IN THE COURT OF APPEAL
OF THE REPUBLIC OF SINGAPORE

[2022] SGCA(I) 9

Civil Appeal No 55 of 2021

Between

(1) Lao Holdings NV
(2) Sanum Investments Ltd

… *Appellants*

And

The Government of the Lao People's Democratic Republic

… *Respondent*

In the matter of Originating Summons No 5 of 2020

Between

Lao Holdings NV

… *Plaintiff*

And

The Government of the Lao People's Democratic Republic

… *Defendant*

In the matter of Originating Summons No 6 of 2020

Between

Sanum Investments Limited

… *Plaintiff*

And

The Government of the Lao
People's Democratic Republic

… *Defendant*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside]
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Court of Appeal — Civil Appeal No 55 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Robert French IJ
12 April 2022

24 November 2022 Judgment reserved.

Robert French IJ (delivering the judgment of the court):

Introduction

1 This appeal concerns two arbitral awards (the "Awards") made in investor-State arbitrations between the appellants ("Appellants") as claimants in the arbitrations and the respondent ("Respondent") as defendant in the arbitrations. The arbitrations, seated in Singapore, were conducted by two three-person arbitral tribunals (collectively, the "Arbitral Tribunals") with common membership, save for the presiding arbitrators. The Appellants alleged violations by the Respondent of two bilateral investment treaties. One of the arbitrations was conducted under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). It is referred to in these proceedings as the "ICSID Arbitration" and the arbitral tribunal therein is referred to as the "ICSID Tribunal". The other was an *ad hoc* arbitration conducted under the auspices of the Permanent Court of Arbitration ("PCA"). It is referred to as the "PCA Arbitration" and the arbitral tribunal therein is

referred to as the "PCA Tribunal". The arbitrations were distinct proceedings and were not consolidated. They were however, largely conducted in parallel and were the subject of joint hearings attended by the two party-appointed members and the two presiding arbitrators.

2 Before their completion, the arbitrations were suspended pursuant to a Deed of Settlement (the "Settlement Deed") entered into between the Appellants and the Respondent on 15 June 2014. Under the Settlement Deed the arbitrations could be reinstated in the event of a "material breach" by the Respondent. Section 34 of the Deed provided that, if that occurred, neither the Appellants nor the Respondent could add new claims or evidence to the arbitrations nor seek any additional relief not already sought. In the event, material breach was alleged and the arbitrations were revived. The Respondent was permitted by the Arbitral Tribunals to adduce new evidence, in the revived arbitrations, said to go to illegal activities undertaken on the part of the Appellants. The Arbitral Tribunals, by their Awards, dismissed the Appellants' claims with costs. The Singapore International Commercial Court ("SICC") dismissed the Appellants' applications to set aside the Awards. The Appellants now appeal to this court. The appeal ("Appeal") involves the application of Arts 34(2)(*a*)(ii) and 34(2)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which is given the force of law in Singapore by s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). For the reasons that follow ("Reasons") the Appeal is dismissed.

Overview of factual background and procedural history

3 The Appellants are two companies Lao Holdings NV ("LH"), incorporated in the Netherlands and its wholly-owned subsidiary Sanum

Investments Limited ("Sanum"), incorporated in Macau in the People's Republic of China. They were involved in the development of hotels, casinos and clubs in the Lao People's Democratic Republic. The Respondent is the Government of the Lao People's Democratic Republic ("GOL").

4 The Appellants entered into arrangements with a Laotian conglomerate, the ST Group Co Ltd ("ST") and related entities and individuals from 2007 to 2013. In partnership with ST they invested in projects including the Savan Vegas Hotel and Casino Complex (or "Savan Vegas"), which was built and successfully operated, the Paksong Vegas Hotel and Casino Complex ("Paksong Vegas") which was never developed, and multiple slot clubs. The slot clubs included the "Lao Bao Club", the "Ferry Terminal Club", the "Thanaleng Club" and a slot club at the Paksan Hotel ("Paksan Club").

5 By late 2011, relations between the Appellants and ST had deteriorated and disputes had arisen between them. ST ceased cooperation with Sanum and initiated litigation against it. The Appellants pursued claims against ST in separate arbitration proceedings at the Singapore International Arbitration Centre ("SIAC").

6 Relevantly to the present proceedings, the Appellants also claimed that officials of the Respondent began to renege on earlier commitments, and embarked on a series of arbitrary and discriminatory actions designed to enrich them and ST at the Appellants' expense.

7 In the arbitrations which were commenced on 14 August 2012, the Appellants alleged violations by the Respondent of the protection afforded to investors by two bilateral investment treaties (individually, "BIT" or "Treaty").

The first, invoked by LH, was the Agreement on Encouragement and Reciprocal Protection of Investments between the Lao People's Democratic Republic and the Kingdom of the Netherlands (16 May 2003) (entered into force on 1 May 2005) ("Laos-Netherlands BIT"). The arbitration under that Treaty was initiated by LH through ICSID. It was conducted under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (2006) ("ICSID Additional Facility Rules"). Sanum's claims were brought before the PCA under Art 8(5) of the Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments (31 January 1993) (entered into force on 1 June 1993) ("Laos-PRC BIT"). That arbitration was conducted under the 2010 UNCITRAL Arbitration Rules ("UNCITRAL Rules"). We shall refer to these arbitral proceedings collectively as the "BIT Arbitrations".

8 Although there were two separate Awards, one by the ICSID Tribunal and the other by the PCA Tribunal, the relevant parts of the text of each Award were almost identical. As was stated in each of the Awards:

> … for ease of reference only, LHNV and Sanum will be referred to as "the Claimants", as the facts of the cases are intermingled.

9 The Arbitral Tribunals characterised the claims of the Appellants as based upon a multiplicity of alleged treaty breaches by GOL including, but not limited to, an 80% tax on casino revenues and what were said to be unfair and oppressive audits of Savan Vegas. It was also alleged that the Respondent had abused its sovereign authority to assist ST to acquire other assets which

belonged, in whole or in part, to the Appellants. They eventually valued their investment loss as at 31 August 2016 at between US$690m and US$1bn.

10 The Respondent raised defences that the claims should not be entertained as there was evidence of bribery, corruption and embezzlement. The Respondent also counterclaimed against Sanum for alleged embezzlement of funds from a joint venture company set up to operate the Paksan Club ("Embezzlement Counterclaim"). The counterclaim was not pursued.

11 The history of the disputes between the parties and the arbitral proceedings is long and convoluted. However, on 15 June 2014, two days before the merits hearings for the arbitrations were to begin, the parties entered into a Settlement Deed with a "Side Letter" dated 18 June 2014. The Settlement Deed was intended to resolve the claims. On 19 June 2014, the ICSID Tribunal and the PCA Tribunal each signed consent orders suspending their respective BIT Arbitrations.

12 Key provisions of the Settlement Deed, Sections 32 and 34, provided for the possibility that the proceedings might be revived by reason of material breach by the Respondent. They read as follows:

> 32. The Claimants shall only be permitted to revive the arbitration in the event that Laos is in material breach of Sections 5 – 8, 15, 21 – 23, 25, 27 or 28 above and only after reasonable written notice is given to Laos by the Claimants of such breach and such breach is not remedied within 45 days after receipt of notice of such breach. … In the event there is a dispute as to whether or not Laos is in material breach of Sections 5 – 8, 15, 21 – 23, 25, 27 or 28 above, the Tribunals shall determine whether or not there has been such a material breach and shall only revive the arbitration if they conclude that there has been such a material breach.
>
> …

> 34. In the event that the arbitration is revived pursuant to clause 32 above, neither the Claimants nor Laos shall not be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs not already sought in the proceedings.
>
> [emphasis added in underline]

13 It was common ground that the word "not", appearing in the second line of Section 34, was an error which should be disregarded in reading Section 34.

14 The Settlement Deed also contained a choice of law and dispute resolution provision – Section 42 – which provided as follows:

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

15 Subsequently, the Appellants applied to the Arbitral Tribunals to reinstate the arbitrations on the basis that the Respondent had committed material breaches of the terms of the Settlement Deed. This first application failed. However, a second application on the basis of a second set of alleged material breaches succeeded. On 15 December 2017, the Arbitral Tribunals reinstated the BIT Arbitrations.

16 On 15 May 2018, the Respondent lodged with each Arbitral Tribunal an "Application to Admit Additional Evidence". It sought to introduce three categories of evidence consisting of:

(a) two awards rendered in related SIAC arbitrations ("SIAC Awards");

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

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

17 The second category of evidence was said to have supported the Respondent's allegations of bribery, corruption and fraud with respect to:

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

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

(c) the "Alleged Witness Bribe" relating to alleged payments made by the Appellants to Mdm Sengkeo in May 2014 to prevent her from testifying against the Appellants in the BIT Arbitrations; and

(d) the "Alleged MaxGaming Fraud", which related to the Appellants' allegedly fraudulent scheme in April 2015 to re-acquire

> control of Savan Vegas from the Respondent by presenting a sham offer from an entity called MaxGaming Consulting Services Ltd (Macau) ("MaxGaming") to purchase Savan Vegas in order to delay a deadline to sell certain gaming assets within a ten-month period after 15 June 2014.

