

**PCA Case No. 2013-13**

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE  
GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA AND THE GOVERNMENT OF  
THE LAO PEOPLE’S DEMOCRATIC REPUBLIC CONCERNING THE  
ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS DATED 31  
JANUARY 1993 AND THE 2010 UNCITRAL ARBITRATION RULES**

**- between -**

**SANUM INVESTMENTS LIMITED**

**“Claimant”**

**- and -**

**THE GOVERNMENT OF THE LAO PEOPLE’S DEMOCRATIC REPUBLIC**

**(“Respondent,” and together with Claimant, the “Parties”)**

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**AWARD ON JURISDICTION**

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

**Registry:  
The Permanent Court of Arbitration**

**Tribunal Secretary:  
Ms. Sarah Grimmer**

**13 December 2013**

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## **I. THE PARTIES AND THEIR REPRESENTATIVES**

1. The Claimant is Sanum Investments Limited (“**Sanum**” or “**Claimant**”), an entity incorporated in the Macao Special Administrative Region of the People’s Republic of China (“**PRC**”) (“**Macao SAR**” or “**Macao**”). The Claimant is represented by Mr. David W. Rivkin and Ms. Catherine M. Amirfar (Debevoise & Plimpton LLP, New York); Mr. Christopher K. Tahbaz (Debevoise & Plimpton LLP, Hong Kong); and Mr. Todd Weiler (Barrister & Solicitor, London, Ontario, Canada).
2. The Respondent is the Government of the Lao People’s Democratic Republic (“**Laos**” or “**Respondent**”). The Respondent is represented by the Laos Ministry of Foreign Affairs, Mr. David Branson (King Branson LLC, Washington, D.C.), Ms. Jane Willems, Ms. Teresa Cheng S.C. (De Voeux Chambers, Hong Kong), Professor George A. Bermann (Columbia University School of Law, New York) and L.S. Horizon (Vientiane).

## **II. PROCEDURAL HISTORY**

3. The Claimant commenced these proceedings by a Notice of Arbitration (“**Notice**”) dated 14 August 2013 pursuant to the Agreement between the Government of the People’s Republic of China and the Government of the Lao People’s Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments dated 31 January 1993 (“**PRC/Laos Treaty**”, “**BIT**”, “**Treaty**”).<sup>1</sup>
4. On 8 May 2013, the Tribunal and the Parties attended a first procedural conference in London.
5. On 21 May 2013, after consultation with the Parties, the Tribunal issued Procedural Order No. 1, which designated: (a) Singapore as the place of arbitration; (b) the Permanent Court of Arbitration (“**PCA**”) as Registry; and (c) the 2010 UNCITRAL Arbitration Rules as the applicable procedural rules. Procedural Order No. 1 also set forth the timetable of the proceedings.
6. On 7 June 2013, the Claimant filed an Amended Notice of Arbitration (“**Amended Notice**”).
7. On 9 August 2013, the Respondent filed its Memorial on Jurisdiction with exhibits RE-01 to RE-18 and legal authorities RA-01 to RA-25.

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<sup>1</sup> PRC/Laos Treaty (Ex. D to Claimant’s Amended Notice of Arbitration).

8. On 1 October 2013, the Claimant filed its Statement of Claim and Response on Jurisdiction with (a) witness statements of Mr. John Baldwin, Mr. Clay Crawford, Mr. Richard A. Pipes; (b) expert reports of Mr. Joseph P. Kalt, Ph.D. (with Appendices A to C) and the Innovation Group (with Appendices A to G); (c) exhibits C-1 to C-421; and (d) legal authorities CLA-1 to CLA-118.
9. On 8 October 2013, the Tribunal held a pre-hearing telephone conference call with the Parties.
10. On 11 October 2013, the Presiding Arbitrator issued Procedural Order No. 2 on behalf of the Tribunal.
11. On 17 October 2013, the Respondent submitted its Reply in Support of its Objection to Jurisdiction with exhibits RE-19 to RE-23 and legal authorities RA-27 to RA-34.
12. On 31 October 2013, the Claimant filed its Rejoinder on Jurisdiction accompanied by exhibit C-422 and legal authorities CLA-119 to CLA-125.
13. On 6 November 2013, a hearing on jurisdiction was held in Singapore (“**Hearing on Jurisdiction**”).<sup>2</sup> The attendees for the Claimant were Mr. John Baldwin, Mr. Shawn Scott, Mr. David Rivkin, Ms. Catherine M. Amirfar, Ms. Samantha J. Rowe, Dr. Todd Weiler, and Ms. Swee Yen Koh. The attendees for the Respondent were Ms. Jane Willems, Mr. David Branson, Mr. Werner Tsu, Mr. Kongphanh Santivong, Prof. Dr. Bountiem Phissamay, Mr. Ket Kiettisak, Mr. Khampheth Viraphondet, Mr. Sith Siripraphanh, Mr. Outakeo Keodouangsingh and Mr. Phoukong Sisoulath.
14. At the conclusion of the Hearing on Jurisdiction, the Tribunal requested the Parties to file further submissions on (a) the respective roles, if any, of Article 29 of the 1969 Vienna Convention on the Law of Treaties (“**VCLT**”) and Article 15 of the 1978 Convention on the Succession of States in Respect of Treaties (“**VCST**”), in relation to the application or non-application of the PRC/Laos Treaty to the Macao SAR; and (b) an analysis of the texts of the PRC/Portugal, PRC/Netherlands, Macao/Portugal, Macao/Netherlands bilateral investment treaties to determine whether there exists any relationship between the treaties entered into by Macao and those entered into by the PRC.<sup>3</sup>

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<sup>2</sup> In advance of the Hearing on Jurisdiction, the Parties provided the Tribunal with an agreed core hearing bundle of exhibits and legal authorities.

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

15. On 15 November 2013, the Respondent submitted its Post-Hearing Submission in Support of its Objection to Jurisdiction accompanied by Tables 1 to 4 and exhibits RE-24 to RE-46 and legal authorities RA-35 to RA-53 (“**Respondent’s Post-Hearing Submission**”), and the Claimant submitted its Response to the Tribunal’s Questions on Jurisdiction accompanied by legal authorities CLA-126 to CLA-150 (“**Claimant’s Response**”).
16. Following several e-mails from the Parties on 17 and 18 November 2013, on behalf of the Tribunal, the Presiding Arbitrator directed the Parties to refrain from providing additional submissions unless invited to do so by the Tribunal.
17. In Procedural Order No. 1, the Tribunal undertook to its decision on jurisdiction in a brief statement to the Parties indicating whether the jurisdictional objections were upheld or denied as soon as possible and not later than 15 December 2013. Such statement was to be followed by a fully reasoned decision of the Tribunal. This Award on Jurisdiction constitutes the fully reasoned decision of the Tribunal and thus obviates the need for a brief statement.

### III. FACTUAL BACKGROUND

18. Prior to 1999, Macao was considered a “Chinese territory” over which Portugal exercised administrative power.<sup>4</sup> After the handover of Macao by Portugal in 1999, the PRC resumed sovereignty over Macao and established it as a special administrative region (“**SAR**”) under Article 31 of the Constitution of the PRC and the Basic Law of the Macao SAR (“**Macao SAR Basic Law**”).<sup>5</sup>
19. On 13 December 1999, the PRC filed a Notification regarding the Macao SAR with the Secretary-General of the United Nations (“**UN**”) (“**1999 Notification**”)<sup>6</sup> that is recorded in a

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

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

<sup>5</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 25, 73; Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 227. .

<sup>6</sup> 1999 Notification (RE-08).

UN document entitled *Multilateral Treaties Deposited with the Secretary-General: Status as at 1 April 2009*.<sup>7</sup>

20. Sanum was established on 14 July 2005 under the laws of the Macao SAR.
21. In the spring of 2007, Mr. John Baldwin, Chairman of the Board of Sanum, travelled to Laos to explore possibilities for investing in Laos upon learning that a locally incorporated entity involved in the resort and gaming business—the ST Group (“ST”)—was in need of financing to develop its gaming business.<sup>8</sup>
22. According to the Claimant, Mr. Baldwin subsequently met with individuals, attorneys, representatives of ST, and high-ranking government officials to discuss cooperation in the development of gaming enterprises in Laos.<sup>9</sup> Sanum eventually became involved in the operation and development of two casinos and five slot clubs in Laos.
23. The Claimant alleges that, prior to its investment, its representatives were assured by Laos government officials, including the Prime Minister, that Laos had favorable conditions for foreign investors,<sup>10</sup> strongly respected the rule of law,<sup>11</sup> and that Sanum would be accorded an ongoing majority control of its investment and long-term protection and security for those investments and their returns,<sup>12</sup> as well as a favorable and certain tax regime.<sup>13</sup> Sanum submits that the Prime Minister personally assured it that partnering with ST would be beneficial to it,<sup>14</sup> and that Laos would protect Sanum’s investment.<sup>15</sup> Sanum further alleges that other officials of the Respondent also assured Sanum representatives that they would support Sanum for as long as it lived up to its commitments.<sup>16</sup>

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

<sup>8</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 44.

<sup>9</sup> Amended Notice, ¶¶ 18-19; Claimant’s Statement of Claim and Response on Jurisdiction, ¶¶ 45-48.

<sup>10</sup> Amended Notice, ¶ 20.

<sup>11</sup> Amended Notice, ¶ 24; Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 52.

<sup>12</sup> Amended Notice, ¶ 20.

<sup>13</sup> Amended Notice, ¶ 21; Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 52.

<sup>14</sup> Amended Notice, ¶ 22.

<sup>15</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 53.

<sup>16</sup> Amended Notice, ¶ 23.

*Conclusion of the Master Agreement*

24. Sanum and ST formalized their relationship in a Master Agreement dated 30 May 2007, which would govern all of the joint ventures in which the parties would participate.<sup>17</sup> Specifically, ST promised Sanum 60% of each of its existing (and all future) gaming ventures, and Sanum promised to make payments to ST (e.g. US\$1.5 million upon signing the Master Agreement and US\$2 million upon receiving the government approvals to be arranged by ST) and to finance the development of their planned ventures.<sup>18</sup> According to the Respondent, the Master Agreement was not intended to be a definitive agreement, but an “agreement to agree.”<sup>19</sup>
25. The Master Agreement envisaged the creation of three joint ventures: (1) the Savan Vegas Hotel and Casino (“**Savan Vegas**”), for which ST already held a concession; (2) the Paksong Vegas Hotel and Casino (“**Paksong Vegas**”), for which ST already held a concession; and (3) three slot clubs: the Vientiane Friendship Bridge Slot Club, also known as the Thanaleng Slot Club (“**Thanaleng**”); the Lao Bao Slot Club (“**Lao Bao**”); and the Ferry Terminal Slot Club, also known as Daensavan Slot Club (“**Ferry Terminal**”).<sup>20</sup>
26. Sanum’s investment and ownership in all of the joint ventures were contingent upon Government acceptance and approval.<sup>21</sup>
27. The Master Agreement provided that the gaming rights would be exclusively those of the joint ventures.<sup>22</sup>

*Project Development Agreements*

28. On 10 August 2007, two project development agreements (“**PDAs**”) were concluded.<sup>23</sup>

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<sup>17</sup> Amended Notice, ¶ 26; Claimant’s Statement of Claim and Response on Jurisdiction, ¶¶ 49-51; Respondent’s Memorial on Jurisdiction, ¶ 4.

<sup>18</sup> Amended Notice, ¶ 26; Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 49.

<sup>19</sup> Respondent’s Memorial on Jurisdiction, ¶ 4.

<sup>20</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 50; Respondent’s Memorial on Jurisdiction, ¶ 5.

<sup>21</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 51; Respondent’s Memorial on Jurisdiction, ¶ 6.

<sup>22</sup> Respondent’s Memorial on Jurisdiction, ¶ 6.

<sup>23</sup> Respondent’s Memorial on Jurisdiction, ¶ 7.



29. The first was concluded between Laos on the one hand and Sanum, Xaya Construction Co. Ltd. (a Laotian company), and Mr. Xaysana Xaysoulivong, on the other hand, with respect to Savan Vegas (“**Savan Vegas PDA**”).<sup>24</sup> Therein, it was agreed that a joint venture—Savan Vegas and Casino Co. Ltd.—would be established under the laws of Laos to implement the Savan Vegas PDA (“**Savan Vegas JVC**”).<sup>25</sup> The share ownership was divided as follows: Laos would own 20%, Sanum 60%, Xaya Construction Co. Ltd. 10%, and Mr. Xaysoulivong 10%.<sup>26</sup>
30. The second PDA was concluded between Laos on the one hand and Sanum, Nouansavanh Construction Co. Ltd. (a Laotian company), and Mr. Sittixay Xaysana, on the other hand, with respect to Paksong Vegas (“**Paksong Vegas PDA**”).<sup>27</sup> Therein, it was agreed that a joint venture—Paksong Vegas and Casino Co. Ltd.—would be established under the laws of Laos to implement the Paksong Vegas PDA (“**Paksong Vegas JVC**”).<sup>28</sup> The share ownership was divided as follows: Laos would own 20%, Sanum 60%, Nouansavanh Construction Co. Ltd. 10%, and Mr. Xaysana 10%.<sup>29</sup>
31. Both PDAs provided for dispute settlement by arbitration before the Economic Dispute Organization in Singapore.<sup>30</sup>
32. The Claimant submits that, through the PDAs, the Government agreed to an “Investment Incentive Policy” pursuant to which the joint ventures would be exempt from certain taxes.<sup>31</sup> According to the Claimant, the Government subsequently entered into a Flat Tax Agreement (“**FTA**”) with Savan Vegas that capped annual taxes through the end of 2013.<sup>32</sup>
33. On 31 October 2007, the Government, Sanum, and ST executed Shareholders’ Agreements for Savan Vegas and Paksong Vegas.<sup>33</sup>

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<sup>24</sup> Respondent’s Memorial on Jurisdiction, ¶ 7; Savan Vegas PDA (RE-03).

<sup>25</sup> Respondent’s Memorial on Jurisdiction, ¶ 7.

<sup>26</sup> Respondent’s Memorial on Jurisdiction, ¶ 7.

<sup>27</sup> Respondent’s Memorial on Jurisdiction, ¶ 7; Paksong Vegas PDA (RE-04).

<sup>28</sup> Respondent’s Memorial on Jurisdiction, ¶ 7.

<sup>29</sup> Respondent’s Memorial on Jurisdiction, ¶ 7.

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

<sup>31</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 7

<sup>32</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 7

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

*The Slot Clubs*

34. According to the Claimant, negotiations over the future ownership and management of ST's three existing slot clubs—Thanaleng, Lao Bao, and Ferry Terminal—also proceeded in 2007 and 2008.<sup>34</sup>
35. On 6 August 2007, Sanum and ST entered into a Participation Agreement concerning the Lao Bao and Ferry Terminal Slot Clubs according to which Sanum would supply and maintain certain gaming machines in exchange for a percentage share in the revenue generated (60%).<sup>35</sup> Sanum and ST also entered into additional agreements concerning the Lao Bao and Ferry Terminal Slot Clubs, which granted Sanum management control of the clubs and protection of its 60% stake.<sup>36</sup>
36. On 4 October 2008, Sanum and ST entered into a Participation Agreement concerning the Thanaleng Slot Club, pursuant to which Sanum would supply and maintain certain gaming machines in exchange for revenue share.<sup>37</sup>
37. Sanum claims that it also invested in new slot club ventures in the provinces in which the Government had granted its investments monopoly gaming rights. On 25 October 2009, Savan Vegas opened a new slot club in Paksan. It also began exploring the possibility of having Savan Vegas open a slot club and international welcome center in Thakhaek.<sup>38</sup>
38. The Claimant describes its investment in Laos as follows:

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

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

<sup>34</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 59.

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

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

<sup>37</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 59.

<sup>38</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 60.

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

*The Claimant's Claims*

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

*The Respondent's Limited Response on the Facts*

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

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

<sup>40</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 313.

<sup>41</sup> Respondent's Reply on Jurisdiction, ¶¶ 54-57.

<sup>42</sup> Respondent's Reply on Jurisdiction, ¶ 55.

<sup>43</sup> Respondent's Reply on Jurisdiction, ¶ 56.

<sup>44</sup> Respondent's Reply on Jurisdiction, ¶ 56.

<sup>45</sup> Respondent's Reply on Jurisdiction, ¶ 57.

*Related Proceedings*

41. On the same day that the present arbitration was commenced, Lao Holdings N.V. (“**Lao Holdings**”), a company formed in Aruba, the Netherlands, and the 100% owner of Sanum, also commenced arbitration proceedings against Laos pursuant to the bilateral investment treaty concluded between the Netherlands and Laos in 2005 (“**Lao Holdings Arbitration**”).<sup>46</sup>
42. In April 2013, Lao Holdings requested provisional measures from the tribunal in the related proceedings.<sup>47</sup> On 17 September 2013, the tribunal in the Lao Holdings Arbitration awarded provisional measures to the claimant ordering the parties to maintain the *status quo* with respect to investments subject to that arbitration.<sup>48</sup>

**IV. RELEVANT LEGAL PROVISIONS**

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

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

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

The term “investments” means every kind of asset invested by investors of one Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the latter, including mainly

- (a) movable and immovable property and other property rights;
- (b) shares in companies or other forms of interest in such companies;
- (c) a claim to money or to any performance having an economic value;
- (d) copyrights, industrial property, know-how and technological process;
- (e) concessions conferred by law, including concessions to search for or to exploit natural resources.

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

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

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<sup>46</sup> Respondent’s Memorial on Jurisdiction, ¶ 2(iii).

<sup>47</sup> Respondent’s Memorial on Jurisdiction, ¶ 10.

<sup>48</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 24.

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

(1) Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.

(2) The treatment and protection as mentioned in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.

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

(1) Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investments of investors of the other Contracting state in its territory, unless the following conditions are met:

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

(2) The compensation mentioned in paragraph 1(d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.

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

(1) Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.

(2) If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.

(3) If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.

49. Article 29 of the VCLT states:

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

50. Article 15 of the VCST provides:

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

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

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

## **V. SUMMARIES OF THE PARTIES' ARGUMENTS**

### **A. WHETHER THE CLAIMANT IS COVERED BY THE BIT**

#### **1. Whether the BIT extends to the Macao SAR**

##### **(a) The Respondent's Position**

51. The Respondent argues that the BIT does not provide protection to the Claimant because the BIT does not extend to cover the Macao SAR.<sup>49</sup>
52. The Respondent notes that the PRC resumed the exercise of sovereignty over Macao in 1999, and established Macao as an SAR pursuant to Article 31 of the PRC Constitution and the Macao SAR Basic Law.<sup>50</sup> The Respondent alleges that the Macao SAR Basic Law establishes the capacity of Macao to enter into international trade arrangements on its own behalf<sup>51</sup> and to adopt its own policies and laws on the protection and development of industry and commerce,<sup>52</sup> which includes the power to execute bilateral investment treaties.<sup>53</sup> It further contends that the Macao SAR Basic Law provides that international agreements to which the PRC is a party would not apply automatically in the Macao SAR but must instead be decided by the Central Government of the PRC.<sup>54</sup>

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<sup>49</sup> Respondent's Memorial on Jurisdiction, ¶¶ 32-37.

<sup>50</sup> Respondent's Memorial on Jurisdiction, ¶¶ 25, 71.

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

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

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

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

53. According to the Respondent, it is common ground that Article 29 of the VCLT, which contains the customary international law rule of “moving treaty frontiers”, is operative in this case because Laos and the PRC are both signatories to the VCLT.<sup>55</sup>
54. The Respondent further submits that Article 15 of the VCST is an expression of customary international law.<sup>56</sup> According to the Respondent, the rule is “commonly understood to have two aspects, one negative (treaties of the predecessor State cease to be in force in the portion of territory in question, except for certain types of treaties or specific circumstances) and one positive (treaties of the successor State become in force in the portion of territory in question, except for certain types of treaties or specific circumstances).”<sup>57</sup> The Respondent specifies that the “rule formulated in Article 15 of the [VCST] in its negative and positive aspects and the exceptions applicable to the rule in both aspects are well grounded in customary international law.”<sup>58</sup>
55. The Respondent submits that both Articles 29 of the VCLT and Article 15 of the VCST co-exist, are “very closely connected” and compatible.<sup>59</sup>
56. It is the Respondent’s case that the Treaty does not extend to the Macao SAR because it falls within the exceptions to Article 29 of the VCLT<sup>60</sup> and the exceptions to Article 15 of the VCST.<sup>61</sup>

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<sup>55</sup> Respondent’s Post-Hearing Submission, ¶ 2.

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

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

See also Hearing Transcript, pp. 54, 57.

<sup>57</sup> Respondent’s Post-Hearing Submission, ¶ 4.

<sup>58</sup> Respondent’s Post-Hearing Submission, ¶ 12.

<sup>59</sup> Respondent’s Post-Hearing Submission, ¶¶ 15-16, 22.

<sup>60</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 35-37; Hearing Transcript, p. 16.

57. The Respondent contends that the 1999 Notification filed by the PRC with the UN Secretary-General as depositary operates as a reservation to the territorial application of the BIT to the Macao SAR.<sup>62</sup> The Respondent emphasizes that the 1999 Notification *specifically* provided for the application of the treaties listed in its Annexes I and II to the Macao SAR,<sup>63</sup> and that the BIT was not listed in either of these two Annexes.<sup>64</sup>
58. The Respondent cites paragraph IV of the 1999 Notification, which states that the PRC “will go through separately the necessary formalities for [the] application [of treaties that are not listed in the Annexes to this Note] to the Macao [SAR] if it so decided.”<sup>65</sup> The Respondent argues that Laos would have had to have been notified separately if the BIT were to be extended to the Macao SAR and it was not.<sup>66</sup> The Respondent also notes that Article 138 of the Macao SAR Basic Law requires consultation with the Macao SAR before a decision regarding treaty application, and points to the absence of evidence in this case that the Macao SAR has indeed been consulted.<sup>67</sup>
59. The Respondent rejects the argument of the Claimant that the 1999 Notification relates only to multilateral treaties by stating that: (a) the Overview of the UN Treaty Collection (“UNTC”) does not distinguish between the different locations as to where the 1999 Notification is deposited; (b) the UNTC covers both multilateral and bilateral treaties; (c) the capacity of the UN to register, file and record treaties is not distinct as between bilateral and multilateral treaties; (d) Article 102 of the UN Charter requires “treaties” and “international agreements” to be registered with the Secretariat before parties to such treaties or agreements can invoke them before an organ of the UN, and, while neither the UN Charter nor the regulations define either term, the Secretariat defers to the definition of Member States submitting such instruments for registration; and (e) there is no distinction with regard to the depositary practice for bilateral and multilateral treaties.<sup>68</sup> The Respondent further notes that the requirements for the deposit of

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<sup>61</sup> Respondent’s Memorial on Jurisdiction, ¶ 32; Hearing Transcript, pp. 15-16.

<sup>62</sup> Hearing Transcript, pp. 20, 148-149.

<sup>63</sup> Respondent’s Memorial on Jurisdiction, ¶ 41.

<sup>64</sup> Respondent’s Memorial on Jurisdiction, ¶ 42; Hearing Transcript, pp. 18-19.

<sup>65</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 41, 43; Hearing Transcript, p. 19.

<sup>66</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 43, 53(5); Hearing Transcript, p. 26.

<sup>67</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 43, 53(6), 78; Hearing Transcript, pp. 59-60.

