

**IN THE ARBITRATION UNDER THE AGREEMENT ON ENCOURAGEMENT  
AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE LAO  
PEOPLE'S DEMOCRATIC REPUBLIC AND THE KINGDOM OF THE  
NETHERLANDS AND THE ICSID ARBITRATION (ADDITIONAL FACILITY)  
RULES  
BETWEEN**

LAO HOLDINGS N.V.

Claimant

AND

THE GOVERNMENT OF THE LAO  
PEOPLE'S DEMOCRATIC  
REPUBLIC

Respondent

ICSID Case No. ARB(AF)/12/6

---

**DECISION ON THE MERITS OF THE CLAIMANTS' SECOND  
MATERIAL BREACH APPLICATION**

---

***Members of the Tribunal***

The Honourable Ian Binnie, C.C., Q.C., President  
Professor Bernard Hanotiau, Arbitrator  
Professor Brigitte Stern, Arbitrator

***Secretary of the Tribunal***

Ms. Anneliese Fleckenstein, ICSID

Date of dispatch to the Parties: 15 December 2017

## Contents

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>6</b>
i.	The Parties .....	6
ii.	The Treaty Claims.....	7
iii.	The Settlement .....	8
<b>II.</b>	<b>PROCEDURAL HISTORY OF THE SECOND MATERIAL BREACH APPLICATION.....</b>	<b>9</b>
i.	The Objections to Jurisdiction .....	9
ii.	The Sanum Proceedings Before the Permanent Court of Arbitration are Revived .....	10
iii.	The Hearing on the Merits .....	11
<b>III.</b>	<b>BACKGROUND TO THE SECOND MATERIAL BREACH APPLICATION.....</b>	<b>12</b>
i.	The First Material Breach Application .....	14
ii.	The Claimants’ Conduct Pending a Decision on the First Material Breach Application and the Impact on Subsequent Events, Rights and Responsibilities..	15
iii.	The Government Moves Ahead to Establish a Flat Tax Committee .....	18
iv.	The Government Moves Ahead with the Sale .....	20
v.	The ICSID Tribunal Rejects the Claimants’ First Material Breach Application.....	23
vi.	The Government’s Seizure and Sale of the Casino .....	24
vii.	The Change of Position of Sanum Seeking to Participate in the Sale Process .....	24
viii.	The Ad Valorem Tax Rate of Mr. Va.....	25
ix.	The Government Announces a New Plan to Sell the Casino.....	26
x.	The Recommendation of a 28% Ad Valorem Tax by Mr. Va .....	27
xi.	The Reliance on the Settlement both by the Government and Sanum at the SIAC Hearing on 16 June 2015 .....	28

xii.	The Government Takes Ownership of the Gambling Assets.....	29
xiii.	The Government’s Failed Auction Process .....	30
xiv.	The Macau Legend Flat Tax Agreement .....	32
xv.	The Award of the SIAC Tribunal Dated 29 June 2017 .....	33
<b>IV. OUTLINE OF THE SUBMISSIONS OF THE PARTIES ON THE SECOND MATERIAL BREACH APPLICATION .....</b>		<b>36</b>
i.	The Claimants’ Contentions in Support of the Second Material Breach Application.....	36
ii.	The Government Defences to the Second Material Breach Application ...	41
<b>V. THRESHOLD ISSUES RAISED BY THE GOVERNMENT AGAINST THE ENTIRETY OF THE CLAIMANTS’ APPLICATION.....</b>		<b>45</b>
i.	Res Judicata and the Alleged Impact of the SIAC Award Rendered on 29 June 2017 on the Jurisdiction of the Tribunal.....	45
(a)	The Government’s Position .....	45
(b)	The Claimants’ Position .....	46
(c)	The Tribunal’s Ruling .....	47
ii.	Did the Claimants Forfeit Any Right to Government Performance Under the Settlement by Their Own Non-Performance?.....	51
(a)	The Government’s Position .....	51
(b)	The Claimants’ Position .....	52
(c)	The Tribunal’s Ruling .....	54
iii.	Are the Claimants Barred from Claiming the Benefit of Section 32 Because They Did Not Perform Their Contractual Obligations and New York Law Provides That a Party in Default Cannot Call on the Other Contracting Party for Enforcement? .....	57
(a)	The Government’s Position .....	57
(b)	The Claimants’ Position .....	57
(c)	The Tribunal’s Ruling .....	58
iv.	Are the Claimants Barred from Relief Under Section 32 Because They Do Not Have “Clean Hands”? .....	59
(a)	The Government’s Position .....	59
(b)	The Claimants’ Position .....	60

(c)	The Tribunal’s Ruling .....	61
<b>VI.</b>	<b>THE GOVERNMENT’S ALLEGED MATERIAL BREACHES OF THE</b>	
	<b>SECTIONS LISTED IN SECTION 32 OF THE SETTLEMENT.....</b>	<b>62</b>
i.	Are Any of the Government’s Breaches “Material”? .....	62
(a)	The Claimants’ Position .....	62
(b)	The Government’s Position .....	64
(c)	The Tribunal’s Ruling .....	65
ii.	Did the Government Imposition of a 28% Ad Valorem Tax Comply with the Promise of a “New Flat Tax” in Section 8 of the Settlement? .....	66
(a)	The Claimants’ Position .....	66
(b)	The Government’s Position .....	66
(c)	The Tribunal’s Ruling .....	67
iii.	Did the Government’s Collection of Alleged Tax Arrears of \$26,659,000 Constitute a Material Breach of Section 7 of the Settlement? .....	72
(a)	The Claimants’ Position .....	72
(b)	The Government’s Position .....	73
(c)	The Tribunal’s Ruling .....	73
iv.	Did the Government’s Failure to Establish a Joint Escrow Account to Receive the Proceeds of Sale of the Gaming Assets Constitute a Material Breach of Section 15 of the Settlement? .....	75
(a)	The Claimants’ Position .....	75
(b)	The Government’s Position .....	76
(c)	The Tribunal’s Ruling .....	76
v.	Did the Government’s Failure to Include the Right to Extend the Savannakhet Airport Runway as Part of the Gaming Assets Constitute a Material Breach of Section 25? .....	77
(a)	The Claimants’ Position .....	77
(b)	The Government’s Position .....	78
(c)	The Tribunal’s Ruling .....	78
vi.	Did the Government’s Alleged Failure to Negotiate the Thakhaek Agreements “in Good Faith” Constitute a Material Breach of Section 22 of the Settlement? .....	79
(a)	The Claimants’ Position .....	80
(b)	The Government’s Position .....	81

(c)	The Tribunal’s Ruling .....	81
vii.	Did the Government’s Failure to Discontinue Criminal Investigations Against the Claimants and their Principals Constitute a Material Breach of Section 23 and Section 27? .....	82
(a)	The Claimants’ Position .....	83
(b)	The Government’s Position .....	83
(c)	The Tribunal’s Ruling .....	83
<b>VII.</b>	<b>CONCLUSION .....</b>	<b>86</b>
<b>VIII.</b>	<b>COSTS .....</b>	<b>87</b>
(a)	The Claimants’ Position .....	87
(b)	The Government’s Position .....	87
(c)	The Tribunal’s Ruling .....	88
<b>IX.</b>	<b>DECISION.....</b>	<b>88</b>

## **I. INTRODUCTION**

### **i. The Parties**

1. The Claimant, Lao Holdings N.V. (“LHNV”), owned gambling assets in Laos including the Savan Vegas Hotel and a Casino Complex in Savannakhet Province. The Casino is strategically located near the Friendship Bridge which spans the Mekong River between Laos and Thailand. The Claimant also had an investment in two “slot clubs.” As a result of what it considered to be treaty violations, the Claimant LHNV, a company incorporated under the laws of Aruba in the Netherlands Antilles, initiated proceedings on 14 August 2012 against the Respondent, the Government of The Lao People’s Democratic Republic (the “Government”), before the International Centre for Settlement of Investment Disputes (ICSID). The claim was made pursuant to the Agreement on Encouragement and Reciprocal Protection of Investments between Laos and the Kingdom of the Netherlands,<sup>1</sup> and the Arbitration Rules (Additional Facility) of ICSID.<sup>2</sup>
2. Parallel proceedings were initiated against the Government by the Claimant, Sanum Investments Limited, a LHNV subsidiary which operated the Savan Vegas Hotel and Casino, before the Permanent Court of Arbitration (PCA) for alleged violations 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

---

<sup>1</sup> Signed on 16 May 2003, in force since 1 May 2005.

<sup>2</sup> As amended on 10 April 2006.

Encouragement and Reciprocal Protection of Investments, dated January 31, 1993 and the UNCITRAL Arbitration Rules as revised in 2010.

3. While the proceedings before the two Tribunals are distinct and separate, the current application was the subject of a joint hearing in Singapore on 3 and 4 July 2017. Accordingly, for ease of reference only, LHNV will be referred to in this Ruling as "the Claimants", as its case is intermingled with the Sanum case. This terminology is not to suggest, however, that the two arbitral proceedings are consolidated or otherwise conjoined.

**ii. The Treaty Claims**

4. The Claimants allege expropriation without compensation of their investment in gambling projects described in the Project Development Agreement ("PDA") dated 10 August 2007 in respect of the Savan Vegas Casino, as well as the slot clubs located at the border at Lao Bao and Savannakhet Ferry Terminal (located at the Savannakhet/Mukdahan checkpoint) all in Savannakhet Province (collectively, the "Gaming Assets"). The claims also relate to the expected expansion of the Savannakhet Airport and opportunities for development in the Special Economic Zone at Thakheak.
5. The Claimants' original treaty claims were based on a multiplicity of alleged treaty breaches by the Government including an 80% tax on casino revenues and what the Claimants contended were unfair and oppressive audits of the Savan Vegas Hotel and Casino. In the treaty proceedings, the Claimants eventually valued their

investment loss as of 31 August 2016 at between USD \$690 million and USD \$1 billion.<sup>3</sup>

### **iii. The Settlement**

6. The treaty claims were thought to be resolved by a Deed of Settlement concluded between the parties during the merits hearing in Singapore on 15 June 2014 (to be read together with a Side Letter dated 18 June 2014) (herein referred to collectively as “the Settlement”).
7. Shortly after the Settlement, the Claimants alleged that the Government had committed a material breach of its terms which entitled them to revive the Treaty arbitration (“the First Material Breach Application”). The Government contested jurisdiction. On 11 August 2014, the Government filed a Notice of Arbitration with the Singapore International Arbitration Centre (“SIAC”) pursuant to Paragraphs 35 and 42 of the Settlement, seeking an order directing Sanum to comply with its settlement obligations.
8. The ICSID and PCA Tribunals held a hearing on the objections to jurisdiction, which were dismissed. However, on 20 January 2015, the High Court of the Republic of Singapore held that the PCA Tribunal did not possess subject matter jurisdiction under the 31 January 1993 Investment Treaty between Laos and China because of the status of Macao and issues of state succession not here relevant, as well as the limitation in the BIT, according to which “only disputes over the amount

---

<sup>3</sup> See Reports of Joseph P. Kalt dated 14 October 2016, 2 December 2016, 22 December 2016 and 15 March 2017.



of compensation for expropriation can be submitted to arbitration.”<sup>4</sup> This judgment was later reversed by the Court of Appeal for Singapore on 29 September 2016.<sup>5</sup>

9. In the meantime, the ICSID proceedings continued. After hearing the parties on the merits, this Tribunal delivered a decision on 10 June 2015, dismissing the First Material Breach Application.

## **II. PROCEDURAL HISTORY OF THE SECOND MATERIAL BREACH APPLICATION**

10. On 26 April 2016, the Claimant LHNV submitted a Second Material Breach Application to the ICSID Tribunal with accompanying documentation.
11. On 29 April 2016, the Government informed ICSID that it would be submitting a response to the Second Material Breach Application which, when filed on 12 May 2016, included its Objections to Jurisdiction and a request for a procedural conference.

### **i. The Objections to Jurisdiction**

12. On 24 June 2016, the Government requested a stay of the ICSID proceedings pending the outcome of the SIAC proceedings. Subsequently, the SIAC Tribunal rejected Sanum’s request for interim measures to block the Government’s seizure and proposed sale of the Gaming Assets.
13. On 29 June 2016, the Tribunal held a pre-hearing conference call with the parties.

---

<sup>4</sup> *Government of the Lao People’s Democratic Republic v. Sanum Investments Ltd.*, [2015] SGHC 15, para. 128.

<sup>5</sup> *Sanum Investments Ltd. v. Government of the Lao People’s Democratic Republic*, [2016] SGCA 57.

14. On 30 June 2016, the Tribunal issued a Decision on Bifurcation ordering a separate hearing with respect to the Government's objections to jurisdiction.
15. On 16 September 2016, the Government submitted to the Tribunal a request for security for costs.
16. On 7 October 2016, the Claimant LHNV submitted a response opposing the Government's objections to jurisdiction, the motion to stay the proceedings and the request for security for costs.
17. On 18 October 2016, the Tribunal and the parties held a hearing on the Government's objections to jurisdiction in Brussels, Belgium. At the beginning of the hearing, the Government informed the Tribunal that it withdrew its objections to jurisdiction as they were now moot.
18. On 20 October 2016, the Tribunal issued Procedural Order No. 8, amended on 21 October 2016, in respect of the agreed upon filing dates, rejecting the request to stay the current proceedings, but setting out a schedule that was expected to accommodate the time required by the SIAC Tribunal to complete its deliberations. The Tribunal also rejected the Government's request for an order for security for costs.

**ii. The Sanum Proceedings Before the Permanent Court of Arbitration are Revived**

19. On 23 February 2017, the Claimant Sanum filed a Second Material Breach Application before the PCA Tribunal, which had been revived, as mentioned, by a decision of the Singapore Court of Appeals dated 29 September 2016.<sup>6</sup>

---

<sup>6</sup> *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic*, [2016] SGCA 57.

20. On 6 March 2017, the Claimants submitted a request for the production of documents. On 17 March 2017, the Government responded. On 31 March 2017, the Claimants submitted a reply. On 3 April 2017, the Claimants' request for production of documents was dismissed in light of the parties' prior agreement to forgo a fresh document production phase and the lack of any compelling circumstances to order otherwise.
21. On 16 March 2017, the Claimants submitted their Memorial on the Merits of the Second Material Breach Application with accompanying documentation. On 5 May 2017, the Government submitted its Counter-Memorial on the Claimants' Second Material Breach Application, with accompanying documentation. On 31 May 2017, the Claimants submitted their Reply and on 21 June 2017, the Government submitted its Rejoinder.