18 As the SICC recorded, the Respondent had argued that its applications to introduce fresh evidence were justified because the Arbitral Tribunals retained a residual discretion under the relevant Treaties notwithstanding Section 34 of the Settlement Deed. It also contended that there had been significant developments over the four years following the execution of the Settlement Deed, including at least six new proceedings, which were said to constitute compelling circumstances for the Arbitral Tribunals to exercise that residual discretion. Further, it was said the Appellants' bribery, corruption, illegal and bad faith activities would result in dismissal of their claims in the BIT Arbitrations.

19 In written submissions in support of its Applications to Admit Additional Evidence dated 15 May 2017, the Respondent argued that the Arbitral Tribunals had broad and inherent power to consider additional evidence that was relevant and material to their awards based on the facts of the particular case. The Appellants said that the language of Section 34 of the Settlement Deed was mandatory and that the Arbitral Tribunals had no discretion to admit the new evidence. They also contended that the admission of the new evidence would require the adducing of rebuttal evidence and new witnesses, which would increase the length of the hearing.

20 On 25 June 2018, the Arbitral Tribunals ruled on the Respondent's Applications to Admit Additional Evidence. This was done by way of procedural orders, PCA Procedural Order 9 ("PCA PO 9") and ICSID Procedural Order 11 ("ICSID PO 11"). Their texts were relevantly identical.

The Procedural Orders – PCA PO 9 and ICSID PO 11

21 The Arbitral Tribunals took as their point of departure that in general they would defer to what the parties agreed in Section 34. Nevertheless they held that they retained a residual discretion to chart a different course "if compelling circumstances were shown to exist". This terminology derived from a statement made earlier by the ICSID Tribunal in a letter dated 3 April 2017. The Arbitral Tribunals also referred to a similar approach taken in *Compañía de Aguas del Aconquija S.A., Vivendi Universal v Argentine Republic,* ICSID Case No ARB/97/3, Award (20 August 2007).

22 The Arbitral Tribunals concluded that the 2014 record — that is the record in existence at the time of the Settlement Deed should remain "frozen" as provided in Section 34 unless they were satisfied that there were "compelling circumstances" to exceptionally admit fresh material. The principle governing that approach was said to be party autonomy and the parties' freely negotiated bargain of which Section 34 was an important and inextricable element.

23 The Arbitral Tribunals rejected a contention by the Respondent that the Application to Admit Additional Evidence should be allowed on the basis that the evidence was "relevant, material, [and] reliable and [did] not take the [Appellants] by surprise". That test was rejected as giving little or no weight to Section 34. On the other hand, the Arbitral Tribunals rejected the Appellants'

submissions that they lacked authority to admit new evidence without the agreement of the parties. They did not accept an absolute bar.

24 The Arbitral Tribunals then considered the three categories of new evidence proposed by the Respondent.

Category 1 – The SIAC Awards.

25 The first of the SIAC Awards was the "*GOL SIAC Final Award*", *The Government of the Lao People's Democratic Republic v Lao Holdings N.V and another*, SIAC Case No ARB/143/14/MV ("ARB 143/14") dated 29 June 2017. The second was the "*STSIAC Final Award*", *Sanum v ST Group et al*, SIAC Case No ARB184/15 dated 22 August 2016. The award in ARB 143/14 was based upon a far larger evidentiary record than the frozen record before the Arbitral Tribunals and much of it post-dated the Settlement Deed. Statements of Fact in the *GOL SIAC Final Award* would supplement the factual record in a way not permitted by Section 34 of the Settlement Deed. There was no compelling reason to admit the SIAC Award in ARB 143/14.

26 On the other hand, the Arbitral Tribunals accepted the Respondent's contention that if the *STSIAC Final Award* were excluded, the Tribunals' understanding of the situation in relation to the Thanaleng Club might be badly skewed. There was also the possibility of the Appellants obtaining double recovery.

Category 2 – Evidence of Bribery

27 As to the alleged evidence of bribery, the Arbitral Tribunals said:

> The Government made allegations of bribery in 2014. It now offers additional evidence and arbitral authority in paras 36 to

> 46 of its Reply dated 15 June 2018 for the proposition that investor/state arbitration panels are obligated to delve into allegations of corruption which, if established, will disentitle the Claimants to any relief at all. Without in any way pre-judging the merits of the Government's allegations, the Tribunal is of the view that corruption issues, in general, are of over-riding importance to the rule of law and the integrity of the arbitration process. In the result, the Tribunal should have before it all relevant documents to get to the bottom of the allegations. On the basis of that "compelling circumstance," the Tribunal will admit into the record the documents put forward by the Government and identified in its application dated 15 May 2018 … .

Category 3 – The BDO forensic audit

28 The Appellants objected to a forensic audit report, designated the "BDO Report", going in on the basis that it was just another "expert opinion" in support of the Respondent's defence and counterclaim. The Savan Vegas casino had been sold under the auspices of the SIAC tribunal, which had dealt with the claims and counterclaims of the Appellants and of the Respondent arising out of the operations of the casino and its sale. The casino accounts had been settled by SIAC. Apart from bribery, there was no compelling justification for admission into the record of the BDO forensic audit in the face of Section 34. The Arbitral Tribunals held:

> Accordingly, the BDO forensic audit will be admitted insofar as it deals with the subject matter or otherwise assists in the resolution of the Government's allegations of bribery and corruption but is otherwise excluded from the record for purposes of the Singapore hearing commencing 3 September 2018.

Further applications and the hearing

29 The Appellants then sought to introduce their own additional evidence to address and rebut the new evidence from the Respondent. The Arbitral Tribunals admitted 35 of their proposed 40 new exhibits in PCA Procedural

Order 12 and ICSID Procedural Order 14, which were relevantly identical. One expert report was not admitted for want of relevance.

30 The Respondent made a further application to introduce a witness statement of a Mr Angus Roderick Noble ("Mr Noble") dated 8 June 2015. That application was granted on 29 August 2018 in PCA Procedural Order 13 and ICSID Procedural Order 15.

31 A merits hearing followed and the proceedings were declared closed on 17 July 2019. On 6 August 2019, final Awards were rendered by the Arbitral Tribunals dismissing all of the Appellants' claims and awarding costs to the Respondent.

The Arbitral Tribunals' approach to allegations of bribery, corruption and want of "clean hands"

32 The approach of the Arbitral Tribunals to allegations of bribery and corruption informed their views about the admission of the additional evidence. They were also concerned about the applicable standard of proof of such allegations.

33 The parties had agreed that investment tribunals are properly sensitive to allegations of corruption and that the Respondent bore the burden of proof. There was disagreement about the standard of proof, namely whether a balance of probabilities was sufficient or whether corruption should be established to the more demanding standard of "clear and convincing evidence" of corruption.

34 The Respondent contended that, as a matter of *ordre public international* and public policy, the Appellants were not legally entitled to maintain any of their claims (citing *World Duty Free Company Ltd v Republic of Kenya,* ICSID

Case No ARB/00/7, Award (4 October 2006) ("*World Duty Free Company*") at [188(3)]). Corruption was relevant both to the initial investment and also to the investor's subsequent conduct in relation to the investment in the host country. The International Chamber of Commerce dossier: *Addressing Issues of Corruption in Commercial and Investment Arbitrations* (Domitille Baizeau & Richard Kreindler eds) (2015) ch 11 at para 31 (citing *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/19, Award (18 November 2014) at [129]–[132]) was quoted:

> 31. The approach to bribery is different in investment arbitrations, where jurisdiction does not derive from a contract, but rather from an investment treaty. In these cases validity of contracts is not the question. The issue is whether an investor who has incurred in corrupt practices when making or performing the investment can still enjoy protection under the relevant investment treaty. And the answer is a clear no.

35 The Arbitral Tribunals observed that corruption in the making of an investment will raise an issue of jurisdiction for the arbitral tribunal. Subsequent acts of corruption will go to a claimant's entitlement to relief under the BIT. Both Arbitral Tribunals cited the following passage in *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007) at [345]:

> If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.
>
> [emphasis in original in italics]

36 While the United Nations Convention Against Corruption (adopted on 31 October 2003), 2349 UNTS 41 (entered into force 14 December 2005) (the

"UN Convention") applied to States rather than private parties, it embodied a principle of customary international law applicable, according to the Organisation for Economic Co-operation and Development ("OECD"), to root out corruption used "to obtain or retain business or other improper advantage in the conduct of international business" (*OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (17 December 1997), Art 1(1); see also the UN Convention, Art 16(1)).

37 The Respondent also relied on a more general "clean hands" doctrine. It alleged that, under that rubric, the Appellants' misconduct was sufficient to deny them the assistance of investor/State arbitration.

38 The Arbitral Tribunals described the term "clean hands" as a metaphor designating a defence to equitable relief in common law jurisdictions. The incorporation of such a general doctrine into investor-State law without careful boundaries would risk opening investment disputes to an open-ended, vague and, ultimately, unmanageable principle. Putting aside the label, serious financial misconduct by the Appellants incompatible with their good faith obligations as investors in the host country would not be without Treaty consequences both in relation to the attempt to rely on the guarantee of fair and equitable treatment, as well as the entitlement to relief of any kind from an international tribunal. As appears later in these Reasons, the reference in the Arbitral Tribunals' reasons to "good faith" as an aspect of the "clean hands" defence is relevant to the Appellants' argument under Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the IAA, that they were not given a reasonable opportunity to present their case on that issue.