<sup>68</sup> Respondent’s Reply on Jurisdiction, ¶ 42, referring to the UNTC at <http://treaties.un.org>; UN Charter: Chapter XVI: Miscellaneous Provisions (RA-28); Definition key terms used in the UNTC at [http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml#agreements](http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements) (RA-29); Notes verbales from the Legal Counsel relating to the depositary practice and the registration of treaties



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

60. Further, the Respondent submits that the reference to “multilateral treaties” in the UN document containing the 1999 Notification does not change the *effect* of the PRC’s notification in which the PRC expressly refers to international agreements, and draws no distinction between multilateral or bilateral treaties.<sup>71</sup> The Respondent also argues that the Claimant’s submission that the notification only applies to treaties that are to be deposited with the Secretary-General as depositary is irrelevant because that is an external reference and what should be considered is the intent of the PRC as expressed in the 1999 Notification, *i.e.*, that the Treaty is not listed as one that extends to the Macao SAR.<sup>72</sup>
61. In the Respondent’s view, there exists an important body of practice as well as authority regarding the qualification of the rule of automatic succession (or extension) of treaties when it comes to certain types of treaties or circumstances, *e.g.*, “personal” or “bilateral” treaties.<sup>73</sup> According to the Respondent, the 1999 Notification drew a distinction between (a) treaties that apply to Macao by virtue of the application to the entire Chinese territory (including Macao) as a result of their character (*e.g.*, treaties concerning foreign affairs or defense); and (b) treaties that applied to Macao before 20 December 1999, the date of transfer of sovereign rights.<sup>74</sup> To determine whether treaties concluded by the PRC but not included in the 1999 Notification

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pursuant to Article 102 of the UN Charter, [http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml#agreements](http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements) (RA-30).

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

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

<sup>71</sup> Hearing Transcript, pp. 149, 155-156.

<sup>72</sup> Hearing Transcript, pp. 149-150.

<sup>73</sup> Respondent’s Post-Hearing Submission, ¶¶ 17-19.

<sup>74</sup> Respondent’s Post-Hearing Submission, ¶ 20.

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

62. The Respondent emphasizes the fact that both instruments recognize Macao's treaty-making powers in economic and cultural matters.<sup>76</sup> The Respondent argues that "[u]nder these conditions, there can be no doubt that bilateral investment treaties and other commercial treaties concluded by China with third countries do not automatically apply to Macao under the positive aspect of the basic rule [of Article 15] but are instead the object of an exception to such rule."<sup>77</sup>
63. The Respondent cites Article 20(5) of the VCLT which states that a State is deemed to have accepted a reservation if it has raised no objection within twelve months after either being notified of the reservation or expressing consent to the treaty, whichever is later.<sup>78</sup> The Respondent notes that Laos did not object to the 1999 Notification within the stipulated twelve months.<sup>79</sup>
64. The Respondent stresses that a state's unilateral declaration can create legal obligations,<sup>80</sup> regardless of the declaration's form.<sup>81</sup> The Respondent contends that good faith binds States to international obligations that are created by a unilateral declaration and that interested States are entitled to demand that such obligations be respected.<sup>82</sup> The Respondent argues that paragraph

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

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

<sup>77</sup> Respondent's Post-Hearing Submission, ¶ 21.

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

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

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

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

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

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

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

65. The Respondent notes that Laos accepted the position of the PRC by not objecting to it or otherwise taking any action with regard to it over the years.<sup>84</sup> From the above, the Respondent contends that the Contracting Parties had effectively established a different intention from the customary rule in Article 29 of the VCLT.<sup>85</sup>
66. The Respondent clarifies that, contrary to the contention of the Claimant, reservations can apply in the bilateral context and are not explicitly excluded by the VCLT.<sup>86</sup> It also distinguishes the present case from those cited by the Claimant, by noting that those cases involved reservations being proposed prior to or during the signing of the bilateral treaties.<sup>87</sup> Respondent stresses in any case that it relies on the reservation as a unilateral declaration that gives rise to legitimate expectations on the part of the other party and, correspondingly, to legal implications such as estoppel by convention.<sup>88</sup> The Respondent also argues that, under public international law, the unilateral declaration of a state can amount to a reservation and satisfy the "otherwise established" exception contained in Article 29 of the VCLT.<sup>89</sup>
67. The Respondent points out that the BIT entered into force in 1993 at a time when Macao was a dependent territory of Portugal. In 1999, when the PRC assumed sovereignty over Macao and established the Macao SAR, the PRC could not have extended the application of the BIT to Macao because the governmental powers of the Macao SAR were established in the Macao SAR Basic Law.<sup>90</sup> It further notes that trade and investment policy operate separately as

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

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

<sup>85</sup> Respondent's Reply on Jurisdiction, ¶ 31.

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

<sup>87</sup> Respondent's Reply on Jurisdiction, ¶ 29.

<sup>88</sup> Respondent's Reply on Jurisdiction, ¶ 29.

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

<sup>90</sup> Respondent's Memorial on Jurisdiction, ¶¶ 71-72.

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

68. The Respondent clarifies that the issue of the territorial application of the BIT to the Macao SAR involves and is intended to involve consideration of the PRC Constitution and the Macao SAR Basic Law, as established by legal authority and references in the BIT to municipal law.<sup>93</sup> The Respondent notes that Article 18 of the Macao SAR Basic Law provides that PRC national laws must be listed in Annex III if they are to be incorporated in the laws of the Macao SAR.<sup>94</sup> On this basis, the BIT has never been extended to the Macao SAR and therefore can only have effect in Mainland China.<sup>95</sup>
69. In response to the argument of the Claimant that the PRC could have prevented the default application of the “moving treaty frontiers” rule by expressly excluding Macao from the territorial scope of the BIT when it was executed in 1993, as the PRC and Portugal had already entered into the Joint Declaration on the issue of Macao at that time, the Respondent states that: (a) in 1993, the PRC did not have the jurisdiction to state the position of Macao; and (b) the Joint Declaration of the PRC and Portugal entered into in 1987 contains provisions—namely, Articles 3, 4, and 5 and Annex II—regarding the autonomy of Macao that were still being negotiated and had not yet been finalized in 1993, making it impossible to ascertain the effect of this Joint Declaration at that time.<sup>96</sup> Moreover, the Claimant contends that the Joint Declarations entered into by the PRC for Macao and Hong Kong with Portugal and the United Kingdom respectively oblige it to maintain their capitalist systems and respect their autonomy.<sup>97</sup>
70. The Respondent also notes that the Claimant relies on the exception in the Agreement between the Government of the Russian Federation and the PRC on the Promotion and Reciprocal Protection of Investments (“**PRC/Russia BIT**”) concerning its application to the Macao SAR.<sup>98</sup> The Respondent argues that, in that case, the PRC merely reiterated its position as enunciated in

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<sup>91</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 73-75.

<sup>92</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 73-75.

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

<sup>94</sup> Respondent’s Memorial on Jurisdiction, ¶ 76.

<sup>95</sup> Respondent’s Memorial on Jurisdiction, ¶ 76.

<sup>96</sup> Respondent’s Reply on Jurisdiction, ¶ 26, referring to the Joint Declaration (RE-11).

<sup>97</sup> Respondent’s Reply on Jurisdiction, ¶ 41.

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

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

71. In response to the argument of the Claimant that the Respondent’s interpretation of the BIT would be contrary to the purpose of the investment treaty regime, in that it would deny Hong Kong and Macao investors the protection available to other Chinese investors, the Respondent submits that by the provisions of the Macao SAR Basic Law, Macao is given full autonomy of its economic affairs, including the power to enter into agreements with other States in the field of economics and trade (Articles 136 and 138 of the Macao SAR Basic Law).<sup>102</sup> This internal arrangement, the Respondent claims, evidences the intention of the PRC, enunciated in the 1999 Notification, to preclude the automatic application of the “moving treaty frontiers” rule in relation to both the PRC’s bilateral and multilateral treaties entered into before the handover.<sup>103</sup> This is not inconsistent with the purposes of the investment treaty regime, the Respondent argues, because the economic structure and development of the PRC and Macao was indisputably different in 1999.<sup>104</sup>
72. In response to the Claimant’s argument that the Respondent’s interpretation would have a wide impact as it would be applicable to all Chinese BITs, the Respondent submits that the *Claimant’s* interpretation would have the effect of rendering over 130 BITs automatically applicable to Hong Kong and Macao; something that was never contemplated.<sup>105</sup> This number exceeds the number of BITs each SAR has entered into in its history.<sup>106</sup> It also brings the application of the BIT under an exception to Article 15 of the VCST by radically changing the condition of its operation.<sup>107</sup> The Respondent points out that the Macao SAR has the autonomy

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<sup>99</sup> Respondent’s Reply on Jurisdiction, ¶ 40.

<sup>100</sup> Respondent’s Reply on Jurisdiction, ¶ 40.

<sup>101</sup> Respondent’s Post-Hearing Submission, ¶ 26.

<sup>102</sup> Respondent’s Reply on Jurisdiction, ¶ 26.

<sup>103</sup> Respondent’s Reply on Jurisdiction, ¶ 26.

<sup>104</sup> Respondent’s Reply on Jurisdiction, ¶ 26.

<sup>105</sup> Respondent’s Reply on Jurisdiction, ¶ 39; Hearing Transcript, pp. 58-59.

<sup>106</sup> Respondent’s Reply on Jurisdiction, ¶ 39.

<sup>107</sup> Hearing Transcript, pp. 58, 147-148.

to enter into its own BITs with other States,<sup>108</sup> and, like Hong Kong, it *has* entered into its own BITs with other States.<sup>109</sup>

73. With reference to BITs with third states concluded by both the PRC and Macao as well as BITs with third States entered into by the PRC and Hong Kong, the Respondent notes that none contain an express provision extending them to the Macao or Hong Kong SARs, respectively.<sup>110</sup> The Respondent places particular emphasis on the PRC/Netherlands BIT in which the Netherlands expressly extended it to cover the Netherlands Antilles and Aruba whereas the PRC did not similarly extend it to cover Macao or Hong Kong.<sup>111</sup>
74. The Respondent also submits that (a) before and after the resumption of sovereignty, the PRC, Hong Kong, and Macao have each entered into BITs with the *same* third States; (b) the territorial definition in the BITs clearly indicates that Macao and the Hong Kong SARs have the power to enter into BITs to cover their own territory notwithstanding that the PRC has also entered into BITs with the same third States. This indicates that the territorial limit of the PRC BITs are confined to Mainland China.<sup>112</sup> The Respondent also points out that different forms of dispute resolution provisions have been resorted to by the PRC, Hong Kong and Macao.<sup>113</sup>
75. It is the Respondent's submission that, if the PRC BITs would, by reason of the "moving treaty frontiers" rule, automatically extend to Macao and Hong Kong after the resumption of sovereignty, the PRC would not allow the SARs to enter into BITs with the same third States with which it has concluded treaties.<sup>114</sup> Nor would that be necessary.<sup>115</sup> It would lead to "legal chaos" for foreign investors in the PRC, Macao and Hong Kong.<sup>116</sup>

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<sup>108</sup> Respondent's Reply on Jurisdiction, ¶ 26.

<sup>109</sup> Respondent's Reply on Jurisdiction, ¶ 39.

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

<sup>111</sup> Respondent's Post-Hearing Submission, ¶ 25.

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

<sup>113</sup> Respondent's Post-Hearing Submission, ¶ 27.

<sup>114</sup> Respondent's Post-Hearing Submission, ¶ 30.

<sup>115</sup> Respondent's Post-Hearing Submission, ¶ 30.

<sup>116</sup> Respondent's Post-Hearing Submission, ¶ 30.

76. The Respondent further argues that its interpretation of the 1999 Notification is consistent with the PRC’s “one country, two systems” policy in that it aligns with the economic and legal independence of the Macao SAR from Mainland China.<sup>117</sup> It contends, furthermore, that it is the position of the Claimant that contradicts this policy and would, in the long run, adversely affect the economic development of the SARs.<sup>118</sup> The Respondent submits that the interests of Laos would not be affected by its position because Macao and Laos did not have a treaty prior to the handover in 1999.<sup>119</sup>
77. The Respondent rebuts the Claimant’s reliance on Gallagher & Shan for its interpretation on the grounds that: (a) the passage cited by the Claimant refers to the issue of “treaty coverage on persons (and entities)” which is different from the territorial coverage of a treaty; (b) the passage is based on the ICSID case of *Tza Yap Shum v. The Republic of Peru*, which stands for the proposition that investors should not be denied protection under Chinese BITs if the term “autonomy” in the Macao SAR Basic Law is properly construed, which under the circumstances of this case, supports the Respondent’s position on the exception to the automatic extension of treaties; and (c) the decision in *Tza Yap Shum*—which it notes has been severely criticized—is distinguishable because it dealt with the issue of the nationality of a *natural* person, which is not an issue in the present case.<sup>120</sup>
78. The Respondent notes that the PRC is a unitary state and therefore the “federal clause” exception, whereby treaties entered into by individual federated States do not automatically bind the entire federation, is not applicable to it.<sup>121</sup> The Respondent nevertheless likens the PRC to a federation, as its three territorial units (namely the Mainland, the Hong Kong SAR, and the Macao SAR) have their own legal, economic, and judicial systems.<sup>122</sup> The SARs are largely

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<sup>117</sup> Respondent’s Reply on Jurisdiction, ¶ 26.

<sup>118</sup> Respondent’s Reply on Jurisdiction, ¶ 35.

<sup>119</sup> Respondent’s Reply on Jurisdiction, ¶ 36.

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

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

<sup>122</sup> Respondent’s Memorial on Jurisdiction, ¶ 82.

autonomous from the Mainland and have the right to be consulted before treaties to which the PRC is a party are extended to them.<sup>123</sup>

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

**(b) The Claimant’s Position**

80. The Claimant notes that it is uncontested that Macao became part of the territory of the PRC following the handover from Portugal on 1 January 1999.<sup>125</sup> It notes that the decision of the PRC to structure its governance of Macao as an SAR is a matter of domestic law, distinct from and irrelevant to the international law issue of whether Macao falls within the sovereignty of the PRC.<sup>126</sup>
81. The Claimant contends that whether the PRC/Laos BIT extends to Macao requires an application of the “moving treaty frontiers” rule, enshrined in Article 29 of the VCLT,<sup>127</sup> according to which, unless a different intention is established, a treaty must be understood as applicable automatically and of its own force in respect of any territory newly acquired by one of its parties.<sup>128</sup> It is the Claimant’s case that the PRC treaties in force as of the date of the handover of Macao automatically apply to the entirety of the territory over which the PRC exercised its sovereignty, including Macao, absent any indication from the PRC to the contrary.<sup>129</sup>

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<sup>123</sup> Respondent’s Memorial on Jurisdiction, ¶ 82.

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

<sup>125</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 227.

<sup>126</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 227.

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

<sup>128</sup> Claimant’s Response, ¶ 4; see also Hearing Transcript, pp. 157-160.

<sup>129</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 230.



82. The Claimant submits that Article 29 of the VCLT represents an applicable rule of customary international law.<sup>130</sup> The Claimant notes that Laos and the PRC are parties to the VCLT.<sup>131</sup> The Claimant also points out that Laos accepts that the exceptions contained in Article 29 of the VCLT are those that apply to this case.<sup>132</sup>
83. According to the Claimant, the rule in Article 29 of the VCLT is reflected, in part, in Article 15 of the VCST.<sup>133</sup> However, the Claimant contends that there is no evidence of the requisite consistent State practice or *opinio juris* to support the notion that all of the VCST's provisions reflect customary international law.<sup>134</sup> In particular, the Claimant argues that the exceptions to the rule in Article 15 of the VCST that differ from the customary rule reflected in Article 29 of the VCLT cannot be considered to reflect customary international law.<sup>135</sup> The Claimant notes that Laos and the PRC have not ratified the VCST.<sup>136</sup>
84. The Claimant states that even if the exceptions under Article 15 of the VCST applied as a matter of customary international law, which it denies, they would not preclude the automatic extension of the BIT to Macao in 1999.<sup>137</sup> Article 15 looks only to the language and application of the Treaty and not to the internal constitutional arrangements in a given State.<sup>138</sup> Moreover, the threshold for establishing the exceptions is a high one.<sup>139</sup>
85. Concerning the first exception, the Claimant argues that the Treaty contains no territorial limits; nor does it limit the category or territorial origin of investors entitled to its protection.<sup>140</sup>

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

<sup>131</sup> Claimant's Response, ¶ 3.

<sup>132</sup> Claimant's Response, ¶¶ 26.

<sup>133</sup> Claimant's Response, ¶¶ 20-25.

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

<sup>135</sup> Claimant's Response, ¶¶ 3, 28-32.

<sup>136</sup> Claimant's Response, ¶ 3; Hearing Transcript, p. 74.

<sup>137</sup> Claimant's Response, ¶ 44.

<sup>138</sup> Claimant's Response, ¶ 35.

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

<sup>140</sup> Claimant's Response, ¶ 37.

86. Concerning the second exception, the Claimant submits that the extension of the BIT to the Macao SAR is not incompatible with its object and purpose which is to “encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State[.]”<sup>141</sup> In the Claimant’s view, allowing Macanese investors to benefit from the protections of the BIT is fundamentally compatible with the object and purpose as is extending the protections of the BIT to foreign investors who have invested in what is indisputably part of the territory of the PRC.<sup>142</sup>
87. Third, the Claimant argues that including Macao within the scope of application of the BIT does not radically change the conditions for the Treaty’s operation, because (a) the only change effected is that Laos must provide investors from Macao the same protection and guarantees required for investors from Mainland China;<sup>143</sup> (b) this kind of change is simply the normal consequence of the application of the “moving treaty frontiers” rule and as such cannot constitute a “radical change”; if mere expansion were enough to constitute a “radical change”, the exception would “swallow” the rule;<sup>144</sup> (c) this applies also in the case of bilateral treaties which are not distinguished from multilateral treaties in Articles 29 of the VCLT or Article 15 of the VCST; the PRC was Laos’s treaty partner before 1999, and it remains so afterwards.<sup>145</sup>
88. According to the Claimant, it is uncontested between the Parties that there are two exceptions to Article 29 of the VCLT; namely that a “different intention” with regard to the territorial scope of the BIT “appears from the Treaty” or “is otherwise established”.<sup>146</sup> The Claimant argues that the Respondent carries the evidentiary burden of establishing the PRC’s “different intention”,<sup>147</sup>

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<sup>141</sup> Claimant’s Response, ¶ 38, citing the Preamble of the Treaty.

<sup>142</sup> Claimant’s Response, ¶ 38.

<sup>143</sup> Claimant’s Response, ¶ 39.

<sup>144</sup> Claimant’s Response, ¶ 40; Hearing Transcript, p. 162.

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

<sup>146</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 12.

<sup>147</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 12.

which must be established by evidence providing a “sufficient degree of certainty” that would overcome the default position.<sup>148</sup>

89. The Claimant asserts that the Treaty does not provide for the territorial limitation of its application or otherwise express a “different intention” or an intention to depart from the default customary rule.<sup>149</sup>
90. The Claimant rejects the Respondent’s contention that the Preamble, Articles 7, 11 or 12 of the Treaty can be invoked to establish the first exception.<sup>150</sup> It disputes the Respondent’s position that the reference to domestic law in Article 12 of the Treaty is relevant to the territorial scope of the Treaty;<sup>151</sup> Article 12 refers to “internal legal procedures” solely in the context of the entry into force of the Treaty but is silent on the application of the Treaty once effective, as well as on its territorial scope.<sup>152</sup>
91. Although the BIT was signed in 1993, or six years prior to the handover of Macao from Portugal to the PRC, the Claimant contends that both Parties to the BIT were aware—during both the negotiation and the conclusion of the BIT—that the PRC would resume the exercise of its sovereignty over Macao in 1999.<sup>153</sup> On this basis, the Claimant notes that either Party could have expressly excluded Macao from the scope of the BIT.<sup>154</sup>
92. The Claimant relies upon the explicit exclusion of Hong Kong and Macao from the PRC/Russia BIT to show that the PRC adopts express language excluding its SARs from the territorial scope of treaties if it in fact has the intention to do so, which was not the case here.<sup>155</sup>
93. The Claimant contests the argument of the Respondent that the PRC did not have the jurisdiction to state the position of Macao at the time of concluding the Treaty, as it was signed

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<sup>148</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 231, referring to Karagiannis, “Article 29, Convention of 1969” in Corten & Klein (“**Karagiannis**”) (CLA-100).

<sup>149</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 13; Hearing Transcript, p. 77.

<sup>150</sup> Hearing Transcript, p. 77.

<sup>151</sup> Hearing Transcript, p. 78.

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

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

<sup>154</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 237.

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

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

94. The Claimant contends that Laos has provided no evidence establishing the intention to exclude Macao from the scope of the BIT, or to demonstrate that a “different intention” has been “otherwise established.”<sup>159</sup>
95. The Claimant rejects the Respondent’s characterization of the 1999 Notification as a unilateral declaration that prevents the BIT from applying to Macao.<sup>160</sup>
96. First, the Claimant notes that the 1999 Notification applies only to multilateral treaties for which the UN Secretary-General is depositary.<sup>161</sup> The PRC/Laos Treaty is a bilateral treaty that does not involve the UN Secretary-General in any capacity. Therefore, it is not surprising that it is not included in the list annexed to the 1999 Notification—no bilateral investment treaties are included on the list—,<sup>162</sup> and the formalities for the application of a treaty to Macao as set out in Paragraph IV of the 1999 Notification do not apply to the Treaty.<sup>163</sup> The Claimant contends that a contrary interpretation would effectively deny all investors from Macao and Hong Kong the protections enjoyed by their PRC counterparts, which would be incompatible with the purposes of both the investment treaty regime and the “one country, two systems” policy of the PRC.<sup>164</sup>

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<sup>156</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 14.

<sup>157</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 14; Hearing Transcript, p. 81.

<sup>158</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 15; Hearing Transcript, pp. 81-82.

<sup>159</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 24.

<sup>160</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 241, referring to Respondent’s Memorial on Jurisdiction, ¶¶ 38-59.

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

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

<sup>163</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 243; Hearing Transcript, pp. 85-86.

<sup>164</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 244, referring to Gallagher & Shan, *Chinese Investment Treaties, Policies and Practice* (2009) (“**Gallagher & Shan**”) (CLA-99).

97. The Claimant rejects the Respondent's argument that the Treaty was deposited with the UN Secretary-General and contends that the Respondent is confusing (a) the registration function of the UN Secretariat (pursuant to Article 102 of the UN Charter, which requires all UN members to register treaties to which they are a party with the UN Secretariat), which covers both multilateral and bilateral treaties<sup>165</sup> and (b) the treaty depository function of the UN Secretary-General, which is open only to multilateral and regional treaties but not to bilateral treaties.<sup>166</sup> In other words, "[t]he fact that the Treaty is included in the UNTC is simply a function of the Treaty having been *registered* with the United Nations, not of the Secretary-General's *depository* function."<sup>167</sup> In this case, the 1999 Notification referred only to treaties that were deposited with the Secretary-General, a category that necessarily excludes the Treaty by virtue of it being a bilateral treaty.<sup>168</sup>
98. In response to the Respondent's argument that the manner in which the 1999 Notification is treated by the UN does not change its effect, the Claimant argues that to accept this, the Tribunal would effectively have to find that the UN somehow misrepresented the context of the PRC's communication.<sup>169</sup> In any event, the Claimant submits that even within the text of the PRC's notification, reference is made to the UN Secretary-General's depository function, which applies to multilateral instruments.<sup>170</sup>
99. Second, the Claimant contends that reservations do not apply to bilateral agreements since any valid reservation would necessarily modify the treaty for both parties.<sup>171</sup> Thus, the alleged failure by Laos to object to the 1999 Notification is irrelevant.<sup>172</sup> But even if reservations could apply to bilateral agreements, the Claimant notes that the 1999 Notification did not refer to the Treaty it purported to modify, and was not communicated directly to Laos, the other

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

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

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

<sup>168</sup> Claimant's Rejoinder on Jurisdiction, ¶ 23.

<sup>169</sup> Hearing Transcript, pp. 163-164.

<sup>170</sup> Hearing Transcript, pp. 164-165.

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

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

Contracting State.<sup>173</sup> According to the Claimant, these are fundamental requirements attaching to treaty reservations under international law.<sup>174</sup>

100. Third, the Claimant contends that the 1999 Notification does not qualify as a “unilateral declaration” that limited the territorial scope of the Treaty because, as explained above, the 1999 Notification does not apply to bilateral treaties.<sup>175</sup> The Claimant further notes that, as the 1999 Notification does not even refer to the Treaty, the intention of the PRC to bind itself through the alleged unilateral declaration could not have been “clearly established.”<sup>176</sup>
101. Therefore, it could not have been assumed that the 1999 Notification would limit the territorial scope of the Treaty.<sup>177</sup>
102. The Claimant dismisses the Respondent’s reliance on domestic law provisions on the basis that international law takes precedence over domestic law in determining the application of treaties and, correspondingly, that domestic laws do not affect the international obligations of a State.<sup>178</sup> On the same basis, the Claimant disputes the Respondent’s argument that the internal arrangements between the PRC and the Macao SAR encompassed in the Macao SAR Basic Law establish the PRC’s intention as regards the scope of the Treaty (*i.e.*, that Macao has full autonomy to manage its economic affairs and thus the automatic application of the “moving treaty frontiers” rule is excluded).<sup>179</sup> The Claimant stresses that the PRC never expressed such an intention on the international plane, and reliance on a State’s internal structure cannot

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

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

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

<sup>176</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 26

<sup>177</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 247.