### **iii. The Hearing on the Merits**

22. On 30 June 2017, shortly before the scheduled hearing of the Second Material Breach Application on the merits, the Government filed with this Tribunal the Final Award in this dispute from the SIAC Tribunal, Case No. ARB143/14/MV, rendered on 29 June 2017 (which had been notified to the parties on 30 June 2017).
23. On 3 and 4 July 2017, the ICSID and PCA Tribunals proceeded with the merits hearing of the Claimants' Second Material Breach Application at Maxwell Chambers in Singapore. At the hearing, counsel for both parties presented comprehensive submissions to the Tribunals.
24. On 8 July 2017, the Government announced that it would be formally requesting from this Tribunal a Mareva Injunction to secure funds in the escrow account under

the control of the SIAC Tribunal to ensure payment to the Government of any potential award of costs in the event of a dismissal of the Claimants' Second Material Breach Application. On 9 July 2017, the Government filed a formal application for a Mareva Injunction with accompanying documentation. By communication of 10 July 2017, the Tribunal established an expedited schedule for further submissions, which were exchanged by the parties.

25. On 17 July 2017, the Tribunal issued Procedural Order No. 9 dismissing the Government's Application for a Mareva Injunction and reserving any award of costs until rendering a decision on the merits of the Second Material Breach Application.

### **III. BACKGROUND TO THE SECOND MATERIAL BREACH APPLICATION**

26. As stated, the treaty claims were thought to be resolved by the Settlement. The Settlement contemplated the sale of the Gaming Assets by the Claimants within 10 months, failing which a third party agreeable to both the Claimants and the Government would assume management of the gambling facilities pending their sale on "a basis that will maximize Sale proceeds to the Claimants and Laos"<sup>7</sup> including assurances to a new purchaser of the Gaming Assets of:

- (a) a continued gambling monopoly for 50 years in the Claimants' area of exclusivity<sup>8</sup>;
- (b) a "new" flat tax;<sup>9</sup> and

---

<sup>7</sup> Settlement, Section 13.

<sup>8</sup> Settlement, Section 6.

<sup>9</sup> Settlement, Section 8.

(c) discontinuance of pending criminal investigations.<sup>10</sup>

27. It was agreed that the Government would appoint RMC Gaming Management LLC (“RMC”) or other suitable agent to assist in monitoring the Claimants’ Gaming Assets pending a sale and to assist with the sale itself<sup>11</sup> as described in Annex E to the Settlement.

28. The parties agreed that the Settlement would be “governed by and construed solely in accordance with the laws of New York”<sup>12</sup> coupled with a somewhat complex dispute resolution mechanism:

(a) The Tribunal was given exclusive jurisdiction to revive the “suspended” treaty proceedings in the event of a material breach of a section or sections of the Settlement specified and listed under Section 32, “if not remedied within 45 days after receipt of notice of such breach”;<sup>13</sup>

---

<sup>10</sup> Settlement, Section 23.

<sup>11</sup> Settlement, Section 9.

<sup>12</sup> Settlement, Section 42.

<sup>13</sup> Section 32 provides:

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. **The Sale Deadline and any other relevant time periods herein shall be extended by the length of time required to cure such breach.** In the event that 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. (emphasis added)

Section 35 provides:

In the event that the Claimants fail to comply with their obligations under this Deed, Laos shall be entitled to commence a fresh arbitration to enforce the terms of this Deed. Such arbitration shall be conducted in Singapore in accordance with the Arbitration Rules of the **Singapore International Arbitration Centre** for the time being in force. The seat of the arbitration shall be Singapore. The Tribunal shall consist of three arbitrators. Each Party shall nominate one arbitrator and the two nominated arbitrators shall nominate the presiding arbitrator. In the event that the two nominated arbitrators are unable to agree on a presiding arbitrator, the presiding arbitrator shall be appointed

(b) All other disputes arising out of the Settlement would be referred to the Singapore Centre for International Arbitration (SIAC) under Section 35 and Section 42.<sup>14</sup>

29. The Government paid no financial compensation to the Claimants under or in respect of the Settlement.
30. Following the execution of the Settlement, Sanum continued to operate the Casino. The Government nominated Mr. Robert Russell (the CEO of RMC) on 20 June 2014 to serve on the Flat Tax Committee (“FTC”), and Sanum nominated Mr. Steve Rittvo (Chairman of Innovation Group and adviser to and expert witness for Sanum) on 25 June 2014.<sup>15</sup>

#### **i. The First Material Breach Application**

31. However, as stated, on 27 June 2014, nine days after the Settlement and the Consent Award issued was executed, LHNV and Sanum gave Notice of a Material Breach alleging that the Government’s violations of the Settlement “entitle[d] Claimants

---

by the President of the SIAC Court of Arbitration. The language of the arbitration shall be English. (emphasis added)

<sup>14</sup> Section 42 provides as follows:

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. The Tribunal shall consist of three arbitrators. Each Party shall nominate one arbitrator and the two nominated arbitrators shall nominate the presiding arbitrator. In the event that the two nominated arbitrators are unable to agree on a presiding arbitrator, the presiding arbitrator shall be appointed by the President of the SIAC Court of Arbitration. The language of the arbitration shall be English. (emphasis added)

<sup>15</sup> See SIAC Tribunal Award, 29 June 2017, para. 74 (Flat Tax Committee – Independent Member Position Compensation Package, 20 June 2014).

to revive the international arbitration proceedings”<sup>16</sup> under Section 32 of the Settlement.

32. The Material Breach Notice alleged in particular that the Government had violated Section 6 of the Settlement by granting or approving the grant of a gaming licence to a rival casino or casinos within Sanum’s area of exclusivity, thereby substantially reducing the price at which the Claimants’ Gaming Assets could be expected to be sold to prospective purchasers. The breach was said to be so serious and fundamental as not to be “susceptible to cure due to the irreversible impact on the pool of buyers for the asset.”<sup>17</sup> Moreover, in any event, the Claimants took the position that under Section 32 of the Settlement “all deed deadlines in the Deed and Side Letter are extended by the length of time required to cure this breach.”<sup>18</sup>

**ii. The Claimants’ Conduct Pending a Decision on the First Material Breach Application and the Impact on Subsequent Events, Rights and Responsibilities**

33. On 2 July 2014, the Claimants sent the Government a further email taking a more nuanced position on the suspension of deadlines, namely that while:

[n]either the Deed nor the Side Letter expressly addresses what happens with respect to the parties’ performance during the 45-day cure period contemplated by Section 32 of the Deed, ...Claimants hereby ‘suspend[ed] further performance under the Deed and Side Letter, at least **until we have [the Government’s] response to the Material Breach Notice.** (emphasis added)

---

<sup>16</sup> C-777, Material Breach Notice, *Laos Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, p. 2, 27 June 2014.

<sup>17</sup> *Ibid.*, p. 2.

<sup>18</sup> *Ibid.*

34. The Claimants proceeded to suspend (i) their participation in the work of the FT Committee to appoint a third member, and (ii) the monthly payments of RMC's fees as required under Annex E of the Deed.<sup>19</sup>
35. That same day, 2 July 2014, the Claimants expressly instructed Mr. Rittvo not to participate in the FT Committee.<sup>20</sup>
36. The Government responded by sending Sanum an email, also on 2 July 2014, asserting that if RMC were not paid, the Government would apply to SIAC to appoint RMC to take control of the Casino and to sell it.<sup>21</sup>
37. Despite what it regarded as bad faith conduct by the Claimants, the Government never did take steps to terminate the Settlement as threatened on 2 July 2014 or otherwise.
38. On 4 July 2014, the Claimants filed their formal Application for Finding of Material Breach of Deed of Settlement and for Reinstatement of Arbitration in the Treaty arbitration.
39. On 11 July 2014, the Government responded by asserting (and enclosing evidence) that:

In fact, there has been no grant of a license, no grant of permission, no grant of any kind that will allow the operation of a new casino in Savannakhet, Laos. That is a fact. **The Government attaches letters from the relevant officials who have personal knowledge of the recent transactions** that state unequivocally that there is no casino in the new development plans. (emphasis added)

---

<sup>19</sup> C-780, Email to Minister of Planning and Investment and Werner Tsu from David Rivkin, p. 1, 2 July 2014.

<sup>20</sup> C-971, Laos' SIAC Opening Memorial, para. 42.

<sup>21</sup> C-781, Emails between Christopher Tahbaz and David Branson, p. 2, 2-3 July 2014.



40. On 11 August 2014, the Government filed a Notice of Arbitration with SIAC pursuant to Sections 35 and 42 of the Settlement, seeking an order directing Sanum to comply with its obligations under the Settlement, including a declaration that the waiver of overdue taxes contained in Section 7 of the Settlement was no longer binding on the Government, because Sanum refused to proceed with the establishment of a Flat Tax Committee or to cooperate with RMC's monitoring of Savan Vegas pending the sale of the Casino, plus compensation, costs and interest on all monies due.
41. The Government thereby continued to affirm the Settlement notwithstanding what it regarded as the Claimants' bad faith breaches of the Settlement.
42. Sanum responded in the SIAC proceedings with a request for:
  - (a) A declaration that the Settlement was void *ab initio* as a result of the Government's alleged fraudulent inducement of the Settlement; or
  - (b) Rescission of the Settlement in light of the Government's material breach of the Settlement;
  - (c) Or, in the further alternative, an award of monetary damages.<sup>22</sup>
43. The SIAC Tribunal temporarily deferred ruling on Sanum's Motion to Stay the SIAC Arbitration pending the results of the Treaty arbitration rulings in the First Material Breach Application.

---

<sup>22</sup> C-825, Response to Notice of Arbitration and Brief Statement of Counterclaims, p. 1, 16 September 2014.

**iii. The Government Moves Ahead to Establish a Flat Tax Committee**

44. On 5 December 2014, approximately six months after the Settlement had been executed, and there being no cooperation from the Claimants regarding formation of the Flat Tax Committee, the Government wrote to the President of the Macau Society of Registered Accountants pursuant to Section 9 of the Settlement explaining that a three-member committee was to be formed to determine a flat tax and requesting that the President assist in “secur[ing] the appointment of the third member of the Committee.” It was specified that “[t]he person will be a member of your Society familiar with the taxation of casinos.”<sup>23</sup>
45. The Government then wrote to Sanum on 24 December 2014 requesting it to facilitate

... the orderly process of the exchange of control due on 15 April 2105, in the event Sanum/LH does not complete a sale or have in place an MOU, as stated in the Deed.<sup>24</sup>

46. On 29 December 2014, while the First Material Breach Application was still pending, the Government sent a notice to Mr. John Baldwin and Claimants’ counsel advising that if the Claimants did not participate in forming the FT Committee and the Flat Tax Agreement expired, Laotian tax law would apply at a rate of 35% plus 10% VAT.<sup>25</sup>

---

<sup>23</sup> See SIAC Tribunal Award, 29 June 2017, para. 95.

<sup>24</sup> R-014, Letter from Dr. Bounthavy Sisouphanthong to John Baldwin and Christopher Tahbaz, 24 December 2014.

<sup>25</sup> See SIAC Tribunal Award, 29 June 2017, para. 97 (Letter from Laos’ Ministry of Finance to John Baldwin and Christopher Tahbaz, 29 December 2014):

The Ministry of Finance has been requested by the Committee Supervising the Sanum Settlement to assist in compliance with the tax aspects of the Deed of Settlement (Deed). According to the Deed, the parties were to have agreed to a procedure to set a Flat Tax for Savan Vegas and Casino

47. The existing Flat Tax Agreement expired according to its terms on December 31, 2013.<sup>26</sup>
48. The Claimants maintained their position that all rights and obligations under the Settlement (including the obligation to pay tax and to cooperate with the establishment of a “new” flat tax) were suspended pending a resolution of their First Material Breach Application.
49. On 6 January 2015, RMC, which had previously stopped working “as a result of the lack of cooperation and payment from Savan Vegas”, and had declined to step

---

Co. (Savan Vegas). We understand that Sanum Investments Limited (Sanum) and Lao Holdings NV (LH) are refusing to comply with that procedure.

It is not acceptable to the Government of the Lao PDR that a large gaming establishment operating with the good licenses of the Government simply refuses to pay taxes to the Government ... The Ministry of Finance requests compliance by Sanum, LH and Savan Vegas with the laws of the Government of the Lao PDR in connection with proper taxation of the gross gaming revenues of the Savan Vegas casino, operated in Savannakhet Province of the Lao PDR ... **A failure to execute a Flat Tax Agreement within 30 days as required by your agreement with the Government will lead to the imposition of tax according to the laws, based upon the requested financial reports.** We call to your attention that by Presidential Decree, dated 24 October 2014, amending Article 20, point 2, of the Tax Law, the tax rate on Savan Vegas **gaming revenues has been set to 35%. In addition, 10% VAT applies to such revenues.**

If there is no cooperation in submitting the financial reports within 15 days, a Tax Order will be sent to Savan Vegas for the last six months of 2014, based upon the new Tax Law and the above stated estimate of revenue for 2013. If after payment of taxes so imposed, the parties later agree to a Flat Tax with retroactive effect, the Ministry will make adjustments accordingly. (emphasis added)

<sup>26</sup> See Agreement No. 2569 dated 1 September 2009 Regarding Flat Tax Payment for Casino Business of Savan Vegas and Casino between Tax Department, Financial Management Government Enterprises Department and Savan Vegas and Casino Company, Ltd.: (LHNV Exhibit C-7)

In order to assure that the payment of taxes of Savan Vegas and Casino Limited to the Government of Lao PDR is fit with actual business activity and is in line with the laws and regulations of Lao PDR as issued periodically, both parties agree to make this **Flat Tax Agreement for the experimental period of 5 years. This agreement shall begin the 1<sup>st</sup> of January 2009 to the 31 of December 2013.**

**Article 1:** Savan Vegas and Casino, LTD agrees to pay the government Flat Tax which specifically covers the Casino Business and includes Excise tax, turn over tax, profit tax, Dividend tax, and dividend which is included in the Flat Tax (see “Dividend” of below timetable) and is in an amount of **\$745,000 (seven hundred forty-five thousand dollars) per year.** The payment shall be split into 4 payments, in the period of 3 months each. The Flat Tax shall be paid to the Provincial Tax Department of Savannkhet Province but the dividend portion of the Flat Tax shall be paid to the Ministry of Finance through State Enterprise Finance Supervision Department. (emphasis added)

- in to act as the “qualified gaming operator” of Savan Vegas, were Sanum to fail to sell the Casino by the deadline of 15 April 2015,<sup>27</sup> recommended that in its place, the Government appoint San Marco Capital Partners LLC (“San Marco”) and its president, Ms. Kelly Gass, to manage and sell the Savan Vegas Hotel and Casino.
50. On 19 January 2015, the Claimants sought to block the Government’s plan to market the Casino by filing a further Application for Provisional Measures before the ICSID Tribunal requesting an order prohibiting the Government from:
- (a) Applying a 45% tax (35% plus 10% VAT) on gross gaming revenues to Savan Vegas;
  - (b) Seizing the Casino; and
  - (c) Taking any steps that would alter the status quo of the dispute pending the resolution by the Tribunal of the Claimants’ First Material Breach Application.<sup>28</sup>

#### **iv. The Government Moves Ahead with the Sale**

51. Events continued to progress. On 7 March 2015, the President of the Macau Society of Registered Accountants appointed Mr. Quin Va, a Macau registered accountant and qualified auditor, to be the Chair of the Flat Tax Committee.<sup>29</sup> (The Government did not formally retain Mr. Va until 15 May 2015.<sup>30</sup>)

---

<sup>27</sup> See SIAC Tribunal Award, 29 June 2017, para. 99 (Email from Robert Russell (RMC) to David Branson, 6 January 2015).