39 As to standard of proof, the Arbitral Tribunals acknowledged the difficulty of proving corruption as well as the importance of exposing corruption where it existed. Nevertheless, given the seriousness of the charge and the severity of the consequences to the individuals concerned, procedural fairness required that there be proof rather than conjecture. The Arbitral Tribunals held that the standard of "probabilities" requires the trier of fact to stand back and make an overall assessment. The requirement of "clear and convincing" evidence put the focus more closely on the building blocks of the evidence to ensure a rigorous testing.

40 In the Arbitral Tribunals' views it was not necessary that there be "clear and convincing evidence" on every element of every allegation of corruption but such "clear and convincing evidence" as exists must point clearly to corruption. An assessment must then be made of which of the elements of the alleged act of corruption had been established by "clear and convincing evidence" and which elements were left to reasonable inference and on the whole whether the alleged act of corruption was established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt. This approach was said to reflect the general proposition that the "graver the charge, the more confidence there must be in the evidence relied on."

41 The Arbitral Tribunals' formulation of the distinction was not entirely clear. The term "balance of probabilities" directs attention to a requirement of a cognitive state of which the decision-maker can say "I think it more likely than not that these facts existed." Nor is the higher criminal standard of "proof beyond reasonable doubt" to be quantified. It requires that a person have much more certainty than a belief that somebody is likely to have done what he or she

is alleged to have done. As Dixon J said in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361, a leading decision of the High Court of Australia in 1938:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes.

42 That said, the general thrust of the Arbitral Tribunals' reasoning on the question of standard of proof was clear enough. In making findings going to allegations of want of good faith on the part of the Appellants they were prepared to apply a lesser standard of proof than what they regarded as necessary for the proof of essentially criminal activity. The standard of proof that they chose to apply and the mode of that application is not a matter to be revisited by a supervising court on an application to set aside the award.

43 This background casts some light upon the findings made by the Arbitral Tribunals which are relevant to the present Appeal and which are summarised below.

The Four Findings

44 The Arbitral Tribunals made "Four Findings" relevant to the present Appeal:

> (a) It was more probable than not that Mdm Sengkeo was used as a conduit to bribe government officials to stop the E&Y Audit of Savan Vegas (*ie*, the Alleged E&Y Bribe). However, the conclusion was not established to the higher standard of "clear and convincing evidence".

The Arbitral Tribunals were satisfied on the "lesser standard of probabilities" that Mr John K Baldwin ("Mr Baldwin"), a 50% shareholder of LH and Chairman of the Sanum board of directors, involved the Appellants in "serious financial illegalities in respect of the halt of the E&Y [A]udit".

(b) It was more likely than not, on "the lower 'probabilities' standard", that a bribe was paid to an unidentified GOL official or officials in an unsuccessful attempt to advance the Appellants' agenda at the Thanaleng Club. This was the "Alleged Thanaleng Bribe".

(c) While the Arbitral Tribunals were unable to find "clear and convincing evidence" that US$875,000 was paid to Mdm Sengkeo to bribe GOL ministers, they were nevertheless satisfied on the "lower standard of probabilities", that Mr Baldwin and Mdm Sengkeo were involved in channelling funds illicitly to the Respondent's officials and further that she was paid to secure her loyalty and to avoid her testifying on behalf of GOL, thereby obstructing justice. This related to the "Alleged Witness Bribe".

(d) The Respondent had seized control of the Savan Vegas and gambling facilities on 15 April 2015 and its right to do so had been confirmed by an arbitral tribunal constituted under the SIAC in the SIAC Award dated 29 June 2017 in ARB 143/14. Prior to that award, the Appellants had asserted a right under the 2014 Settlement Deed to take back control on the basis that they had managed to sell their investments on the open market prior to the deadline of 15 April 2015, imposed as a term of the Settlement Deed. The alleged third-party offer to purchase dated 14 April 2015 was from MaxGaming. The transaction did not

proceed and was found by the SIAC tribunal to be a sham. On the evidence, the Arbitral Tribunals also concluded that the offer was a sham, "but bribery and corruption as opposed to fraud and chicanery [was] not established."

Applications to set aside the BIT Awards

45 The Appellants applied to the Singapore High Court to set aside the BIT Awards. On 14 July 2020, the cases were transferred to the SICC. Singapore had been designated as the seat of both the ICSID and PCA Arbitrations. The applications were brought under the IAA.

46 There were a number of grounds advanced before the SICC. Those relevant to this Appeal were:

> [i] that the arbitral procedure in the BIT Arbitrations was not in accordance with the parties' express agreement, under Art 34(2)(*a*)(iv) of the Model Law; and/or
>
> [ii] that the [Appellants] were not afforded a reasonable opportunity to be heard on determinations made in the BIT Awards, under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA.

47 The SICC dismissed the Appellants' applications to set aside the BIT Awards. The judgment of the SICC was delivered on 10 September 2021.

The statutory framework

48 The statutory framework is provided by the IAA. That Act sets out, in its First Schedule, and gives the force of law to, the Model Law, adopted by the United Nations Commission on International Trade Law on 21 June 1985.

49 Article 2 of the Model Law contains definitions, including the following, which is significant for the first ground:

> For the purposes of this Law:
>
> …
>
> (*e*) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.

50 Section 3 of the IAA provides:

> **3.**—(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.
>
> (2) In the Model Law —
>
> "State" means Singapore and any country other than Singapore;
>
> "this State" means Singapore.

51 Article 19 of the Model Law provides:

> *Article 19. Determination of rules of procedure*
>
> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

52 Article 34 of the Model Law provides, *inter alia*:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:

> (*a*) the party making the application furnishes proof that:
>
> …
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> …
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;
>
> …

53 The grounds listed in Art 34(2) are very similar to those listed in Art V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*ie*, the "New York Convention") – see especially Arts V(1)(b) and V(1)(d). By force of Art 2(*e*) of the Model Law the reference to the agreement of the parties in Art 34(2)(*a*)(iv) picks up arbitral rules referred to in their arbitration agreement. In fact, agreements on procedure are usually reached with the incorporation by reference of a set of arbitral rules in the arbitration agreement (see Pietro Ortolani, "Article 34 – Application for Setting Aside as Exclusive Recourse against Arbitral Award" in Ilias Bantekas *et al*, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press, 2020) ("Ortolani") s 9.2).

54 The grounds set out in Arts 34(2)(*a*)(ii) and 34(2)(*a*)(iv) are similar to those in Art 36 of the Model Law setting out the grounds for refusal of recognition or enforcement of an arbitral award. That Article provides in Art 36(1)(*a*)(ii) a ground for refusal of recognition or enforcement in terms

relevantly identical to that appearing in Art 34(2)(*a*)(ii). Article 36(1)(*a*)(iv), in slightly different language, provides:

> The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the State or Territory where the arbitration took place.

55 The Model Law has been described as embracing "an almost perfect parallelism between the grounds for setting aside a 'domestic' arbitral award (article 34) and the grounds for refusing recognition and enforcement of a 'foreign' award (article 36)" (Ortolani at pp 858–898).

56 Section 24 of the IAA provides:

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

57 The effect of an award is set out in s 19B of the IAA, as follows:

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

> or in accordance with the provisions of this Act and the Model Law.

58 The SICC correctly described the scope for challenge to awards available under the IAA and the Model Law as "narrow and limited" (*Lao Holdings NV v The Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228 ("*Judgment*") at [40]).

The SICC's Reasoning

The general approach

59 The approach taken by the SICC to the applications before it was guided by the well-settled policy of "minimal curial intervention, consistent with international practice" (*Judgment* at [41]; *BLC and others v BLB and another* [2014] 4 SLR 79 at [86]; *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [59]). A setting aside application is not an opportunity for an applicant to take "a second bite at the cherry" (*Judgment* at [44]).

60 The SICC said that an application is not to be undertaken with an hypercritical or excessive syntactical analysis of what the arbitrator has written (*Judgment* at [45], citing *Atkins Limited v The Secretary of State for Transport* [2013] BLR 193 at [36]). As to the review of procedural discretions the SICC quoted from *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] SLR 695 at [103] in which this court stated:

> … the court should accord a margin of deference to the tribunal in its exercise of procedural discretion. Deference is accorded in recognition of the fact that (a) the tribunal possesses a wide discretion to determine the arbitral procedure, and (b) that discretion is exercised within a highly specific and fact-intensive contextual milieu, the finer points of which the court may not be privy to. It has therefore been said that the court ought not to micromanage the tribunal's procedural decision-

> making, and will instead give "substantial deference" to procedural decisions of the tribunal (*On Call Internet Services Ltd v Telus Communications Co* [2013] BCAA 366 at [18]). …

*Breach of an agreed arbitral procedure – Art 34(2)(*a*)(iv)*

61 The Appellants contended before the SICC that the Arbitral Tribunals had admitted the Respondent's new evidence in contravention of the agreed procedure in Section 34.

62 The SICC defined a threshold question arising because the case concerned the contested meaning and effect of an agreed procedure. The SICC said (at [124]):

> In such circumstances, the arbitral tribunal will have to make a decision on the meaning and effect of that procedure in order to determine how to proceed. In doing so, it will make a finding of fact and law based on the submissions of the parties. In such circumstances, the question is whether this court should ignore the findings of fact and law and proceed to make its own determination of the meaning and effect of the procedure or whether the determination by the arbitral tribunal should be respected as determinative or, at least, accorded some role in the decision of whether the arbitral procedure adopted was not in accordance with that agreed procedure.