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

<sup>179</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 28.

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

103. On this point, the Claimant stresses that the Respondent's position has the effect of making the territorial scope of treaties dependent on internal governmental organization and subject to shifts therein.<sup>181</sup> It notes that this would also have the effect of equating the delegation of economic autonomy and autonomy in entering into agreements with foreign states to automatic exceptions under the "moving treaty frontiers" rule, which it contends is an untenable result.<sup>182</sup> In any case, the Claimant notes that the Macao SAR Basic Law does not, on its face, provide for the exclusion of Macao from the bilateral treaties of the PRC that were in force at the moment of the handover.<sup>183</sup>
104. The Claimant defends its reliance on Gallagher & Shan by stating that (a) paragraph 2.48 of this source applies to "entities" incorporated in the SARs, as applicable here; (b) paragraph 2.45 is not premised on *Tza Yap Shum*; and (c) paragraph 2.45 refers to the SAR "investors" generally and is not limited to investors who are natural persons.<sup>184</sup>
105. The Claimant argues that the fact that the PRC and Macao entered into two bilateral agreements with the same third States almost a decade after the BIT entered into force, cannot impact the application of the "moving treaty frontiers" rule to the BIT as of 1999.<sup>185</sup> It is the Claimant's position that there is no evidence to suggest that the four treaties in question—PRC/Portugal BIT (2005), PRC/Netherlands BIT (2001), Macao/Portugal BIT (2000), Macao/Netherlands BIT (2008)—conflict or are mutually exclusive; to the contrary, the Claimant argues that they establish a complementary regime.<sup>186</sup> The PRC treaties do not contain language referring to or carving out Macao and the later treaties do not contain language superseding the former

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

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

<sup>182</sup> Claimant's Rejoinder on Jurisdiction, ¶ 29.

<sup>183</sup> Claimant's Rejoinder on Jurisdiction, ¶ 30.

<sup>184</sup> Claimant's Rejoinder on Jurisdiction, ¶ 32 n. 52.

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

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

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

106. The Claimant characterizes the Macao/Netherlands and Macao/Portugal BITs as supplemental agreements that apply only in the territory of the Macao SAR.<sup>189</sup> The only consequence of this supplemental regime is that Macanese investors can file for arbitration under the PRC or Macao treaty.<sup>190</sup> Dutch or Portuguese investors complaining of breaches in Macao, however, can only bring claims against the PRC under the PRC treaties and against Macao under the Macao treaties.<sup>191</sup> The same does not apply with respect to bringing claims against Macao under the PRC/Laos Treaty because there is no supplemental Laos treaty with Macao.<sup>192</sup>
107. The Claimant also submits that the existence of supplemental Macao treaties does not conflict with the object and purpose of the PRC treaties: extending the PRC treaties to Macao ensures that Macanese investors enjoy dual sets of protection.<sup>193</sup> By contrast, not extending the PRC treaties to Macao would deny Macanese investors the protection of 130 BITs concluded by the PRC, leaving them the protection of only two BITs concluded by Macao,<sup>194</sup> and undermining the “one country, two systems” policy.<sup>195</sup>
108. The Claimant relies on the *Tza Yap Shum* decision in which the tribunal, after hearing evidence on the topic of the Hong Kong SAR’s power to conclude investment treaties, found that there was nothing inconsistent between the parallel treaty regimes of Hong Kong and the PRC.<sup>196</sup>
109. The Claimant contends that the Respondent’s admission that the “federal clause exception” does not apply here resolves this issue.<sup>197</sup> Alternatively, it contends that the rationale behind the

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<sup>187</sup> Claimant’s Response, ¶ 47.

<sup>188</sup> Claimant’s Response, ¶ 47.

<sup>189</sup> Claimant’s Response, ¶ 48.

<sup>190</sup> Claimant’s Response, ¶ 49; Claimant’s Rejoinder on Jurisdiction, ¶ 31.

<sup>191</sup> Claimant’s Response, ¶ 49.

<sup>192</sup> Claimant’s Response, ¶ 49.

<sup>193</sup> Claimant’s Response, ¶ 50; Claimant’s Rejoinder on Jurisdiction, ¶ 32.

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

<sup>195</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 32.

<sup>196</sup> Claimant’s Response, ¶ 51; Hearing Transcript, p. 96.



“federal clause exception” is irrelevant to this case because this Treaty does not have a federal clause provision, thereby requiring the Tribunal to resort to the default rule of customary international law.<sup>198</sup>

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

## **B. WHETHER SANUM QUALIFIES AS AN INVESTOR UNDER THE TREATY**

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

#### **(a) The Respondent’s Position**

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

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

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

<sup>199</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 254, referring to Respondent’s Memorial on Jurisdiction, ¶¶ 25, 85.

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

<sup>201</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 88-89; Hearing Transcript, p. 28.

<sup>202</sup> Respondent’s Memorial on Jurisdiction, ¶ 89.

<sup>203</sup> Respondent’s Memorial on Jurisdiction, ¶ 86.

<sup>204</sup> Respondent’s Memorial on Jurisdiction, ¶ 86.

112. The Respondent clarifies that Mainland China applies PRC laws while the Macao SAR applies Macanese laws.<sup>205</sup> It then notes that the Claimant was not incorporated in accordance with the applicable PRC Company Law,<sup>206</sup> which does not apply to the SARs of Hong Kong and Macao.<sup>207</sup> For PRC law to be applicable to the Macao SAR, the Government of the PRC would have to have listed this law in Annex III to the Macao SAR Basic Law, which it did not do.<sup>208</sup>
113. The Respondent also argues that the Macao SAR Basic Law, which was promulgated by the PRC Congress on 31 March 1993, provided for a legal system applicable to the Macao SAR different and separate from the PRC legal system.<sup>209</sup> In conjunction with the aforementioned PRC Company Law, the Macao SAR Basic Law evidences that the PRC and the Macao SAR have different laws with regard to the incorporation of a company.<sup>210</sup>
114. The Respondent further maintains that the international community recognizes the separate legal systems of the PRC—specifically, PRC law as applicable to Mainland China and Macanese laws as applicable to the Macao SAR, as well as Hong Kong laws applicable to the Hong Kong SAR.<sup>211</sup> The Respondent gives the example of commercial arbitrations, where parties who choose either Hong Kong law or Macao law as the governing law do not expect their choice to translate to PRC law.<sup>212</sup>

**(b) The Claimant’s Position**

115. The Claimant notes that the Parties agree that Sanum was established pursuant to the laws of the Macao SAR on 14 July 2005.<sup>213</sup>
116. The Claimant notes that SARs are jurisdictions separate from the PRC, but contends that their laws form part of PRC law for the purposes of the Treaty.<sup>214</sup> It argues that a contrary view

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<sup>205</sup> Respondent’s Memorial on Jurisdiction, ¶ 91.

<sup>206</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 92-93.

<sup>207</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 92-93.

<sup>208</sup> Respondent’s Memorial on Jurisdiction, ¶ 98.

<sup>209</sup> Respondent’s Memorial on Jurisdiction, ¶ 94.

<sup>210</sup> Respondent’s Memorial on Jurisdiction, ¶ 95; Hearing Transcript, pp. 29-30, 61-62.

<sup>211</sup> Respondent’s Memorial on Jurisdiction, ¶ 96; Hearing Transcript, p. 30.

<sup>212</sup> Respondent’s Memorial on Jurisdiction, ¶ 96.

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

would effectively exclude Macao and Hong Kong investors from the protection of BITs worded similarly to the Treaty.<sup>215</sup>

117. The Claimant maintains that the term “laws and regulations” of the PRC, as referred to in the Treaty, refers to a State comprised of autonomous regions with their own legal regimes and must be taken to include the laws of all such sub-units falling within the entire territory over which that State exercises its sovereignty, unless a different intention is apparent or established.<sup>216</sup> The Claimant highlights that the laws of the separate jurisdictions apply within the territory over which the PRC exercises its sovereignty and the absence of a legal or factual basis to impose a more restrictive definition to such laws.<sup>217</sup>
118. The Claimant also argues that, contrary to the intention expressed in the Preamble to the Treaty, a more restrictive interpretation of the Treaty would lead to an imbalance in the territorial scope of the protections offered by the host States, in that Laotian investors would receive Treaty protection in the SARs of Hong Kong and Macao, while Hong Kong and Macao investors would be denied similar coverage in Laos.<sup>218</sup>

## **2. Whether the Claimant is an “economic entity”**

### **(a) The Respondent’s Position**

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

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

<sup>215</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 267.

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

<sup>217</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 269, referring to Respondent’s Memorial on Jurisdiction, ¶ 91.

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

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

120. The Respondent first notes that the requirement in the Treaty that an “investor” be an “economic entity” means that an entity must have economic activities related to the investment that is the subject of a claim in order to qualify as an investor. This evidences an intention to exclude mere shell companies from the definition of an “investor.”<sup>220</sup>
121. Concerning the nationality of the “economic entity”, the Respondent first contends that, subject to the wording and interpretation of the Treaty, there are three criteria by which the nationality of a company can typically be determined: (a) place of incorporation; (b) seat or *siège social*; and (c) place of effective control.<sup>221</sup>
122. The Respondent submits that the second criterion—the seat or *siège social*—pertains to the description of “economic entity.”<sup>222</sup> According to the Respondent, this means that the place in which the economic activities are conducted must be the State in which the company is incorporated.<sup>223</sup> It further argues that to allow a shell corporation to conduct its economic activities in third States and yet avail itself of the BIT protections of the State in which it is merely incorporated would be tantamount to treaty shopping, which the Contracting Parties did not intend to permit under the Treaty.<sup>224</sup> Moreover, the economic activities must pertain to the investment that is the subject of the claim in question under the Treaty.<sup>225</sup>
123. The Respondent disagrees with the majority in *Tokios Tokelès v. Ukraine* which adopted a purposive interpretation of the BIT and meaning of “investor” under Article 1(2) of that treaty.<sup>226</sup> The majority concluded that the treaty “extended its protections to entities incorporated in third countries using the nationality of the individuals who controlled the enterprise (or the management seat of the entity that controlled the enterprise) to determine the

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<sup>219</sup> Respondent’s Memorial on Jurisdiction, ¶ 101.

<sup>220</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 102-105.

<sup>221</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 106-107.

<sup>222</sup> Respondent’s Memorial on Jurisdiction, ¶ 108.

<sup>223</sup> Respondent’s Memorial on Jurisdiction, ¶ 109.

<sup>224</sup> Respondent’s Memorial on Jurisdiction, ¶ 109.

<sup>225</sup> Respondent’s Memorial on Jurisdiction, ¶ 110.

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

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

124. The Respondent notes that the majority of the *Tokios Tokelès* tribunal declined to impose the “origin of capital” requirement.<sup>231</sup> The Respondent observes that the dissent in that case characterized this position as contrary to the object and purpose of the ICSID Convention and system.<sup>232</sup> Here, the Respondent notes that even if the BIT contains no “origin of capital” requirement, the reference to an “economic activity” evidences that the object and purpose of the BIT is to protect investments belonging to a national of a Contracting State only and not those belonging to the national of a third State that has established a shell company in a Contracting State.<sup>233</sup>
125. The Respondent reiterates that international law determines the nationality of an investor by more than the place of incorporation and considers other factors such as the seat of management and the financial control of the corporation.<sup>234</sup>

#### **(b) The Claimant’s Position**

126. The Claimant contends that Sanum clearly falls within the broad definition of “economic entity.”<sup>235</sup> The Claimant rejects the contention of the Respondent that the term “economic

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<sup>227</sup> Respondent’s Memorial on Jurisdiction, ¶ 111.

<sup>228</sup> Respondent’s Memorial on Jurisdiction, ¶ 111, referring to *Tokios Tokelès*, ¶ 31 (RA-14).

<sup>229</sup> Respondent’s Memorial on Jurisdiction, ¶ 112, referring to *Autopista v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, September 27, 2001, ¶ 107 (“*Autopista*”).

<sup>230</sup> Respondent’s Memorial on Jurisdiction, ¶ 112, referring to *Autopista*, ¶ 107.

<sup>231</sup> Respondent’s Memorial on Jurisdiction, ¶ 113, referring to *Tokios Tokelès*, ¶ 77 (RA-14).

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

<sup>233</sup> Respondent’s Memorial on Jurisdiction, ¶ 115.

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

<sup>235</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 264.

entity” in Article 1(2) was intended to exclude “entities that are mere shell companies” from the coverage of the Treaty.<sup>236</sup>

127. First, the Claimant contends that the fundamental rule of treaty interpretation—that the text is to be construed “in accordance with the *ordinary meaning* to be given to the terms”—applies when there is no indication that the parties intended to assign a special meaning to a treaty term.<sup>237</sup> As applied to this case, Sanum therefore meets the definition of an “economic entity,” as it is a private company that was incorporated to pursue investment opportunities and participate in all commercial and industrial sectors allowed by law.<sup>238</sup>
128. Second, the Claimant notes that the BIT does not expressly indicate an origin of capital requirement, and submits that the Respondent has provided neither evidence nor authority for its contention that the Contracting States intended to restrict the definition of protected investors.<sup>239</sup> The Claimant contends that tribunals cannot impose extra-textual limits on the scope of BITs<sup>240</sup> but should strictly adhere to the treaty terms.<sup>241</sup> The Claimant notes that the BIT in this case only requires that an economic entity be established pursuant to the laws of a Contracting State, which means that the inquiry ends once the State of incorporation is ascertained.<sup>242</sup>
129. The Claimant contests the reliance of the Respondent on the dissenting opinion in *Tokios Tokelès* on the basis that this opinion relied heavily on the facts of that case and the purpose of ICSID arbitration, considerations which are not present in this case.<sup>243</sup> The Claimant also

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<sup>236</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 257, referring to Respondent’s Memorial on Jurisdiction, ¶ 105.

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

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

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

<sup>240</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 260, referring to *Tokios Tokelès*, ¶ 36.

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

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

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

dismisses the reliance of the Respondent on cases potentially dealing with piercing the corporate veil because such issue is irrelevant to this case.<sup>244</sup>

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

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

#### **(a) The Respondent’s Position**

131. The Respondent submits that Article 8(1) and 8(3) of the BIT require that a dispute involving the quantification of the compensation for expropriation arises in connection with an investment in the territory of a Contracting State.<sup>246</sup>
132. The Respondent notes that the Claimant has only submitted the articles of association of Savan Vegas and Paksong Vegas (Laos companies in which Sanum has a 60% ownership and Laos has a 20% ownership) as evidence of its investment in Laos.<sup>247</sup> The Respondent notes that the contribution of the Claimant for its shares takes the form of loans that are being repaid annually from casino proceeds. It contends that this contribution does not meet the requirement of Article 1(1)(b) of the BIT, which includes “shares in companies or other forms of interest in such companies” in its definition of investment.<sup>248</sup>
133. The Respondent rejects the Claimant’s submission that its investment consists of “investing in real property; employing its know-how and acquiring other tangible assets in order to establish and maintain gaming facilities described above, and in obtaining concession[s] from the

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

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

<sup>246</sup> Respondent’s Memorial on Jurisdiction, ¶ 123.

<sup>247</sup> Respondent’s Memorial on Jurisdiction, ¶ 123.

<sup>248</sup> Respondent’s Memorial on Jurisdiction, ¶ 122.

[R]espondent which accorded its investment enterprises exclusive rights to operate gaming facilities in five provinces.”<sup>249</sup>

134. The Respondent first contests the Claimant’s argument that it has invested in movable or immovable property assets in the territory of Laos, pursuant to Article 1(1)(a) of the BIT, on the grounds that the said property rights belong not to Sanum but to the local companies that are to operate the gaming facilities.<sup>250</sup>
135. Second, the Respondent notes that it cannot identify any “know-how of Sanum employed in Lao PDR” or “other tangible assets” that would meet the definition of an investment, and further notes that the “concessions” to which Sanum refers were actually accorded to its investment enterprise—namely, Savan Vegas and Paksong Vegas, and not to it.<sup>251</sup>
136. Last, the Respondent contends that the two PDAs do not qualify as investments, because they replace existing PDAs (concluded on 11 April 2006 and amended on 26 July 2006) to which Sanum is not a party and from which Sanum cannot derive rights.<sup>252</sup> Moreover, the Respondent notes that “[n]o specific right was granted to Sanum under the PDAs,” as the PDAs merely (a) express the intention of the Parties to cooperate on project development (Article 4, PDAs); (b) involve Laos granting development rights to both Sanum and ST (Article 2, PDAs); and (c) provide that the development project area is to be considered as part of the PDA “after the company has completely developed the land area of 50 hectares allowed by the Government.” (Article 2(2), PDAs).<sup>253</sup>
137. The Respondent also notes that the PDAs only contemplate the conclusion of future contracts upon the establishment of a joint venture (Article 6, PDAs) or a lease agreement for the concession area (Article 4(4), PDAs).<sup>254</sup> It contends that the shareholders’ rights, the gaming license, and lease agreement were granted not to the Claimant but to Savan Vegas and Paksong Vegas, the local vehicles.<sup>255</sup>

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<sup>249</sup> Respondent’s Memorial on Jurisdiction, ¶ 124, referring to Amended Notice, ¶ 115.

<sup>250</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 124-125, referring to Amended Notice, ¶ 115.

<sup>251</sup> Respondent’s Memorial on Jurisdiction, ¶ 126, referring to Amended Notice, ¶ 115.

<sup>252</sup> Respondent’s Memorial on Jurisdiction, ¶ 127.

<sup>253</sup> Respondent’s Memorial on Jurisdiction, ¶ 127.

<sup>254</sup> Respondent’s Memorial on Jurisdiction, ¶ 127.

<sup>255</sup> Respondent’s Memorial on Jurisdiction, ¶ 127.



138. The Respondent argues that the rights arising out of the PDAs cannot be taken as “claims for money or to any performance having an economic value (Article 1(1)(c) of the BIT),” and that the PDAs themselves do not legitimately give rise to expectations regarding financial value because they do not guarantee the formation of a joint venture or the granting of a gaming license.<sup>256</sup>

**(b) The Claimant’s Position**

139. The Claimant contends that the text of the Treaty neither excludes indirect investments from its coverage nor provides a basis on which to distinguish between the operating entities and Sanum for the purposes of defining qualifying “investments.”<sup>257</sup>

140. Sanum highlights the substantial investments it has made in the various Laotian enterprises and projects, including (a) capital investments exceeding US\$ 85 million; (b) being a majority shareholder in Savan Vegas and Paksong Vegas; (c) ownership stakes in the Thanaleng, Lao Bao, and Ferry Terminal slot clubs; and (d) using its industry expertise and business know-how to generate returns and advance its different enterprises.<sup>258</sup>

141. The Claimant stresses that Article 1(1) defines “investments” to include “*every kind of asset invested*,”<sup>259</sup> and notes that the restriction that the Respondent seeks to impose on this provision would be fundamentally unfair to the Claimant, especially in view of its substantial contributions to Laos.<sup>260</sup>

142. The Claimant rebuts the Respondent’s contention that the PDAs do not qualify as investments because they do not constitute contractual guarantees and therefore cannot form the basis of

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<sup>256</sup> Respondent’s Memorial on Jurisdiction, ¶ 127.

<sup>257</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 273. The Claimant also cites cases in which investment treaty tribunals have found all investments, including indirect investments, to be encompassed by broad language in the relevant treaties (*see* Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 273 n. 578); Hearing Transcript, p. 110.

<sup>258</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 273, referring to *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 137 (“*Siemens*”) (CLA-71); *Mobil Corporation et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, ¶ 165 (CLA-49); *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶¶ 378-80 (CLA-33); *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶¶ 123-124 (CLA-40).

<sup>259</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 272, referring to PRC/Laos Treaty, Article 1 (Ex. D to Amended Notice) (Claimant’s emphasis); Hearing Transcript, p. 110.

<sup>260</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 273.

legitimate expectations. The Claimant argues that the relevant contracts did in fact contain guarantees, in the form of the Lao Government granting development rights to the respective casino companies and promising to issue the required licenses for their operation.<sup>261</sup> The Claimant further notes that international tribunals have considered contractual rights to be “assets,” just like tangible property, where a bilateral investment treaty has defined “investments” broadly.<sup>262</sup>

143. The Claimant submits that Laos has cited no authority to establish the relevance of the method by which Sanum invested in the local companies to the issue of whether its investments are covered under the BIT.<sup>263</sup> The Claimant contends that the loans extended by Sanum to the local companies fall under the category of “claim[s] to money” under Article 1(1) of the Treaty.<sup>264</sup> The Claimant notes that the loans that form part of continuing financing arrangements of an investment and that are interposed on a non-regular basis have been recognized as protected investments.<sup>265</sup>

#### **D. WHETHER LAOS CONSENTED TO THE ARBITRATION OF THE CLAIMANT’S CLAIMS UNDER THE BIT**

##### **1. Article 8 of the BIT**

###### **(a) The Respondent’s Position**

144. The Respondent argues that the ordinary meaning of Article 8(3) establishes that Laos did not consent to the arbitration of Sanum’s claims under the BIT.
145. It notes that Article 8(1) first imposes a six-month negotiation period on the parties.<sup>266</sup> If the negotiation is unsuccessful, then the BIT assigns Laotian courts general jurisdiction to hear any

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<sup>261</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 274; Savan Vegas PDA, Articles 2(1), 3, 8(10) (C-004); Paksong Vegas PDA, Articles 2(1), 3, 8(10) (C-005).

<sup>262</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 274, referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award August 20, 2007, ¶ 7.5.18 (CLA-23); Hearing Transcript, pp. 110-111.

<sup>263</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 275.

<sup>264</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 275, referring to *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, ¶¶ 77, 81-83 (CLA-19); Hearing Transcript, p. 111.

<sup>265</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 275, referring to *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 214 (CLA-69).

<sup>266</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 131-132; Hearing Transcript, pp. 33-35.

dispute connected with the investment (Article 8(2))<sup>267</sup> and an ad hoc arbitral tribunal the more specific jurisdiction of hearing only those “dispute[s] involving the amount of compensation for expropriation”<sup>268</sup> and not “dispute[s] involving expropriation.”<sup>269</sup>

146. Accordingly, it is the Respondent’s position that all of the Claimant’s other claims—*i.e.*, the breach of the fair and equitable treatment standard, expropriation, and breach of contract—are excluded from these proceedings.
147. In reliance on Article 31(1) of the VCLT that requires a treaty to be interpreted according to the ordinary meaning of its terms, the Respondent contends that the Parties have consented to international arbitration only for the quantum of an expropriation, and are required by the BIT to submit all other disputes, including the issue of whether an expropriation has occurred in the first place, to the local courts of the host State.<sup>270</sup> The Respondent relies on three arbitral tribunal decisions that have interpreted arbitration clauses in treaties providing for disputes on the “amount of compensation” only to be determined by international arbitration.<sup>271</sup> The Respondent contends that the Claimant’s argument on this matter requires a departure from and an enlargement of the actual wording of the text.<sup>272</sup>
148. The Respondent also argues that the limited scope of Article 8(3) is confirmed when read in the context of the expropriation clause (Article 4) and Preamble of the BIT.<sup>273</sup>
149. The Respondent notes that Article 4(1) of the BIT defines the term “expropriation” and enumerates the conditions that must attach to an expropriation,<sup>274</sup> while Article 4(2) of the BIT

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<sup>267</sup> Hearing Transcript, p. 35.

<sup>268</sup> Respondent’s Memorial on Jurisdiction, ¶ 132; Respondent’s Reply on Jurisdiction, ¶ 47; Hearing Transcript, pp. 35-36.

<sup>269</sup> Respondent’s Reply on Jurisdiction, ¶ 47.

