof is, in any event, academic. This is because, as discussed in detail in the next

> section, [GOL] fails to meet any cognizable burden of proof …. Indeed, *even if the Tribunal rejected the 'clear and convincing evidence' standard, in favour of a mere 'balance of probabilities' approach, the result would still be the same.* [GOL] falls far short of establishing any illegal conduct by [the plaintiffs]." [emphasis in original underlined; emphasis added in italics]

396 It is evident therefore that the plaintiffs recognised that the BIT Tribunals might reject their submission of "clear and convincing evidence" and instead adopt a standard of "balance of probabilities", as the BIT Tribunals did for bad faith.

397 In its Reply to its Application to Admit Additional Evidence, GOL approached the question of standard of proof by referring to "red flags" or indicators applied to circumstantial evidence on which to base its assumptions of bribery or corruption. GOL relied on the decision in *Metal-Tech*. This was then referred to by the BIT Tribunals at para 107 of the ICSID Award and para 105 of the PCA Award. In *Metal-Tech* at para 243 the arbitral tribunal held that a tribunal will determine, on the basis before it, whether corruption has been established with reasonable certainty.

398 We therefore consider that the position was this. The BIT Tribunals had raised on 19 April 2014 the position that "balance of probabilities" was the appropriate standard. In their pleadings following that letter, the plaintiffs raised the issue of the appropriate standard and submitted that it should be "clear and convincing evidence" in respect of GOL's illegality or bad faith defence. GOL did not dispute the standard which the BIT Tribunals had proposed and only in its Reply to its Application to Admit Additional Evidence did GOL put forward the different standard based on "red flags" and *Metal-Tech* which would, if anything, be less than "balance of probabilities".

399 In those circumstances, the BIT Tribunals had indicated their view on 19 April 2014 that the standard of proof was "balance of probabilities" and the plaintiffs submitted, in response, that it should be "clear and convincing evidence". The plaintiffs also expressly contemplated that the BIT Tribunals might apply a standard of "balance of probabilities", saying that they would still succeed on that basis.

400 The plaintiffs therefore had ample opportunity to make submissions on the appropriate standard and did so. They cannot therefore establish a natural justice ground for setting aside and, indeed, could not have complained had the BIT Tribunals decided the illegality allegation based on "balance of probabilities". In fact, the BIT Tribunals found illegality required "clear and convincing evidence" and adopted a standard of "balance of probabilities" for the bad faith allegations.

401 On that basis we reject the plaintiffs' contention of breach of natural justice, both in relation to the bad faith aspect and also the standard of proof aspect.

402 Accordingly, we dismiss the plaintiffs' application to set aside the BIT Awards on the basis of Art 34(2)(*a*)(ii) of the Model Law or s 24(*b*) of the IAA.

Conclusion

403 For the reasons set out above, we reject the plaintiffs' submissions and dismiss the plaintiffs' applications to set aside the BIT Awards.

404 We will give the parties a chance to come to an agreement on costs. To the extent that parties are unable to agree, parties are to file written submissions

on costs, limited to 15 pages but excluding exhibits, lists of disbursements and case authorities, within a month of this judgment. If parties are of the view that a further hearing is required to address the issue of costs, they are to indicate as such in their written submissions.

Quentin Loh
Judge of the Appellate Division

Vivian Ramsey
International Judge

Douglas Jones
International Judge

Lin Weiqi Wendy, Chong Wan Yee Monica (Zhang Wanyu), Ling Jia Yu (Lin Jiayu) and Ho Yi Jie (WongPartnership LLP) for the plaintiffs;
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