63 The SICC set out the relevant parts of the text of the rulings in ICSID PO 11 and PCA PO 9, noting that the Arbitral Tribunals, as set out earlier in these Reasons, had referred to their authority under the applicable arbitration rules to determine the admissibility of evidence.

64 The SICC referred to the dispute resolution provision in Section 42 of the Settlement Deed. The parties could have submitted the question of construction of Section 34 to an SIAC arbitration under Section 42. The SICC regarded the parties as having "evidently submitted that question to the BIT Tribunals in the context of [the Respondent's] Application to Admit Additional

Evidence." The Arbitral Tribunals could not deal with the applications without deciding the construction of Section 34. If the parties had referred the question of construction to an SIAC arbitration and the Arbitral Tribunals had then applied the finding emerging from that arbitration to the Respondent's Application to Admit Additional Evidence, there could be no ground for contending that the BIT Awards should be set aside under Art 34(2)(*a*)(iv) for non-compliance with the agreed arbitral procedure. The SICC said:

> 128 ... In principle, it is difficult to distinguish that case from a case where, as here, the parties referred the construction of Section 34 to the BIT Tribunals rather than an SIAC arbitration.

65 The SICC held that the question whether Section 34 excluded any discretion on the part of the Arbitral Tribunals in relation to more evidence in respect of events occurring after the Settlement Deed was a matter involving its interpretation and that of the Deed. That interpretive exercise was one which the parties had agreed that the Arbitral Tribunals would undertake and on which each of the parties provided detailed submissions. There had been no question of jurisdiction raised and no protest to the Arbitral Tribunals making decisions on the Respondent's Application. By referring to the issue of interpretation of Section 34 as a necessary part of their decision on the Respondent's Application to Admit Additional Evidence, the parties gave the Arbitral Tribunals jurisdiction to decide that matter (*Judgment* at [129]–[130]). As appeared from their written submissions, the Appellants' contention in the SICC was that no question of the interpretation of Section 34 had been submitted to the Arbitral Tribunals and that there was no debated construction. As appears below, having regard to the Appellants' written submissions to the Arbitral Tribunals, that was an untenable proposition.

66 That said the better view is that no question of jurisdiction was engaged. The Arbitral Tribunals had jurisdiction to decide the construction of Section 34 as an aspect of their overall arbitral jurisdiction deriving from the BITs. Section 34 was an agreement about procedure to be applied in the BIT Arbitrations if they were revived pursuant to the terms of the Settlement Deed.

67 The question whether the Arbitral Tribunals had actually undertaken an interpretive exercise in relation to Section 34 became one of some importance. The Respondent submitted to the SICC that Art 34(2)(*a*)(iv) was not engaged when the real dispute turned upon the correctness of the Arbitral Tribunals' interpretation of the parties' agreement (*Judgment* at [133]). One of the cases to which they referred was the decision of this court in *AJU v AJT* [2011] 4 SLR 739 ("*AJU*") which concerned the question whether an agreement governed by Singapore law was null and void on the grounds of duress, undue influence and illegality. In that case the arbitral tribunal had held the agreement to be valid and enforceable. The High Court reopened the findings of the arbitral tribunal and set aside the award as contrary to Singapore public policy because the agreement was illegal under Singapore law, which was the governing law and Thai law which was the place of performance. This court allowed an appeal against the High Court judge's decision and said (*AJU* at [70], cited in *Judgment* at [141]):

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

68 However, returning to the SICC's finding that the parties had conferred jurisdiction on the Arbitral Tribunals to interpret Section 34 (see [65] above), the SICC held that the Arbitral Tribunals' decision on this issue "would not be a matter which, *de novo*, this court could consider" (*Judgment* at [130]).

69 That finding was sufficient to dispose of the Art 34(2)(*a*)(iv) ground advanced to the SICC by the Appellants. However, the SICC went on to make a number of what might be called "fall back findings". It held that even if it could, in principle, consider the interpretation of Section 34, despite the decision of the Arbitral Tribunals, it was not persuaded that in the circumstances of the case it should do so. The SICC held that in the present case the Arbitral Tribunals had to construe the terms of Section 34 of the Settlement Deed, which was governed by New York law. From the point of view of the court below findings of New York law were to be treated as findings of fact on a question of foreign law. Such findings of fact made by the Arbitral Tribunals were final and binding with nothing to vitiate them. Accordingly, the SICC did not consider that it should, in the particular circumstances of the case, seek to reopen the findings of the Arbitral Tribunals as to their ability to admit additional evidence (*Judgment* at [142] and [143]). The SICC went further and found that *if* it were open to it to determine the meaning and effect of Section 34 and that *if* it thought it should do so, it would have found that the Arbitral Tribunals retained a residual power to admit additional evidence in exceptional circumstances notwithstanding that provision. The reference to "new claims or evidence" in Section 34 could not have been intended to exclude all "new evidence". The reinstated BIT Arbitrations would necessarily have included hearings at which witnesses would be heard and cross-examined giving "new evidence" which the parties obviously intended that the Arbitral Tribunals should hear. Section 34 was not an absolute exclusion of all new evidence.

70 The SICC discussed the general power enjoyed by arbitral tribunals to determine what evidence is adduced in an arbitration. It referred to Art 12(6) of the Laos-Netherlands BIT, which provides that "[u]nless the Parties decide otherwise, the tribunal shall determine its own procedure." Moreover, Art 28(2) in Schedule C of the ICSID Additional Facility Rules, provides that "[i]n the conduct of the proceeding the Tribunal shall apply any agreement between the Parties on procedural matters, which is not inconsistent with any provisions of the Additional Facility Rules …". The ICSID Additional Facility Rules also state in Art 41 of Schedule C:

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

71 Relevantly to the PCA Arbitration, Arts 7(5) and 8(5) of the Laos-PRC BIT provide that "[t]he arbitral tribunal shall determine its own procedure". The UNCITRAL Rules at Art 27(4), which applied to that arbitration, provide that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." All of those rules, it may be noted were, by reason of Art 2 of the Model Law, imported into the procedures agreed by the parties for the purpose of Art 34(2)(*a*)(iv).

72 The SICC held that the terms of the Settlement Deed and Section 34 in particular, did not seek to and could not amend the terms of the BITs, nor remove the Arbitral Tribunals' power to determine their own procedure and the admissibility of evidence under the applicable procedural rules (*Judgment* at [149]). The Arbitral Tribunals were entitled to decide, as they had, that the record should remain "frozen" as provided in Section 34 "unless [they were]

satisfied that there were compelling circumstances to, exceptionally, admit fresh evidence" (*Judgment* at [150]).

73 The SICC considered a further alternative argument put on the narrower basis that the Arbitral Tribunals had the authority to admit and review evidence of the Appellants' illegality, corruption, bribery and/or fraud even if Section 34 would otherwise have precluded them from considering new evidence.

74 In support of that argument, a number of authorities were referred to by the Respondent (see *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666; *Bariven S.A. v Wells Ultimate Service LLC* (ECLI:NL:GHDHA:2019:2677); *World Duty Free Company*; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3 ("*Metal-Tech*"); *Belokon v Kyrgyzstan* (Paris Court of Appeals, RG No 15/01650, 21 February 2017)). In each of the cases cited, the court or tribunal had recognised that arbitral tribunals and particularly those dealing with investor-State disputes have a duty to consider corruption which includes illegal conduct, bribery and fraud. The SICC held that that duty arises, not only where the arbitral tribunal has to deal with allegations of corruption in the dispute between the parties, but also where the evidence in the case indicates possible corruption. Arbitral tribunals have a proactive role and cannot simply ignore evidence of corruption (*Judgment* at [153]). The SICC held (at [154]):

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

75 The SICC then went on to consider yet another issue which was hypothetical in light of its preceding findings. That was whether, in any event, the Appellants had waived Section 34 by their conduct in the reinstated proceedings. Two members of the SICC held that the Appellants waived Section 34 because they acted in a manner which was consistent only with Section 34 not precluding the admission of additional evidence into the proceedings of the BIT Arbitrations. The other member of the court considered that there was no waiver because the conduct was consistent with the Appellants protecting their interests subsequent to the Arbitral Tribunals' decision to admit additional evidence and therefore did not amount to a waiver of Section 34 in clear and unequivocal terms (*Judgment* at [195]).

76 The SICC considered the question of prejudice — yet another hypothetical question in light of its preceding findings. The Appellants accepted that to set aside the BIT Awards under Art 34(2)(*a*)(iv) they would have to show that they had suffered prejudice because of the admission of the additional evidence if there had been a breach of the agreed arbitral procedure. The SICC held that on the facts of the case, even if it had found that there was a breach, it would have found that the Appellants had not established the necessary prejudice to justify setting aside the BIT Awards.