<sup>270</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 133-135.

<sup>271</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 133-135, relying on *Berschader v. Russian Federation*, Arb. Inst. of Stockholm Chamber of Commerce, Award, Case No. V 080/2004, ¶¶ 152-158 (Apr. 21, 2006) (involving the Belgium/Luxembourg-Russian BIT of 1989) (“*Berschader*”) (RA-18); *RosInvest Co. UK Ltd. v. Russian Federation* (RosInvest), Arb. Inst. of Stockholm Chamber of Commerce, Award on Jurisdiction, Case No. V 079/2005, ¶ 110 (Oct. 2007) (involving the UK-Russian BIT of 1989) (“*RosInvest*”) (RA-19); *Austrian Airlines v. Slovak Republic* (Austrian Airlines), UNCITRAL, Final Award, ¶¶ 96-99 (Oct. 9, 2009) (involving the Austrian-Czech BIT of 1990) (“*Austrian Airlines*”) (RA-20); Hearing Transcript, pp. 36-38.

<sup>272</sup> Respondent’s Reply on Jurisdiction, ¶ 47.

<sup>273</sup> Respondent’s Memorial on Jurisdiction, ¶ 137; Hearing Transcript, p. 38.

<sup>274</sup> Respondent’s Memorial on Jurisdiction, ¶ 138; Hearing Transcript, p. 38.

defines the amount of compensation that must accompany an expropriation.<sup>275</sup> It then contends that the Respondent's consent to international arbitration applies only to disputes involving Article 4(2) and not Article 4(1).<sup>276</sup>

150. The Respondent also notes that the Preamble of the BIT and the "generally recognized principles of international law accepted by both Contracting States," referred to in Article 8(7) of the BIT, further confirm the Respondent's interpretation of Article 8(3);<sup>277</sup> namely, that the scope of the arbitration clause and the clause giving jurisdiction to Laotian courts must be understood against the principle of "mutual respect of sovereignty." The principle of "mutual respect of sovereignty, equality and mutual benefit" as affirmed in the Preamble and embodied in the "principles of international law accepted" by both the PRC and Laos under Article 8(7) of the Treaty constitute part of the Five Principles of Pacific Coexistence that both Contracting States have recognized.<sup>278</sup>
151. In this case, the Respondent argues that the principle of mutual respect of sovereignty mandates respecting the Contracting States' choice to give exclusive jurisdiction to their respective judicial organs over the disputes connected to an investor's investments under Article 8(2), save for that relating to the compensation amount for an expropriation (Article 8(3)).<sup>279</sup>
152. The Respondent then argues that the common treaty practice of Laos and the PRC, as well as the treaty practice of each of these States with other States, further confirms its interpretation. It notes that the PRC has committed to respecting the sovereignty of Laos in its ratification of the International Declaration on the Neutrality of Laos dated 23 July 1962.<sup>280</sup> The Respondent also notes that preambles of other BITs signed by Laos, such as those with Australia and Indonesia, also refer to the principle of respect for the mutual independence and sovereignty of States.<sup>281</sup>

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<sup>275</sup> Respondent's Memorial on Jurisdiction, ¶ 139; Hearing Transcript, p. 38.

<sup>276</sup> Respondent's Memorial on Jurisdiction, ¶ 140; Respondent's Reply on Jurisdiction, ¶ 47; Hearing Transcript, p. 39.

<sup>277</sup> Respondent's Memorial on Jurisdiction, ¶¶ 141-142; Respondent's Reply on Jurisdiction, ¶ 47.

<sup>278</sup> Respondent's Memorial on Jurisdiction, ¶ 143.

<sup>279</sup> Respondent's Memorial on Jurisdiction, ¶ 144.

<sup>280</sup> Respondent's Memorial on Jurisdiction, ¶ 146, referring to the Department of State Bulletin, Vol. XLVII, No. 1207 dated 13 August 1962 (RE-13).

<sup>281</sup> Respondent's Memorial on Jurisdiction, ¶ 147, referring to Preamble, Laos/Australia BIT signed on 6 April 1994 (RE-14) and Laos/Indonesia BIT signed on 18 October 1994 (RE-15).

153. It submits that several BITs signed by the PRC also refer to the principle of mutual respect of sovereignty,<sup>282</sup> and limit the scope of arbitral jurisdiction to only those disputes involving the quantum of an expropriation claim while assigning the resolution of all other disputes to the local courts of the host State.<sup>283</sup>
154. The Respondent cautions the Tribunal against relying on the findings of other arbitral tribunals or state courts that have interpreted narrow consent clauses broadly in order to allow the investor to arbitrate expropriation claims.<sup>284</sup> The Respondent argues that none of the bilateral investment treaties in those cases incorporate the principle of mutual respect of sovereignty, as does the BIT here.<sup>285</sup> The application of the principle of mutual respect of sovereignty obliges the Tribunal to respect the Contracting States' choice of submitting disputes of a foreign investor to local courts.<sup>286</sup>
155. The Respondent further cites the notification made by the PRC on 7 January 1993, pursuant to Article 24(5) of the ICSID Convention, as to the jurisdiction of ICSID, in which the PRC stated that it "would only consider submitting to the jurisdiction of disputes over compensation resulting from expropriation and nationalization."<sup>287</sup>
156. The Respondent rejects any argument that the Claimant may make with regard to Article 8(3) being construed as containing a fork-in-the-road clause that would operate to exclude international arbitration once a foreign investor has submitted to Laotian courts any dispute

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<sup>282</sup> Respondent's Memorial on Jurisdiction, ¶ 148, referring to Preamble, the PRC/Mongolia BIT 1991 (RE-16) and Preamble, the PRC/Australia BIT 1988.

<sup>283</sup> Respondent's Memorial on Jurisdiction, ¶ 148, referring to Article 8(3) of the PRC/Mongolia BIT 1991 (RE-16).

<sup>284</sup> Respondent's Memorial on Jurisdiction, ¶ 149; Hearing Transcript, pp. 39-41, referring to *Renta 4 S.V.S.A et al. v. Russian Federation*, Arb. Inst. of Stockholm Chamber of Commerce, Award on Preliminary Objections, Case No. V 024/2007 (Mar. 20, 2009) (involving the Spanish-Russian BIT of 1991) ("*Renta 4*") (RA-21) (the Respondent argues that in that case the tribunal was able to find jurisdiction because the arbitration clause contained a reference to the expropriation clause which did not contain a split between the principle of expropriation and quantum of expropriation); *Tza Yap Shum* (CLA-70/RA-10) (the Respondent notes that the treaty in this case does not contain the restriction of the principle of mutual respect of sovereignty as is contained in the Treaty); *Czech Republic v. European Media Ventures*, 2007 EWHC 2851 (Comm), involving the Belgium/Luxembourg-Czech BIT (1992) ("*European Media Ventures*") (RA-22) (the Respondent notes that it does not have the award in this case).

<sup>285</sup> Respondent's Memorial on Jurisdiction, ¶ 149, referring to *Renta 4* (RA-21); *Tza Yap Shum* (CLA-70/RA-10); *European Media Ventures*, (RA-22); Hearing Transcript, pp. 41-42.

<sup>286</sup> Hearing Transcript, pp. 42-43.

<sup>287</sup> Respondent's Memorial on Jurisdiction, ¶ 150, referring to Notification of the People's Republic of China to ICSID pursuant to Article 25(4) of the ICSID Convention dated 9 January 1993 (RE-17).

connected to an investment.<sup>288</sup> It clarifies that Article 8(3) mandates an interpretation under which international arbitration is excluded only when the investor submits to Laotian courts a dispute on the amount of compensation for expropriation, which is the only claim that can ever be arbitrated.<sup>289</sup>

**(b) The Claimant's Position**

157. The Claimant rejects the Respondent's interpretation of Article 8(3) of the Treaty.
158. The Claimant relies on *Tza Yap Shum*, which contains language similar to that of the BIT.<sup>290</sup> There, the tribunal found that the phrase "dispute involving the amount of compensation for expropriation" (as set out in Article 8(3) of the Treaty) simply meant that the dispute must *include* the determination of the amount of compensation but must not necessarily be limited to it.<sup>291</sup> The tribunal noted that the phrase evinced that the parties had consented to arbitrate all issues pertinent to the determination of the amount of damages, which necessarily includes whether damages must be awarded at all.<sup>292</sup>
159. The Claimant contends that this interpretation is consistent with the language of Article 4(1) of the Treaty, which sets out standards for the determination of whether an expropriation has taken place. It is thus clear, the Claimant argues, that whether an expropriation has occurred is an assessment that is a necessary element of any claim "involving the amount of compensation for expropriation."<sup>293</sup> The Claimant submits that the term "involving" is broad and extends the Tribunal's jurisdiction beyond disputes in which the only point of dispute is quantum.<sup>294</sup>

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<sup>288</sup> Respondent's Memorial on Jurisdiction, ¶¶ 151-154; Hearing Transcript, pp. 43-45. (In this way, the Respondent seeks to distinguish the findings of the tribunal in *Tza Yap Shum*. That tribunal, the Respondent says, was motivated to interpret the jurisdictional clause broadly because it contained a fork-in-the-road provision such that if an investor submitted its dispute on the principle of expropriation to a local court, it was barred from access to international arbitration on the quantum of expropriation. The Respondent argues that this is not the case under the PRC/Laos Treaty).

<sup>289</sup> Respondent's Memorial on Jurisdiction, ¶¶ 151-154; Hearing Transcript, pp. 43-45.

<sup>290</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281; Hearing Transcript, pp. 123-125; *Tza Yap Shum* (CLA-70/RA-10).

<sup>291</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281, referring to Respondent's Memorial on Jurisdiction, ¶ 134; *Tza Tap Shum* (CLA-79).

<sup>292</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281.

<sup>293</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 281; *Tza Tap Shum*, ¶ 152 (CLA-79/RA-10); Hearing Transcript, p. 117.

<sup>294</sup> Hearing Transcript, p. 117.

160. The Claimant argues that a contrary interpretation would render Article 4(1) meaningless, because the standards set out in Article 4(1) for determining an unlawful expropriation do not strictly fit within a dispute restricted to the amount or quantum of damages.<sup>295</sup> The Claimant further notes that, contrary to the contention of the Respondent, there can be no distinction between the question of whether the investor received “appropriate and effective compensation” under Article 4(2) and the question of whether an expropriation occurred under Article 4(1), as the former is an element of the latter.<sup>296</sup> The Claimant further points out that clauses like Article 4(1) and 4(2)—variants of which can be found in many investment arbitration treaties, including those with broad dispute resolution provisions—do not relate to the forum for making expropriation claims but merely set out the conditions for lawful expropriation and the standard for compensation.<sup>297</sup>
161. The Claimant maintains that Article 8(1) and 8(2) of the BIT do not have the effect of designating the local courts as the exclusive forum for the resolution of disputes apart from the quantum of expropriation, as the Respondent claims, because Article 8(1) provides for the amicable settlement of disputes and Article 8(2) gives the parties the option of submitting the dispute to the courts of the host State after the designated waiting period.<sup>298</sup>
162. The Claimant cites to courts and tribunals that have interpreted treaty provisions similar to Article 8(3) to confer jurisdiction over the question of whether an expropriation has occurred.<sup>299</sup>
163. The Claimant contests the Respondent’s reliance on, what the Claimant characterizes as, “the only three cases in which tribunals declined to read such clauses as conferring jurisdiction over disputes as to the existence of an expropriation”.<sup>300</sup> The Claimant further contends that those

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<sup>295</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 282.

<sup>296</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 283; Hearing Transcript, pp. 119-120.

<sup>297</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 39; Hearing Transcript, p. 120.

<sup>298</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 38.

<sup>299</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 284; Claimant’s Rejoinder on Jurisdiction, ¶ 36, citing: (1) *Tza Yap Shum*, at 151 (CLA-70/RA-10); (2) *European Media Ventures*, ¶ 44 (RA-22) (see also Hearing Transcript, pp. 128-129); (3) *Quasar de Valores (formerly Renta 4 S.V.S.A. et al.) v. The Russian Federation*, Award on Preliminary Objections (SCC 20 March 2009), at 5, 20–21 (RA-21) (“*Quasar de Valores*”) (see also Hearing Transcript, pp. 125-128); (4) *Franz Sedelmayer v. The Russian Federation*, Arbitration Award (SCC, 7 July 1998), at 9, 71–73 (CLA-34) (see also Hearing Transcript, p. 129); and (5) *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶¶ 70, 76, 116–118, 29–133 (CLA-64) (see also Hearing Transcript, p. 129).

<sup>300</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 285, referring to the Respondent’s reliance on (1) *Austrian Airlines*, ¶ 102 (RA-20); (2) *Berschader*, ¶¶ 152-158 (RA-18); and, (3) *RosInvest*, ¶ 110 (RA-19).

decisions would not in any case support a similar outcome in this case, as they can be distinguished.<sup>301</sup> For instance, none of them contain fork-in-the-road provisions in their dispute settlement clauses.<sup>302</sup> In addition, the Claimant contends that five of the tribunals that have interpreted clauses like Article 8 have done so expansively.<sup>303</sup>

164. Further, the Claimant argues that the interpretation of the Respondent disregards the context of Article 8(3).<sup>304</sup> The Claimant submits that a proper reading of Article 8(2) of the PRC/Laos Treaty is that an investor is entitled to submit its dispute to the State courts, but that it will be barred from seeking arbitration of its expropriation claim if it in fact pursues this option.<sup>305</sup> The Claimant asserts that the Respondent's contention that an investor must first submit the issue of whether an expropriation has occurred to the domestic courts effectively deprives the investor of access to arbitration; its opportunity to arbitrate the dispute will be foreclosed by its submission of the issue of expropriation to the domestic courts.<sup>306</sup>
165. The Claimant contends that Article 8(2) and 8(3) provide an investor two options if the dispute cannot be settled through negotiation within six months.<sup>307</sup> Article 8(3) contains a fork-in-the-road provision.<sup>308</sup> The Claimant asserts that had the Contracting Parties intended to require the investor to litigate whether an expropriation had occurred before submitting the question of quantum to a tribunal, they would not have stipulated that "either" process could begin after six months.<sup>309</sup>

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<sup>301</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 285-286. Concerning the Respondent's reliance on (1) *Austrian Airlines*, the Claimant notes that unlike the Treaty in this case, the BIT in that case explicitly stated that an investor could only challenge an expropriation before the local authorities (RA-20) (see also Hearing Transcript, p. 130); (2) *Berschader*, the Claimant notes that the panel had considered the phrase "amount or mode of compensation" after it had already concluded that it lacked jurisdiction on an entirely separate ground and its conclusions on the scope of the arbitration clause were 'superfluous' *obiter dicta* (see also Hearing Transcript, pp. 130-131) (RA-18); and, (3) *RosInvest*, the Claimant notes, *inter alia*, that that decision did not consider whether the word 'payment' may lead to consideration of the reality of its predicate: 'expropriation' (RA-19); see also Hearing Transcript, pp. 131-132.

<sup>302</sup> Hearing Transcript, p. 129.

<sup>303</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 280-284; Claimant's Rejoinder on Jurisdiction, ¶ 36; see also Hearing Transcript, p. 129.

<sup>304</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 287-288.

<sup>305</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 287-288.

<sup>306</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 289, referring to *Tza Yap Shum*, ¶¶ 154-161 (CLA-70/RA-10).

<sup>307</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 290.

<sup>308</sup> Hearing Transcript, pp. 117, 120.

<sup>309</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 290.



166. The Claimant also disagrees with the Respondent’s contention that the fork-in-the-road bar in Article 8(3) merely precludes an investor who has submitted a dispute over the quantum of compensation to a domestic court from bringing the same claim before an arbitral tribunal.<sup>310</sup> First, the Claimant notes that Article 8(3) categorically states that arbitration shall not be permitted if the investor has submitted the dispute “involving the amount of compensation for expropriation” to the local courts; a statement that can only make sense if Article 8 permits an investor to choose between litigating and arbitrating all aspects of its expropriation claim.<sup>311</sup>
167. Second, the Claimant notes that the determination of the fact of an expropriation and the amount of compensation for an expropriation are linked in the Treaty, so that a court could not determine one issue without also determining the other.<sup>312</sup>
168. Third, the Claimant contends that the Respondent’s interpretation renders the right to arbitration illusory, which in turn defeats the object of the Treaty to encourage investment.<sup>313</sup>
169. And finally, the Claimant contends that the principle of mutual respect for sovereignty is not undermined by holding a State to the commitments it made for the benefit of its treaty partner.<sup>314</sup> On a broader but related note, the Claimant also contends that the Respondent has not expounded as to how the “principle of mutual respect for sovereignty, equality and mutual benefit,” as contained in the Preamble of the BIT supports its interpretation.<sup>315</sup> The Claimant points out that investment treaties with expansive dispute resolution provisions contain similar language.<sup>316</sup>

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<sup>310</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 291, referring to Respondent’s Memorial on Jurisdiction ¶¶ 151-154.

<sup>311</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 292; Hearing Transcript, pp. 121-122.

<sup>312</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 293.

<sup>313</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 294, referring to *Tza Yap Shum*, ¶ 153 (CLA-70/RA-10); *RosInvest*, ¶ 130 (RA-19); *Amco v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction, September 25, 1983, ¶ 24 (CLA-7); Hearing Transcript, pp. 117-118, 121-122.

<sup>314</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 295, referring to *Case of the S.S. ‘Wimbledon’ (U.K. v. Japan)*, 1923 (ser. A) No. 1, Judgment (P.C.I.J., 17 August 1923), p. 25 (CLA-84); *CME Czech Republic B.V. v. The Czech Republic*, Partial Award (UNCITRAL 13 September 2001), ¶ 533 (CLA-21); *Quasar de Valors*, ¶ 31 (RA-21); Lalive, “The First World Bank Arbitration (*Holiday Inns v Morocco*)—Some Legal Problems,” *British Yearbook of International Law* (1980), at 158 (CLA-101); Hearing Transcript, pp. 119-120.

<sup>315</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 37.

<sup>316</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 37; referring to the Australia/Pakistan BIT (CLA-119) and the Australia/India BIT as examples (CLA-120); Hearing Transcript, p. 119.

## 2. Article 3(2) of the BIT

### (a) The Respondent's Position

170. The Respondent rejects the Claimant's attempt, based on Article 3(2) of the BIT, to import the arbitration clauses contained in BITs entered into by Laos with third States to this dispute so as to widen this Tribunal's jurisdiction.<sup>317</sup>
171. The Respondent argues that the most favored nation ("MFN") clause under the BIT does not encompass dispute settlement for the following reasons: (a) the scope of the MFN clause is limited to "fair and equitable treatment" and "protection" and does not refer to dispute settlement;<sup>318</sup> and (b) the context of Article 3(2) of the BIT confirms that the MFN clause does not apply to dispute settlement.<sup>319</sup>
172. First, the Respondent contends that the plain meaning of Article 3(2) is that the MFN clause is limited to "fair and equitable treatment" and "protection" as listed in Article 3(1), which does not cover access to international arbitration.<sup>320</sup> The Respondent notes that, for an MFN clause to enlarge the scope of an arbitration clause, its wording must be broad enough to include arbitration proceedings.<sup>321</sup>
173. The Respondent argues that "fair and equitable and full protection and security" clause is a standard term in most modern BITs that has appeared in such treaties since the 19<sup>th</sup> century, including in the first Chinese model BIT and other BITs contemporary to that at issue here.<sup>322</sup> The Respondent stresses that the term "protection" refers to the "protection and security" standard.<sup>323</sup> The Respondent therefore concludes that the scope of the MFN clause is restricted

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<sup>317</sup> Respondent's Memorial on Jurisdiction, ¶¶ 155-157, referring to the Amended Notice, ¶ 2, pp. 119-123, 126.

<sup>318</sup> Respondent's Memorial on Jurisdiction, ¶ 158; Hearing Transcript, pp. 47-48.

<sup>319</sup> Respondent's Memorial on Jurisdiction, ¶ 158.

<sup>320</sup> Respondent's Memorial on Jurisdiction, ¶ 159, referring to Amended Notice, ¶ 2, pp. 119-123, 126; Hearing Transcript, p. 48.

<sup>321</sup> Respondent's Memorial on Jurisdiction, ¶ 159, referring to *RosInvest*, ¶ 110 (RA-19); Hearing Transcript, pp. 151-152 (referring to *Tza Yap Shum*, ¶ 126) and pp. 152-153 (referring to *RosInvest* and the distinction made in that case between investments or investors in applying the MFN clause).

<sup>322</sup> Respondent's Reply on Jurisdiction, ¶ 50.

<sup>323</sup> Respondent's Reply on Jurisdiction, ¶ 51, referring to Gallagher & Shan, pp. 134-135 (RA-34); Hearing Transcript, p. 151.

to Article 3(1), which is “fair and equitable treatment” with the “protection” indicated therein having no relation to access to international arbitration.<sup>324</sup>

174. The Respondent argues that the context of Article 3(2) confirms its non-application to dispute settlement.<sup>325</sup> The specific reference in Article 3(2) to Article 3(1) manifests the clear intention of the Contracting States that “the MFN clause would import only [the] more favorable substantive treatments from third-party treaties, and not arbitration or other dispute resolution provisions.”<sup>326</sup>
175. In the Respondent’s view, Article 3(2) would have specifically referred to Article 8 if the Contracting States’ intention was to be able to import an arbitration clause from another treaty to expand the consent in Article 8(3) of the BIT, which is not the case here.<sup>327</sup> The Respondent therefore contends that the jurisdiction of the Tribunal is limited to that specified in Article 8(3) of the BIT.<sup>328</sup>
176. The Respondent submits that the principle of mutual respect for sovereignty, as referenced in both the Preamble and Article 8(7) of the BIT, precludes the expansive interpretation of the MFN clause.<sup>329</sup> The Respondent contends that a broad application of the MFN to enlarge access to arbitration would directly violate the agreement of the Contracting States to limit the scope of permissible arbitration.<sup>330</sup>
177. The Respondent stresses that the Contracting Parties assigned disputes of the kind brought by the Claimant exclusively to the courts of the Contracting States, pursuant to Article 8(2) of the BIT.<sup>331</sup> To allow the Claimant to import broader consent clauses that would allow it to arbitrate claims for breach of the fair and equitable treatment standard, breach of contract, and liability for expropriation, would circumvent the Contracting States’ agreement on this matter.<sup>332</sup>

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<sup>324</sup> Respondent’s Reply on Jurisdiction, ¶ 53; Hearing Transcript, pp. 49-50.

<sup>325</sup> Respondent’s Memorial on Jurisdiction, ¶ 161.

<sup>326</sup> Respondent’s Memorial on Jurisdiction, ¶ 162.

<sup>327</sup> Respondent’s Memorial on Jurisdiction, ¶ 162.

<sup>328</sup> Respondent’s Memorial on Jurisdiction, ¶ 162.

<sup>329</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 163-164.

<sup>330</sup> Respondent’s Memorial on Jurisdiction, ¶ 165.

<sup>331</sup> Respondent’s Memorial on Jurisdiction, ¶ 165.

<sup>332</sup> Respondent’s Memorial on Jurisdiction, ¶ 166.

178. The Respondent emphasizes that “an MFN clause cannot change the scope, *ratione materiae*, of the jurisdiction of an arbitral tribunal.”<sup>333</sup> The Respondent distinguishes this case from other cases in which the consent clauses were broader than that found in Article 8(3) and over which the tribunals had *ratione materiae* jurisdiction for all of the disputes brought by the claimant.<sup>334</sup>

**(b) The Claimant’s Position**

179. The Claimant contends that the MFN clause of Article 3(2) extends the jurisdiction of the Tribunal to claims for the breach of the obligation of fair and equitable treatment, as enshrined in Article 3(1); the guarantee of free transfer of payments in Article 5; and other protections that are imported from more favorable bilateral investment treaties, including the Claimant’s right to have its expropriation claim resolved through international arbitration.<sup>335</sup>

180. The Claimant rejects the Respondent’s contention that any right imported through Article 3(1) is limited to the substantive entitlements in Article 3(1), thereby excluding dispute settlement.<sup>336</sup>

181. First, the Claimant contends that the “protection” that Article 3(1) accords to investments extends to all protections provided in the Treaty—including access to international arbitration—and not merely substantive ones.<sup>337</sup> Moreover, Article 3(2) promises no less favorable treatment and protection for “activities associated with such investments.” The Claimant argues that the settlement of disputes is an “activity” associated with an investment.<sup>338</sup> The Claimant further argues that arbitration clauses are highly valued by investors and are considered essential to the range of protection offered in investment treaties.<sup>339</sup>

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<sup>333</sup> Respondent’s Memorial on Jurisdiction, ¶ 167, referring to *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17), Decision on Jurisdiction, June 21, 2011, Concurring and Dissenting Opinion of Brigitte Stern (“*Impregilo*”) (RA-24).