<sup>28</sup> Claimant’s Application for Provisional Measures, *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, 19 January 2015.

<sup>29</sup> C-971, Laos’ SIAC Opening Memorial, para. 78.

<sup>30</sup> C-979, Flat Tax Committee Appointment Agreement between Laos and Quin Va, 15 May 2015.

52. The ICSID Tribunal held a telephone hearing on 10 March 2015 in respect of the Claimants' pending Application for Provisional Measures. During this hearing, the Government declared that it would proceed to form the FT Committee without the Claimants' participation:

The Government contends ... that it is open to the Government to have the Flat Tax Committee constituted without the cooperation of [Sanum] by resorting under Article 9 of the Deed of Settlement, to the President of the Macao Society of Registered Accountants.<sup>31</sup>

53. On 18 March 2015, the ICSID Tribunal denied the Claimants' Second Application for Provisional Measures, stating in relevant part:

In the Tribunal's view, the Claimant has not established a case for relief from the collection of the 45% tax on gross gaming revenues enacted in October 2014.<sup>32</sup>

...

The Tribunal notes that the Government was quite prepared to proceed with the renegotiation of a Flat Tax Agreement under the Terms of the Settlement and in fact appointed its nominee early in July 2014. The Claimant has refused to participate as part of its broader disagreement with the Government of Laos over the status of the Deed of Settlement.

When the Flat Tax Agreement expired on 31 December [2013], Savan Vegas became subject to the applicable tax laws of Laos. It is common ground that although Savan Vegas has continued to do business in Laos, it has not paid taxes either directly or in escrow since 1 January 2014. While it now offers to pay in escrow the sum of US \$429,300 per month retroactive to 1 January 2014, there is no obligation on the Government to agree to such a figure or to any escrow arrangement.<sup>33</sup>

---

<sup>31</sup> Decision on Claimant's Second Application for Provisional Measures, *Lao Holdings, N.V. v. The Government of the Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, para. 33, 18 March 2015.

<sup>32</sup> *Ibid*, para 27.

<sup>33</sup> *Ibid*, paras. 31-32.

...

... [F]or so long as the Claimant continues to do business in Laos, it can reasonably expect to be bound by the Laotian income tax laws applicable to gambling casinos unless and until a new Flat Tax Agreement is negotiated.<sup>34</sup>

54. On 30 March 2015, the Government again reiterated by letter to the Claimants the Government's intention to take control of Savan Vegas on 15 April 2015, unless Sanum had either completed a sale or had signed a binding MOU with a purchaser of Savan Vegas. Nothing less would extend Sanum's sale deadline (under the terms of Section 11 of the Settlement).<sup>35</sup> The letter also referenced the decision of the ICSID Tribunal to reject the Application for Provisional Measures. The Government stated that:

the Government is not enjoined from proceeding to complete the takeover of the Gaming Assets (and further not enjoined from enforcing the outstanding tax invoices sent to Savan Vegas in January 2015) ... **We trust Sanum/LH will now agree to cooperate to ensure a peaceful turnover.** (emphasis added)

55. The letter concluded by inviting Sanum:

to be in contact with the Ministry of Planning and Investment ... to set forth [**Sanum's**] **proposed compliance with these important terms of the Deed** [of Settlement]. (emphasis added)

56. The Claimants persisted in the view that while their First Material Breach Application was still pending, their obligations under the Settlement were suspended, as were the rights of the Government to proceed to take control of Savan Vegas and sell it.

---

<sup>34</sup> *Ibid*, para. 34.

<sup>35</sup> R-018, Letter from Dr. Bounthavy Sisouphanthong to John Baldwin and Christopher Tahbaz, 30 March 2015.

**v. The ICSID Tribunal Rejects the Claimants' First Material Breach Application**

57. On 13 and 14 April 2015, the ICSID Tribunal held a hearing on the merits of the First Material Breach Application in Singapore. On the evening of 14 April 2015, following the conclusion of the hearing, the Tribunal emailed both parties its decision not to grant the Claimants' request for a provisional measure to prohibit the Government from proceeding with the take-over of the Savan Vegas Casino:

The Tribunal is seized of [a] request for Provisional Measures in support of the Claimant's Material Breach Application. Having deliberated ... the Tribunal concludes that the Claimant has failed to establish all of the requisite elements for such an order, and therefore dismisses the application, with reasons to follow.<sup>36</sup>

58. It later emerged that during the Singapore hearing,<sup>37</sup> Mr. Shawn Scott, Mr. Baldwin's partner, initiated a discussion with a Mr. Angus Noble about the potential purchase and sale of the Casino. On the evening of 14 April 2015, at 23:04, shortly after receipt of notification of the ICSID Tribunal's refusal of provisional measures, and minutes before the expiry of the deadline to sell the Casino, Sanum provided to the Government a MOU signed by Mr. Angus Noble on behalf of his company, MaxGaming Consulting Services, Ltd. ("MaxGaming"), to purchase the Casino. The Government declined to take the Noble MOU seriously and was later vindicated by the SIAC Tribunal which concluded after hearing all the evidence that the Noble MOU was not a serious document but a

---

<sup>36</sup> R- 025, Email from Ian Binnie to the Parties, 14 April 2015.

<sup>37</sup> Hearing Transcript, p. 64, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, 14 April 2015 (cross-examination of Mr. Baldwin).

worthless device designed simply to extend the time of Sanum's operation of the Casino.<sup>38</sup>

**vi. The Government's Seizure and Sale of the Casino**

59. On 16 April 2015, one day after the expiry of the Claimants' deadline to sell the Casino, the Government took control of the Casino. It appointed San Marco to manage and operate the Gaming Assets pending a sale.

**vii. The Change of Position of Sanum Seeking to Participate in the Sale Process**

60. On 5 May 2015, the Claimants changed direction and proposed to "try to work together to sell the property." The Government declined the offer. The Government made it clear that the effort to sell Savan Vegas "will not be a joint effort; the Government will adopt a procedure to have a due diligence room, and create a fair process for accepting bids and evaluating them ... the Government will not allow ... Mr. Crawford [a senior Sanum employee] on the premises. He is free of course to meet anyone off the property and say what he wishes, but he must not be offered as an agent or emissary of the Government."<sup>39</sup>
61. Once again, the Government thereby affirmed the agreement to sell the Casino under the authority of the Settlement, but to do so on the Government's own terms.

---

<sup>38</sup> See SIAC Tribunal Award, paras. 189-191.

<sup>39</sup> *Ibid*, para. 112.



**viii. The *Ad Valorem* Tax Rate of Mr. Va**

62. On 15 May 2015, the Government formally engaged Mr. Va to be the sole member of the FT Committee and to determine the tax to be paid by Savan Vegas.<sup>40</sup> The Government provided Mr. Va with three documents: (i) a Gaming Tax Recommendation by BDO that described tax rates in other Asian jurisdictions; (ii) a Report to the Flat Tax Committee that described the tax situation with the other two casinos in Laos; and (iii) the Taxation Opinion of Professor Rose.<sup>41</sup> No documents were passed to Mr. Va by or on behalf of the Claimants, who were unaware at the time of Mr. Va's appointment.
63. It is not clear to what extent, if at all, Mr. Va was briefed on the "old" flat tax arrangement between Savan Vegas and the Government dated 1 September 2009 which was to be replaced by the "new" flat tax he was to recommend.
64. On 23 May 2015, Sanum wrote to the Government to indicate that it was prepared to resume participation in the FT Committee if the ICSID Tribunal were to deny the Claimant LHNV's First Material Breach Application:

In the event that the ICSID tribunal denies the Material Breach Application, then that suspension [of performance of the Settlement] comes to an end and performance of the Parties' obligations under the Settlement resumes ... On this basis ... our clients write with regard to the immediate steps that should be taken by the Parties to move forward now with the Settlement.

FT Committee ... Prior to the suspension of the Deed in June 2014, the Government had appointed Robert Russell of RMC Consulting to sit on the Committee, while our clients had appointed Steven Rittvo ... Please confirm that Mr. Russell remains the Government's nominee to the Committee. **As soon**

---

<sup>40</sup> C-1979, Flat Tax Committee Appointment Agreement between Laos and Quin Va, 15 May 2015.

<sup>41</sup> C-971, Laos' SIAC Opening Memorial, para. 81.

**as we receive that confirmation, Mr. Rittvo will reach out to Mr. Russell in order to agree the third FT Committee Member.**<sup>42</sup> (emphasis added)

65. The Government rejected the proposal (conditional in any event on the outcome of the First Material Breach Application) to proceed by way of a three members Flat Tax Committee.

**ix. The Government Announces a New Plan to Sell the Casino**

66. On 29 May 2015, the Government filed with the SIAC Tribunal its Response to the Claimants' Amended Provisional Measures Application. The Government acknowledged that it had seized the Savan Vegas Casino and intended to proceed unilaterally with its sale as follows:

- (a) the Government will terminate the Savan Vegas Project Development Agreement (2007);
- (b) the Government will form a Newco;
- (c) the Government will grant Newco a 50 years concession agreement to operate the Casino, a gaming license and land concession the day it terminates the [2007] PDA;
- (d) the Government **will have an independent expert set a flat tax** which will be enshrined in the Newco concession agreement;
- (e) on completion of the audit [of Savan Vegas], the Government will put Newco on the market for sale by **auction**; the audit should be complete by mid-July;

---

<sup>42</sup> C-1050, Letter from Christopher Tahbaz to the Minister of Planning and Investment and David Branson, pp. 1-2, 23 May 2015.

- (f) when the bids are evaluated, and the highest bid selected, Newco will be sold;
  - (g) the Government will pay Sanum its share of the proceeds;
  - (h) the Government expects to close the sale before year-end.<sup>43</sup>
67. The Government's proposed procedure did not comply (and did not purport to comply) with the terms of the Settlement.

**x. The Recommendation of a 28% Ad Valorem Tax by Mr. Va**

68. On 9 June 2015, Mr. Quin Va produced his report on the taxation of Savan Vegas. He considered the existing Laotian taxation system and relevant Government policies, the taxation policy of other countries in the region in relation to gambling businesses and their comparative advantages and disadvantages, the current size of Savan Vegas, the current market position of Laos in the Asian gaming industry and the impact of the gaming policies of Thailand (Savan Vegas' largest source of gamblers). Mr. Va recommended that Savan Vegas be taxed on an *ad valorem* basis at the rate of 28% of gross gaming revenue ("GGR").<sup>44</sup>
69. The evidence is that during the period between his appointment (15 May 2015 when he received the three reports referred to earlier<sup>45</sup>) and the issuance of his report (9 June 2015), Mr. Va had no discussions or communications with the Claimants.
70. Mr. Va gave no weight (if he was aware of it) to the earlier 1 September 2009 Flat Tax Agreement between Sanum and the Government for a "flat tax" of the fixed

---

<sup>43</sup> Claimant's Response to Respondent's Amended Appeal for Provisional Measures, pp. 6-7, 29 May 2015.

<sup>44</sup> C-971, Laos' SIAC Opening Memorial, para. 81.

<sup>45</sup> R-053, Final SIAC Hearing Transcript, pp. 654-655, 24 January 2017 (testimony of Mr. Va).

amount of US \$745,000 per year for 5 years, ending 31 December 2013, with the possibility of a renewal.<sup>46</sup>

71. On 10 June 2015, the ICSID Tribunal issued reasons<sup>47</sup> for its dismissal on the merits of the Claimant LHNV's First Material Breach Application.

**xi. The Reliance on the Settlement both by the Government and Sanum at the SIAC Hearing on 16 June 2015**

72. The SIAC Tribunal convened a hearing on 16 June 2015 to deal with all pending interim relief sought by Sanum. In its decision of 29 June 2015, the SIAC Tribunal noted:

At that hearing before this Tribunal, both **Laos and Sanum specifically reiterated their desire to enforce the Deed to effectuate the sale of the Casino** and agreed that the Deed's fundamental purpose was to sell the Casino at the maximum price possible and divide the proceeds 80/20 between Sanum and Laos.<sup>48</sup> (emphasis added)

73. It is therefore clear that despite what the Government considered to be the wrongful and provocative conduct of the Claimants referred to above, the Government elected "to enforce the Deed [of Settlement]." (Sanum had earlier asked SIAC to rescind the Settlement.) The Government made it clear it had no desire to return to the *status quo ante*. The SIAC Tribunal continued:

---

<sup>46</sup> Flat Tax Agreement between the Tax Department, Ministry of Finance, the Lao Government and Savan Vegas, 1 September 2009 (LHNV Exhibit C-7).

<sup>47</sup> Decision on the Merits, *Lao Holdings N.V. v. The Government of the Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, paras. 6, 10, 34-35, 10 June 2015.

<sup>48</sup> See C-917, Hearing Transcript, pp. 122-123 (statement of Mr. Branson), 168 (statement of Mr. Rivkin), 16 June 2015.

Laos also stated that it had appointed Mr. Va to unilaterally determine the tax rate and that he had already done so.<sup>49</sup>

On 18 June 2015, Laos terminated the 2007 PDA with Sanum, asserting its right to do so “pursuant to the terms of the PDA, the provisions of the Law on Investment Promotion (2009) and other applicable laws of the Lao PDR” and citing, among other reasons, Sanum’s non-payment of taxes.<sup>50</sup>

74. On 30 June 2015, the SIAC Tribunal denied Sanum’s Application for Provisional Measures, seeking a reversion of the operation of the Savan Vegas Casino to Sanum and a prohibition of the termination of the 2007 PDA. However, the SIAC Tribunal did order the Government to provide Sanum with regular and ongoing financial information including any developments in respect of marketing initiatives. The SIAC Tribunal also observed that the Government had acknowledged that it had, as did its agent San Marco, a “fiduciary duty to Sanum in managing the casino and making efforts to obtain the maximum price at a sale.”<sup>51</sup>

## **xii. The Government Takes Ownership of the Gambling Assets**

75. On 28 September 2015, the Government issued a decree transferring all assets owned by the Claimants (but not the corporate liabilities) to Savan Lao, a new entity (earlier identified as Newco) that was solely owned by the Government, in order to accomplish the sale contemplated in the Settlement,<sup>52</sup> but on terms decided by the Government and fully disclosed to the SIAC Tribunal. In doing so, the Government claimed to be acting pursuant to the Settlement.