77 Their Honours cited the test for prejudice set out by this court in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125. The relevant statement related to breaches of natural justice, but was seen as having more general application. The court said at [54]:

> …the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of

> making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. Where it is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator … .
>
> [emphasis in original in italics]

78 That statement was applied in *AMZ v AXX* [2016] 1 SLR 549 ("*AMZ*") at [103]–[104] where it was said at [105]:

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

79 Against that background, the SICC referred to the Four Findings of the Arbitral Tribunals already outlined in these Reasons. It accepted the Respondent's contention that the first finding, relating to the Alleged E&Y Bribe, was based mainly on the lack of credibility of the testimony of Mr Baldwin. The BDO Report only provided support for a reason why the bribe was made. The first finding was based mainly on the evidence of the payments and the circumstances in which they were made (*Judgment* at [219]). The SICC did not consider that the Arbitral Tribunals could or would reasonably have arrived at a different result absent the BDO Report and given the overwhelming evidence.

80 As to the Arbitral Tribunals' finding relating to the Alleged Thanaleng Bribe, the Appellants complained that the Arbitral Tribunals had relied upon

one of the newly admitted documents, a bank statement. In that case the SICC was of the view that the Arbitral Tribunals could reasonably have arrived at a different result in relation to the Alleged Thanaleng Bribe if not for the admission of the bank statement (*Judgment* at [222]).

81 In relation to the Alleged Witness Bribe, the SICC referred to its earlier conclusion that the Arbitral Tribunals could not reasonably have arrived at a different result on the first finding, even without the BDO Report and that the first finding could not affect the third finding. As to the Respondent's SIAC transcripts which had been admitted as additional evidence, there was no basis for saying that the Arbitral Tribunals could reasonably have arrived at a different result but for those transcripts. The matter had been raised before the Settlement Deed and there was clear evidence for the Arbitral Tribunals to come to their conclusion without those transcripts (*Judgment* at [230]).

82 The Appellants submitted to the SICC that the finding relating to the Alleged MaxGaming Fraud was only raised in the revived proceedings and was entirely based on additional evidence, including unspecified parts of the BDO Report and the testimony of Mr Noble (*Judgment* at [231]). The SICC held that the Arbitral Tribunals could reasonably have arrived at a different result on the fourth finding in the absence of the additional evidence admitted by the Arbitral Tribunals.

83 The SICC considered whether the Arbitral Tribunals' assessments of the merits of the claims before them was made with substantial reliance on the Respondent's new evidence or were tainted by the four challenged findings and the finding of manifest bad faith on the Appellants' part which both Arbitral Tribunals made after reaching the Four Findings. The SICC reviewed

arguments about the Arbitral Tribunals' findings in relation to the Thanaleng Club, Paksong Vegas, the Paksan Club, the "Thakhaek Club", and LH's non-expropriation claims.

84 The SICC found that there was no basis for the Appellants' contention that the Arbitral Tribunals' conclusions on the merits were made on the basis of substantial reliance on the Respondent's new evidence or that it was tainted by the Four Findings and the finding of manifest bad faith on the Appellants' part (*Judgment* at [262]). The SICC came to the general conclusion that even if the Arbitral Tribunals had not had the power to admit additional evidence in the light of Section 34, the Appellants had not established that the admission of that additional evidence caused them prejudice. The Arbitral Tribunals could not reasonably have arrived at a different overall result without the additional evidence admitted by them (*Judgment* at [277]–[278]).

SICC's hypothetical findings

85 In summary, the SICC concluded that the Arbitral Tribunals had jurisdiction to determine the interpretation of Section 34 of the Settlement Deed and that the Appellants could not now seek to set aside the BIT Awards on the basis that the procedure followed by the Arbitral Tribunals, based on their interpretation of Section 34, was not in accordance with the agreement of the parties. If the court had to determine the matter *de novo* it would have come to the same conclusion as the Arbitral Tribunals on the basis of their construction of the ICSID Additional Facility Rules and UNCITRAL Rules and Section 34, or the broader duty of arbitral tribunals in relation to evidence pertaining to illegality, corruption, bribery and/or fraud (*Judgment* at [282]). In any event, the Appellants, by their conduct, waived the propounded failures by the Arbitral Tribunals to comply with the agreed arbitral procedure. Further, even if the

Arbitral Tribunals had breached an agreed procedure by admitting the additional evidence, the Appellants had failed to establish any prejudice. The SICC put six nails into the coffin of the Appellants' case when any one of them would have sealed it.

86 As appears from the above outline, the SICC made findings on a set of issues which were hypothetical in light of its primary finding. It is not unusual for a court exercising original jurisdiction, subject to appellate review, to make a finding against a party and then to make a further finding contingent on the first finding being found to be in error. An obvious example is the case in which there is a claim for damages and the court finds against a claimant on liability. The court may nevertheless go ahead and assess damages against the possibility that the finding against liability is overturned on appeal. If the damages assessment is found to be correct then this avoids remitter of the matter for reassessment to the primary court.

87 This is not to say a primary court is obliged to make cascading contingent findings and the present case is perhaps unusual in the number of hypothetical issues decided. The SICC helpfully dealt with all issues argued before it so that on appeal, if the need arose, this court would have the benefit of its reasons and findings in relation to each of those matters. That said, it does not follow that this court should deal with issues which become moot in light of its finding on a controlling issue.

No reasonable opportunity to present a case – Art 34(2)(a)(ii)

88 The SICC considered the Appellants' complaint that they had not been afforded a reasonable opportunity to be heard on determinations made in the BIT Awards — invoking Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of

the IAA. The Appellants advanced six grounds in support of this aspect of their case in the SICC. Only one is directly relevant to the appeal, namely that (*Judgment* at [289(f)]):

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

89 The Appellants claimed in the SICC that the Arbitral Tribunals were never addressed on the legal issue of whether an arbitral tribunal may disentitle an investor to substantive treaty relief on the basis of bad faith alone established on a balance of probabilities as opposed to the higher standard of "clear and convincing evidence".

90 The SICC held that it was clear that the Respondent had relied on a defence based on bad faith and that the Appellants were aware of that. The SICC referred to the "unclean hands" argument advanced by the Respondent in the Counter-Memorial in the ICSID Arbitration and in the Statement of Defence and Counterclaims in the PCA Arbitration. The Appellants had engaged with this allegation in their Reply and Opposition to the Respondent's Counterclaims. They contended that the Respondent's appeal to the doctrine of "unclean hands" was unavailing and that the Respondent could cite no case in which a tribunal relied on the doctrine to sanction bad behaviour taking place after the investment was made or established with a full dismissal of the Appellants' case (*Judgment* at [387]). Both the Arbitral Tribunals had dealt with those arguments in the Awards (*Judgment* at [388]).

91 The SICC held that the Appellants understood the Respondent to have pleaded a case both on illegality and on bad faith. While the acts relied on were the same for both the illegality and bad faith defences, the two defences were treated as distinct (*Judgment* at [389]). Further, the Appellants had a proper opportunity to deal with the bad faith ground for dismissing their claims and did deal with it. It was also clear that they had an opportunity of making submissions on the standard of proof and that they did so.

92 The conclusions in relation to "reasonable opportunity to be heard" led to the SICC dismissing the Appellants' application to set aside the Awards on the bases of Art 34(2)(*a*)(ii) of the Model Law or s 24(*b*) of the IAA.

The grounds of appeal

93 There are two grounds of appeal. The first is that the Arbitral Tribunals wrongly accepted the Respondent's argument that Section 34's mandatory prohibition would be overridden by a supposed "inherent power" to circumvent Section 34. The arbitrations were said to have proceeded on that non-compliant basis until the BIT Awards were rendered. This is the basis upon which the Appellants seek to set aside the Awards under Art 34(2)(*a*)(iv) of the Model Law.

94 In the second ground the Appellants allege that the Arbitral Tribunals made several factual findings in breach of the rules of natural justice. The Arbitral Tribunals had found that, on a balance of probabilities, the Appellants had bribed and committed fraud in relation to their investments in the Lao People's Democratic Republic. The Arbitral Tribunals held that the Appellants had acted in "manifest bad faith" and denied treaty relief on that basis. This finding, the Appellants allege, was arrived at without the Arbitral Tribunals

having been addressed on it. The Appellants relied upon s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law.

Breach of the parties' agreed arbitral procedure – Art 34(2)(*a*)(iv)

The general application of Art 34(2)(a)(iv) in relation to agreed arbitral procedures

95 The question whether the arbitral procedure was not in accordance with the agreement of the parties is not a question about the jurisdiction of the Arbitral Tribunals. Their jurisdiction derived from the respective BITs. It was their authority to decide the disputes before them. Jurisdiction does not encompass the means of exercising that authority, which includes the applicable procedures. Those procedures were to be found in the relevant Rules. In the case of the ICSID Arbitration, they were the ICSID Additional Facility Rules. In the case of the PCA Arbitration, they were the UNCITRAL Rules. Article 28(2) of the ICSID Additional Facility Rules provides that tribunals "shall apply any agreement between the parties on procedural matters". Article 1.1 of the UNCITRAL Rules states that they are "subject to such modification as the parties may agree". And as already noted above, Art 19 of the Model Law which has the force of law pursuant to s 3 of the IAA, allows the parties, subject to the provisions of the Model Law, "to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". There may be a question, where the parties disagree on the construction of an agreed procedure, by reference to circumstances which neither contemplated when the procedure was agreed, whether it can still be said that there is an agreed procedure. The arguments in the present case however proceeded upon the assumption that Section 34 of the Deed of Settlement, however construed, fell into the category of an agreed procedure for the purposes of Art 34(2)(*a*)(iv).