<sup>334</sup> Respondent’s Memorial on Jurisdiction, ¶ 167, referring to *Impregilo* (RA-24).

<sup>335</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 297; Hearing Transcript, p. 132.

<sup>336</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 298.

<sup>337</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶¶ 299-300. The Claimant also argues that such a reading is consistent with the Preamble to the Treaty which includes the protection of investment as one of its primary purposes. Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 300; Hearing Transcript, pp.133-134, 144.

<sup>338</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶¶ 300-301, referring to *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, October 24, 2011, ¶ 73 (CLA-38); Hearing Transcript, p. 135.

<sup>339</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶¶ 301-302, referring to *RosInvest*, ¶¶ 130, 132 (RA-19); *AWG Group Ltd. v. Argentine Republic*, Decision on Jurisdiction (UNCITRAL, 3 August 2006), ¶ 59 (“*AWG Group*”) (CLA-9); *Gas Natural SGD, S.A. v. The Argentine Republic*, ICSID Case

182. The Claimant contests the Respondent’s attempt to restrict the term “protection” to “full protection and security.” It points out that the full protection and security standard obliges the State to provide the investor with access to justice, just as the fair and equitable treatment standard entitles the investor to have its claims adjudicated by an impartial decision maker.<sup>340</sup> The Claimant further argues that this obligation gains particular significance when the investor brings claims for unfair treatment by the domestic courts; it is only by bringing its claims before an international tribunal that the investor will have access to the standard of justice required under the fair and equitable treatment standard.<sup>341</sup>
183. Second, the Claimant contends that tribunals that have considered broad MFN clauses, such as the one at issue here, have authorized the importation of dispute resolution clauses.<sup>342</sup> The Claimant rejects the Respondent’s argument that those cases contained broader arbitration clauses than the Treaty. It argues that the principle underlying the decisions of those tribunals applies here, *i.e.*, that the less favorable treatment bestowed on the Claimant by the Respondent has been prejudicial and has effectively foreclosed access to international arbitration.<sup>343</sup>
184. The Claimant highlights, in particular, the *RosInvest* case, in which the tribunal noted that the MFN clause permitted the importation of the dispute resolution clause because it was a procedural option that offered the investor protection from interference with the use and enjoyment of the investment.<sup>344</sup> It contends that the reasoning of the *RosInvest* tribunal applies

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No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction, June 17, 2005, ¶ 29 (“*Gas Natural*”) (CLA-36); Hearing Transcript, p. 133.

<sup>340</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 42, referring to Dr. Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* 101-103 (Martinus Nijhoff Publishers, 2013) (CLA-125); Hearing Transcript, pp. 133-134, see also p. 170 where the Claimant states that the right of access to justice is included under either formulation of the standard, *i.e.*, “full protection and security” or “protection”.

<sup>341</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 42, referring to *Frontier Petroleum Serv. Ltd. v. Czech Republic*, Final Award (UNCITRAL, 12 November 2010), ¶ 263 (CLA-35); Hearing Transcript, pp. 134-135.

<sup>342</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶¶ 303-304, referring to *RosInvest*, ¶¶ 126, 130, 136 (RA-19); *Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000, ¶¶ 54, 56 (“*Maffezini*”) (CLA-46); *Gas Natural*, ¶¶ 9, 31 (CLA-36); *Siemens*, ¶¶ 102-103 (CLA-71); *National Grid PLC v. Argentine Republic*, Decision on Jurisdiction (UNCITRAL, 20 June 2006), ¶ 93 (CLA-53); *Camuzzi International S.A. v. República Argentina*, ICSID Case No. ARB/03/7, Decision of the Arbitral Tribunal on Jurisdictional Objections, June 10, 2005, ¶¶ 16-17, 28 and 34(iii) (CLA-17); *AWG Group*, ¶¶ 57, 68 (CLA-9).

<sup>343</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 306; Hearing Transcript, pp. 136-137.

<sup>344</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 43, referring to *RosInvest*, ¶ 128 (RA-19).

here, where interference with the “activities associated with such investments” (Article 3(2)) would also require access to the procedural option of international arbitration.<sup>345</sup>

185. The Claimant rejects as irrelevant and speculative the Respondent’s contention that (a) the MFN clause would have specifically referred to Article 8 of the Treaty if it were meant to apply to arbitration; and (b) importing a broader arbitration clause would award the Claimant a right specifically foreclosed.<sup>346</sup> As regards the latter argument, the Claimant notes that the Treaty does not list arbitration or any other dispute resolution mechanism as an exception to the MFN clause.<sup>347</sup>

**E. WHETHER *LIS PENDENS* AND THE DOCTRINE AGAINST THE ABUSE OF PROCESS BAR THE CLAIMS OF THE CLAIMANT**

**(a) The Respondent’s Position**

186. The Respondent alleges that the Claimant’s 7 June 2013 Amended Notice is an attempt to add to these proceedings the claims from the Lao Holdings Arbitration. The Respondent contends that this “duplication of claims submitted before two separate Tribunals must be procedurally barred.”<sup>348</sup> In its view, prior to the submission of the Amended Notice, the claims were separate, and their incorporation in this arbitration has caused the Respondent prejudice in its selection of arbitrators and the preparation of its defenses.<sup>349</sup>
187. The Respondent contends that Lao Holdings was specifically created to own Sanum so that two BIT arbitrations could be filed against the Respondent.<sup>350</sup> The Respondent notes that it rejected the Claimant’s efforts to consolidate the two arbitrations.<sup>351</sup> That the Claimant now seeks to consolidate these cases by importing its claims in the Lao Holdings Arbitration into this arbitration is a “patent abuse of process.”<sup>352</sup>

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<sup>345</sup> Claimant’s Rejoinder on Jurisdiction, ¶ 44; Hearing Transcript, p. 137 (see also Hearing Transcript, pp. 143-146 for further discussion on *RosInvest*).

<sup>346</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 307, referring to Respondent’s Memorial on Jurisdiction, ¶¶ 162, 166.

<sup>347</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 307, referring to *RosInvest*, ¶ 135 (RA-19); *Gas Natural*, ¶ 30 (CLA-36).

<sup>348</sup> Respondent’s Memorial on Jurisdiction, ¶ 168.

<sup>349</sup> Respondent’s Memorial on Jurisdiction, ¶ 168; Hearing Transcript, pp. 153-154.

<sup>350</sup> Respondent’s Memorial on Jurisdiction, ¶ 169.

<sup>351</sup> Respondent’s Memorial on Jurisdiction, ¶ 169.

<sup>352</sup> Respondent’s Memorial on Jurisdiction, ¶ 169.

188. Second, the Respondent notes that the doctrine of *lis pendens* prevents identical claims from being brought against the same party.<sup>353</sup> The Respondent argues that it should not be forced to defend the same claims twice before different arbitral tribunals.<sup>354</sup> The Respondent notes that the procedural timetables of both arbitrations provide for defenses to be raised at separate times.
189. The Respondent refers to the inequality and inefficiency of the Respondent having to defend a different argument based on different evidence in the later proceedings as the Claimant would be able to modify its argument based on the defense of the Respondent in the earlier proceedings.<sup>355</sup>
190. Lastly, the Respondent maintains that procedural equality prevents the Claimant from having “two bites at the cherry,” and notes that the rule of *lis pendens* has as its primary purpose the prevention of dual verdicts on the same claims.<sup>356</sup>
191. The Respondent then notes that “[n]ow that Claimant Sanum has spelled out in 170 pages its full amendments, [it] further objects under Articles 17 and 22 of the UNCITRAL Rules and requests that the arbitrator deny the amendments.”<sup>357</sup> By way of providing context to this claim, it reiterates that Lao Holdings was specifically created in January 2012 to enable the Claimant to avail of the protections accorded under the Netherlands/Laos BIT,<sup>358</sup> and that Lao Holdings made untrue statements in order to ensure that the ICSID tribunal had jurisdiction *ratione temporis* to decide its claims.<sup>359</sup> It characterizes the amendment of the Claimant’s claims in this case as a further “attempt to manipulate the investment arbitration system.”<sup>360</sup>
192. In response to the contention of the Claimant that it had to amend its Notice because of the refusal of the Respondent to consolidate the two cases, the Respondent notes that the requested

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<sup>353</sup> Respondent’s Memorial on Jurisdiction, ¶ 170; Hearing Transcript, pp. 52-53.

<sup>354</sup> Respondent’s Memorial on Jurisdiction, ¶ 170.

<sup>355</sup> Respondent’s Memorial on Jurisdiction, ¶ 170.

<sup>356</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 171-172, referring to Born, *International Commercial Arbitration*, Vol. II, Wolters Kluwer, page 2949 [2009] (“**Born**”) (RA-25).

<sup>357</sup> Respondent’s Reply, ¶ 11.

<sup>358</sup> Respondent’s Reply, ¶¶ 3-5.

<sup>359</sup> Respondent’s Reply, ¶¶ 7-10.

<sup>360</sup> Respondent’s Reply, ¶ 11.

amendment was not to enhance efficiency but was intended, rather, to transfer claims arising under the Netherlands/Laos BIT to this case.<sup>361</sup>

193. The Respondent highlights that Article 17 of the 2010 UNCITRAL Rules allows the Tribunal to avoid “unnecessary delay and expense and to provide a fair and efficient process”<sup>362</sup> and that Article 22 of the UNCITRAL Rules allows the Tribunal to reject an amendment that causes “delay” and “prejudice.”<sup>363</sup> The Respondent points to the effort exerted and costs incurred in the Lao Holdings Arbitration, and notes that the Claimant had sought the production of documents in this case to be used in the Lao Holdings Arbitration.<sup>364</sup>

194. It also notes that Article 22 of the 2010 UNCITRAL Rules prevents an amendment in this case because this amendment falls outside the jurisdiction of the Tribunal, as shown by (a) the initial decision of the Claimant to file separate claims under the Netherlands/Laos BIT and the PRC-Laos BIT, respectively; and (b) the allegedly limited scope of the PRC/Laos BIT, which the Respondent claims applies only to claims regarding the quantum of expropriation.<sup>365</sup> As further proof of the alleged lack of jurisdiction of the Tribunal over the claims the Claimant wishes to introduce in this arbitration, the Respondent points to an allegedly private dispute—between Sanum and its local partner—that it contends does not belong in an investment arbitration.<sup>366</sup>

#### **(b) The Claimant’s Position**

195. The Claimant contends that the doctrine of *lis pendens* is inapplicable in this case because there is no identity of parties and claims in the two cases.<sup>367</sup> It further submits that *lis pendens* provides a ground for staying one proceeding until the other has terminated. It argues that there are no grounds to support a stay in this case as the resolution of one case will not resolve the other and, moreover; the simultaneous conduct of both cases actually enhances efficiency.<sup>368</sup>

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<sup>361</sup> Respondent’s Reply, ¶ 12.

<sup>362</sup> Respondent’s Reply, ¶¶ 13-14; Hearing Transcript, p. 53.

<sup>363</sup> Respondent’s Reply, ¶¶ 15, 17.

<sup>364</sup> Respondent’s Reply, ¶ 17.

<sup>365</sup> Respondent’s Reply, ¶¶ 18-19; Hearing Transcript, p. 53.

<sup>366</sup> Respondent’s Reply, ¶ 20.

<sup>367</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 310, referring to *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2001, ¶¶ 89-89 (CLA-10); Hearing Transcript, p. 141.

<sup>368</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 310, referring to Born, at 2933 (RA-25).



196. The Claimant rejects the Respondent's allegation that the Claimant is committing an abuse of process. It argues that Laos chose to have two separate proceedings in this case; Sanum had proposed to consolidate the proceedings prior to the selection of arbitrators in both cases.<sup>369</sup> It notes that Laos has benefited from seeing the Claimant's detailed arguments in both proceedings before having to file its defense.<sup>370</sup> The Claimant also argues that the two claimant parties have the right to bring claims under two different treaties as they are from different States and have separate rights under the treaties.<sup>371</sup>
197. Finally, the Claimant contends that the amendment of its Notice to include claims in the Lao Holdings arbitration could not have prejudiced the Respondent in its selection of arbitrators, given that Laos has been able to appoint the same arbitrator in both proceedings.<sup>372</sup> The Claimant also points out that the amendment of its Notice was discussed at the first procedural hearing, agreed upon by the Parties, and memorialized by the Tribunal in its Procedural Order No. 1.<sup>373</sup>
198. As to the Respondent's contention that the Amended Notice should be rejected pursuant to 2010 UNCITRAL Rules 17 and 22, the Claimant raises four points. First, the Claimant contends that this argument is untimely, given that Laos did not object to this amendment when the process for this amendment was discussed and adopted, when the allegedly detailed Amended Notice was filed, or when the Respondent filed its Response on Jurisdiction.<sup>374</sup> The Claimant insists that "Laos cannot complain of an 'abuse of process' when it agreed to the process."<sup>375</sup>
199. Second, the Claimant asserts that the 2010 UNCITRAL Rules neither prohibit nor require that a notice of arbitration be amended prior to the presentation of a claimant's case in the opening memorial, and argues that Article 22 typically applies not to the notice of arbitration, but to the adding or supplementing of claims after the submission of the claim or counterclaim.<sup>376</sup>

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<sup>369</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 311; Hearing Transcript, pp. 139, 141, 172-173.

<sup>370</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 311.

<sup>371</sup> Hearing Transcript, p. 140.

<sup>372</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 311; the Claimant also submits that it attempted to have the same tribunal constituted to hear the two cases (Hearing Transcript, pp. 139, 140).

<sup>373</sup> Claimant's Rejoinder on Jurisdiction, ¶ 46, referring to Procedural Order No. 1, at 4; Hearing Transcript, p. 140.

<sup>374</sup> Claimant's Rejoinder on Jurisdiction, ¶ 48; Hearing Transcript, p. 142.

<sup>375</sup> Claimant's Rejoinder on Jurisdiction, ¶ 48.

<sup>376</sup> Claimant's Rejoinder on Jurisdiction, ¶ 49.

200. Third, the Claimant notes that neither its Amended Notice nor its Statement of Claim has caused unfairness, prejudice, or delay; both submissions predated the Respondent's filing of any pleadings in this matter.<sup>377</sup> As to the Respondent's claims concerning the Lao Holdings Arbitration, the Claimant contends that the Respondent's work in that case need not be duplicated and is in fact directly applicable to the present matter.<sup>378</sup> The Claimant also points out that any inefficiency or added costs resulting from the parallel litigation can be attributed to the refusal of the Respondent to consolidate the two arbitrations.<sup>379</sup>
201. Fourth, the Claimant contends that the Respondent has not explained its argument under Article 22, that the Lao Holdings claims fall outside the jurisdiction of this Tribunal, and questions the relevance of what it describes as the Respondent's speculation as to why the Claimant filed two separate arbitrations.<sup>380</sup>

## **VI. RELIEF REQUESTED**

202. The Respondent requests that:
- i) The Tribunal decline jurisdiction because Sanum is not a qualified investor under the BIT.
  - ii) The Tribunal decline jurisdiction because the claims brought are not investment related claims.
  - iii) The Tribunal decline jurisdiction because the Respondent did not consent to arbitrate Sanum's claims under the BIT.
  - iv) In the alternative, the Tribunal dismisses the several claims introduced into this arbitration by the Amended Notice filed 7 June 2013, incorporating the duplicative claims previously made in the Holdings arbitration.
  - v) The Tribunal issue an award of the Respondent's costs incurred in connection with this arbitration, including Laos' legal fees and other costs, and Laos' share of the fees and expenses of the Tribunal and the Administrative Centre.

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<sup>377</sup> Claimant's Rejoinder on Jurisdiction, ¶ 50.

<sup>378</sup> Claimant's Rejoinder on Jurisdiction, ¶ 50.

<sup>379</sup> Claimant's Rejoinder on Jurisdiction, ¶ 51.

<sup>380</sup> Claimant's Rejoinder on Jurisdiction, ¶ 52.

203. The Claimant requests an award:

- i) Dismissing the Respondent's objections to the Tribunal's jurisdiction in their entirety;
- ii) Awarding Sanum its costs and expenses of this proceeding, including attorneys' fees, in an amount to be determined in the course of this proceeding by such means as the Tribunal may direct; and
- iii) Ordering such other relief as may be just and appropriate in the circumstances.

## **VII. THE TRIBUNAL'S ANALYSIS**

### **A. APPLICABLE LAW**

204. It is common ground between the Parties that public international law is the applicable law. It is also undisputed that the VCLT is binding upon Laos and the PRC.

### **B. WHETHER THE CLAIMANT IS COVERED BY THE TREATY**

#### **1. Whether the Treaty extends to the Macao SAR**

205. The question of the application or non-application of the PRC/Laos BIT to the Macao SAR is central to the question of jurisdiction. The Claimant considers that it applies, while the Respondent argues that it does not. If the Respondent is correct, the case stops as the Tribunal would have no jurisdiction and would not need to examine the other objections to jurisdiction. If the Claimant is correct, the Tribunal must continue its mission by examining the other objections to jurisdiction.

#### **(a) The theoretical analysis of the relevance of the 1999 Notification to the Secretary-General of the UN**

206. One of the main arguments relied upon by the Respondent is that the 1999 Notification to the UN Secretary-General contains the list of treaties that the PRC intended to extend to the Macao SAR. In the Respondent's Memorial on Jurisdiction, it states:

Similarly, the 1999 Notification regarding the Macao SAR, which the PRC filed on 13 December 1999 and on which Lao PDR has been relying, provides:

“[...] IV. *With respect to other treaties that are not listed in the Annexes to this Note, to which the People’s Republic of China is or will become a Party, the Government of the People’s Republic of China will go through separately the necessary formalities for their application to the Macao Special Administrative Region if it so decided.*”

The BIT is not listed in the two Annexes referred to in the 1999 Notification. Thus, it was not extended to the Macao SAR.<sup>381</sup>

207. The Claimant has answered this argument by underlining that it ignores an important difference between multilateral treaties and bilateral treaties:

[...] on its face, the Notification did not intend to cover the universe of international agreements to which the PRC is a party. Rather, as is evident from the official record, the Notification applied only to multilateral treaties for which the UN Secretary-General acts as depositary: “By a notification dated 13 December 1999, the Government of the People’s Republic of China informed the Secretary-General of *the status of Macao in relation to treaties deposited with the Secretary-General.*” The PRC-Laos Treaty, however, is not such an instrument: it is a bilateral treaty with regard to which the Secretary-General plays no role. Thus, contrary to what Respondent argues, no conclusion about the territorial scope of the Treaty can be drawn from the fact that it does not appear in the lists, annexed to the Notification, of multilateral PRC treaties that would apply to Macau after the handover. In fact, none of the PRC’s numerous bilateral agreements (or multilateral agreements with other depositaries) is included in those annexes, because there was no reason to notify the Secretary-General of purported territorial limitations for treaties where he plays no role.<sup>382</sup>

208. In its Reply on Jurisdiction, the Respondent tried to explain that there is no difference between multilateral and bilateral treaties<sup>383</sup> as can be seen from the fact that the bilateral treaties are also published in the UNTS, and to support this line of argument, it cited Article 102 of the UN Charter, which provides:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be **registered** with the Secretariat and **published** by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.<sup>384</sup>

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<sup>381</sup> Respondent’s Memorial on Jurisdiction, ¶¶ 41-42 (Respondent’s emphasis).

<sup>382</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 242 (Claimant’s emphasis).

<sup>383</sup> Respondent’s Reply on Jurisdiction, ¶ 42; Notes verbales from the Legal Counsel relating to the depositary practice and the registration of treaties pursuant to Article 102 of the UN Charter, [http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml#agreements](http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#agreements) (emphasis added) (RA-30).

<sup>384</sup> UN Charter: Chapter XVI: Miscellaneous Provisions (RA-28) (emphasis added).

209. The Tribunal must, however, emphasize that such an approach ignores the fundamental difference between the role of the UN as depositary and its role as an instance of registration. The role as depositary concerns exclusively multilateral treaties; the role as instance of registration concerns bilateral treaties. In both situations, the UN ensures the publication of the treaties. It is not because multilateral treaties and bilateral treaties are all published in the UNTS that the roles played upwards by the UN are not to be differentiated. When acting as depositary, the UN Secretary-General plays an important role as far as reservations to multilateral treaties are concerned, while no question of reservation arises in relation to bilateral treaties.
210. The Tribunal cannot therefore accept this line of argument by the Respondent. The Tribunal finds that the 1999 Notification has no relevance as far as bilateral treaties are concerned. As such, it does not need to enter into an examination of the Respondent's arguments to the effect that the 1999 Notification could be considered either as a reservation to the application of Article 29 of the VCLT or as a binding unilateral declaration according to which the PRC/Laos BIT—not being mentioned among the multilateral treaties listed therein—is not applicable to the Macao SAR.
211. The Respondent's reliance on the 1999 Notification being of no avail, the Tribunal must analyze the legal parameters that are applicable in this case.

**(b) The relevance of Article 29 of the VCLT and Article 15 of the VCST**

*The Parties' Positions*

212. The Parties have invoked both Article 29 of the VCLT and Article 15 of the VCST.
213. As the written and oral submission of the Parties were far from exhaustive on these Articles, at the end of the Hearing on Jurisdiction, the Tribunal sought clarification from the Parties on the following point:

The respective roles, if any, of Article 29 of the [VCLT] and Article 15 of the [VCST] in relation to the application or non-application of the PRC/Laos Treaty to the Macau SAR.

214. It is useful to reproduce here these two articles. Article 29 of the VCLT reads as follows:

**Article 29 - Territorial Scope of Treaties**

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

215. Article 15 of the VCST reads as follows:

**Article 15 - Succession In Respect of Part of Territory**

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

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

216. The Respondent summarizes its position on the respective roles of Articles 15 and 29 as follows:

Respondent submits its analysis on Question I in two parts. The first part establishes that Article 15 of the [VCST] is an expression of customary international law (A). The second part establishes that both Article 29 and Article 15 are applicable to this case as they are both expressions of customary international law and their co-existence is not incompatible (B).<sup>385</sup>

217. The conclusion of the Respondent's analysis is that:

[...] there can be no doubt that bilateral investment treaties and other commercial treaties concluded by China with third countries do not automatically apply to Macao under the positive aspect of the basic rule but are instead the object of an exception to such rule.<sup>386</sup>

218. The Claimant, for its part, argues the following:

Article 29 is applicable to the PRC-Laos Treaty both because the PRC and Laos are parties to the VCLT and because Article 29 undeniably represents the applicable rule of customary international law. In contrast, neither the PRC nor Laos has ratified the [VCST]. [...] [T]here is no evidence of the requisite consistent State practice or *opinio juris* to support the notion that its provisions reflect customary international law. In particular, the aspect of Article 15 of the [VCST] that differs from the customary rule reflected in Article 29—its exceptions—cannot be considered to reflect customary international law. [...] Even if the exceptions in Article 15 were somehow deemed to constitute applicable law, the PRC-Laos Treaty does not fall under its exceptions.<sup>387</sup>

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<sup>385</sup> Respondent's Post Hearing Submission, ¶ 2.

<sup>386</sup> Respondent's Post Hearing Submission, ¶ 21.

<sup>387</sup> Claimant's Response, ¶¶ 3, 6.

*The Tribunal's Analysis*

219. It is common ground that both the PRC and Laos are parties to the VCLT. It is also common ground that neither the PRC nor Laos are parties to the VCST. The customary nature of Article 15 is controversial between the Parties: they both accept that the general rule of the “moving treaty frontiers” of Article 15 of the VCST is customary, but the Claimant argues that the exceptions to Article 15 are not customary.

i) Both Article 29 of the VCLT and Article 15 of the VCST are rules of customary international law

220. It is undisputed by the Parties that Article 29 in its entirety has the force of binding customary international law.<sup>388</sup> As this is not controversial the Tribunal does not consider that it needs to make lengthy developments to support this statement of law.