---

<sup>49</sup> *Ibid*, p. 87 (statement of Mr. Branson).

<sup>50</sup> C-921, PDA Termination Notice, 18 June 2015.

<sup>51</sup> C-919, Order on Respondent’s Amended Application, para. 34, 30 June 2015.

<sup>52</sup> Claimants’ Opening, 3 July 2017, citing the Ministry of Finance Declaration of 28 September 2015.

76. After receiving draft versions of San Marco's marketing documents at the end of September 2015, Sanum objected to the SIAC Tribunal that, *inter alia*, the assets on offer failed to include the Lao Bao Slot Club and the Savannakhet Ferry Terminal Slot Club. Moreover, contrary to Section 6 of the Settlement, the draft of the New PDA to be executed by the eventual purchaser contained less favourable terms than the 2007 PDA between Laos and Sanum. These departures were not contemplated by the Settlement, and according to the Claimants significantly reduced the potential sale price. However, the SIAC Tribunal declined to intervene with the Government's proposed course of action. In its view, any actionable damages suffered by the Claimants could be satisfied by financial compensation.

**xiii. The Government's Failed Auction Process**

77. In March 2016, six prospective buyers were approved by the Government to bid on Savan Vegas, including the eventual purchaser, Macau Legend Development Ltd. ("Macau Legend").
78. At the end of March, the six approved bidders were given access to relevant financial and other data, which included the relevant Savan Vegas financial statements.<sup>53</sup> In addition, some of the bidders, including Macau Legend, met privately with Government representatives.

---

<sup>53</sup> See SIAC Tribunal Award, 29 June 2017, para. 129 (Email exchange between Steve Croxton and Kelly Gass, 17-29 March 2016 (when asked when the financial information would be provided, Ms. Gass responds on the same day that they "will be sending out the instructions for accessing the data room Wednesday or Thursday USA time.")).

79. In its discussions with Government representatives, Macau Legend switched the focus somewhat from the Savan Vegas Casino to a proposed USD \$300 million development for the 300-hectare land parcel adjacent to the Casino property (known as “Site A”). The Site A development was linked by Macau Legend to the purchase of the Casino.<sup>54</sup> The Claimants argue that the proposed development of Site A, with facilities in competition with the Casino, further diluted the market value of the Casino itself.
80. Macau Legend offered to purchase Savan Vegas for US \$40 million, provided the auction was cancelled and Macau Legend was given development rights in Site A.<sup>55</sup>
81. The SIAC Tribunal accepted the Government’s evidence that as the “auction” process moved forward, and some potential bidders pulled out, the Government became legitimately alarmed that in the end Macau Legend would be the only bidder at the auction and in consequence be in a position to offer a low bid. The Prime Minister met with some of his Ministers and decided that Laos would accept Macau Legend’s offer to cancel the auction, and close the deal with Macau Legend, provided the sale price was increased from US \$40 million to US \$42 million.<sup>56</sup>
82. On 6 May 2016, Macau Legend accepted the counter-offer,<sup>57</sup> and, on the same day, the Government advised the SIAC Tribunal that it had entered into an agreement

---

<sup>54</sup> R-078 (SIAC), First Witness Statement of Dr. Vounthavy Sisouphanthong, para. 35, R-080 (SIAC), Witness Statement of Mr. Sheldon Trainor-DeGirolamo, para. 16, 29 November 2016.

<sup>55</sup> *Ibid*, paras. 24-26.

<sup>56</sup> R-078 (SIAC), First Witness Statement of Dr. Bounthavy Sisouphanthong, paras. 39-41.

<sup>57</sup> *Ibid*, para. 42; R-080 (SIAC), Witness Statement of Mr. Sheldon Trainor-DeGirolamo, para. 31.

with Macau Legend for the sale of Savan Vegas. Macau Legend and Laos executed the New PDA and other relevant documentation on or about 13 May 2016.<sup>58</sup>

**xiv. The Macau Legend Flat Tax Agreement**

83. The Government and Macau Legend subsequently concluded a flat tax agreement, pursuant to which Macau Legend would pay a flat tax of US \$10 million annually for three years following the closing of the purchase, which would then increase somewhat thereafter, for two extensions of one year each.<sup>59</sup> As part of the deal, Macau Legend also committed to invest in certain infrastructure projects in Laos.<sup>60</sup>
84. While the Claimants note the difference between the flat tax agreed to with Macau Legend, and the 28% *ad valorem* tax recommended by Mr. Va, they also contend that the “tax” payments of US \$10 million per year in fact amounted in significant part to a deferred purchase price, which would go entirely to the Government instead of the 80/20 split agreed to in the Settlement.
85. Meanwhile, as the sale to Macau Legend was being finalized, ST Vegas Enterprise Ltd. (“ST Group”), a Lao company that had previously partnered with Sanum (and had initially invested in the Casino and slot clubs), communicated to the Government its interest in purchasing Savan Vegas. On 15 August 2016, the ST Group offered “to buy our properties and business of Savan Vegas and Casino, Ltd ... with the proposed price of US \$100,000,000 (one hundred million dollars), with

---

<sup>58</sup> See SIAC Tribunal Award, 29 June 2017, para. 136 (PDA between Laos and Macau Legend, 13 May 2016; Letter of Record for Savan Vegas Hotel, 13 May 2016).

<sup>59</sup> C-964, Executed Flat Tax Agreement between the Ministry of Finance of the Lao People’s Democratic Republic and Savan Legend Resorts Sole Company Limited, 19 August 2016.

<sup>60</sup> See SIAC Tribunal Award, 29 June 2017, para. 136 (PDA between Laos and Macau Legend, at Annex C, 13 May 2016).



additional payments of US \$380 million denominated as taxes over the next twenty years.”<sup>61</sup> The ST proposal was not pursued by the Government.

86. On 31 August 2016, Macau Legend funded the Asset Purchase Agreement and took possession of Savan Vegas.

**xv. The Award of the SIAC Tribunal Dated 29 June 2017**

87. As explained above, one of the difficulties created by the framing of the Settlement is the allocation of overlapping jurisdiction in some respects between this Tribunal and the SIAC Tribunal. The Government contends that its victory at SIAC in the Award of 29 June 2017 puts an end to the treaty proceedings by virtue of the New York law doctrines of *res judicata* and issue preclusion.

88. The majority decision of the SIAC Tribunal was rendered by Judge Rosemary Barkett (Presiding Arbitrator) and Mr. Laurence Craig. An opinion dissenting in part was delivered by Ms. Carolyn Lamm.

89. The majority decision of the SIAC Tribunal concluded that the Government had not only affirmed the Settlement despite the conduct of the Claimants, but had actually implemented the Settlement:

(a) The Government “did not breach its obligations under the Deed [of Settlement]” [Award, para. 328(f)];

(b) “The Tribunal determines that both Parties are entitled to a share of the purchase price of Savan Vegas, ... as defined by the Asset Purchase

---

<sup>61</sup> Claimants’ Opening, 3 July 2017, citing Letter of Intent from ST Group, 15 August 2016.

Agreement between Laos and Macau Legend, proportionate to their ownership interest in Savan Vegas” [Award, para. 312(d)];

- (c) “Laos is entitled to receive 20% of the purchase price of US \$15,341,000 which equals US \$3,068,200 and Sanum is entitled to receive the remaining 80% which equals US \$12,272,800” [Award, para. 317];
- (d) In respect of the sale process, “[LHNV and Sanum] were in material breach of their obligations under Paragraph 9 of the Deed and Annex E of the Deed concerning payment to and cooperation with RMC” [Award, para. 328(d)];
- (e) “[LHNV and Sanum] materially breached their obligations under Paragraph 10 of the Deed concerning their obligation to take steps to sell Savan Vegas” [Award, para. 328(c)];
- (f) The SIAC Tribunal noted that “[LHNV and Sanum] also argue that the Deed’s requirement that the tax be ‘flat’ means that the tax should be a fixed, unchanging, periodic amount, not a fixed tax rate.” However, [the SIAC Tribunal comments] “the Deed does not define ‘flat tax’, and when Mr. Va, a qualified professional knowledgeable about the taxation of casinos, was asked to determine a ‘flat tax’, he interpreted this term to mean a tax with a flat rate ... a flat tax is a tax that applies a constant marginal rate on income, **the Majority does not find Mr. Va’s interpretation to be an unreasonable one**” [Award, para. 287]; (emphasis added)

- (g) “[LHNV and Sanum] materially breached their obligations under Paragraph 7 of the Deed concerning their obligation to cause Savan Vegas to pay taxes to Laos as of 1 July 2014” [Award, para. 328(b)];
- (h) “We conclude that [LHNV and Sanum] have not proven their claim with respect to the exclusion of the Slot Clubs from the sale of Savan Vegas” [Award, para. 228];
- (i) “The Deed itself acknowledges that [the Government’s] obligation to terminate ‘the current criminal investigations against Sanum/Savan Vegas and its management’ only exists ‘provided that the terms and conditions agreed herein are duly and fully implemented by [LHNV and Sanum] [Award, para. 310];
- (j) “Evidence is undisputed that, for ten months, as delineated earlier in this Award, ‘the terms and conditions’ agreed [in the Deed] were not ‘duly and fully implemented’” [Award, para. 311];
- (k) “... the Majority concludes that Claimant [the Government] did not breach any obligation under these circumstances by failing to grant the new buyer the right to extend the runway at Savannakhet” [Award, para. 239];
- (l) “Therefore, the Majority concludes that, based on the record [LHNV and Sanum] failed to demonstrate that [the Government] did not maximize the Sale proceeds of Savan Vegas” [Award, para. 295].

90. Extracts of the reasons dissenting in part of Ms. Carolyn Lamm will appear, when relevant, below.

#### IV. OUTLINE OF THE SUBMISSIONS OF THE PARTIES ON THE SECOND MATERIAL BREACH APPLICATION

##### i. The Claimants' Contentions in Support of the Second Material Breach Application

91. The Claimants note that under New York law “material breach” means that “a party has failed to substantially perform its obligations under the relevant contract or provision.”<sup>62</sup> Therefore, the “Claimants need only show that the breach was material in light of the performance, promised benefit and purpose of each of the enumerated sections, not of the contract as a whole.”<sup>63</sup>

92. The Claimants contend that each of the following breaches by the Government, taken in isolation, is sufficient to revive the Treaty arbitration:

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

(b) The Government willfully breached Section 6 of the Settlement by terminating the Savan Vegas PDA and publicizing a new and deficient Project Development Agreement (“PDA”) as part of the auction process. The PDA executed by the Government with Macau Legend provided for fewer rights and more obligations than the original 2007 PDA with Sanum. These modifications made Savan Vegas less valuable as a going concern;

---

<sup>62</sup> Memorial, para. 111.

<sup>63</sup> *Ibid*, para. 112.

(c) The value of the “Gaming Assets” was further reduced by failing to include in the sale the Lao Bao Slot Club and the Savannakhet Ferry Terminal Slot Club. The Claimants reject the Government’s contention that it could not sell the “slot clubs” as the licenses were actually held by the Claimants’ former Laotian partner, ST, because, the Claimants contend, the Government was aware at the time of the Settlement of the ownership structure of the slot clubs. The Government keeps a record of the gaming licenses that it has issued. Despite this knowledge of ST’s interest, the Government included the slot clubs in the definition of gambling assets to be sold as contemplated by Section 6 of the Settlement;<sup>64</sup>

(d) The Government breached Sections 7 and 8 of the Settlement in respect of the “new flat tax” by abandoning the mutually agreed procedure, and imposing a tax which is not a flat tax but an *ad valorem* tax of 28% of gross gambling revenues. The Claimants contend that under any

---

<sup>64</sup> The Government explains the “slot club” issue as follows:

What actually happened was that it was admitted that ST owned the land on which the slot clubs were built, ST owned the buildings in which the slot clubs operated and ST owned the licences issued by the government to operate the slot clubs. All Mr. Baldwin had was a contract which is called, in the slot club industry, a participation agreement, which allows you to put your slot clubs into somebody else’s property under their licence and you share the profits 60/40. That was the only 60/40 right Mr. Baldwin had. It was to 60 per cent of the profits of operating the slot machines.

I wrote to them three times, and it’s listed in the SIAC Award. I wrote to them in July, August and September, and each time I said to them, “We have discovered that ST owns the slot clubs”, and even the participation agreement cannot be assigned – Sanum was the 60 per cent majority in the participation agreement – the agreement expressly says it cannot be assigned unless ST agrees to the assignment.