96 Arbitration rules which mostly form the content of the parties' agreements as to procedures, confer broad discretions on arbitral tribunals. Cases in which the procedural conduct of the arbitration is directly at odds with what the parties have agreed are relatively uncommon: Ortolani at p 886. In considering an application to set aside an award under Art 34(2)(*a*)(iv), the court does not re-evaluate the evidence or revisit the merits of the tribunal's application of the agreed procedures.

97 A high-level principle underlying Art 34(2)(*a*)(iv) may be derived from the observation of Diplock LJ in *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 WLR 271 at 277:

> Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted …

98 A basic framework for the application of Art 34(2)(*a*)(iv) was outlined by Vinodh Coomaraswamy J in *AMZ*. In that case, at [102], His Honour accepted a submission that the following elements meet the requirements of setting aside an award under Art 34(2)(*a*)(iv) on the grounds of non-adherence to an agreed procedure:

(a) There must be an agreement between the parties on a particular procedure.

(b) The tribunal must have failed to adhere to that agreed procedure.

(c) The failure must be causally related to the tribunal's decision in the sense that the decision could reasonably have been different if the tribunal had adhered to the parties' agreement on procedure; and

(d) The party mounting the challenge will be barred from relying on this ground if it failed to raise an objection during proceedings before the tribunal.

99 As appears from the text of Art 34(2)(*a*)(iv) and from those observations, the criteria for setting aside an award for failure to adhere to an agreed procedure require the supervising court to identify "the agreed procedure" and to determine whether the tribunal has failed to adhere to it. When the construction of the agreed procedure is not in issue, the court is confined to considering whether the tribunal has departed from the procedure and whether its decision could reasonably have been different had that departure not occurred.

100 Where the tribunal has construed a provision of an arbitral agreement providing for an agreed procedure and its construction is contested, the anterior question arises whether that construction is beyond examination by the court.

101 Awards are not to be set aside for errors of fact or law. The interpretation of an arbitral agreement, like the interpretation of any contract, may be taken to involve determination of questions of mixed law and fact — the application of principles of interpretation of the contractual text and the determination of the meaning of that text.

102 As a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties

where the construction is open on the text of the agreement. That is to say, even though there might be more than one construction and the court might think a construction other than that chosen by the tribunal is to be preferred, the court will accept the tribunal's construction. Where, however, a tribunal adopts and acts upon a construction of a term, providing for an agreed procedure, which is simply not open on any view of the text, then the tribunal cannot be said, on any view, to have adhered to the agreed procedure. It is open to the supervising court in such a case to determine the content of the agreed arbitral procedure.

Whether the Arbitral Tribunals construed Section 34 of the Settlement Deed

103 A threshold question for the application of Art 34(2)(*a*)(iv) of the Model Law was whether the Arbitral Tribunals construed Section 34 of the Settlement Deed when they decided that they had "a residual discretion" to admit additional evidence and, if so, whether the SICC was precluded from visiting their construction.

104 The Appellants submit that the Respondent's Application to Admit Additional Evidence relied upon the proposition that the application concerned a procedural matter. There was, they said, no dispute about the interpretation of Section 34.

105 The Respondent accept that its application was procedural in character but maintained, as the SICC subsequently held, that the Arbitral Tribunals could not have dealt with the application without deciding on the construction of Section 34. Further the parties' submissions on the application showed that the construction of Section 34 was expressly argued before the Arbitral Tribunals.

106 The record shows that in their Response to the Respondent's Application to Admit Additional Evidence, the Appellants submitted that the "central issue: was the "meaning and effect of [Section 34]." It also submitted before the Arbitral Tribunals that the Respondent had failed to address the meaning and effect of Section 34 and thus should not be allowed to do so in Reply.

107 The introductory part of the Appellants' Response focused upon the language of Section 34 and in particular the use of the word "shall" signalling an absence of discretion. The Appellants submitted:

> 3. … That analysis fatally undermines the argument on which Respondent's entire Application depends, which is that 'the parties' prior agreement [in Section 34's Frozen Record Provision] […] does not strip the Tribunal of its inherent authority and discretion to admit relevant and material evidence […].' But that is exactly what Section 34 does, for the reasons explained by the Tribunals with respect to Section 32 and by the New York Appellate Division in *Spirits of St. Louis Basketball Club.*
>
> [footnotes omitted]

108 The Appellants also submitted before the Arbitral Tribunals that, properly interpreted, Section 34 barred the reception of further evidence and contained "no exception to that bar".

109 It would be difficult to imagine a clearer case of a debate before arbitral tribunals about the interpretation or construction of a provision of an agreement between the parties.

110 Section 34 was a preclusive contractual provision. Determination of its scope and limits was necessarily a process of construction. They were to be determined by reference to its text, its context and its purpose. The text was uncompromising in its application to new claims or evidence. Its evident

purpose was to ensure that the reinstatement of the suspended BIT Arbitrations should proceed on the basis of claims and relief and evidence already made and tendered. However, the all-important context was that Section 34 was a contractual provision made within the framework of the arbitration agreements which themselves attracted the operation of arbitral rules, agreed by the parties, conferring procedural powers on the tribunals appointed under those rules. Further, the jurisdiction of the Arbitral Tribunals derived from investor-State treaties which attract considerations transcending from those which arise simply between State and non-State actors in their private or commercial capacities.

111 The Arbitral Tribunals found that the preclusive operation of Section 34 did not extend to displacing entirely their powers to receive new evidence. That was a finding about the limits of the operation of the provision. In making that finding, the Arbitral Tribunals construed what the parties had agreed. Their construction was informed by the text of Section 34 and by the arbitral rules applicable to each of the arbitrations. The construction of Section 34 was a necessary step in determining the Application to Admit Additional Evidence.

112 For the preceding reasons, the SICC did not err in its characterisation of the interpretive approach taken by the Arbitral Tribunals.

113 As to the applicable law, Section 42 of the Settlement Deed provided that the Deed was to be "… governed by and construed solely in accordance with the laws of New York". The construction adopted by the Arbitral Tribunals must be taken to have been in accordance with the laws of New York as understood by the Tribunals. Both parties had cited US court cases in their debate about the application of Section 34. The Arbitral Tribunals said:

> New York law is relevant because [Section 34] is in the Settlement Agreement and the parties agreed that [the] interpretation of the Settlement Agreement would be governed by New York law.

114 That said, the judicial decisions cited were found by the Arbitral Tribunals to be largely inapplicable as they dealt for the most part with post-trial applications and the judges were not constrained by a provision like Section 34 nor did they have in mind the unusual procedural context in which the Arbitral Tribunals found themselves.

115 There was no explicit ruling on the part of the Arbitral Tribunals about the content of New York law. It may be taken that they operated upon the basis that their interpretation was in accordance with New York law. The parties themselves seem to have approached the interpretation question on that basis. In any event, it is not necessary for the disposition of this Appeal to determine whether there was in truth a finding of fact about New York law which the SICC could not review.

116 The Appellants argue that Art 34(2)(*a*)(iv) permits a *de novo* review of the Arbitral Tribunals' construction by the SICC. They submitted that it was plain from the language of Art 34(2)(*a*)(iv) that any court hearing an application to set aside an award has a duty to consider and come to its own view on the meaning or proper interpretation of the relevant party agreement so that it can assess whether the arbitral procedure was in accordance with that agreement. Article 34(2)(*a*)(iv) they say, does not distinguish between situations where the tribunal has decided the issue and where the tribunal has not. The SICC's distinction and its holding that the court can only intervene in the latter case was said to be unprincipled and incorrect.

117 The Appellants cite case law in support of the proposition that the Arbitral Tribunals could and should have undertaken *de novo* review of the Tribunals' interpretation. Authorities cited included: *AJU*; *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 ("*Quarella*"); *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 ("*Triulzi*"); *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ*") and *CBS v CPB* [2021] 1 SLR 935 ("*CBS*"). None of those authorities support the Appellants' submissions on the point at issue in this appeal.

118 *Quarella* was cited for the proposition that the court ought rigorously to consider the proper interpretation of the agreed procedure to determine if it were breached for the purposes of setting aside under Art 34(2)(*a*)(iv). The SICC was said to have erred in relying upon *Quarella* as authority for the proposition that Art 34(2)(*a*)(iv) is not engaged where the real dispute concerns the correctness of the tribunal's interpretation of the parties' procedural agreement.

119 *Quarella* concerned the application of a choice of law provision in an arbitration agreement specifying the applicable law as the Uniform Law for International Sales under the 1980 United Nations Vienna Convention ("CISG") and as Italian law where CISG did not apply. The contract under which the dispute had arisen was a distributorship agreement and it was contended that the CISG did not apply because it was a framework agreement. The arbitrator applied Italian law. On the application to set aside the award under Art 34(2)(*a*)(iv), the court held that the tribunal had respected the choice of law clause set out in the contract. The parties had agreed on the rule of law to be applied to the dispute. The real point of the dispute was that the party seeking to set aside the award considered that the tribunal had applied the chosen law wrongly. The dispute was held not to engage Art 34(2)(*a*)(iv).