221. By contrast, although there is unanimity or “quasi-unanimity” among the doctrine to consider that Article 15 also represents customary international law, in view of the diverging analyses presented by the Parties, the Tribunal will elaborate at some length on this question.

222. The Tribunal first notes that the ILC, in its 1974 Commentary on Draft Article 14 (which became Article 15) of the VCST, is explicit that the “moving treaty frontiers” rule was a pre-existing customary rule.<sup>389</sup> In the same sense, Mr. Yasseen, the president of the ILC Drafting Committee that prepared the text of the VCST, declared: “This principle is a generally recognized principle of international law; it is observed in the practice of States and can be considered as part of customary international law.”<sup>390</sup>

223. The Tribunal also cites some authors who have written on this issue, for example, Philippe Cahier explains that Article 15 “corresponds to State practice, was adopted without modification

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<sup>388</sup> Respondent's Post-Hearing Submission, ¶ 2; Claimant's Statement of Claim and Response on Jurisdiction, ¶¶ 228-232; Claimant's Rejoinder on Jurisdiction, ¶¶ 11-12; Hearing Transcript, pp. 14:1-22; 71:1-73:14.

<sup>389</sup> ILC Commentary 1974, at pp. 208-209 (RA-13); see also Hearing Transcript, pp. 158-160, 169-170.

<sup>390</sup> Yasseen, “La Convention de Vienne sur la succession d'Etats en matière de traités,” AFDI, 1978, at p. 92 (RA-40). [English translation provided by the Tribunal, the original French being: “Ce principe est un principe généralement reconnu du droit international; il est observé dans la pratique des Etats et peut être considéré comme faisant partie du droit international coutumier.”]

by the Conference and simply codifies a customary rule.”<sup>391</sup> Also, in a course given at the Hague Academy of International law on “La succession d’Etats” in a Section entitled “L’existence de règles coutumières : la portée juridique des Conventions”,<sup>392</sup> it was noted that there are some rules whose customary value are contested: “I. Les règles à l’égard desquelles existent des controverses doctrinales”,<sup>393</sup> but that others clearly have customary value: “III. Les règles des Conventions qui ont indéniablement une valeur coutumière”.<sup>394</sup> Among the latter was included: “la règle coutumière de la variabilité des limites territoriales d’application des traités”.<sup>395</sup>

224. The Claimant has admitted that Article 15 is customary as far as the general rule is concerned but submits that the exceptions are not customary. The Tribunal notes that the Claimant has not provided any reason in support of this position and the Tribunal has found no indication that such a dichotomy can be made; the doctrine on the customary character of Article 15 has never made such distinction but has referred to the rule as a whole.

ii) The rules are not incompatible, but merely deal with different moments in the evolution of a situation

225. Article 15 explains and regulates what happens at the moment of transition from one sovereign to another whereas Article 29 prescribes what the general situation is outside of a transitional period, whether a territory has undergone a transition or not. In other words, the rule of Article 15 can correctly be described as the “moving treaty frontiers” rule. The rule of Article 29 does not deal with a situation of change,<sup>396</sup> but only states the general principle of international law

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<sup>391</sup> Cahier, pp. 73-74 (RA-39) [English translation provided by the Tribunal, the original French being: “[...] correspondent à la pratique des Etats, il a été adopté sans changement par la Conférence et il ne fait que codifier une règle coutumière.”]

<sup>392</sup> Stern, *La succession d’Etats*, Hague Academy of International Law Collected Courses, t. 262, 2000 (“Stern”) (CLA-140). [English translation from the French: “State Succession” and “The existence of customary rules: the legal scope of the Conventions”]

<sup>393</sup> Stern, at p. 147 (CLA-140). [English translation from the French: “The rules whose customary nature is controversial”]

<sup>394</sup> Stern, at p. 164 (CLA-140). [English translation from the French: “The rules of the Conventions that have an undeniably customary nature”]

<sup>395</sup> Stern, at p. 169 (CLA-140). [English translation from French: “The customary international law rule of the moving treaty frontiers”.]

<sup>396</sup> See for example, Odendahl, p. 489 : “[...] questions of State succession are not covered by Article 29.” (CLA-102). See, in the same sense, Doehring, *The Scope of the Territorial Application of Treaties: Comments on Article 25 of the ILC’s 1966 Draft Articles on the Law of Treaties (1967)* 27 *Z.a.o.R.V.* 483, pp. 488-489: “The draft [Article 25 that became Article 29] gives no answer as to the legal situation created when, in the course of the application of a treaty, a change occurs in the national boundaries of a State.” (CLA-133).



related to the territorial extension of a State's sovereignty, which can be described as the principle of the territorial application of a State's legal order.

226. Of course, this does not mean that the two rules do not have an extremely close relationship, which explains why they were not always clearly distinguished by the Parties. The situation described in Article 29 can be the result of the application of Article 15, or, it can also be seen the other way around, *i.e.*, that Article 15 regulates the transition in the way it does, because this is the normal result of the territorial application of the law. This was indeed emphasized in The Hague Academy course on State Succession already mentioned:

This rule [Article 15] is but an application, in a given succession process, namely the transfer of a portion of territory between two States which remain in existence, of the general principle on the territorial application of treaties or, in other words, of the rules on the distribution of competences among States.<sup>397</sup>

227. This is also indicated by the ILC, when discussing the draft article that was to become Article 15:

As to the rationale of the rule, it is sufficient to refer to the principle embodied in article 29 of the [VCLT] under which, unless a different intention is established, a treaty is binding upon each party in respect of its entire territory. This means generally that at any given time a State is bound by a treaty in respect of any territory of which it is sovereign, but is equally not bound in respect of territory which it no longer holds.<sup>398</sup>

228. In other words, the two rules exist side-by-side, Article 15 being the corollary of Article 29 and Article 29 being a consequence of Article 15.

iii) The exceptions to Article 15 of the VCST are encompassed in the exceptions to Article 29 of the VCLT

229. This close relationship explains indeed why the exceptions to the two rules are in fact very similar—contrary to what the Claimant argued—as can be seen from what has been emphasized in the two Articles in paragraphs 214 and 215 above.

230. In both Articles, the non-application of a treaty to the whole territory can only result from the treaty itself or if it is otherwise established. The reasons for the non-application of a treaty to an

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<sup>397</sup> Stern, p. 169. [English translation provided by the Tribunal, the original French being: “Cette règle n’est que la mise en oeuvre, dans un processus successoral spécifique, le transfert d’un territoire entre deux Etats dont chacun reste identique à lui-même, du principe général de l’application territoriale des traités, autrement dit des règles de répartition des compétences entre Etats.”]

<sup>398</sup> ILC Commentary 1974, p. 208(3) (RA-13).

expanded territory at the moment of a succession are more limited than the reasons for the non-application of a treaty to the entire territory, but are included in them. Indeed, automatic succession applies unless it appears from the treaty itself or is otherwise established that such a result would not be appropriate *for one of two reasons*: either because such succession would be incompatible with the object and the purpose of the treaty or because it would radically change the conditions of its operation. As far as the non-application of a treaty to the whole territory is concerned, it is sufficient that such non-application results from the treaty or, *for whatever reason*, the State sees fit to decide such non-application: for example, the PRC and the Russian Federation decided that the PRC/Russia BIT would not apply to the Macao SAR, for no stated reason.

231. This analysis means that in order to ascertain whether or not the PRC/Laos BIT applies to the Macao SAR, Article 15 of the VCST with its exceptions as well as Article 29 of the VCLT with its exceptions—which are two faces of the same coin—are relevant.

**(c) The Tribunal’s analysis of the concrete situation of the PRC/Laos BIT**

232. A first remark to be made by the Tribunal is the difficulty it faced in ascertaining the application or non-application of the PRC/Laos BIT to the Macao SAR due to the paucity of factual elements presented by the Parties: there were no affidavits from the PRC, Laos or the Macao SAR, which could probably have been obtained from the respective authorities.

233. Moreover, the response to a question raised by a member of the Tribunal during the Hearing on Jurisdiction did not clarify the matter. The question was the following:

So, my question is: Has there been any negotiation, any list of bilateral treaties? I’m very surprised that this does not exist [...]<sup>399</sup>

234. The response from counsel for the Respondent was the following:

Now, as to your question of the lists of treaties that, on the one hand, have been entered into by China, there is, to my knowledge, no list, no official list [...]<sup>400</sup>

235. The response from counsel for the Claimant was similar:

There is no evidence in the record that any similar Notification in any way, shape, or form was made by China in respect of the category of bilateral investment treaties. It’s not in the record. It didn’t happen.<sup>401</sup>

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<sup>399</sup> Hearing Transcript, p. 56:23-25.

<sup>400</sup> Hearing Transcript, p. 60:12-14.

236. The Tribunal, being left with no actual information on the status of the PRC/Laos BIT must analyze the situation by application of the relevant rules: Article 15 of the VCST and Article 29 of the VCLT. In the Tribunal's view, the conditions of Article 15 shall be verified first, as the transition came first in the chronology of events relevant to the issue of whether the Treaty applies or not.
237. The Tribunal will therefore turn first to Article 15 of the VCST and apply the rule developed in the framework of the international law on State succession. It is well known that it is the PRC's contention that no transfer of sovereignty took place in December 1999, since it merely "resumed" its exercise of sovereignty over Macao, as it did over Hong Kong. The Tribunal wants to put it beyond doubt that its approach does not contradict this position of the PRC when it applies the rules on State succession. Indeed, as explained by an author in relation to Hong Kong (an explanation that also applies to Macao), "there is little doubt that the 'transition' on 1 July 1997 largely comports with the definition of 'state succession'—as 'the replacement of one state by another in the responsibility for the international relations of territory'—and that the issues raised as a result of this event are generally covered within the branch of international law which 'deals with the legal consequences of change of sovereignty over territory.'"<sup>402</sup>
238. The central question is: Does the PRC/Laos BIT enter into the general rule or the exceptions to Article 15 and Article 29? If the general rule applies, the BIT will be applicable to the Macao SAR; if one of the exceptions applies, the BIT will not be applicable to the Macao SAR. The general rule—*i.e.*, the extension of the treaty to the whole territory, at the moment of a transfer of sovereignty or at any time—applies if none of the exceptions are satisfied. In order to ascertain whether or not the general rule applies, a negative approach must be adopted, *i.e.* an approach that verifies first whether any of the exceptions apply. If the answer is negative, it can be asserted that the applicable rule is the general rule of extension of the treaty to the new part of the territory, or in the case there is no succession, to the whole territory.
- i) Does it appear from the PRC/Laos BIT that it was not extended to the Macao SAR at the moment of recovery of sovereignty by the PRC, because the application of the Treaty to that territory would be incompatible with the object and purpose of the Treaty?
239. The object and purpose of the BIT is stated in the Preamble in the following terms:

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<sup>401</sup> Hearing Transcript, p. 85:4-7.

<sup>402</sup> Mushkat, in "Hong Kong and Succession of Treaties", *ICLQ*, 1997, pp. 191-197 ("Mushkat").

[The two Contracting States] desiring to encourage, protect, and create favorable conditions for investment by investors [...] based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States, [h]ave agreed as follows [...]<sup>403</sup>

240. The purpose is twofold: to protect the investor and develop economic cooperation. The Tribunal does not find—and no element has been provided by the Respondent to that effect—that the extension of the PRC/Laos BIT could be contrary to such a dual purpose. In fact, the larger scope the Treaty has, the better fulfilled the purposes of the Treaty are in this case: more investors—who would not otherwise be protected—are internationally protected, and the economic cooperation benefits a larger territory that would otherwise not receive such benefit.
241. In other words, the Tribunal is satisfied that the extension of the PRC/Laos Treaty to the Macao SAR is not incompatible with its object and purpose, which again is to “encourage, protect and create *favorable conditions for investment* by investors of one Contracting State in the territory of the other Contracting State [...] and for the purpose of the *development of economic cooperation* between both States [...]”<sup>404</sup>
242. Allowing investors from the Macao SAR to benefit from the protections of the PRC/Laos Treaty is fundamentally compatible with this object and purpose, the more so that there is no other possibly competing BIT adopted by the Macao SAR with Laos.

ii) Is it otherwise established that the PRC/Laos BIT was not extended to the Macao SAR at the moment of recovery of sovereignty by the PRC, because the application of the Treaty to that territory would radically change the conditions for its operation?

243. The question which must be answered next is whether the extension of the PRC/Laos BIT to the Macao SAR radically changes the conditions of application of the Treaty. The Tribunal considers that this question is particularly relevant considering the different economic philosophy that pertains to Mainland China and the Macao SAR, which is illustrated by the famous formula “one country, two systems.”
244. Concerning the question of bilateral treaties and whether or not a succession to them radically changes the conditions for their operation, there are two schools of thought.
245. For some States, the personal aspect of a bilateral treaty implies that the replacement of one State with another in a bilateral relationship radically changes the condition for its operation

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<sup>403</sup> Preamble to the PRC/Laos Treaty (Ex. D to Amended Notice).

<sup>404</sup> Preamble to the PRC/Laos Treaty (emphasis added) (Ex. D to Amended Notice).

with the consequence that the general rule of continuity should not apply. For other States, the continuity rule applies generally to bilateral treaties as well as to multilateral treaties, unless there are specific elements that lead to the conclusion that a change in the Contracting Parties would radically change the conditions for their operation.

246. The Tribunal notes first that Article 15 does not distinguish between multilateral and bilateral treaties. Second, the Tribunal considers that it would be excessive to say that all bilateral treaties are *so* personal, *so* related to *intuitu personae* questions that they cannot survive a State's succession. In other words, the Tribunal considers that it is necessary to consider the application of the general rule to bilateral treaties on a case-by-case basis.
247. In the case at hand, a specific element is the fact that the States Parties to the PRC/Laos BIT were States with planned economies, and that the extension of this BIT was to include a capitalist region. This could give some credibility to the argument that there is a fundamental change of circumstances which would call for the non-extension of the Treaty. Some doctrinal approaches would seem to support to such an argument. In The Hague Lecture on State Succession mentioned earlier, it was indicated that:

[...] political treaties constitute a specific category of treaties concluded *intuitu personae*, according to the characteristics of a specific State, such as treaties of alliance, or certain commercial **treaties concluded between States with a planned economy**. Their extinction in case of succession is, again, an application of a general principle of international law which is the fundamental change of circumstances."<sup>405</sup>

248. It can indeed be the case that when a treaty is concluded between two States with planned economies, the extension of such treaty to a capitalist economy would fundamentally change the conditions for its application if the treaty was based on features specific to a planned economy and irreconcilable with the liberal principles of a capitalist economy. The Tribunal, however, has not found in the Respondent's case any indication in this direction or any attempt to prove the existence of different conditions for the application of the PRC/Laos BIT in Mainland China and in the Macao SAR.

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<sup>405</sup> Stern, p. 170 (CLA-140) [English translation provided by the Tribunal, the original French being:

“Les traités politiques constituent une catégorie spécifique de traités conclus *intuitu personae*, en fonction des caractéristiques d'un Etat précis, tels que des traités d'alliance, ou certains traités commerciaux conclus entre Etats à économie planifiée. Leur extinction en cas de succession apparaît, encore une fois, comme une mise en oeuvre d'un principe général du droit international qui est le *changement fondamental de circonstances*.”] (emphasis added)

249. In the present case, it is the Tribunal’s view that a treaty that would not be extended to the Macao SAR under Article 15 would be a treaty imposing “communist” values or institutions in the Macao SAR. This is very clear under the “one country, two systems” doctrine, which is reflected both in the respective Preambles of the Joint Declaration and the Basic Law of the Macao SAR.
250. The Preamble to the Joint Declaration affirms that “[t]he current social and economic systems in Macao will remain unchanged, and so will the life-style.”<sup>406</sup> The Preamble to the Basic Law of the Macao SAR states that “[...] under the principle of “one country, two systems”, the socialist system and policies will not be practiced in Macao.”<sup>407</sup>
251. It appears that the treaties that will not be extended under the applicable principles are those whose application would endanger the capitalist system and the liberal way of life. Such is not the case of the PRC/Laos BIT; to the contrary.
252. Indeed, a comparison of the BITs of the Netherlands and Portugal entered into with the PRC (which are very similar to the PRC/Laos BIT) and the Macao SAR, respectively, show that they contain very similar provisions. For example, the articles on the settlement of investment disputes are the same but for one feature; this tends to prove that the rules of the PRC/Laos BIT can be considered as compatible with their application in the Macao SAR and do not need to be rejected for incompatibility with the capitalist economic system.<sup>408</sup>
253. It could also be said—and the Respondent presented arguments to this effect—that the automatic extension should not apply, as it has been *otherwise established* by the Joint Declaration<sup>409</sup> and the Macao’s SAR Basic Law,<sup>410</sup> which both recognize Macao SAR’s treaty-making powers in economic matters.
254. The Joint Declaration deals in the following manner with the treaties of the PRC (the second paragraph of this Article has been reproduced in Article 138 of the Basic Law of the Macao SAR):

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<sup>406</sup> Joint Declaration (RE-11).

<sup>407</sup> Basic Law of the Macao SAR (RE-09).

<sup>408</sup> A similar analysis has been performed as far as the resumption of the sovereignty of the PRC over Hong Kong by Mushkat (p. 169): “[...] the transfer of sovereignty over Hong Kong cannot be deemed a ‘fundamental change’ that ‘radically transforms’ the nature of the territory, allowing claims of *rebus sic stantibus*” to refute continuity of the applicable treaty regime.”

<sup>409</sup> Joint Declaration (RE-11).

<sup>410</sup> Basic Law of the Macao SAR (RE-09).

### VIII

Subject to the principle that foreign affairs are the responsibility of the Central People's Government, the Macao [SAR] may on its own, using the name "Macao, China", maintain and develop relations and conclude and implement agreements with states, regions and relevant international or regional organizations in the appropriate fields, such as the economy, trade, finance, shipping, communications, tourism, culture, science and technology and sports. [...]

The application to the Macao [SAR] of international agreements to which the [PRC] is a member or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the [SAR], and after seeking the views of the government of the [SAR].

255. Based on these articles, the Respondent argued that the automatic extension provided for in Article 15 has to be rejected as it was otherwise provided by the Joint Declaration and the Basic Law of the Macao SAR.
256. According to the Tribunal, this argument merits consideration as it could appear at first sight that the PRC and Portugal have provided for a specific way to deal with the extension of international agreements of the PRC to the Macao SAR, and have therefore superseded the automatic extension provided for as the general rule in Article 15 of the VCST.
257. The Tribunal notes at the outset that the Basic Law of the Macao SAR in and of itself, as an internal law, cannot be considered as legally capable of modifying the international rule set out in Article 15. It is well known that "the binding character of treaties is determined by international law, which on this point takes precedence over internal law."<sup>411</sup>
258. The Tribunal, however, considers that the same is not true of the Joint Declaration which can be considered an international treaty and, more precisely, a devolution treaty, by which the two States involved in a process of succession decide the modalities of such succession.
259. Before entering into a consideration of the legal value of such a devolution treaty, the Tribunal wishes to focus on the meaning of Article VIII of the Joint Declaration, reproduced word-for-word in Article 138 of the Basic Law of the Macao SAR, as the Parties presented diverging interpretations of these articles. The Tribunal recalls the main elements of Article VIII: "The application to the Macao [SAR] of international agreements [...] shall be decided by the Central People's Government [...] after seeking the views of the government of the Region."
260. The Respondent principally relied on this article for the proposition that, because the Macao SAR was not consulted by the PRC before the Treaty was extended to its territory, the Treaty

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<sup>411</sup> Schaus, in Corten & Klein, p. 700 (CLA-105).

has no application to Macanese investors. Indeed the Respondent places great weight on the fact that the views of the Macao SAR in relation to the PRC/Laos BIT have never been requested:

To my knowledge, neither in Macao nor in Hong Kong has the local government been consulted over a possible extension of an International Treaty upon the request of the Central Government. Beijing has never consulted or has never asked the Government, either the executive body or the legislative body, over the potential application in Macao of treaties to which China has entered into [...]<sup>412</sup>

261. The Claimant has a radically different reading of the same language:

What Laos has said is that this means that you don't apply the customary rule until the PRC actually consults with the Macao SAR. But, in fact, the more consistent reading with respect to the customary rule is—and supported by the text here, is that, in fact, the customary rule applies until such time if and when the PRC decides to actually make explicit a contrary intention, and at that juncture should take the step of consultation.<sup>413</sup>

262. In other words, according to the Respondent, the PRC/Laos BIT could only have been extended after seeking the views of the Macao SAR Government; and, according to the Claimant, the PRC/Laos BIT is to be presumed applicable to the Macao SAR until the PRC Government decides, after consulting the Macao SAR, that it does not apply. The Tribunal considers that neither of these lines of reasoning stands scrutiny.

263. The Claimant's analysis is not coherent with the basic rule of interpretation of treaties embodied in Article 31 of the VCLT, requiring that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The wording of Article VIII of the Joint Declaration is to the effect that the treaties will be applied *when* the PRC Government so decides and not that they will be applied *unless* the PRC Government so decides.

264. But the Respondent's analysis, although coherent with the wording of the text, does not bring about the result sought by the Respondent. This is so because of the legal nature of the Joint Declaration, which can be considered as a devolution treaty.<sup>414</sup>

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<sup>412</sup> Hearing Transcript, p. 60:4-11.

<sup>413</sup> Hearing Transcript, p. 93:8-15.

<sup>414</sup> By analogy, it can be mentioned that the Joint Declaration concerning Hong Kong has been registered as a treaty in the UN. See Slinn, *Aspects juridiques du retour de Hong Kong à la Chine*, *AFDI*, 1996 (p. 274): "Le côté délicat de la question du statut de l'arrangement se reflète dans l'emploi du titre «Déclaration commune» plutôt que de celui d'«accord», encore que l'instrument ait été enregistré par les deux parties comme un accord international conformément à l'article 102 de la Charte de l'ONU."



265. Such treaties can only bind third parties if they apply the customary principles of international law. This was explained in The Hague Course on State Succession. One of the customary rules on State succession is the rule of the “*effet relatif des traités*”, the consequences of which were described in the following manner:

Bien entendu, cette règle signifie simplement que les traités de dévolution s'ils donnent des solutions différentes de celles qui sont prévues par les règles de la succession d'Etats ne s'imposent pas aux Etats tiers ; si ces traités mettent en œuvre les solutions résultant du droit coutumier, la manière dont la succession d'Etats est réglée s'impose aux Etats tiers, parce qu'ils sont tenus au respect du droit international. Là encore la règle n'apparaît que comme une transposition, dans le domaine de la succession d'Etats, d'une des règles de base du droit des traités, qui est la règle de l'effet relatif des traités, codifiée à l'article 57 de la Convention de Vienne sur le droit des traités.<sup>415</sup>

266. This was also underscored in relation to the Joint Declaration between the PRC and Great Britain concerning Hong Kong by an author, who said that “[n]otwithstanding the reasonableness of the Hong Kong formula or the ‘devolutionary’ function of the Sino-British Joint Declaration, questions may be posed in relation to the binding effect on third parties.”<sup>416</sup>

267. As pointed out by the Claimant during the Hearing on Jurisdiction, no element has been submitted to the Tribunal to indicate that Laos was informed of such an internal procedure or whether such procedure was ever enforced:

[...] there is actually no evidence in the record about the actual practice of the PRC with respect to this consultation, internal procedure, none. So, we actually have no evidence about when it has been invoked, in what circumstance it has been invoked, whether it's a law on the books and doesn't reflect practice—nothing. We have nothing on that.<sup>417</sup>

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[English translation from the French: “The delicate aspect of the question of the status of the arrangement is reflected in the use of the title “Joint Declaration” rather than “Agreement”, even though the instrument was registered by the two parties as an international agreement pursuant to Article 102 of the UN Charter.”] The same is possibly true for this Joint Declaration, but the Tribunal was provided with no information to that effect.