So we said to them, “The government has no objection to selling the slot clubs, delighted, but we can’t sell them if the owner doesn’t agree. So please deal with ST and come up with a solution.” (3 July 2017, Hearing Transcript, p. 165.)

plausible scenario an *ad valorem* tax of 28% GGR depressed materially the value of the Casino. According to the Claimants, the wrongful purpose of setting an *ad valorem* tax was to confiscate value from the Claimants and to reduce the Claimants' share of the proceeds;

- (e) The 28% *ad valorem* tax is discriminatory as it has only been applied to Savan Vegas and not to other casinos in Laos. Furthermore, the Claimants point to the lump sum payments of US \$10 million per year by Macau Legend for the first three years as proof of what was always understood by both the Government and the Claimants to constitute a "flat tax." The breach of the promise of a flat tax was willful and altogether destroyed a material driver of the value of the gambling assets. The *ad valorem* tax was non-flat and unreasonably high and thereby materially depressed the purchase price;
- (f) Furthermore, the Government misused the *ad valorem* tax to justify seizing a substantial part of the Claimants' share of the purchase price paid by Macau Legend for payment of supposed back taxes;
- (g) The Government accepted a lower price for the sale of the Casino in exchange for Macau Legend's agreement to pay post-purchase inflated flat-tax payments;
- (h) The Government also breached Section 15 of the Settlement by depositing all of the sale proceeds in its own bank accounts or those of its own wholly-owned entity Savan Lao rather than in a joint escrow account. It then wrongfully diverted US \$26,659,000 million of the \$42

million purchase price to satisfy the Claimants' alleged tax liability which was not lawfully imposed. According to the Claimant, "the fact that Respondent deposited the remaining US \$15,341,000 in a sole party escrow account almost four months after the transaction closed, in an effort to make a show of compliance [with the Settlement], does not change the fact that Laos failed to comply with the Deed's requirement that all proceeds be deposited directly by the buyer into a **joint** escrow account established by both Parties";

- (i) The Government breached Section 25 of the Settlement by falsely representing to prospective purchasers that expansion of the Savannakhet Airport runway was not feasible. While the Government suggested the possibility of development of a new airport at an alternative location, such an "alternative" proposal does not remedy the breach. Construction of a new airport will take longer and cost more than extending the existing Airport at Savannakhet, and, under New York law, a material breach in respect of a unique asset cannot be cured by substituting a different asset. Based on their experts' calculations, the Claimants contend that the failure to include the airport right in the sale resulted in the material loss of nearly a fifth of the Casino's value;
- (j) The Government breached Section 22 of the Settlement in respect of Thakhaek development site. The Claimants paid the US \$500,000 deposit required by Section 22 and they say they attempted to negotiate in good faith development proposals for the 90 hectares site but were

stonewalled by the Government and have received none of the benefit which was intended and expected. The Government refused to negotiate the Thakhaek Agreements in good faith and in particular:

- (a) refused to include the most valuable 16 hectares of the site on the basis that it was private property, notwithstanding that the 16 hectares were included on the map attached to the MOU, in which the Government had implicitly committed itself to pay compensation to the private owners;
  - (b) rejected without explanation the Claimants' proposal for an alternative concession arrangement;
  - (c) based on the valuation of their expert, the Claimants claim that the opportunity to develop the Thakhaek concession was worth as much as US\$ 10.52 million;
- (k) The Government materially breached Sections 23 and 27 of the Deed by commencing and continuing to pursue criminal investigations in US Federal Courts under 28 USC 1782, invoking the suspended allegations of bribery and attempted corruption. The Government's pursuit of those criminal investigations entitles the Claimant "to revive arbitration proceedings on that basis, in addition to the other material breaches described above."<sup>65</sup>

---

<sup>65</sup> Memorial, para. 168.



**ii. The Government Defences to the Second Material Breach Application**

93. The Government points out that the Claimants’ arguments and contentions in this Application rest on the same basis and duplicate the legal claims decided against the Claimants by the SIAC Tribunal on 29 June 2017. Accordingly, under New York law, the principles of *res judicata* and issue preclusion apply to bar the application.<sup>66</sup>
94. The Government emphasizes that in order to revive a pre-settlement claim under the Settlement, interpreted in accordance with New York law, “the breach must be material, destroying the ‘root of the bargain’”<sup>67</sup> of the entire contract.
95. The Tribunal has already determined that Section 32 requires a determination “on both the existence of the breach and its materiality.”<sup>68</sup> The Government says the Claimants agreed at SIAC and in the treaty proceedings that the “root of the bargain” is to sell the Casino “on a basis that will maximize Sale proceeds.”<sup>69</sup> The SIAC Tribunal concluded that the Casino was in fact sold for maximum value within the meaning of Section 13 (which is not a section listed in Section 32 and therefore not within the jurisdiction of the Tribunal). The breaches alleged against the Government under Sections 5-8 – even if established – would by definition not be material because the Claimants did receive the essence of their bargain, namely the sale of the Casino “on a basis that will maximize Sale proceeds.”

---

<sup>66</sup> Counter-Memorial, para. 11. Preclusion is “plainly applicable here because all the facts and legal issues that serve as the basis of Sanum’s claims in these proceedings were fully pled before, and are soon to be adjudicated by, the SIAC Tribunal.”

<sup>67</sup> *Ibid*, para. 28.

<sup>68</sup> Rejoinder, para. 23.

<sup>69</sup> Settlement, Section 13.

96. Insofar as the Claimants argue that revival under Section 32 is equivalent to the equitable remedy of rescission, the Government points out that entitlement to an equitable remedy requires clean hands. The Claimants and their principals do not have “clean hands.” They have committed repeated acts of fraud and bribery. Even at the date of the Settlement, Mr. Baldwin had no intention of selling the Savan Vegas Casino regardless of the price, according to the Government:

- (a) First, Tak Chun, the possible buyer touted by Mr. Baldwin, at the time of the Settlement, was not an interested buyer. “Sanum concocted this false narrative from the very beginning, during the settlement negotiations, in order to keep control of the Casino. It is only because Sanum said they had a buyer that it was allowed [by the Government] to keep control for 10 months to complete the sale;”<sup>70</sup>
- (b) Second, the First Material Breach Application was a bad faith effort to pressure Laos to renegotiate the Settlement. The strategem failed but “the Decision on the Merits exposed Sanum’s bad faith. The LHNV Tribunal held that the Government did not materially breach the Deed, but also, and more significantly, that Sanum’s decision to unilaterally stop performance and disregard the ‘cure’ provision was wholly unjustified;”<sup>71</sup>
- (c) Third, the Government says the Claimants put forward a fraudulent buyer, Mr. Angus Noble, for Savan Vegas after the First Material

---

<sup>70</sup> Counter-Memorial, para. 44.

<sup>71</sup> *Ibid*, para. 50.

Breach Application failed. “Claimants induced Mr. Noble to sign this fraudulent document [the MOU], suborned knowingly false testimony from Mr. Noble [by paying him] \$10,000 per month for twenty-one (21) months. Sanum submitted the fraudulent Noble MOU to the Government, and more egregiously, to the SIAC Tribunal, all in an effort to further Mr. Baldwin’s objective of maintaining control of the casino;”<sup>72</sup>

- (d) “Rather than accept the Government’s numerous invitations to participate in the transition of control, and to help the Government complete the Deed’s purpose by selling the Casino, Mr. Baldwin chose [to pursue] the Angus Nobel fraud. For Mr. Baldwin, the Noble fraud ‘was the right thing to do’ simply because he desperately ‘needed’ to maintain control – **that was the plan all along;**”<sup>73</sup> (emphasis added)
- (e) In late spring-early summer 2015, after the Settlement, Mr. Baldwin hatched a scheme to bribe Government officials in an attempt to recover control of Savan Vegas. The Government points to a draft consulting agreement with an unemployed security guard, Mr. Ben Gersten, disclosing (the Government says) the bribe that Mr. Baldwin was willing to pay to Government officials to permit Sanum to recover control of the Casino;

---

<sup>72</sup> *Ibid*, para. 70.

<sup>73</sup> *Ibid*, para. 73.

(f) The Government says bribery is part of Sanum's regular business model as shown by numerous documented and uncontroverted acts of illegality uncovered or proven after the Settlement was signed. It is now established, the Government says, that Mr. Baldwin authorized a bribe of \$30,000 to obtain the original 2009 Savan Vegas Flat Tax Agreement, and paid various other bribes to have the Thanaleng Slot Club shut down, to tamper with witness in the court case with his former partner, ST, and to obtain a lottery license in Cambodia.

97. The Government concludes: “In light of Sanum's egregious bad faith conduct in connection with the Deed, the Tribunal should exercise its broad discretion under New York law and the ICSID Rules to refuse to aid Sanum, the unclean litigant.”<sup>74</sup>
98. In the result, the Government claims the following relief: “the Tribunals must deny the Second Material Breach Application and dismiss Sanum's claims in their entirety.”<sup>75</sup> Both Tribunals must order “that these arbitration proceedings are discontinued and terminated.”<sup>76</sup> Finally, the Government claims indemnification under Section 28 of the Settlement.<sup>77</sup>

---

<sup>74</sup> *Ibid*, para. 101.

<sup>75</sup> *Ibid*, para. 102.

<sup>76</sup> *Ibid*, para. 102.

<sup>77</sup> Section 28 provides:

Each of the Claimants and Laos shall indemnify and keep the other Party hereto indemnified on demand and shall defend and, hold the other Party hereto harmless from and against all liabilities, loss, damages, expenses and claims of any nature whatsoever by any person for any and all losses or damages arising out of or in any way connected with the indemnifying Party's breach hereof and any negligent or willful act or omission of the indemnifying Party hereunder.

**V. THRESHOLD ISSUES RAISED BY THE GOVERNMENT AGAINST THE ENTIRETY OF THE CLAIMANTS' APPLICATION**

**i. *Res Judicata* and the Alleged Impact of the SIAC Award Rendered on 29 June 2017 on the Jurisdiction of the Tribunal**

**(a) The Government's Position**

99. The Government contends that the issues raised by Sanum in the Government-initiated SIAC proceedings track the issues raised by the Claimants in the ICSID and PCA proceedings. Thus, "LHNV literally cut and pasted their claims from the Second Material Breach Application into their Second Amended SIAC Counterclaims."<sup>78</sup>
100. The Claimants' Second Material Breach Application contains 65 paragraphs, of which 35 paragraphs present Sanum's legal claims, and of these 35 paragraphs, 33 paragraphs are identical to the text of Sanum's Counterclaims before the SIAC Tribunal.<sup>79</sup>
101. *Res judicata* and collateral estoppel are plainly applicable here because all the facts and legal issues that serve as the basis of Sanum's claims in these proceedings were fully pleaded before, and were adjudicated by, the SIAC Tribunal.<sup>80</sup> The Government cites in support of its position, *inter alia*, the decision of the New York Court of Appeals for the proposition that:

[I]n general the doctrines of claim preclusion and issue preclusion between the same parties (more familiarly referred to as res

---

<sup>78</sup> Respondent's Opening, 3 July 2017.

<sup>79</sup> Counter-Memorial, para. 6.

<sup>80</sup> *Ibid*, para. 11.

judicata or direct estoppel) apply as well to awards in arbitration as they do to adjudications in judicial proceedings.<sup>81</sup>

**(b) The Claimants' Position**

102. The Claimants deny that the SIAC Award precludes the Tribunal from reviving the Treaty arbitration under Section 32 of the Settlement. First, the SIAC Tribunal had no jurisdiction to consider the only relief claimed before this Tribunal, namely whether the Claimants are entitled to revive the Treaty arbitration under Section 32 of the Settlement. Second, New York procedure does not govern these proceedings. *Res judicata* and issue preclusion questions are to be governed by international law.
103. In any event, the Government has not established the prerequisites for *res judicata* or issue preclusion for the following reasons: first, the claims do not meet the triple identity test applied by international tribunals, (identity of parties, causes of action and relief);<sup>82</sup> second, under New York law, “claim preclusion could be invoked only to bar a claim that had been or could have been brought in the prior proceeding”;<sup>83</sup> third, [t]here are no clear rules under international law as to how, when and whether the doctrine of issue preclusion is to be applied as between two arbitrations”;<sup>84</sup> and fourth, under New York law, “collateral estoppel [issue

---

<sup>81</sup> RLA-063, *Matter of American Ins. Co. (Messinger – Aetna Cas. & Sur. Co.)*, 43 N.Y. 2d 184, 189-90, 191 (Ct. App. 1977).

<sup>82</sup> CLA-316, *Gavassi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, paras. 164, 166:

164 ... From its perspective as an international tribunal formed under the BIT, the Tribunal applies international law as the law applicable to these questions

...

166 ... Under international law, three conditions need to be fulfilled for a decision to have binding effect in later proceedings: namely, that in both instances, the object of the claim, the cause of action, and the parties are identical.

<sup>83</sup> Reply, para. 61.

<sup>84</sup> *Ibid*, para. 62.

preclusion] applies only if the issue in the two forums is identical, there was a full and fair opportunity to litigate the issue in the first forum, and the issue was actually decided and necessary to the outcome in the first forum.”<sup>85</sup>

104. The Government’s only reference to an “international” case is *Grynberg and RSM v. Grenada*<sup>86</sup> which was not a case (as here) where the two tribunals were constituted under the same instrument, with one tribunal assigned jurisdiction over certain issues, and the other tribunal assigned jurisdiction over certain other issues.

**(c) The Tribunal’s Ruling**

105. The preclusion issue must be approached from an international law perspective.<sup>87</sup> The Tribunal was not “constituted” by the Settlement. It was constituted under, and derives its jurisdiction from, international treaties. The Treaty hearings were suspended (perhaps permanently) by the Settlement, but the Tribunal continues to exist “in suspense” as a Treaty Tribunal. A finding of a material breach of one of the sections listed in Section 32 is a condition precedent, of course, to any revival of the Treaty arbitration, but the fact that the parties have stipulated that “(t)his Deed shall be governed by and construed solely in accordance with the laws of New

---

<sup>85</sup> *Ibid*, para. 63.

<sup>86</sup> RLA-071, *Grynberg and RSM v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 2.4.1, 4.6.18.

<sup>87</sup> CLA-293, Gary Born, *International Commercial Arbitration*, (Second Edition) (Kluwer 2014), para. 3775:

Nonetheless, as discussed above, there are substantial grounds for doubting that national preclusion rules are appropriate in international arbitration, particularly with regard to the preclusive effects of arbitral awards. For the reasons already detailed, the appropriate choice-of-law treatment of the preclusive effect of awards is to develop and apply uniform international standards of preclusion derived from the New York Convention.

Mr. Born’s point was that international tribunals should not resort to national law because it could often lead to overly technical applications of preclusion. (See Hearing Transcript, R-047, 18 October 2016, p. 23).

York” does not transform the Treaty Tribunal into a domestic New York commercial arbitration tribunal.

106. As acknowledged by counsel for the Government at an earlier stage in these proceedings, the contractual basis of arbitration jurisdiction distinguishes international arbitrations from a court system established under a state constitution:

Mr. D. Branson: ... there’s a hierarchy, in our court system. That doesn’t exist in international arbitration. So, technically, while you must, under New York law, if you’re a court in New York, apply the doctrines of *res judicata* and collateral estoppel, you’re not required to apply them. We would have to ask you to apply them as a matter of wisdom and good sense.<sup>88</sup>

107. While the Government took a more aggressive position on this point at the merits hearing in Singapore, in the Tribunal’s view, Mr. Branson’ earlier statement is the correct analysis.

108. Even in matters governed by U.S. domestic law, including the law of New York, it is for the parties to determine by contract their chosen “scheme of remedies.” Party autonomy in arbitration in this respect is affirmed by the jurisprudence cited in the *American Restatement of Law (Judgments)*:

Assuming that the arbitration procedure has the elements of validity and has become final, it should be accorded claim preclusive effect **unless a scheme of remedies requires that it be denied such effect.**<sup>89</sup> (emphasis added)

109. In arbitral matters, the contract governs. The Settlement confers two distinct and separate arbitral mandates without creating any preclusive hierarchy in their

---

<sup>88</sup> R-047, Hearing Transcript, 18 October 2016, p. 18.