120 The decision offers no support for the proposition that a supervising court is empowered to undertake a review of a tribunal's interpretation of the parties' procedural agreement for the purposes of Art 34(2)(*a*)(iv). Of course, if a choice of law clause were to provide for the application of Italian law only and the tribunal decided to apply German law, there would be an argument that it had completely disregarded the parties' agreement. Where the choice of law provision could not, on any view, be construed as permitting the application of anything other than Italian law, it would be open to a supervisory court to hold that the choice of German law constituted a failure to adhere to the agreed procedure.

121 Next, the Appellants contend that in *Triulzi* the court had considered the question of whether a tribunal's decision to allow the defendant to admit an expert witness statement constituted a breach of the parties' procedural agreement to dispense with expert evidence. The court was said to have considered the question even though the same issue had been decided by the tribunal after hearing the parties.

122 The question in *Triulzi* was whether the parties had agreed to dispense with expert evidence: at [70]. That was not a question of contested interpretation of an agreed procedure, but a question whether there was an agreed procedure at all. In any event, the relevant provision was incorporated in a procedural timetable issued by the tribunal and so was not in terms an agreed procedure: at [84].

123 The judge, Belinda Ang Saw Ean J (as she then was) held that there was no agreed procedure: at [88]. There being none, the application to set aside the award failed at the threshold. *Triulzi* is of no assistance to the Appellants on the

question of whether and under what circumstances a reviewing court can review the interpretation of an agreed arbitral procedure.

124 The Appellants submitted that in *AQZ* the President of the SIAC Court of Arbitration had allowed one party's application for the arbitration to be conducted under an Expedited Procedure pursuant to the SIAC Rules 2010. In an application to set aside the award, the other party argued, *inter alia*, that the arbitral procedure was not in accordance with the parties' agreement because it was the SIAC Rules 2007, not the SIAC Rules 2010 which had applied at the time that the arbitration agreement had been entered into. The 2007 Rules made no provision for an Expedited Procedure. The Appellants contended that in holding that there was no breach of arbitral procedure, the court had undertaken an interpretation of the parties' agreement.

125 The relevant arbitration clause provided for any dispute to be settled by arbitration "… in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators in English Language": at [105]. Judith Prakash J (as she then was) observed that there was a presumption that reference to particular arbitral rules in an arbitration clause attracts the application of those rules as they apply at the date of commencement of the arbitration, provided that they contain mainly procedural provisions: at [125]. Her Honour held "[o]n the basis of the presumption, the SIAC Rules 2010 are the applicable rules": at [127]. The approach taken in *AQZ* has a parallel in the general rule that statutes that are concerned only with matters of procedure may have retrospective operation — albeit the distinction is subsumed under a general rubric of fairness: *ABU v Comptroller of Income Tax* [2015] 2 SLR 420 at [64] and [72].

126 *AQZ* was not a decision of an arbitrator interpreting an arbitration agreement in a way that led to the application of the Expedited Procedure. The decision to apply the Expedited Procedure was taken by the President of the SIAC Court of Arbitration. The President appointed a sole arbitrator in accordance with that Procedure to conduct the proceedings. The case is not directly on point in the present Appeal as it did not involve review of a finding of the arbitral tribunal itself.

127 *CBS* concerned an alleged breach of natural justice. Rule 28.1 of the Singapore Chamber of Maritime Arbitration Rules provided for a "documents only" arbitration if the parties agreed. The arbitrator proceeded on the basis that no witnesses should be called. The court found that the arbitrator had misinterpreted Rule 28.1 and that there had been a breach of natural justice. The court said (at [79]):

> Whilst it is correct that the courts would generally accord a margin of deference to the tribunal's decisions, especially on procedural matters, this is a clear case of a serious breach of the rules of natural justice and to decide otherwise would be to reduce the content of those rules to a vanishing point.

128 The Appellants submit that in *CBS* in arriving at its decision this court recognised that "determination of this question [of whether there was a breach of natural justice] turns on the interpretation of Rule 28.1 of the SCMA Rules" [emphasis omitted]. The Appellants submit that the court had undertaken a fresh and comprehensive consideration of the proper interpretation of Rule 28.1 and had disagreed with the tribunal. The Respondent relies upon what the court said at [79] of its judgment to argue that the court was not saying that it could undertake a *de novo* review of a tribunal's interpretation of a disputed procedural provision in a challenge under Art 34(2)(*a*)(iv) where the issue was not one of natural justice but whether the parties' agreement was respected.

129 The Respondent's submissions in relation to *CBS* should be accepted. It is difficult to imagine a case in which a construction of an arbitral procedure could be said to be closed if that construction resulted in a serious breach of the rules of natural justice. In the ordinary course, such a construction would not be open and a court is entitled so to find.

130 It should also be noted that the ground of non-adherence to an agreed arbitral procedure as a basis for setting aside an award under Art 34(2)(*a*)(iv) is not available where the agreed procedure conflicts with a provision of the Model Law from which the parties cannot derogate. One such provision is Art 18, which provides that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." The fundamental rule of procedural fairness reflected in Art 18 and indeed in Art 34(2)(*a*)(ii) and Art 36 will displace a procedural agreement to the contrary or require that it be construed and applied consistently with that rule. That may require a reading down of broad language in the agreed procedure.

131 A decision of the Federal Court of Australia not cited by either party has some resonance with this appeal. In *Hebei Jikai Industrial Group Co Ltd v Martin* [2015] FCA 228 ("*Hebei*"), Wigney J considered an application to set aside an award under Art 34(2)(*a*)(iv). Parties engaged in curial litigation had agreed to settle their disputes and discontinue their proceedings. They entered a Deed of Settlement providing for the appointment of an auditor to report to the parties on whether the respondent, Mr Martin, had breached his duties as a director. If the report disclosed a basis for a breach of duty, he could dispute it and refer the matter to an arbitration to determine whether a breach had occurred and, if so, the amount of any loss incurred by the companies of which he had been a director. The arbitration proceedings were to be conducted in accordance

with the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations ("IAMA Rules"). A report was produced, disputed and referred to arbitration. The arbitrator determined, as a threshold question, that the audit report "on its face" did not disclose a basis for a breach of duty, which effectively brought the arbitration to an end: at [3].

132 In considering an application to set aside the award under Art 34(2)(*a*)(iv), the judge observed that it was relevant to have regard to Art 2(*e*) of the Model Law which had the effect that the IAMA Rules were included in the agreement as to procedure between the parties to the arbitration: at [33].

133 According to the applicant, the agreement of the parties had envisaged that the arbitrator would determine, after a full hearing, whether there had been a breach of the director's duties and any consequential loss. That did not occur. The applicants submitted that there was no hearing at all: at [57].

134 The court held that the agreement of the parties encompassed the determination by the arbitrator of the threshold question whether the auditor's report disclosed a basis for a finding of a breach of duty. By agreeing to incorporate the IAMA Rules, the parties were taken to have agreed that the arbitrator was empowered to adopt procedures suitable to the particular case so as to provide a fair, expeditious and cost-effective process for determination of the dispute: *Hebei* at [79]–[80].

135 In answer to the applicants' submission that in deciding the threshold issue adversely to it, the arbitrator misconstrued the terms of the Deed of Settlement and therefore the agreement between the parties which led him to fail or refuse to conduct a full hearing on the merits, Wigney J said at [83]:

> Even if there is some merit in that submission, it is not to the point. It amounts to an impermissible attack on the merits of the award. These proceedings are not an appeal from the arbitrator's award. Nor are they some form of judicial review at large. An award cannot be set aside simply on the ground that it contains errors of fact or law. The Court can only set aside an award if one of the grounds in article 34 of the Model Law is made out.

136 The court added the following useful qualification at [85]:

> It may be accepted that in some circumstances an erroneous finding by an arbitrator that he or she has no jurisdiction to conduct an arbitration may give rise to a ground under article 34(2)(a)(iv) where the result is that the arbitrator fails entirely to give any effect to the agreed dispute resolution procedure at arbitration: see Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) at 1103. But this is not such a case. An arbitration was conducted. An agreed procedure was put in place to deal with an agreed threshold issue. That issue was determined adversely to one of the parties to the agreement in a final award.

137 The court in *Hebei* found that the interpretation at which the arbitrator had arrived was "one which the words used in [the Deed of Settlement] [could] reasonably bear": at [88]. While a court should generally defer to the construction adopted by the arbitral tribunal, as already stated, the construction must be one which is open on the text. As observed earlier, if the tribunal acts upon a construction which is not open, then the tribunal has not adhered to the arbitral procedure agreed by the parties.

138 The construction of Section 34 adopted by the Arbitral Tribunals was open having regard to the context in which Section 34 of the Settlement Deed was agreed including the applicable arbitral rules. Having adopted a construction that was open, the Arbitral Tribunals had discharged their duty of construction. There is no basis upon which the SICC or this court could or should properly revisit the exercise of that arbitral function.

139 It may be added, although it is superfluous having regard to the preceding conclusions, that this court is of the view that the construction adopted by the Arbitral Tribunals allowing for a discretionary reception of additional evidence in limited circumstances was correct.

140 In light of the preceding conclusions, the remaining limbs of the Appellants' arguments in relation to Art 34(2)(*a*)(iv) fall away. It is unnecessary for this court to consider the challenges to other hypothetical findings of the SICC relating to the materiality of the alleged breach of Section 34 and whether or not the Appellants were prejudiced by the Arbitral Tribunals' construction of the Section. Also moot is the Respondent's argument that the Appellants waived the preclusive operation of Section 34 in relation to the documents which were ultimately received by the Arbitral Tribunals.