<sup>415</sup> Stern, p. 169 (CLA-140). [English translation from the French: “Of course, this rule simply means that if devolution treaties adopt different solutions to those foreseen by the rules of State succession, those solutions do not bind third States; if the treaties adopt solutions that conform with customary international law, the manner by which the State succession is governed does apply to third States because they are obliged to abide by international law. There again the rule only appears as a transposition, in the domain of State succession, of one of the fundamental rules of the law of treaties, which is the rule of the relative effect of treaties, codified by Article 57 of the VCLT.”]

<sup>416</sup> Mushkat, p. 194.

<sup>417</sup> Hearing Transcript, p. 90:19-25.

268. In other words, Laos, having not been informed that its treaty with the PRC would only be extended after a procedure of consultation—which in fact never seems to have been enforced—, cannot claim that such an agreement between the PRC and Laos could set aside the international rule applicable to a bilateral treaty between itself and the PRC.
269. In the absence of convincing elements to the contrary, the Tribunal is left with no other option but to consider that, by application of Article 15 of the VCST, the PRC/Laos BIT must be deemed to have been extended to the Macao SAR. This provisional conclusion has to be verified and confirmed by the analysis of the application to the situation of Article 29 of the VCLT which has broader exceptions than the ones included in Article 15 of the VCST.

iii) Does it appear from the PRC/Laos BIT that it is not applicable to the whole territory?

270. The Tribunal notes, on the one hand, that the PRC/Laos BIT does not contain an express provision stating that *it applies to the Macao SAR*. But this is not necessary as the principle of territorial extension of the State’s legal order embodied in Article 29 applies, unless otherwise indicated.
271. The Tribunal further notes, on the other hand, that it is also evident that the PRC/Laos BIT has *not expressly excluded its application to the Macao SAR*, as has, for example, been the case of the Protocol accompanying the PRC/Russia BIT entered into in 2006.<sup>418</sup> This Protocol expressly provides that “[u]nless otherwise agreed by both Contracting Parties, the Agreement does not apply to” the Macao SAR.<sup>419</sup> Both Parties mentioned during the Hearing on Jurisdiction the fact that the Treaty does not mention that it does not apply to the entire territory.
272. In the morning session, counsel for the Respondent stated:

And the principle reads as follows: “Treaties are binding upon the entire territory, unless it’s provided otherwise in the Treaty and intention appears in the Treaty or is otherwise established.” We have been through the Treaty together. It does not provide for a definition of the territory. So, the principle would be, under Article 29, that unless it is otherwise intended by the Parties or by—here, by China, then it should apply to the entire territory of China.<sup>420</sup>

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<sup>418</sup> PRC/Russia BIT (CLA-90).

<sup>419</sup> PRC/Russia BIT (CLA-90).

<sup>420</sup> Hearing Transcript, p. 14:14-22.

273. In the afternoon session, counsel for the Claimant echoed this statement:

Now, you heard Ms. Willems this morning, I think confirm this when she stated, “There is no provision as to restriction of territory.” On this we agree.<sup>421</sup>

274. This element should, however, not be overestimated as it might simply be explained by the fact that the PRC/Laos BIT was signed in 1993, and that at that time it would not have made sense to exclude the Macao SAR which was not then a part of the Chinese territory under PRC sovereignty. By contrast, with respect to the PRC/Russia BIT, which was signed in 2006, it made sense to deal with the question of the extension of the BIT to Macao. As stated by Mark Villiger:

A general presumption is established that, when a State concludes a treaty, the latter applies to the entire territory of the State, and individual areas and territories **need only be mentioned** where there is a special reason for doing so, in particular **to exclude them** from the treaty’s application. [...] If there are territorial changes, the treaty continues, in principle, to apply to the entire territory; different intentions would have to be renegotiated with, or at least be tacitly approved by, the other parties.<sup>422</sup>

275. It is a fact that no intention to exclude the Macao SAR from the application of the PRC/Laos BIT has been transmitted by the PRC to Laos, at least none that the Tribunal has been made aware of.

276. On the other hand, the return of Macao to Chinese sovereignty was not a unforeseen event; it had been negotiated for a relatively long period of time. The first step was the establishment of diplomatic relations between the PRC and Portugal on 8 February 1979, which permitted the launching of negotiations between the two countries on the future of Macao. Official negotiations began in June 1986 in Beijing and gave birth to the Joint Declaration of 1987 which entered into force on 15 January 1988. The Joint Declaration states that Macao will return to the PRC’s sovereignty on 20 December 1999, and organizes the transitory period.<sup>423</sup>

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<sup>421</sup> Hearing Transcript, p. 77:12-14.

<sup>422</sup> Villiger, pp. 392-393 (emphasis added) (CLA-116).

<sup>423</sup> This information is public and is derived from an article by Goy, *La rétrocession de Macau*, AFDI, 1997, pp. 271-285. See also Claimant’s Rejoinder: “[...] it was clear in 1993 that both Portugal and the PRC recognized that the former’s administration over Macau would cease, thereby restoring full Chinese sovereignty over its territory” (¶ 15) (Claimant’s emphasis). See also the Hearing Transcript, p. 80:2-9, where counsel for the Claimant stated:

“So, there is no dispute that six years before the Treaty was signed, the PRC had concluded in 1987 the Joint Declaration with Portugal which provided that the Government of the People’s Republic of China will resume the exercise of sovereignty over Macao with effect from 20 December 1999. And as the Tribunal’s aware, it’s a

Thus, at the moment of the conclusion of the PRC/Laos BIT, it was already common knowledge that in a few years' time, Macao would be under the PRC's sovereignty.

277. This factual situation means that no definite conclusion can be drawn either from the silence of the Treaty on its extension to the Macao SAR, or its silence on the non-extension of the Treaty to the Macao SAR.

iv) Is it otherwise established that the PRC/Laos BIT is not applicable to the whole territory?

278. This question in fact turns on the meaning of the existence of two sets of BITs by the same foreign country—Laos—one with the PRC and one with the Macao SAR. The question thus raised is whether the possibility of co-existence of a PRC-BIT and a Macao SAR-BIT with the same third State “otherwise establishes” that the PRC/Laos BIT cannot apply to the Macao SAR.

279. Having been made aware of the existence of two instances where there co-exists a BIT with the PRC and with the Macao SAR, the Tribunal asked, at the close of the Hearing on Jurisdiction, for clarification on that point. As indicated by the President of the Tribunal:

[I]t has been brought to our attention [...] that there are two—in the case of Portugal and the Netherlands, there are actually treaties entered into by Macao with these countries and also with China. [...] [I]t would be helpful to us if you could analyze the text of these four treaties in terms of any relationship between the two and how they [work] or don't together.<sup>424</sup>

280. The motivation for this question was to ascertain whether the analysis of these BITs could give some “otherwise established” indications on the respective role of these two series of treaties and, for example, help to ascertain whether the existence of one necessarily excluded the existence of the other.

281. An initial remark must be made by the Tribunal. The four treaties—the PRC/Portugal, PRC/Netherlands, Macao/Portugal, Macao/Netherlands treaties—were concluded after the handover of Macao to the PRC in 1999. As such, they do not call for the application of Article 15 of the VCST, but only of Article 29 of the VCLT. Interestingly, in the case of Portugal, the Macao/Portugal BIT preceded the PRC/Portugal BIT by five years, while in the case of the

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pretty detailed Declaration about the intent of the two Parties with respect to the transfer of sovereignty in 1999”.

<sup>424</sup> Hearing Transcript, p. 176:7-13.

Netherlands, the PRC/Netherlands BIT was concluded seven years prior to the Macao/Netherlands BIT.

282. This sequence of events—a PRC-BIT followed by a Macao-BIT with the same third country, and a Macao-BIT followed by a PRC-BIT with the same third country—has been analyzed by the Claimant as indicating that “there is no evidence that the PRC considered duplicate treaties between itself and Macau on the one hand and third States on the other to be contradictory or mutually exclusive.”<sup>425</sup>
283. The Tribunal considers this analysis compelling.
284. A first point which has come to light is that the territorial scope of the two series of BITs is not the same.
285. In the PRC/Portugal BIT signed in 2005, the territorial scope is as follows:

**Article 1(2)b)**

For the Macao Special Administrative Region of the People’s Republic of China, the territory comprised by the Macao peninsula and the islands of Taipa and Coloane.

286. In the Macao SAR/Portugal BIT signed in 2000, the territorial scope is as follows:

**Article 1(4)**

The term “territory” means the territory in which the Parties have, in accordance with international law and their national laws, sovereign rights or jurisdiction, including land territory, territorial sea and air space above them, as well as those maritime areas adjacent to the outer limits of the territorial sea, including seabed and subsoil thereof [...]

287. In the PRC/Netherlands BIT signed in 2001, the territorial scope is as follows:

**Article 1 (4)**

For the purpose of this Agreement, the term “territory” means respectively:

- For the People’s Republic of China, the territory of the People’s Republic of China, the People’s Republic of China, the People’s Republic of China, the People’s Republic of China (including the territorial sea and air space above it) as well as any area beyond its territorial sea within which the People’s Republic of China has sovereign rights of exploration of and exploitation of resources of the seabed and its sub-soil and superjacent water resources in accordance with Chinese law and international law.

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<sup>425</sup> Claimant’s Response, ¶ 47.

288. In the Macao SAR/Netherlands BIT signed in 2008, the territorial scope is as follows:

**Article 1(c)(ii)**

- in respect of the Macao Special Administrative Region of the People's Republic of China, the territory is peninsula of Macau and the islands of Taipa and Coloane.

289. The Respondent draws the following conclusions from the comparison of the territorial scope of the two series of BITs:

The territorial definition in the BITs clearly indicates that the Macao [SAR] [has] the power to enter into BITs to cover [its] own territory notwithstanding the fact that China has also entered into BITs with these same third states. This indicates that the territorial limit of the Chinese BITs [is] confined to Mainland China.<sup>426</sup>

290. The Tribunal does not accept this conclusion. It can indeed also mean, with as much if not more logic, that the PRC-BIT applies to the whole territory including the Macao SAR, while the Macao SAR-BIT is confined to the territory of Macao but cannot extend to Mainland China.

291. Another argument put forward by the Respondent is that the overlapping of the PRC and Macao BITs with the same third State would bring about “legal chaos for foreign investors.”<sup>427</sup>

292. In the Tribunal's view, the superposition of instruments of protection does not bring about chaos, but rather better protection to foreign investors. The Tribunal agrees with the Claimant when it states that “[t]he fact that the PRC authorized Macau to enter into the bilateral investment treaties at issue does not otherwise establish an intention that its own BITs should not extend to the territory of Macau; it is equally consistent with a supplemental regime of protection for Macanese investors, above and beyond that provided by the PRC treaties.”<sup>428</sup>

293. If one takes the example of the two BITs with Portugal, it is apparent that Article 9 of the PRC-BIT and Article 8 of the Macao-BIT are very similar, with a difference being that the PRC-BIT gives a further option to the investor—in addition to the choice of the competent national courts and an *ad hoc* arbitration tribunal under the rules of UNCITRAL—to resort to ICSID arbitration:

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<sup>426</sup> Respondent's Post-Hearing Submission, ¶ 27.

<sup>427</sup> Respondent's Post-Hearing Submission, ¶ 30.

<sup>428</sup> Claimant's Response, ¶ 48 (Claimant's emphasis).

<b>Macao SAR/Portugal BIT, 2000</b>	<b>PRC/Portugal BIT, 2005</b>
<p data-bbox="349 426 448 453">Article 8</p> <p data-bbox="349 485 797 674">1 – Disputes between an investor of one Contracting Party and the other Contracting Party relating to an investment in the first area of the second will be resolved through negotiations.</p> <p data-bbox="349 705 808 926">2 – If the dispute cannot be resolved in accordance with the preceding paragraph within six months from the date on which one of the litigants have requested in writing, the investor may choose to submit the dispute to one of the following instances:</p> <p data-bbox="349 957 686 1083">a) The competent courts of the Contracting Party in whose area the investment is located; or</p> <p data-bbox="349 1115 789 1304">b) At an ad hoc arbitral tribunal established in accordance with the rules of arbitration of the United Nations Commission for Trade and Development (UNCITRAL), which are then in force</p>	<p data-bbox="881 426 980 453">Article 9</p> <p data-bbox="881 485 1325 642">1. Any dispute concerning investments between a Party and an investor of the other Party should as far as possible be settled amicably between the parties in dispute.</p> <p data-bbox="881 674 1341 863">2. If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other State, be submitted at the choice of the investor to:</p> <p data-bbox="881 894 1341 957">a) the competent court of the Party that is a party to the dispute;</p> <p data-bbox="881 989 1341 1115">b) arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID);</p> <p data-bbox="881 1146 1349 1304">c) an ad hoc arbitral tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or other arbitration rules.</p>

294. The Tribunal does not consider that the concomitant application of these two BITs would lead to “legal chaos”. The more dispute settlement options an investor has, the better it is protected, and the more enhanced the economic cooperation will be between the concerned States.

295. In the Tribunal’s view, the existence of two treaties facilitates rather than hinders the fulfillment of the goals of the BITs, which are the protection of the foreign investors and the economic development of the host State. The Tribunal notes that the same analysis was performed by the tribunal in the *Tza Yap Shum* case, where it stated that “Hong Kong’s power to conclude its own

investment promotion and protection treaties with countries wherewith China also has entered into a BIT is not necessarily redundant.”<sup>429</sup>

296. The Respondent has presented another argument, based on the Macao SAR’s autonomy in economic matters, to support the view that the PRC/Laos BIT does not apply to the Macao SAR, *i.e.*, “[t]he very fact that Macao has entered into no BIT with Laos reveals that the Macao SAR under its autonomy has chosen not to enter into any investment protection treaty with Laos.”<sup>430</sup>

297. The Tribunal is not convinced by such reasoning. In its view, it is also possible to make the argument to the contrary: that the Macao SAR has not entered into a BIT with Laos because it considered that its investors were sufficiently protected by the PRC/Laos BIT?

298. A last mention should be made of a remark made by the Claimant related generally to the object and purpose of BITs. After stating that “there is thus no conflict where extending the PRC treaties to Macau ensures that Macanese investors enjoy dual sets of protections in the two instances discussed above”, the Claimant added that:

[...] the object and purpose is not served by denying Macanese investors the protection of the 130 BITs concluded by the PRC—in circumstances where there is no statement or convincing evidence mandating the contrary conclusion from either the PRC or the Macau SAR – and leaving them to avail themselves of only two bilateral treaties that Macau has concluded on its own behalf.<sup>431</sup>

299. Of course, the Tribunal limits its finding to the specific PRC/Laos BIT, which it has analyzed on the basis of the few factual elements provided to it and in application of the relevant rules of international law. Other conclusions might be arrived at with other factual circumstances surrounding other BITs.

300. The Tribunal concludes therefore that the PRC/Laos BIT is applicable to the Macao SAR.

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<sup>429</sup> *Tza Yap Shum*, ¶ 76 (CLA-70/RA-10).

<sup>430</sup> Respondent’s Post-Hearing Submission, ¶ 37.

<sup>431</sup> Claimant’s Response, ¶ 50 (Claimant’s emphasis). See also, in the same sense, Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 244, where the Claimant states that the Respondent’s position:

“[...] would categorically deny all investors from Macau and Hong Kong the protections generally afforded to other Chinese investors worldwide. Such an outcome is not only inconsistent with the purposes of the investment treaty regime, it is incompatible with China’s “one country, two systems” policy, which was created to enhance—not diminish—the protections afforded to investors and other denizens of the SARs.”



## **2. Whether Sanum qualifies as an investor under the Treaty**

### **(a) Whether Claimant is established under the municipal laws of the PRC**

301. The Parties disagree as to whether the reference to “the laws and regulations of each contracting State” in Article 1(2)(b) of the Treaty should be understood in the sense of covering the full territorial extension of each State or, in the case of the PRC, of excluding the Macao SAR and the Hong Kong SAR.
302. The Respondent’s argument for excluding the SARs is based on the existence of three different legal regimes in the State of China: one for Mainland China and one for each of the SARs. These regimes include different company laws and the company law of Mainland China does not apply to the SARs. For the Tribunal, the issue is not how many laws or legal regimes there are in the PRC and whether the investor has been established under one or the other, but whether an economic entity established under any one of such legal regimes is an economic entity established in accordance with the laws and regulations of the PRC. In other words, should the Tribunal include a territorial limitation in interpreting the scope of Article 1(2)(b)?
303. The language of the Treaty does not differentiate between economic entities in accordance with the legal regime under which they were established. There is no difference of treatment between the two States. The Preamble affirms the desire “to encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State [...]”. The Tribunal has already decided that the Treaty applies to all the territory over which the PRC is sovereign. It is consequent with that decision that an economic entity established under the laws applicable in any part of the territory of the PRC is to be considered to have been established under the laws and regulations of the PRC.
304. The Respondent has placed particular emphasis on the mutual respect of the sovereignty of the parties recorded in the Preamble of the Treaty. There is no doubt that the PRC has sovereignty over the Macao SAR and the Hong Kong SAR; it would not be respectful of that sovereignty for the Tribunal to consider that laws enacted in either of the two SARs are not enacted in the PRC.
305. Therefore, the Tribunal concludes that the Claimant is an economic entity established in accordance with the laws and regulations of the PRC as required by Article 1(2)(b) of the Treaty.

**(b) Whether Sanum qualifies as an “economic entity” within the meaning of the Treaty?**

306. The Respondent has interpreted the term “economic entity” as showing the intent of the Contracting Parties to the Treaty to exclude shell companies. Respondent contends that, in order to qualify as an economic entity, an investor must perform some economic activities in the State the protection of which the investor seeks and not in third States. In addition, these activities need to pertain to the investment that is the subject of the claim. The Respondent has related these conditions for an investor to qualify as such under the Treaty to the criteria used to ascertain the nationality of a company. For the Respondent, “economic entity” is concerned with the criterion of the seat of a company; the concept of “economic entity” encompasses more than the concept of incorporation. It is the Respondent’s contention that mere incorporation does not in and of itself determine the nationality of an investor.
307. The Tribunal has difficulty in reading these limitations into the Treaty. As pointed out by the Claimant, Chinese treaties are drafted so as to include entities that may not be separate legal entities with their own legal personality. The concept of “economic entity” contemplates a wider array of entities than the concept of corporation and is related to the particularities of the Chinese legal system. Rather than a limitation on the concept of investor, “economic entity” is a wider term that may include entities that are engaged in economic activities but without separate legal personality.
308. The Tribunal also has difficulty with the connection allegedly intended by the Treaty between the concept of nationality and economic entity. The Treaty requires that the economic entity be incorporated in the PRC or Laos. To extend the criteria to define nationality through the use of “economic entity” in the definition of investor is a far-fetched exercise in interpreting the text of the Treaty. It is hardly consonant with the canons of interpretation under the VCLT to which both Contracting Parties subscribe.
309. The search for a convenient place of incorporation is common practice whether for fiscal reasons or for the network of investment treaties a country may have concluded. There is nothing wrong *per se* in this search. As stated by the *Aguas del Tunari, S.A. v. Republic of Bolivia* tribunal:

It is not uncommon in practice, and—absent a particular limitation—not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.<sup>432</sup>

310. In the same vein the *Phoenix Action Ltd v. The Czech Republic* tribunal articulated the position as follows:

International investors can of course structure *upstream* their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment.<sup>433</sup>

311. However, tribunals have rejected the practice of so-called treaty shopping when a company is incorporated in a certain jurisdiction after a dispute has arisen in order for the investor to avail itself of access to arbitration that it otherwise would not have:

[A]n international investor cannot modify *downstream* the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed.<sup>434</sup>

312. The Respondent has not argued that this was the case in the dispute before the Tribunal.
313. The Respondent has relied extensively on the separate opinion in *Tokios Tokelès*. The Respondent has submitted that the decision in *Tokios Tokelès* was wrong. It is not for this Tribunal to determine whether the majority of that tribunal or the dissenting arbitrator was correct. Suffice it to say here that *Tokios Tokelès* is irrelevant to the matter before this Tribunal. The Claimant is not controlled by nationals of Laos who incorporated it in the Macao SAR and now claim protection under the Treaty against their own State; that is not the issue here.
314. The Respondent has affirmed that, “[t]he purpose and object of this BIT is to protect nationals of one State when investing in the other. It is not to extend the protection to investors and capital from outside the two States.”<sup>435</sup> The Claimant is an economic entity national of the PRC. The Respondent itself has recognized that the Treaty does not include origin-of-capital requirements. Therefore, this argument of the Respondent is without merit.

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<sup>432</sup> *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, October 21, 2005, ¶ 330(d).

<sup>433</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, ¶ 94 (“*Phoenix*”) (emphasis in original).

<sup>434</sup> *Phoenix*, ¶ 95 (emphasis in original).

<sup>435</sup> Respondent’s Memorial on Jurisdiction, ¶ 118.

315. To conclude, the Tribunal determines that Sanum qualifies as an investor under the Treaty.

### **3. Whether the Claimant has made an investment in Laos**

316. The Respondent contends that the Claimant has not made an investment in Laos because it did not directly invest in Laos and because the contributions made in relation to the shares owned in Savan Vegas and Paksong Vegas were “apparently made by loans that are being repaid annually from proceeds of the casino.”<sup>436</sup> The Tribunal will proceed to consider whether indirect investments qualify as investments under the BIT and, if this is the case, whether contributions made in the form of loans to the local companies qualify as investments.

317. For ease of reference the Tribunal reproduces here Article 1(1) of the BIT. It reads as follows:

The term ‘investments’ means every kind of asset invested by investors of one contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the Latter, including mainly,

- (a) movable and immovable property and other property rights;
- (b) shares in companies or other forms of interest in such companies;
- (c) a claim to money or to any performance having an economic value;
- (d) copyrights, industrial property, know-how and technological process;
- (e) concessions conferred by law, including concessions to search for or to exploit natural resources.

318. The definition is wide-ranging and open. First, while certain investments are highlighted, the list is not exclusive. It is a list of the investments that the parties to the BIT considered to be the main investments covered, but not exclusively covered, under the Treaty. Second, the term “investments” is defined as “every kind of asset invested”. Third, the term “investments” is not qualified by any adjective such as “direct”. More importantly, it would be surprising that the parties would have intended to exclude indirect investments and at the same time include among the “main” investments “shares in companies or other forms of interest in such companies”. This provision covers the common business practice of foreign investors using local companies as vehicles to channel the investment, as occurred in this instance.

319. The Tribunal notes that the Respondent has not supported its argument with any reference to decisions of arbitral tribunals and has not rebutted or contested the arguments of the Claimant set forth in its Statement of Claim and Response on Jurisdiction other than observing in general that certain submissions have not been dealt with as “a result of their irrelevance or non-

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<sup>436</sup> Respondent’s Memorial on Jurisdiction, ¶ 123.

application to this case and hence the absence of a refutation must not be taken as an admission to as the correctness of the assertions.”<sup>437</sup>

320. As to the contributions made to the companies in the form of loans, Article 1(1) of the Treaty does not specify the form in which the contributions must be made to qualify as an investment, whether in the form of loans or equity. On the other hand, Article 1(1) explicitly includes in the definition “a claim to money” as one of the main items to be considered as investments. Loans are undoubtedly “claims to money” that qualify as investments, as long as they are invested, which is undoubtedly the case here. Sanum alleges also that it has employed its know-how in the hotel and gaming facilities industry.<sup>438</sup>
321. The Tribunal therefore concludes that Sanum has made an investment protected by the PRC/Laos BIT.

#### **4. Whether Laos Consented to Arbitrate Sanum’s Claims under the Treaty**

##### **(a) Whether the Respondent has consented to arbitrate Sanum’s claims under Article 8 of the Treaty**

322. The issues before the Tribunal are whether access to arbitration is available to the investor before it has recourse to the local courts, and whether the investor may have recourse to arbitration to determine whether an expropriation has occurred. It will be useful to reproduce here the terms of Article 8 of the Treaty and the related paragraphs 1 and 2 of Article 4.
323. Article 8 provides:
1. Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.
  2. If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
  3. If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article 1, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provision of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.

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<sup>437</sup> Respondent’s Reply on Jurisdiction, ¶ 23.

<sup>438</sup> Amended Notice, ¶ 115.