<sup>89</sup> CLA-360, *American Restatement (Second) of Law (Judgments)* Section 84 Arbitration Award (1982), (March 2017 Update); Chapter 6, Special Problems Deriving from Nature of Forum Rendering Judgment.



- authority to decide issues within their respective spheres. The Settlement creates no rule of paramountcy between the SIAC Tribunal and this Treaty Tribunal. The application in these circumstances of *res judicata* or issue preclusion would be contrary to the freedom of contract exercised by the parties.
110. Acceptance of the Government’s position would set up the proverbial “race to the Courthouse.” If the Claimants could get a revival from the Tribunal before the Government could get an award in its favour from SIAC, then the Claimants would prevail. If SIAC issued a favourable award first, the Government would prevail. The scheme of overlapping jurisdiction created by the Settlement does create some complexities, but there is nothing in the Settlement to suggest that the parties intended the complexities to be solved by a “race to the Courthouse.”
111. The SIAC Tribunal itself acknowledged the existence of separate mandates to be exercised by the SIAC Tribunal and this Tribunal to address different causes of action and different remedial relief:
- Given the contents of the prior decision of the LHNV BIT Tribunal, the Second Material Breach application, and Respondents’ Amended Response and Counterclaims, **we cannot conclude**, based on the record before us, that there is a **substantial overlap of the issues** and requested relief before the LHNV BIT Tribunal and the issues and requested relief remaining before this Tribunal.<sup>90</sup> (emphasis added)
112. The Tribunal has no authority to abdicate in favour of a SIAC Tribunal its Section 32 mandate to revive or not to revive the Treaty arbitration.

---

<sup>90</sup> C-962, SIAC Tribunal’s Order on Interim Measures and Requests to Stay Proceedings, 22 July 2016, para. 5.

113. That having been said, it is equally the duty of the Tribunal to confine itself to the sections listed in Section 32 and not to second guess the SIAC Tribunal in respect of sections of the Settlement not listed in Section 32.
114. Thus, for example, Section 9 of the Settlement describes the procedure for the determination of the “new flat tax.” The SIAC Tribunal concluded that the process adopted by the Government did **not** violate Section 9. The Claimants contend that Section 9 is incorporated by reference into Section 8, but counsel for the Government correctly points out the fallacy of this position:

If [the Claimants] wanted to make section 9 or the way that the Flat Tax Committee was formed or the way it operated or the way they made a fair and reasonable tax, then get section 9 into section 32.

We didn't agree to put section 9 in section 32. You can't incorporate by reference, when you have two clauses next to each other, one of them is in section 32, the next one is not, and then say, “Oh, this one really is in section 32 because it's incorporated in section 8.”<sup>91</sup>

115. Any views of the Tribunal about the Government's compliance with the **process** set out in Section 9 are not relevant because Section 9 is not listed in Section 32. On the other hand, the Tribunal is required to determine for the sole purpose of revival whether the **outcome** of the Section 9 process was a “new flat tax” within the meaning of Section 8. The differing mandates under Sections 32 and 42 of the Settlement are not to be confused (and the legitimate expectation of the Claimants thereby negated) by doctrines of *res judicata* and issue estoppel.

---

<sup>91</sup> Hearing Transcript, 3 July 2017, p. 175.

116. The Tribunal is thus limited in its jurisdiction to a sub-set of sections of the Settlement, namely those listed in Section 32. The SIAC Tribunals have no such limitation, either in terms of the elements of the Settlement (except Section 32) subject to their consideration, or in the type of relief (including financial compensation) which they may grant except for the “carve out” from SIAC jurisdiction in respect of revival of the Treaty arbitration. Therefore, the “carve out” in favour of this Tribunal must be respected.
117. The Government’s objection based on *res judicata* and issue preclusion is rejected.

**ii. Did the Claimants Forfeit Any Right to Government Performance Under the Settlement by Their Own Non-Performance?**

118. The Tribunal agrees with the Government that during the pendency of the First Material Breach Application, and in particular in the period beyond the 45 day cure period, the Claimants repeatedly violated important obligations under the Settlement, including through their refusal to proceed with the establishment of a Flat Tax Committee, to cooperate with RMC’s monitoring of Casino matters pending the sale of the Casino, or to cooperate in “the orderly exchange of control” of the unsold Casino on 15 April 2015.
119. The issue is whether these breaches of the Settlement preclude the relief sought by the Claimants in their Second Material Breach Application.

**(a) The Government’s Position**

120. The Government contends that the Claimants forfeited by their repudiation of their obligations under the Settlement any procedural rights under the Settlement to participate in the sale of the Gaming Assets. Despite provocation and disruption

by the Claimants, the Government proceeded prudently by subjecting the sale process to the supervision of the SIAC Tribunal, which endorsed (where it did not actually direct) the steps taken by the Government to sell the Gaming Assets. Any departures from the process set out in the Settlement were made under SIAC supervision in order to salvage a sale “that maximized proceeds.”

**(b) The Claimants’ Position**

121. The Claimants say that their obligations under the Settlement were **suspended** until the First Material Breach Application was decided on 10 June 2015. At that point, the Government had a choice: treat the Settlement as terminated by reason of material breaches by the Claimants, or, notwithstanding such breaches, affirm and carry on with implementation of the Settlement. The Government, having elected to continue to take the **benefit** of the Settlement by so declaring and proceeding with the sale of the Gaming Assets as it did, was thereby obligated to accept the **burden** of the Claimants’ rights and privileges.<sup>92</sup> As pointed out by the Claimants, the Government explicitly affirmed its intention to take the benefits under the Settlement:

---

<sup>92</sup> See Claimants’ Opening, 3 July 2017, citing CLA-367, *V.S. Intl’l v. Boyden World Corp.*, 862 F. Supp. 1188 (S.D.N.Y. 1994):

When one party to a contract materially breaches the contract during the course of a continuing performance, the non-breaching party “has a choice presented to him of continuing the contract or of refusing to go on.” *Id.* (quoting *Emigrant Industr. Savs. Bank v. Willow Builders, Inc.*, 290 N.Y. 133, 145, 48 N.E.2d 293, 299 (1943)). When the “injured party chooses to go on, he loses his right to terminate the contract because of the default.” *Apex Pool Equip.*, 419 F.2d at 562. In short, “[o]nce the non-breaching party elects to continue the contract, he may not at a later time renounce his election and seek to terminate based on the prior breach.”

...

Accordingly, based on the findings of fact set forth above, this Court finds that defendant is not liable to plaintiffs for breach of contract because plaintiffs elected to affirm the contract by continuing to receive benefits thereunder.

- (i) in the Government's Notice of Arbitration filed with SIAC dated 14 August 2014, at para. 37;
  - (ii) in the Government's Response to Sanum's Amended Application for Provisional Measures dated 29 May 2015, at p. 26; and
  - (iii) in the Government's Amended SIAC Notice of Arbitration dated 3 June 2015 at para. 79.
122. Even after the sale of the Casino to Macau Legend on 31 August 2016, the Government repeatedly affirmed its election before the SIAC Tribunal:
- (i) 14 October 2016: "The Government is entitled to specific performance under Section 16 of the Deed;"<sup>93</sup>
  - (ii) 23 December 2016: "The Government is entitled to both specific performance and money damages under the Deed;"<sup>94</sup>
  - (iii) 22 January 2017: "The Government fully performed its duties and therefore is entitled to specific performance and damages."<sup>95</sup>
123. The Government derived substantial benefits from its affirmation of the Settlement:
- (a) It received US \$15,341,000 out of the sale proceeds, as well as unfettered access to the Casino's revenues for over a year;
  - (b) It recovered US \$26,659,000 in taxes from the period before the sale on the basis of an *ad valorem* tax on 28% of gross gaming revenue;

---

<sup>93</sup> Laos' SIAC Opening Memorial, para. 91.

<sup>94</sup> Laos' SIAC Rejoinder, para. 95.

<sup>95</sup> Laos' SIAC Opening Statement, 7:19-22.

(c) It received US \$500,000 as payment to restart the Thakhaek negotiations which led nowhere;

(d) In the meantime, the Government has relied on the Section 27 release and suspension of the Treaty arbitration to avoid litigating the alleged treaty violations.

124. Citing New York jurisprudence,<sup>96</sup> the Claimants contend that “it is black-letter law that when one party to a contract materially breaches it, the non-breaching party has two options: it can terminate the agreement and sue for total breach, or it can continue the contract and sue for partial breach. There is, however, no third option allowing the party claiming a breach to invoke ‘self-help’ and only perform those obligations it wishes to perform.”

**(c) The Tribunal’s Ruling**

125. The Settlement was a compromise under which the Claimants gave up (on conditions) their claim to treaty compensation (the merits and quantum of which were never determined) in exchange for a process for the sale of the Gaming Assets that included substantial rights of participation by the Claimants.

126. While the Tribunal ultimately found the First Material Breach Application to be without merit, the Government thereafter declined the renewed offers of cooperation, but instead:

---

<sup>96</sup> *ESPN, Inc. v. Office of the Comm’r of Baseball*, 76 F. Supp. 2d 3.83, 398-398 (S.D.N.Y. 1999); *V.S. Int’l v. Boyden World Corp., Global Switching, Inc. v. Kasper*, 2006 WL 385315 (E.D.N.Y. Feb. 17, 2006) CLA-365; *Precision Pine & Timber, Inc. v. United States*, 62 Fed. CL 635 (2004) CLA-366; 863 F. Supp. 1188, 1197 (SDNY 1994) CLA-367; *A.R.P. Films, Inc. v. Marvel Entertainment Group, Inc.*, 952 F.2d 643 (2d Cir. 1991); *Estate of John Lennon v. Leggoons, Inc.*, 95 Civ. 8875, 1997 WL 346733, 1(S.D.N.Y. 1997); *Inter-Power of New York, Inc. v. Niagara Mohawk Power Corp.*, 259 A.D. 2d932, 686 N.Y.S.2d 911; *Farnsworth Contracts*, Section 8.19 (3d ed. 1999).

- (a) assumed control of the Casino;
- (b) unilaterally carried out preparation for its sale;
- (c) implemented a procedure to determine the applicable tax;
- (d) adopted a 28% *ad valorem* tax;
- (e) sold the Casino to Macau Legend in a package that included “Site A” to which the Casino licence would be transferred.

127. The Government clearly affirmed and relied on the terms of the Settlement to sell the Gaming Assets and to rid Laos of the Claimants and their managers and principals. As emphatically stated by counsel for the Government to counsel for the Claimants in an email of 30 May 2015 rejecting Sanum’s belated proposal to participate in the Flat Tax Committee:

The Government rejects your assumptions and proposals.

The Government has stated its position on the overall issues in its Response dated May 29, 2015, filed with the SIAC Tribunal.

The Government has no interest in continuing any dealings with **the criminals you represent.**<sup>97</sup> (emphasis added)

128. By affirming the Settlement on numerous occasions up to and including the hearing on 3 and 4 July 2017, the Government obliged itself to accept the burden as well as the benefit of its terms, however distasteful it may have found the obligation to continue to deal with the officers and principals of the Claimants. As expressed by the dissenting arbitrator in the SIAC Award of 29 June 2017 at paragraphs 5 and 6:

Under New York law, a party may not accept the benefits of a contract while refusing to accept the burdens.

---

<sup>97</sup> C-981, Email from David Branson to Christopher Tahbaz, 30 May 2015.

If there is a material breach, the non-breaching party must choose between two remedies: to terminate the contract or to continue it. Under New York's doctrine of election of remedies there is not a "third option" allowing a party claiming breach to invoke self-help and only perform those obligations which it wishes to perform.

129. Indeed, in the course of the hearing of 3 July 2017, counsel for the Government acknowledged a more nuanced position:

So the court says [in *ESPN Inc. v. Office of the Comm'r of Baseball*<sup>98</sup>] baseball has two choices: it can terminate the parties' contract and claim damages for total breach, or it can continue the contract and sue for partial breach. That's the law of New York.

The point is that you have to look at the type of contract the parties are engaged in to determine what the options are when you are confronted with a breach. What it usually means is you are confronted with a breach, you obviously, if it's a material breach, have the right to terminate the contract and sue for damages for the whole contract, but there are times when that's not in the interests of the party on the other side ... so [it] can continue performance because you get the benefit of the future performance, but **you can sue for partial damages** that have occurred.<sup>99</sup> (emphasis added)

130. The Government's potential claim for "partial damages" is not before the Tribunal.
131. The Tribunal intends no disrespect to the majority decision of the SIAC Tribunal.
- The Tribunal is concerned only with the entitlement (if any) of the Claimants to rely on Section 32 of the Settlement. This was not an issue that was dealt with or could be dealt with by the SIAC Tribunal.
132. Accordingly, the Government erred in treating the Claimants as having forfeited important ongoing rights to renewed participation in the sale of the Gaming Assets.

---

<sup>98</sup> CLA-281, *ESPN, Inc. v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 3.83, 398-398 (S.D.N.Y. 1999).

<sup>99</sup> Hearing Transcript, 3 July 2016, pp. 220-221.



**iii. Are the Claimants Barred from Claiming the Benefit of Section 32 Because They Did Not Perform Their Contractual Obligations and New York Law Provides That a Party in Default Cannot Call on the Other Contracting Party for Enforcement?**

**(a) The Government's Position**

133. The Claimants are barred from Section 32 relief because of their failure to perform their own obligations: (i) to establish and complete the work of the Flat Tax Committee; (ii) to accept RMC as the qualified gaming monitor; (iii) to pay taxes to the Government; (iv) to sell the Gaming Assets; and (v) to cooperate in the transition of control to the Government after failing to sell the Gaming Assets within ten months.<sup>100</sup>
134. Such failures bar the Application under the two interrelated principles that (a) “one who breaches a contract may not seek to enforce other provisions of that contract to his or her benefit” and (b) “in order to seek relief under the Deed, Sanum must establish its own performance of its obligations, which it cannot.”<sup>101</sup>

**(b) The Claimants' Position**

135. New York law establishes no such principle applicable to a commercial contract where (as here) both parties allege multiple breaches by the other. It is common in litigation in New York and elsewhere for both contracting parties to point a finger at the other as contract breakers. Both parties may succeed in their claims in some respects and lose in other respects.

---

<sup>100</sup> Rejoinder, para. 78.

<sup>101</sup> Rejoinder, para. 77.