Failure to grant the Appellants a reasonable opportunity to present their case — Art 34(2)(*a*)(ii)

The Appellants' submissions

141 The Appellants invocation of Art 34(2)(*a*)(ii) before this court was narrower than the six grounds advanced in support of this aspect of their case in the SICC (see [88] above). While the Arbitral Tribunals had held that allegations of bribery and fraud had to be established to a "clear and convincing" standard, they also appeared to be of the view that those same allegations, established on the lesser standard of a balance of probabilities, could result in dismissal of the Appellants' claims under a vague, non-specific and undefined principle of "bad faith". This approach is said to have breached the rules of natural justice because the Appellants never had the opportunity to address the Arbitral Tribunals on that line of argument.

142 The Appellants submit that there was only ever one defence with the Respondent had raised to their claims. It had argued that the various illegal acts purportedly committed by the Appellants meant their claims should be dismissed. It had mentioned a doctrine of "unclean hands" in its pleadings and argued that this would bar the Appellants' claims. This was said to be clearly a defence of a different nature to the "bad faith" doctrine which the Arbitral Tribunals invoked.

143 The Appellants referred to the Respondent's pleadings in which it stated that:

> [W]hen an investor engages in significant corruption or other illicit conduct, the unclean hands doctrine precludes him from bringing claims in relation to that tainted investment.

144 And:

> … [B]ecause [the Appellants'] operations violated Lao law, they are not a good faith "investment" … [The Appellants'] illegal conduct also warrants rejection of its claims on the merits. [The Appellants'] repeated violations of Lao criminal law—through bribery, embezzlement, and money laundering—have irrevocably tainted its claims and disentitled it from seeking relief in these proceedings.

145 And that:

> Those egregious, repeated acts of criminal misconduct are more than sufficient grounds to warrant dismissal of [the Appellants'] claims in this case as they violate the legality clause of the [Treaties] as well as international public policy and the principle of good faith.

146 The Appellants said that their pleadings simply addressed the factual allegations of illegal conduct. The Arbitral Tribunals had accepted their arguments on the burden of proof and held that the allegations of illegal conduct were not made out to the "clear and convincing standard". The Appellants

complain that the Arbitral Tribunals then proceeded to hold that the Four Findings were made out on the balance of probabilities which sufficed to dismiss their claims on the basis of "manifest bad faith". The Arbitral Tribunals had done so even though it was neither party's case that the balance of probabilities standard was applicable to determine allegations of illegal conduct or that a different standard of proof could be used to determine the same factual allegations of illegal conduct simply by virtue of the legal analysis being one of "bad faith". The bad faith doctrine is said to be wider than the illegality/clean hands argument raised by the Respondent.

147 The Appellants also complain that they were afforded no notice that the Arbitral Tribunals intended to rely on the Respondent's newly admitted evidence to conclude that the Appellants had acted in "manifest bad faith" on the standard of a balance of probabilities. In their Procedural Orders, PCA PO 9 and ICSID PO 11, the Arbitral Tribunals had admitted the Respondent's additional evidence for the express purpose of "get[ting] to the bottom" of the "corruption issues" raised by the Respondent and "assist[ing] in the resolution of the Government's allegation of bribery and corruption".

148 Having accepted that the Four Findings were not made out to the clear and convincing standard, the Appellants argue that it was a breach of natural justice for the Arbitral Tribunals to rely upon the Respondent's newly admitted evidence to find that the Appellants had acted in "manifest bad faith" on a balance of probabilities.

The Respondent's submissions

149 The Respondent begins by highlighting that the Appellants had shifted their position and largely abandoned their original case on breach of natural

justice advanced in the SICC. The Respondent submits that, as the SICC found, it was "clear" that the Respondent had relied on a separate defence based on "bad faith" and that the Appellants were aware of that. While the same conduct was relied upon, including the Four Findings, illegality and bad faith were two distinct legal doctrines.

150 Long before the BIT Arbitrations were revived and over four years before the merits hearing, the Respondent had expressly pleaded that the Appellants' investments were "tainted by fraud, bad faith, misconduct and illegality" and that the "unclean hands" doctrine "closes the doors of a [tribunal] to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief". The Respondent points to paragraphs 60 to 68 of its Statement of Defence and Counterclaims in the PCA Arbitration and paragraphs 61 and 62 of its Counter-Memorial in the ICSID Arbitration. Importantly, paragraph 67 of the former set of pleadings, which is substantively similar to paragraph 61 of the latter, provided:

> Most importantly, because [the Appellants'] operations violated Lao law, they are not a good faith "investment" entitled to protection under the Laos-PRC BIT … [The Appellants'] illegal conduct also warrants rejection of its claims on the merits. [The Appellants'] repeated violations of Lao criminal law—through bribery, embezzlement, and money laundering—have irrevocably tainted its claims and disentitled it from seeking relief in these proceedings.

151 The Respondent submits that the bad faith defence was an aspect to the unclean hands doctrine which could preclude an investor from bringing claims relating to a tainted investment, and that it had referred to the Appellants' pattern of illegal conduct and concluded that such conduct violated the legality clause of the BITs, international public policy and the principle of good faith.

152 The Respondent argues that the Appellants had opportunities to respond to and address the Respondent's pleaded defences. They had argued, *inter alia*, that the Respondent's allegations of wrongful conduct would not support a "global dismissal" of the Appellants' claims. Further, the Respondent's case for bad faith was said, by the Appellants, to have fallen short of the standard of proof of "clear and convincing evidence". As the SICC had unanimously found, it was evident from the Appellants' pleaded positions that they understood the Respondent to have pleaded a case both on illegality and bad faith.

153 The Respondent also contests the Appellants' submission that they had no opportunity to address the Arbitral Tribunals on the standard of proof. The Respondent relies upon the SICC's finding that the Appellants had "ample opportunity to make submissions on the appropriate standard and did so".

154 The Respondent refers to correspondence from the Arbitral Tribunals of 16 April 2014 which had raised the issue of the standard of proof. In that letter the Arbitral Tribunals had stated that "in the next phase of these hearings…the party alleging facts will be expected to prove them on a balance of probabilities". The Appellants had argued in response in their Reply and Opposition to Counterclaims, that:

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

155 The Respondent also points out that it had sought to persuade the Arbitral Tribunals to adopt the approach in the case of *Metal-Tech* that assumptions of bribery or corruption could be based on "red flags" or indicators applied to circumstantial evidence. The Arbitral Tribunals, however, chose to apply a "balance of probabilities" as they were entitled to do.

Conclusions on the Art 34(2)(a)(ii) ground

156 The Appellants have, in effect, argued that they were denied the right to be heard in relation to the line of reasoning adopted by the Arbitral Tribunals. That line of reasoning was to the effect that, even if the Respondent's allegations of bribery and fraud were not established to a clear and convincing standard, the same allegations could still preclude treaty relief under the doctrine of bad faith, if established on the balance of probabilities.

157 Relevant principles in relation to the right to be heard were set out by this court in *BZW and another v BZV* [2022] 1 SLR 1080 where it was said that (at [60(b)]):

> … a breach of the fair hearing rule can also arise from the *chain of reasoning* which the tribunal adopts in its award. To comply with the fair hearing rule, the tribunal's chain of reasoning must be: (i) one which the parties had reasonable notice that the tribunal could adopt; and (ii) one which has a sufficient nexus to the parties' arguments ([*JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768] at [149]). A party has reasonable notice of a particular chain of reasoning (and of the issues forming the links in that chain) if: (i) it arose from the parties' pleadings; (ii) it arose by reasonable implication from their pleadings; (iii) it is unpleaded but arose in some other way in the arbitration and was reasonably brought to the party's actual notice; or (iv) it flows reasonably from the arguments actually advanced by either party or is related to those arguments (*JVL Agro Industries* at [150], [152], [154] and [156]). To set aside an award on the basis of a defect in the chain of reasoning, a party must establish that the tribunal conducted itself either irrationally or capriciously such

> that 'a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award' (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR [R] 86 ("*Soh Beng Tee*") at [65(d)]).
>
> [emphasis in original in italics]

158 It is clear that, as the SICC found, the Respondent did plead the defence of bad faith as a distinct ground for the denial of treaty relief. While it was an aspect of the "unclean hands" doctrine it was one of two stated reasons along with equitableness for which a party would have "unclean hands". Moreover in its Rejoinder in both arbitrations, the Respondent had expressly stated that a breach of transnational public policy was a "separate legal ground" for dismissing treaty relief from a breach of the host's domestic law.

159 Bad faith was raised by the Respondent as a conceptually distinct defence. There was no breach of natural justice arising by reason of the Arbitral Tribunals' findings in relation to that defence. Nor was there any breach of natural justice in relation to the standard of proof upon which the Appellants had opportunity to address and did address the Arbitral Tribunals as set out in the Respondent's submissions.

160 The application to set aside under Art 34(2)(*a*)(ii) fails.

Conclusion

161 The appeal is dismissed with costs.

Orders

162 We make the following orders:

(a) The appeal is dismissed.

(b) The Appellants are to pay the Respondent's costs of $60,000 plus disbursements of $5,717.47.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Robert French
International Judge

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