324. The relevant paragraphs of Article 4 read as follows:

1. Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as “expropriation”) against investments of investors of the other Contracting State in its territory, unless the following conditions are met:
  - a. as necessitated by the public interest;
  - b. in accordance with domestic legal procedures;
  - c. without discrimination;
  - d. against appropriate and effective compensation.
2. The compensation mentioned in paragraph 1 (d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.

325. The Parties disagree as to whether a Chinese investor may have access to arbitration prior to having recourse to the competent courts of Laos. According to the Respondent, Article 8(2) means that the parties to the Treaty agreed that “no other forum was offered to hear Chinese investor claims, but Laotian local courts. The same would apply to Laotian investors’ claims against China.”<sup>439</sup> This reading of Article 8(2) would completely eliminate access to arbitration in respect of any dispute, including disputes in respect of the quantum of compensation provided for in Article 8(3).

326. The structure of Article 8 follows a logical sequence: first amicable negotiation, second recourse to the competent courts or on certain matters access to arbitration. Access to arbitration is optional; the dispute “may be submitted at the request of either party to an ad hoc arbitral tribunal.” The investor or the State may submit a dispute to arbitration involving the amount of compensation if negotiation on this matter is not successful. Article 8(3) does not provide that access to arbitration by either party to the dispute on the amount of compensation is subject to prior recourse to the Laotian courts. Under Article 8(2), the Parties to the dispute are not obliged to submit their dispute to the local courts, they are simply “entitled” to do so. In any case, the investor or the State would be entitled to have recourse to the local courts irrespective of whether the Treaty provided for it.

327. The Parties disagree on the scope of Article 8(3) and on the relationship between Article 8 and Article 4. For the Respondent, Article 8 is clear: it limits access to arbitration in respect of “a dispute involving the amount of compensation for expropriation.” The Respondent argues that its interpretation of Article 8(3) is further confirmed by the notification made by the PRC on 7 January 1993, pursuant to Article 24(5) of the ICSID Convention, as to the jurisdiction of

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<sup>439</sup> Respondent’s Reply on Jurisdiction, ¶ 47(2).

ICSID. According to that notification, the PRC “would only consider submitting to the jurisdiction of disputes over compensation resulting from expropriation and nationalization.”<sup>440</sup>

328. As far as the notification is concerned, the Tribunal notes that it is settled case-law that such notification is for informative purposes only and cannot be considered as a legal obligation to narrow or broaden an otherwise accepted consent to jurisdiction.<sup>441</sup>
329. Looking then at the “ordinary meaning” of this disposition, as it has to do in accordance with the rules of interpretation of the VCLT, the Tribunal considers that the terms of Article 8(3) indicate that the jurisdiction of the Tribunal is more limited than the dispute clauses found in many BITs. Article 8(3) refers to “disputes involving the amount of compensation for expropriation” and it does not simply refer to disputes involving an expropriation. As a first impression the text of this provision would seem to restrict the jurisdiction of the Tribunal to matters related to the amount of compensation due in instances of expropriation. However, other readings are possible. The term “involving” has a wider meaning than other possible terms such as “limited to” which could have been used if the intention of the State Parties had been to limit the jurisdiction of the Tribunal exclusively to disputes on the amount of compensation. “To involve” means “to wrap”, “to include”, terms that are inclusive rather than exclusive. This wider reading of Article 8(3) would seem more consistent with the other provisions of the Treaty as we will see shortly. It is also consistent with how a similar provision was interpreted by the *Tza Yap Shum* tribunal.
330. The interpretation of this provision shall also take into account its “context”. The Tribunal considers that the first sentence of Article 8(3) cannot be read in isolation, (a) from the sentence that follows, namely, “[t]he provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article”; (b) from Article 8(2) and (3) from the conditions to establish expropriation set forth in Article 4(1).
331. The second sentence of Article 8(3) denies access to arbitration if the party concerned has resorted to “the competent court of the Contracting State accepting the investment.” The Respondent has argued that this sentence in Article 8(3) refers to recourse to the competent court for a dispute involving the amount of compensation for expropriation and not generally to

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<sup>440</sup> Respondent’s Memorial on Jurisdiction, ¶ 150.

<sup>441</sup> Schreuer, *The ICSID Convention: A Commentary* (2001) (Cambridge University Press), pp. 342-347: “[...] notifications under Art. 25(4) are for purposes of information only and are designed to avoid misunderstanding.” (p. 344); see also *Tza Yap Shum*, ¶¶ 163-165; *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004, ¶¶ 135-147; see also *Kaiser Bauxite v. Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction, July 6, 1975, ¶¶ 23, 24.

recourse to a competent court. While this is arguably coherent in the context of Article 8, it is difficult to accommodate in the wider context of Article 4(1).

332. In accordance with Article 4(1), to establish whether an expropriation had taken place, a competent court would need to decide whether the action of Laos meets the four conditions set forth in that paragraph. The fourth condition is “appropriate and effective compensation.” Thus if Articles 8 and Article 4(1) are read together, an investor who would have recourse to a competent court to determine whether an expropriation has occurred would be precluded from submitting the dispute on the amount of compensation to international arbitration because the competent court would have already determined the compensation. There is an overlap between the conditions to be met by an expropriation under the Treaty and the Respondent’s reading of Article 8(3) in isolation of its context. The Respondent has ignored completely this overlap and has assumed that the jurisdiction may be split between the local courts and an arbitral tribunal. Indeed, the Respondent has argued that “[t]he liability/quantum split under Article 8(2) and (3) is consistent with the substantive split under Article 4(1) and 4(2).”<sup>442</sup> The alleged neat relationship between the two Articles ignores the result that emerges from the preceding analysis by the Tribunal.

333. The Respondent’s interpretation would leave Article 8(3) without effect. The task of the Tribunal is to interpret the Treaty in such a way that all the provisions of the Treaty have effect even if specific provisions do not refer to each other. The principle of *effet utile* requires international courts and tribunals to interpret international rules “so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text and in such a way that a reason and a meaning can be attributed to every part of the text.”<sup>443</sup> This principle of interpretation has been applied by investment arbitration tribunals and other international tribunals.

334. To illustrate how the principle has been applied, the Tribunal refers to the decision of the ICSID tribunal in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, which explained:

Nothing is better settled, as a canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning.<sup>444</sup>

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<sup>442</sup> Respondent’s Reply on Jurisdiction, ¶ 47(3).

<sup>443</sup> Gardiner, *Treaty Interpretation* (2008) (Oxford University Press), p. 149.

<sup>444</sup> *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 27, 1990, ¶ 40.



335. It has since then been confirmed in a great number of investment awards, which refer to the:

[...] cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.<sup>445</sup>

336. Other arbitral tribunals have faced the task of interpreting similar treaty provisions and the Parties have adduced their decisions in this proceeding. As noted by the Respondent, there is a split among the awards that have interpreted such provisions. The Respondent has pointed out that in their Preambles, none of the BITs underlying the cases of *Tza Yap Shum*, *European Media Ventures* or *Renta 4* adduced by the Claimant in support of its arguments include the following sentence found in the Preamble of the Treaty: “to encourage, protect and create favorable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on *the principles of mutual respect for sovereignty, equality and mutual benefit* and for the purpose of the development of economic cooperation between both States.” (Respondent’s emphasis). The Respondent has emphasized the importance of these principles:

When applied—how do we apply the principle of respect of sovereignty to international arbitration and international investment arbitration? Well, those principles, when applied to international investment law, and in particular dispute resolution, should and—when applied to international arbitration, foreign investor-State arbitration, push the Tribunal, oblige the Tribunal to respect the choice of domestic jurisdiction clause that is inserted in the Contract.<sup>446</sup>

337. Counsel to Respondent concluded by saying that “a purposive approach does not allow this Arbitral Tribunal to go beyond the wording of the Article 8(3) of the BITs.”<sup>447</sup>

338. The Tribunal is not convinced that the reference to these principles in the Preamble of the Treaty is sufficient to explain the differences in the interpretation of the jurisdictional clause by the arbitral tribunals concerned. More importantly, the Tribunal is unconvinced that the

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<sup>445</sup> *Eureko B.V. v. Republic of Poland*, Partial Award (*Ad hoc*, 19 August 2005), ¶ 248; see also *e.g.*, *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of October 12, 2005, ¶ 50; or *Pan American Energy LLC and BP Argentina Exploration Co. v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections of July 27, 2006, ¶ 132; *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction of December 30, 2010, ¶¶ 104-114; *Tidewater Inc. and others v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction of February 8, 2013, ¶ 134.

<sup>446</sup> Hearing Transcript, p. 42:16-23.

<sup>447</sup> Hearing Transcript, p. 43:9-11.

presence of these principles in the Preamble of the Treaty may override the conclusions of the Tribunal in the analysis of the text of Article 8. In the instant case, to follow the reasoning of the Respondent would mean to justify leaving without effect a clause of the Treaty on the basis of the purpose of the Treaty.

339. The purpose and object of the Treaty covers two distinct aspects: the protection of investments and the development of economic cooperation between both States. The balance between these two aspects must be borne in mind by the Tribunal in the analysis of the text of the Treaty, but it does not mean that the Tribunal needs to give preponderance to one aspect over the meaning of a particular clause of the Treaty or leave a clause without effect. The purpose of a treaty as set forth in its preamble may be useful to resolve doubts in its interpretation but it would not justify leaving without effect a clause of the treaty.
340. To explain the different conclusions reached by arbitral tribunals, the existence or absence of fork-in-the-road clauses in the underlying BIT is, in the view of the Tribunal, a more relevant factor, and it is a factor taken into consideration by these tribunals. Indeed, in none of the BITs underlying the cases relied upon by the Respondent is there a fork-in-the-road clause that would limit the investor's access to arbitration if the investor had recourse first to the local courts to determine whether an expropriation had actually occurred. As stated in the opening statement of Claimant's counsel at the Hearing on Jurisdiction:

Most importantly, I will note at the outset that none of them [of the cases relied on by the Respondent] involve—have fork-in-the-road clauses in their dispute-resolution clauses, and that makes an enormous difference because, as I've shown, having the fork-in-the-road clause makes it impossible for an investor to do what Laos says they want the Treaty says it ought to do, which is first bring a claim for expropriation to the Laos courts and then wholly bring the question of compensation/quantum to a Tribunal.<sup>448</sup>

341. As in the case of the Treaty, the Spain/Russia BIT and the PRC/Peru BIT include fork-in-the-road provisions. In reaching its decision on the meaning of the first sentence of Article 8(3) in the latter, the tribunal in *Tza Yap Shum* stated:

In the opinion of the Tribunal to rule otherwise would eviscerate the provision relating to ICSID arbitration since, in accordance with the final sentence of Article 8(3), to have recourse to tribunals of the State recipient of the investment would definitely preclude the possibility to accede to arbitration under the ICSID Convention.<sup>449</sup>

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<sup>448</sup> Hearing Transcript, pp. 129:21-130:3.

<sup>449</sup> *Tza Yap Shum*, ¶ 188 (CLA-70/RA-10) [English translation provided by the Tribunal. The English translation provided by the Claimant is inaccurate].

342. For the reasons explained above, the Tribunal shares this view and concludes that the Respondent has consented to arbitrate claims of expropriation under Article 8 of the Treaty.

**(b) Whether the Respondent has consented to arbitrate Sanum's claims under Article 3(2)**

343. The question before the Tribunal is whether the MFN clause in the Treaty grants an independent basis for the Tribunal to determine whether an expropriation has occurred and to determine whether the other substantive breaches of Treaty obligations claimed by Sanum have occurred. The Tribunal has already determined that it has jurisdiction as to whether an expropriation has occurred under Article 8 and need not further consider this matter under Article 3(2).

344. Article 3(2) reads as follows:

The treatment and protection as mentioned in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.

345. Article 3(1) provides:

Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.

346. The Parties disagree as to whether the sentence "shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State" refers to the standard of fair and equitable treatment and full protection and security or whether it extends to all protections provided in the Treaty, including access to international arbitration.

347. On the one hand, the Respondent contends that "protection" refers to protection and security and not to all the substantive protections under the Treaty. On the other hand, the Claimant has argued that the most natural reading of the term "protection" is that "it extends to *all* of the protections provided in the Treaty."<sup>450</sup>

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<sup>450</sup> Claimant's Statement of Claim and Response on Jurisdiction, ¶ 300 (Claimant's emphasis).

348. The Claimant has also argued that “activities associated with such investments” include the management, maintenance, use, enjoyment, disposal of investments and the settlement of disputes involved in protecting such investments.<sup>451</sup> Claimant adduces multiple awards to support different aspects of this reading of “activities associated with such investments.”<sup>452</sup> Respondent has not addressed this point in its Reply and has simply insisted that Article 3(1) refers to protection and security and bears no relation to access to international arbitration.
349. The interpretation of the MFN clause has been subject to discrepant views since the decision on jurisdiction of the *Maffezini* tribunal.<sup>453</sup> Therefore, it is not difficult for the parties to a dispute to find prior decisions in support of their conflicting positions. The Tribunal is not obliged to follow any particular prior decision but it cannot ignore the arguments of the Parties and the decisions they have used to support them. Therefore, before entering into the analysis of the MFN clause in the Treaty, the Tribunal considers it appropriate to make two general observations related to the cases of *RosInvest* and *Tza Yap Shum* that figure prominently in the Parties’ arguments.
350. First, notwithstanding the variety of approaches adopted by arbitral tribunals, those tribunals show concern for the reach of their interpretations and seek to limit their effect.
351. Second, general pronouncements of arbitral tribunals need to be considered cautiously in the context of the cases in which they were made. For instance, in the series of cases involving Argentina, access to arbitration is subject first to submitting the dispute to the ordinary courts and after 18 months an investor may proceed to arbitration even if a court decided the dispute and the investor was dissatisfied with the result. The Respondent has distinguished the instant case from the Argentine cases because the underlying treaties contained broader arbitration clauses than the dispute resolution clause found here, and the tribunals merely remove threshold requirements for accessing arbitration<sup>454</sup> The Tribunal agrees with the limited relevance of the Argentine cases.

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<sup>451</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 300.

<sup>452</sup> Claimant’s Statement of Claim and Response on Jurisdiction, ¶ 300.

<sup>453</sup> *Maffezini* (CLA-46).

<sup>454</sup> Respondent’s Memorial on Jurisdiction, ¶ 167.

352. Third, Claimant has drawn the attention of the Tribunal to the award on jurisdiction in the *RosInvest* case and to that tribunal’s finding that the MFN clause permitted importation of a dispute resolution clause. However, this finding needs to be treated with some reservation in view of the caution the *RosInvest* tribunal showed when it considered the MFN clause. It stated:

[...] *without entering into the much more general question whether MFN-clauses can be used to transfer arbitration clauses from one treaty to another*, the Tribunal concludes that, for the specific wording of Article 3(1) of the UK-Soviet BIT, and for the specific purpose of arbitration with regard to expropriation, the wide wording of Article 8 of the Denmark-Russia BIT is not applicable.<sup>455</sup>

353. The tribunal reached this conclusion on the effect of an expropriation on the treatment of an investment and then continued to analyze a separate provision on the treatment of the investor and stated: “*Again limiting its considerations to the possible application of the MFN-clause to arbitration regarding expropriation*, the terms ‘*use*’ and ‘*enjoyment*’ in paragraph (2) lead the Tribunal to different conclusions from those reached with regard to paragraph (1).”<sup>456</sup>

354. Fourth, the tribunal in *Tza Yap Shum* conducted an extensive analysis of the history of MFN clauses and of the MFN clause in the PRC/Peru BIT. The dispute settlement clause in that treaty follows closely the text of Article 8 of the Treaty except that in Article 8(3) of the Peru/PRC BIT there is the following additional sentence: “Any dispute related to other matters between the investor of any Contracting Party and the other Contracting Party may be submitted to ICSID if the parties to the dispute so agree.”<sup>457</sup> The *Tza Yap Shum* tribunal in its analysis of this Article 8(3) gave particular weight to the fact that the parties had contemplated in that article the possibility of submitting other matters to arbitration but only if the parties would agree beforehand. In view of the need for a further specific agreement, the tribunal rejected the claimant’s arguments to extend through the MFN clause access to arbitration in respect of disputes over the other alleged breaches of the Peru/PRC BIT.<sup>458</sup>

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<sup>455</sup> *RosInvest*, ¶ 129 (emphasis added) (RA-19).

<sup>456</sup> *RosInvest*, ¶ 130 (emphasis added) (RA-19).

<sup>457</sup> [English translation from the Spanish provided by the Tribunal]

<sup>458</sup> *Tza Yap Shum*, ¶ 216.

355. Before turning to the MFN clause in the Treaty it will be useful to recall the claims advanced by the Claimant under the Treaty MFN clause. In the Amended Notice, the Claimant has invoked its right under Article 3(2) of the Treaty:

[...] to receive treatment no less favorable than the Respondent has accorded to the investors of third States, such as the Netherlands, the Republic of Korea, France, Sweden, Switzerland, Denmark, the United Kingdom, Germany and Australia, in respect of its right to seek compensation for a breach of either the autonomous treaty standard of fair and equitable treatment or alternative standards of treatment no less favorable, such as Article 8 of the Laos-Germany BIT. Article 2(3) of the Laos-Sweden-BIT, or Article 6 of the Laos-Japan BIT, through recourse to binding, independent, international arbitration.

In addition, and in the alternative, should Article 8(3) of the instant Treaty be construed in such a manner as to in any way curtail or limit the access that a Chinese investor would otherwise enjoy (had it been a national of the Netherlands, the Republic of Korea, France, Switzerland, the United Kingdom, Sweden, Denmark, Australia or Germany), including the availability of access to arbitration under the Treaty itself, Sanum hereby invokes its right to receive treatment no less favorable than the Respondent has accorded to these third country investors, under Article 3(2) of the Treaty, as well.<sup>459</sup>

356. The Tribunal observes that, in its Statement of Claim and Response on Jurisdiction, under the heading “Article 3(2) Grants Authority to the Tribunal To Hear All of Sanum’s Claims”, the Claimant analyzes Article 3(2) of the Treaty but it does not include any analysis of the dispute settlement clauses in the BITs through which allegedly the MFN clause would operate. There is no analysis or specific preference expressed for any of them. While the BITs referred to by the Claimant are part of the record before the Tribunal, it would have been of assistance to the Tribunal had the analysis of Article 3(2) been complemented by an analysis of the dispute settlement clauses in the BITs listed in the Amended Notice.

357. The MFN clause in Article 3(2) refers to the treatment and protection in Article 3(1). Article 3(1) provides for fair and equitable treatment and protection of investments and activities associated with investments of investors. The Claimant has argued in favor of a broad meaning of the term “protection” under Article 3(1). On the other hand, the Claimant seems to realize that the term “protection” as used in Article 3(1) of the Treaty has a limited meaning. Indeed, the Claimant argues that, under the BITs of Laos with Germany, Korea and the United Kingdom, Laos has agreed to accord “full protection and security” and this obligation offers investors broader protection than that afforded under Article 3(1) of the Treaty. The Claimant does not discuss the implications of this statement for its reading of Article 3(1). In the view of

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<sup>459</sup> Amended Notice, ¶¶ 122-123.

the Tribunal, this argument shows that the Claimant considers it necessary to have recourse to the MFN clause to reach the level of protection afforded by the addition of the terms “full” and “security”. In other words, the Claimant’s argument on the application of the MFN clause contradicts the Claimant’s broad reading of the term “protection” in Article 3(1) as including all protections under the Treaty. If this were the case, there would be no need to have recourse to the MFN clause to enjoy wider protection.

358. Thus, the position advanced by the Claimant requires the Tribunal, to (a) extend “protection” under Article 3(1) to all protections provided for in the Treaty; (b) extend through Article 3(2) the reach of Article 3(1); and, (c) go a step further and extend the reach of this clause to include access to arbitration in respect of disputes over a breach of all protections under the Treaty. Article 3(1) is limited in its scope and does not include the traditional formula of *full* protection and *security*, as the Claimant itself recognizes. In addition, to read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties’ consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses. Therefore, the Tribunal finds that it has no jurisdiction for claims submitted under Article 3(2) of the Treaty.

##### **5. Whether the Doctrines of *Lis Pendens* and Against the Abuse of Process Bar the Claims of the Claimant**

359. The Respondent contends that the Claimant has committed an abuse of process by submitting, as part of the Amended Notice, claims already made before in the Lao Holdings Arbitration. The Respondent further argues that these claims are inadmissible on grounds of *lis pendens*. The Respondent has requested that the Tribunal reject the amendments the Claimant has made in its Statement of Claim and Response on Jurisdiction on the basis of Articles 17 and 22 of the 2010 UNCITRAL Arbitration Rules.

360. According to Article 17(1) of the Rules:

[...] the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

361. Article 22 reads as follows:

During the course of the arbitral proceedings, a party may amend or supplement its claim or defense, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defense, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defense falls outside the jurisdiction of the arbitral tribunal.

362. The Tribunal will address whether there have been delays or prejudice caused by the Amended Notice; whether the Respondent had the opportunity to present its case; whether *lis pendens* is an obstacle to admission of the claims in the Amended Notice; whether the amended claims are within the jurisdiction of the Tribunal; and, whether the Claimant has abused the process.

363. Is the Amended Notice a cause for delay? Procedural Order No. 1 provided for the filing of an Amended Notice within ten days of the date of that order. The Amended Notice was filed on June 7, 2013 within the prescribed time. Therefore, it is self-evident that the Tribunal may not consider the Amended Notice to have caused any inappropriate delay.

364. Has each Party had the opportunity to present its case? Suffice it to say here that the Amended Notice not only was filed in good time but also was filed nearly two months before the Statement of Claim and the Respondent's Memorial on Jurisdiction.

365. Has the Amended Notice caused prejudice? It is undisputed that the Claimant offered to consolidate the two proceedings and the Respondent refused. Whatever the reasons for the Respondent's refusal, the Respondent is now precluded from claiming that it has been prejudiced. Whether it has or not is not a matter for the Tribunal to elucidate since consolidation was an option available to the Respondent.



366. Are the claims introduced in the Amended Notice inadmissible on the grounds of *lis pendens* since they are the subject of a parallel proceeding? The Lao Holdings Arbitration is based on a different BIT and the claimant parties are related but different. The mere fact that the subject matter of the dispute may in some aspects overlap with these proceedings is not sufficient reason to reject the claims as inadmissible. As to the jurisdiction of the Tribunal, to the extent that the Tribunal has determined that it has jurisdiction to consider only the expropriation claims before it, that jurisdiction encompasses only the expropriation claims that may be before the Lao Holdings tribunal.
367. Does the pursuit of overlapping claims in two different arbitral tribunals established under two different BITs by different parties constitute an abuse of process? As already observed above, it is undisputed that the Respondent refused to consolidate this proceeding and the Lao Holdings Arbitration. This fact is sufficient ground for the Tribunal to consider that there is no abuse of process.
368. To conclude, the Tribunal determines that the expropriation claims in the Amended Notice are properly before this Tribunal.

## **VIII. COSTS**

369. Each Party has requested that the costs of the proceedings, including its own costs, be borne by the other. The Tribunal reserves this question for consideration and decision along with the merits of the dispute.

## IX. DECISION

370. For the reasons set out above the Tribunal decides:

- i) That the PRC/Laos BIT does apply to the Macao SAR.
- ii) That Sanum is a protected investor under the BIT and its claims are investment-related.
- iii) That the Tribunal has jurisdiction to arbitrate only the expropriation claims of Sanum under Article 8(3) of the BIT.
- iv) That it has no jurisdiction to arbitrate Sanum's other claims by application of Article 3(2) of the BIT.
- v) To reject the Respondent's request to dismiss claims introduced by the Amended Notice which allegedly duplicate claims made in the Laos Holdings Arbitration.
- vi) To consider and decide the Parties' requests in respect of costs together with the merits of the dispute.

Dated this 13<sup>th</sup> day of December 2013, Singapore:



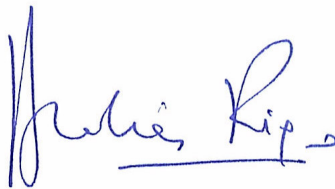
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Professor Bernard Hanotiau  
Arbitrator



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Professor Brigitte Stern  
Arbitrator



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Dr. Andrés Rigo Sureda  
Presiding Arbitrator