(c) **The Tribunal's Ruling**

136. The Government's argument assumes the point in issue, namely whether it is the Claimants or the Government (or both, or neither) that is in breach of the Settlement.
137. In this particular case, the Government relies principally on the Claimants' conduct prior to the dismissal by the ICSID Panel of the First Material Breach Application on 10 June 2015.
138. However, since at least 8 May 2015,<sup>102</sup> the Claimants have professed a desire to participate in the Flat Tax Committee and preparations for the sale of the Casino but were rebuffed by the Government, which, while affirming its reliance on the Settlement, refused to have "any dealings with the criminals you represent."<sup>103</sup>
139. The Government clearly regarded as made in bad faith the Claimants' late flowering offer to cooperate in the sales process which they had for months declared to be "suspended."<sup>104</sup> Apart from everything else, the Government says the

---

<sup>102</sup> C-1045, Respondent's Amended Provisional Measures Application, SIAC, 8 May 2015, para. 36:

Second, instead of waiting for the Flat Tax Committee to establish the proper tax – the Respondents are prepared to constitute that Committee immediately, to preserve their contractual rights under Sections 8 and 9 of the Settlement in the event that the Material Breach Application is denied.

<sup>103</sup> C-981, Email from D. Branson to C. Tahbaz, 30 May 2015.

<sup>104</sup> The Government's interpretation of the 8 May 2015 "offer" differs from that of the Claimants:

What their position was, was not that we want to admit that you are in proper control of the casino and then let's work together to set a flat tax so you can sell it. No. Their positions was: "We're entitled to control of the casino for ten more months because the period was suspended while we were having our material breach application, and if you give us the casino back for ten more months, then we'll set up a Flat Tax Committee because we're going to sell the casino."

That wasn't acceptable to the government. Ten months meant ten months. As the SIAC tribunal said, if their version of the suspension provision was correct, they could just keep filing material breach applications and we would never see the sale of the casino. That was another feature to what was going on at that time.

Claimants took the position that the end of the “suspension” re-started the clock, giving the Claimants a further 10 months of time of the Casino **starting from the date of the end of the suspension**. But the Claimants’ good or bad faith was never put to the test. They were simply shut out of the sales process as “criminals.” (emphasis added)

140. In the circumstances, it is not open to the Government to simultaneously affirm and rely on the Settlement while attempting to ban the Claimants from seeking a remedy on the basis of the Claimants’ conduct (or misconduct) that predated the Government’s affirmations that continued to and included the Singapore hearing on 3 and 4 July 2017.

**iv. Are the Claimants Barred from Relief Under Section 32 Because They Do Not Have “Clean Hands”?**

**(a) The Government’s Position**

141. The Government contends that the Tribunal should not revive the Treaty arbitration at the request of “criminals” who are “unclean litigants.”

142. The Government contends that the Claimants’ unclean hands are a complete bar to the Second Material Breach Application.<sup>105</sup> Each instance of misconduct described by the Government in its Counter-Memorial “meets the legal requirements for

---

We took control in April. I asked Mr. Baldwin in the proceeding in Paris, I said, “Mr. Baldwin, did you ever intend to allow the government to sell the casino?” It’s on page 1120 of the transcript of the fourth day.

Well, his answer was, “No, I never intended to allow the government to sell the casino.” And everything he did, everything he did between April and when we sold the casino was to try and prevent the government from selling the casino. (Hearing Transcript, 3 July 2017, pp. 182-183)

<sup>105</sup> Rejoinder, paras. 70-75.

unclean hands – the conduct (1) relates to the Deed, (2) was committed in bad faith; and (3) injured the Government.”<sup>106</sup>

143. The Government argues that the remedy sought by the Claimants, namely revival of the Treaty arbitration, is in substance an equitable remedy for rescission of the Settlement, and is therefore barred by unclean hands. The fact that the parties have a contract “does not convert rescission into a remedy at law.”<sup>107</sup> It notes that the Claimants have pleaded rescission before SIAC as an alternative ground for relief.

**(b) The Claimants’ Position**

144. The Claimants contend that the Government’s unclean hands defense is irrelevant to the issues before the Tribunal and unsupported by the evidence. Under New York law, a “clean hands” defense bars only equitable relief<sup>108</sup> and the Claimants seek no such equitable relief, only a procedural order explicitly authorized by Section 32 of the Settlement as a matter of contract law not equity. The Claimants point out that the Government “does not even attempt to explain how a procedural determination, allowing the BIT arbitrations to resume on the merits in accordance with a contractual termination provision, could constitute equitable relief.”<sup>109</sup>
145. Moreover, the Claimants argue, the “clean hands” argument invites the Tribunal to examine the truth of the Government’s “allegations of fraud and bribery” but such

---

<sup>106</sup> *Ibid.*, para. 70.

<sup>107</sup> *Ibid.*, para. 71.

<sup>108</sup> CLA-325, *Aetna Cas. And Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566 (2d. Cir. 2005):

“Unclean hands is an equitable defense to equitable claims. Because the [claimant] seeks damages in an action at law, [respondent] cannot avail itself of unclean hands as a defense.”

See also CLA-338, *Hasbro Bradley v. Coopers & Lybrand*, N.Y.S.2d 461 (N.Y. App. Div. 1987).

<sup>109</sup> Reply, para. 68.

allegations fall outside the Tribunal’s Section 32 jurisdiction. To the extent (if any) that the same allegations are at issue in the underlying Treaty arbitration, the Tribunal may consider them only *after* granting the Section 32 applications, and may do so only on the frozen record agreed at the time of the Settlement as specified in Sections 33 and 34 of the Deed.”<sup>110</sup>

**(c) The Tribunal’s Ruling**

146. The Tribunal considers that the claim under Section 32 of the Settlement is not a claim for equitable relief. The Claimants seek to enforce a contractual right. They do so as a matter of legal entitlement (Section 32 uses the word “shall”). There is no equitable discretion. Section 32 does not use “may” which would signal the existence of a discretion, to which the Government might address arguments for dismissal.

147. The Government argues that in effect the Claimants’ demand for revival is equivalent to its demand at SIAC in rescission:

... because as to their counterclaims in SIAC and their claims here, they’re identical. The only difference they say is, “We’re asking for revival instead of rescission” – no, they are asking for rescission which leads to revival.<sup>111</sup>

148. The Tribunal is unable to agree. A revival of the Treaty arbitration would be *enforcement* of Section 32, not rescission of the Settlement. Revival of the Treaty arbitration would be on the terms set out in Sections 33 and 34 of the Settlement

---

<sup>110</sup> *Ibid.*, para. 70. The Claimants continue: “The Government “does not even attempt to connect [the Claimants’ “alleged misconduct”] with the relief that the Claimants are seeking here or the Government’s breaches, as required to plead an unclean hands defense, nor does it attempt to assert that it was injured by them.”, para. 84.

<sup>111</sup> Hearing Transcript, 3 July 2017, p. 147.

governing the content of the record and the bar against “new claims or evidence ... or additional relief.”

149. Accordingly, the Claimants do not seek rescission or other form of equitable relief and under New York law, the enforcement of a **legal** contractual right, if otherwise justified, is not conditional on “clean hands.” The defence based on unclean hands cannot therefore bar the Tribunal’s jurisdiction.

## **VI. THE GOVERNMENT’S ALLEGED MATERIAL BREACHES OF THE SECTIONS LISTED IN SECTION 32 OF THE SETTLEMENT**

### **i. Are Any of the Government’s Breaches “Material”?**

150. In its Interim Ruling on Issues Arising Under the Deed of Settlement, the Tribunal held that:<sup>112</sup>

... Section 32 gives the consent of the parties to the jurisdiction of the Tribunal to decide whether there has been a breach and whether the breach thus established is material.

#### **(a) The Claimants’ Position**

151. The Claimants dispute the relevance of the Government's argument that a party may rescind a contract only for a material breach of the contract as a whole. According to the Claimants, New York law requires Section 32 to be enforced **as written** and therefore, the Claimants are entitled to an order granting their Second Material Breach Application for a material breach of **any** of the listed sections. In any case, argue the Claimants, the Government's breaches deprived the Claimants of virtually all the benefits agreed by the parties in the Settlement. The Claimants add: “Under any reasonable view of the facts, these breaches are a material breach of the

---

<sup>112</sup> R-013, para. 70.

Settlement as a whole, regardless of whether Laos sold the assets it decided to sell on terms that maximized their sale price.”<sup>113</sup>

152. Many of the listed Settlement provisions have nothing to do with maximizing the sale price under Section 13: the Government has disregarded the civil and criminal releases (Sections 23 and 27), breached the escrow provision (Section 15) that the proceeds of the sale be deposited **directly** into a **joint** escrow account; formally expropriated the Claimants’ assets in breach of Section 5, breached Section 22 respecting the Thakhaek concession, and Sections 7 and 8 on the imposition of taxes. Section 32 of the Settlement gives Claimants the right to revive the arbitration if **any** of these provisions has been materially breached irrespective of whether Section 13 has been breached or the Settlement as a whole has been materially breached.
153. The Claimants argue that the Government also materially breached Settlement provisions designed to support the sale price separately from Section 13, such as Sections 6, 7, 8 and 25.<sup>114</sup> The Claimants explain that these terms were included because “they would have a profound effect on the nature and value of the concession that was being transferred to the buyer of the Gaming Assets.” The

---

<sup>113</sup> Reply, para. 47.

<sup>114</sup> The Claimants cite CLA-298, *Hadden v. Consolidated Edison Co. of N.Y. Inc.*, 34 N.Y.2d 88, 96 (N.Y. 1974):

There is no simple test for determining whether substantial performance has been rendered and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance. (See 3A Corbin, Contracts, paras. 704-707, 6 Williston, Contracts, paras. 841-888 844 [3<sup>rd</sup> ed.]).

assets sold by the Government materially differ from the “Gaming Assets” the parties agreed to sell, and the proceeds of the sale were correspondingly reduced.

154. The Claimants point out that “if the Government were right that only a breach of Section 13 could be material, Section 32 of the Deed would be entirely meaningless. Section 32, as amended by the Side Letter, lists twelve separate sections – which do not include Section 13 – that are capable of being materially breached. If the Government were right that only Section 13 can be materially breached, then Section 32 could never apply because Section 13 is not listed there. That is obviously not what the parties intended when they negotiated Section 32, and it cannot be what Section 32 means.”<sup>115</sup>
155. According to the Claimants, under New York law, Claimants are entitled “to rely on the terms of the Deed of Settlement as agreed by the parties. Performance that substantially departs from what the parties agreed is not substantial performance and is by definition a material breach.”<sup>116</sup>

**(b) The Government’s Position**

156. The Government emphasizes that “to revive a pre-settlement claim under New York law and the Deed, the breach must be material, destroying the ‘root of the bargain.’”<sup>117</sup>
157. The Government contends that, under New York law, a party may rescind a contract only for a material breach of the contract as a whole. In light of the facts that: (i)

---

<sup>115</sup> Reply, para. 41.

<sup>116</sup> *Ibid.*, para. 42. Emphasis in the original.

<sup>117</sup> Counter-Memorial, para. 28.



the SIAC Tribunal found that the Government successfully “maximized sale proceeds” within the meaning of Section 13; and (ii) the Claimants agreed throughout these proceedings that the essential purpose of the Settlement was to “maximize” the sale proceeds, therefore none of the other alleged breaches, even if established, can be considered “material” under New York law. The essential benefit of the parties’ bargain as expressed in Section 13 has been satisfied. This is not a matter that can be revisited by the Tribunal because Section 13 itself is not listed in Section 32.

**(c) The Tribunal’s Ruling**

158. The text of Section 32 of the Settlement governs. It provides for revival “in the event that Laos is in **material breach of Sections 5-8, 15, 21-23, 25, 27 or 28.**” Section 32 does not speak of material breach **of the Deed**. Accordingly, the Government is correct that revival is justified only if the breach is material but the text of Section 32 makes clear that materiality is decided disjunctively on a section by section analysis of the provisions listed in Section 32 and not on the Settlement as a whole.
159. The Tribunal agrees with the Claimants that a breach of Section 13 cannot be a condition precedent to revival under Section 32, because Section 32 sets out the conditions for revival and Section 13 is not referenced in Section 32.
160. In determining materiality of a breach of a listed section, however, the Tribunal is content to proceed on the basis of the formulation of “materiality” suggested by the Government, namely that the breach of the section must “go to the root” of the

benefit promised by that section, and “defeat the object of the parties” in their agreement on that provision.<sup>118</sup>

**ii. Did the Government Imposition of a 28% *Ad Valorem* Tax Comply with the Promise of a “New Flat Tax” in Section 8 of the Settlement?**

**(a) The Claimants’ Position**

161. An *ad valorem* tax is not a “flat tax.” The guarantee of a flat tax was an essential feature of the Claimants’ plan to market the Casino. The inability to offer a flat tax, and the consequent destruction of shareholder value by imposition of an *ad valorem* tax went to the root of Section 8 and indeed to the value to the Claimants of the Settlement as a whole.

**(b) The Government’s Position**

162. The Government adopts the position of the majority of the SIAC Tribunal in the 29 June 2017 Award as follows:

[LHNV and Sanum] also argue that the Deed’s requirement that the tax be “flat” means that the tax should be a fixed, unchanging, periodic amount, not a fixed tax rate. However, the Deed does not define “flat tax” and when Mr. Va, a qualified professional knowledgeable about the taxation of casinos, was asked to determine a “flat tax”, he interpreted this term to mean a tax with a flat rate ... a flat tax is a tax that applies a constant marginal rate on income, **the Majority does not find Mr. Va’s interpretation to be an unreasonable one.** (emphasis added)

---

<sup>118</sup> The Government cites *Frank Felix Associates, Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997), RLA-012.

(c) **The Tribunal’s Ruling**

163. Section 8 of the Settlement promised the Claimants a “new flat tax” to be ascertained by following the procedure set out in Section 9. Section 9 is not listed in Section 32. Section 8 provides as follows:

Laos and the Claimants agree that a **new flat tax** (“FT”) shall be promptly established **in accordance with the procedure described in Section 9 below**, and such FT shall be applied to the Gaming Assets with retroactive effect dating back to 1 July 2014. The FT shall apply throughout the fifty (50) year term of the PDA. Such FT shall be escalated by five percent (5%) at the fifth (5th) anniversary of the Effective Date and by five percent (5%) on every five (5) year anniversary thereafter throughout the term. (emphasis added)

164. A distinction must be drawn between the **outcome** promised in Section 8 (“a new flat tax”) and the **procedure** by which the outcome is achieved under “the procedure described in Section 9 below.”<sup>119</sup>

165. Section 7 of the Settlement actually cross-references the lump sum flat tax, which is “specifically indicated in Article 1 of the previously signed FTA attached as

---

<sup>119</sup> Section 9 provides:

9. Laos shall appoint RMC Gaming Management LLC (“RMC”) not later than ten (10) days after the Effective Date, on the terms and conditions attached hereto as Annex E. If RMC does not accept the appointment within 4 days of the Effective Date, Laos shall appoint another agent to assist it in the matter as described in Annex E. Within ten (10) days of the Effective Date, the Claimants (collectively) shall nominate one person and Laos shall nominate one person (which may be an employee of RMC) to be members of a Flat Tax Committee (the “FT Committee”). Within ten (10) days after the Effective Date, the two persons nominated by the Claimants and Laos to the FT Committee shall nominate a mutually acceptable third FT Committee member. If the two FT Committee members fail to reach an agreement on such third FT Committee member within such deadline, the third FT Committee member shall be appointed in the sole discretion of the President of the Macau Society of Registered Accountants. Within forty-five (45) days of the Effective Date, the duly composed, three-member FT Committee shall determine a new fair and reasonable FT applicable to the Gaming Assets, taking into due consideration all relevant information submitted to the FT Committee by the Claimants and Laos.

Annex D hereto.” The “previously signed FTA” affords no basis for the imposition of an *ad valorem* tax.

166. Sections 7<sup>120</sup> and 8 are within the jurisdiction of the Tribunal whereas Section 9 is not. Accordingly, the Claimants are bound to accept the view of the SIAC Tribunal that the **process** followed by the Government in establishing a “new flat tax” complied with Section 9. However, the Tribunal is required to form its independent view as to whether the **outcome**, namely the resulting 28% *ad valorem* tax, comes within the expression “new flat tax” which in Section 8 the Government and the Claimants agreed “**shall** be promptly established.”
167. Under Section 7 of the Settlement, the Government “waived any and all taxes and related interest and penalties due and payable by the Claimants and the Gaming Assets up to 1 July 2014” at which point implementation of a “new flat tax” as provided in Section 8 was expected to come into effect.
168. According to the Tribunal, an *ad valorem* tax is not a flat tax within the meaning of Section 32 of the Settlement.
169. The Government argues, in effect, that the word “flat” refers to “rate”, but the word “rate” nowhere appears in Section 8, where the word “flat” clearly modifies the word “tax.”

---

<sup>120</sup> Section 7 provides:

Laos shall forgive and waive any and all taxes and related interest and penalties due and payable by the Claimants and the Gaming Assets up to 1 July 2014 in respect of the Gaming Assets, provided, however, that taxes shall be due and payable as from 1 July 2014 as provided in Section 8 below. The taxes covered herein are all taxes and fees including but not limited to those that are specifically indicated in Article 1 of the previously signed FTA attached as Annex D hereto.

170. The “**new**” flat tax is to replace the “old” flat tax which was a “fixed unchanging, periodic amount.” The SIAC Tribunal suggested that there was no definition of flat tax in Section 8. With respect, this ignores the word “new” which relates the obligation back to the previous “old” lump sum flat tax. Mr. Va gave no weight (if he was aware of it) to the “old” flat tax under the 1 September 2009 Flat Tax Agreement between Sanum and the Government which required a “fixed unchanging periodic” payment of US \$745,000 per year for 5 years, with the possibility of renewal.<sup>121</sup> Instead, Mr. Va was given a report by the Government’s expert, Professor Nelson Rose, which advocated a tax based on percentage of revenue.<sup>122</sup>

171. It is evident that Mr. Va did not focus his research on flat tax regimes but broadly canvassed the taxation policy of different countries in the region in relation to gambling businesses and their comparative advantages and disadvantages, the

---

<sup>121</sup> Flat Tax Agreement between the Tax Department, Ministry of Finance, the Lao Government and Savan Vegas, 1 September 2009 (LHNV Exhibit C-7).

<sup>122</sup> C-979, Flat Tax Committee Appointment Agreement between the Government of the Lao PDR and Quin Va, 15 May 2015, para. 5:

5. **The Procedure:** On or before May 26, 2015, the Government’s expert on gaming taxation, BDO, will prepare and present to Mr. Va a report on gaming customs and practices in Asia with respect to taxation of gaming operations. The report will provide data concerning casinos throughout Asia including the two casinos now operating in Laos. **The Government will also present a report by Professor L. Nelson Rose, on the necessity of stating the flat tax as a percentage of gaming revenue.** Mr. Va will set the flat tax regime applicable to the Gaming Assets during the life of the concession to be granted to the new buyer and operator of the Gaming Assets. While Mr. Va may consider the BDO report and the Professor Rose report, he is equally free and able to consider information from his own experience or if he so desires, his own research, it being further understood that Mr. Va may consider the factual and financial characteristics of the Gaming Operations and of other gaming facilities in Asia, the 50-year life of the concession and other factors he deems relevant. **Mr. Va may freely determine the basis for the flat tax, whether expressed as a percentage of revenues, dollar amount or other measure,** provided that the measure, once established, will not be subject to revision during the life of the concession. Mr. Va may utilize others for assistance, but he retains the authority and responsibility to set the flat tax. (emphasis added)

current size of Savan Vegas, the current market position of Laos in the Asian gaming industry and the impact of the gaming policies of Thailand (Savan Vegas' largest source of gamblers).<sup>123</sup>

172. The Government knew full well the difference between an *ad valorem* tax with a flat (28%) rate and a “new flat tax” for a fixed lump sum annual amount (as had been agreed to in 2009). The Government soon entered into an agreement dated 19 August 2016 for a lump sum flat tax, at the request of Macau Legend. The result was described in the text of the Macau Legend Agreement as a “flat tax.”

<b>Flat Tax Agreed to with Sanum in 2009</b>	<b>Flat Tax Agreed to with Macau Legend dated 19 August 2016</b>
<p>Article 1: Savan Vegas and Casino, LTD <b>agrees to pay the government a Flat Tax</b> which specifically covers the Casino Business and includes Excise tax, turn over tax, profit tax, Dividend tax, and dividend <b>which is included in the Flat Tax</b> (see “Dividend” of below timetable) <b>and is in an amount of \$745,000 (seven hundred forty five thousand dollars) per year.</b> The payment shall be split into 4 payments, in the period of 3 months each. The Flat Tax shall be paid to the Provincial Tax Department of Savannakhet Province but the dividend portion of the Flat Tax shall be paid to the Ministry of Finance through State Enterprise Finance Supervision Department.<sup>124</sup> (emphasis added)</p>	<p>B. In the Letter of Record dated May 13, 2016, the <b>Investor requested that the Company pay a flat tax</b> in connection with or relating to the Concession Rights, Concession Activities, the Project and Project Management. The PDA provides that such flat tax shall be paid <b>pursuant to this Flat Tax Agreement</b> (this “Agreement”). In consideration of the foregoing and the mutual promises contained herein, and intending to be legally bound hereby, the parties agree as follows:</p> <ol style="list-style-type: none"> <li>1...</li> <li>2. <b>Amount. The flat tax shall be United States Ten Million (US \$10,000,000.00) per year</b> (the “Flat Tax”) in relation only to Gaming Activities.</li> <li>3. <b>Payee.</b> The Company shall pay the Flat Tax to the Tax Department of the Ministry of Finance.</li> <li>4. <b>Period of Application of Flat Tax.</b></li> </ol>

<sup>123</sup> See SIAC Tribunal Award, 29 June 2017, para. 277.

<sup>124</sup> Flat Tax Agreement between the Tax Department, Ministry of Finance, the Lao Government and Savan Vegas, 1 September 2009 (LHNV Exhibit C-7).

	Subject to Paragraph 5 below, <b>the Flat Tax</b> shall be paid for the three (3) year period commencing from the Closing and ending on the third anniversary of the Closing. <sup>125</sup>
--	--

173. While substitution of an *ad valorem* tax with a flat tax rate was in the view of the SIAC majority “reasonable” for SIAC’s purposes, the majority did so by deferring to Mr. Va’s “legal” opinion.
174. In the view of the Tribunal, however, the issue is not what Mr. Va regarded as “reasonable” but whether what he recommended, and what the Government accepted, could correctly be described as a “new flat tax” within the meaning of Section 8. In the view of the Tribunal, a 28% *ad valorem* tax is non-compliant.
175. The question remains whether the 28% *ad valorem* tax is a **material** breach of Section 8. In the view of the Tribunal, the breach is material. It is noted that every other casino in Laos also pays a flat tax established as a lump sum annually.<sup>126</sup>
176. It is apparent from both the First Material Breach Application and the Second Material Breach Application that the Claimants regarded a flat tax as essential to the successful marketing of the Casino.
177. The expert evidence is that the market value of the Casino is highly sensitive to taxation and that establishment of a “fair and reasonable” fixed payment would enhance the marketability of the Gaming Assets and the price they would fetch in

---

<sup>125</sup> C-964, Executed Flat Tax Agreement between the Ministry of Finance of the Lao People’s Democratic Republic and Savan Legend Resorts Sole Company Limited, dated 19 August 2016.

<sup>126</sup> C-980, Joel M. Melendez Report to the Flat Tax Committee, 28 May 2015, para. 23 (Kings Roman Casino) and para. 35 (Dansavanh Casino).

the market. Rightly or wrongly, the Claimants clearly regarded a “flat tax” as of the essence of Section 8. It went to the “root” of the Section 8 bargain. The Claimants’ *quantum* expert, Dr. Joseph Kalt, proceeded on the basis that a fair and reasonable flat tax in respect of the Casino would be no more than \$2,062,200 each year for 5 years and assumed such flat tax amounts would escalate by 5% on the fifth anniversary of the 15 June 2014 Effective Date, and escalate by an additional 5% on every five-year anniversary thereafter, as stated in the Settlement.<sup>127</sup> This suggested tax burden (which, of course, was no more than an untested opinion) was materially less than the imposition of an *ad valorem* tax calculated by the Government at \$26,659,000 and deducted from the proceeds of the sale.

178. In the view of the Tribunal, the Government’s failure to establish a “new” flat tax similar in form to the “old” flat tax is a breach of Section 8 of the Settlement and the breach is “material” within the meaning of New York law.
179. Accordingly, on that basis alone, the Claimants are entitled to a revival of the Treaty arbitration.

**iii. Did the Government’s Collection of Alleged Tax Arrears of \$26,659,000 Constitute a Material Breach of Section 7 of the Settlement?**

**(a) The Claimants’ Position**

180. The Claimants contend that they were entitled to pay no more than the "new flat tax." The Government refused to participate in the Flat Tax Committee even though the Claimants remained ready, willing and able to do so after the dismissal of the

---

<sup>127</sup> Witness Statement of Joseph P. Kalt, Ph.D., dated 14 October 2016, p. 22.



First Material Breach Application. The Government was not entitled to affirm and rely on the Settlement while at the same time attempting to collect a tax that was not authorized under the Settlement and which no other casino in Laos was required to pay.

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

181. The Respondent contends that the Claimants' privileged tax status ended on 1 July 2014. At that point, being a Casino conducting business in Laos, they were required to pay the tax established by the law of Laos for such a business. In the absence of a new flat tax agreement, which was to be established by a process boycotted by the Claimants, the Claimants were bound by the ordinary law, and having failed to do so, the Government was entitled to collect the arrears of tax owing.

**(c) The Tribunal's Ruling**

182. The Claimants and the Gaming Assets were required to pay taxes "as from 1 July 2014 **as provided in Section 8 below.**" The SIAC majority concluded that there had been a "new flat tax" established "as provided in Section 8 below", and therefore the Claimants were in default for not paying the 28% *ad valorem* tax as required by Section 7.<sup>128</sup>

183. In light of the conclusion of the Tribunal that no "new flat tax" had been established within the meaning of Section 8, and that the Claimants had, after numerous

---

<sup>128</sup> Section 7 provides:

7. Laos shall forgive and waive any and all taxes and related interest and penalties due and payable by the Claimants and the Gaming Assets up to 1 July 2014 in respect of the Gaming Assets, **provided, however, that taxes shall be due** and payable as from 1 July 2014 **as provided in Section 8 below.** The taxes covered herein are all taxes and fees including but not limited to those that are specifically indicated in Article 1 of the previously signed FTA attached as Annex D hereto. (emphasis added)

breaches of the Settlement, attempted to rejoin the FTC process, and moreover that the Government had (notwithstanding these breaches) elected to continue to affirm the Settlement, it follows that there was no tax properly payable “*as provided in Section 8 below.*”

184. However, the Government’s waiver of taxes ended on 30 June 2014. At the time of the taking of the \$29,659,000, the Casino had paid no taxes whatsoever since December 31, 2013. The Casino had no right to operate in Laos free of tax.
185. The ICSID Tribunal in rejecting the Claimants’ Second Application for Provisional Measures on 18 March 2015 stated in relevant part:

When the Flat Tax Agreement expired on 31 December [2013], Savan Vegas became subject to the applicable tax laws of Laos. It is common ground that although Savan Vegas has continued to do business in Laos, it has not paid taxes either directly or in escrow since 1 January [2014]. While it now offers to pay in escrow the sum of US \$429,300 per month retroactive to 1 January [2014], there is no obligation on the Government to agree to such a figure or to any escrow arrangement.<sup>129</sup>

...

... [F]or so long as the Claimant continues to do business in Laos, it can reasonably expect to be bound by the Laotian income tax laws applicable to gambling casinos unless and until a new Flat Tax Agreement is negotiated.<sup>130</sup>

186. At some point, the Claimants’ tax liability will have to be assessed and paid. Accordingly, while the Tribunal considers that the Government departed from its obligations under Section 7, the breach in this instance is not material because there is an accumulating tax debt owed by the Claimants, and any recalculation of the

---

<sup>129</sup> Decision on Claimant’s Second Application for Provisional Measures, dated 18 March 2015, para. 32.

<sup>130</sup> *Ibid.*, para. 34.

precise amount of tax owing does not in any sense rob the Claimants of the substantial benefit of their Section 7 bargain. This ground offers no independent basis for a revival of the Treaty arbitration.

**iv. Did the Government’s Failure to Establish a Joint Escrow Account to Receive the Proceeds of Sale of the Gaming Assets Constitute a Material Breach of Section 15 of the Settlement?**

**(a) The Claimants’ Position**

187. Under the terms of Section 15, the proceeds of the sale of the Gaming Assets were to be received **directly** from the buyer [Macau Legend] “into an escrow account ... under instructions to be jointly issued by the Claimants and Laos.”<sup>131</sup>

188. In the Second Material Breach Application, the Claimants argue that the Government breached Section 15 in at least two material ways:

(a) The Government caused Macau Legend to deposit all of the sale proceeds into bank accounts wholly controlled, directly or indirectly, by the Government; and

(b) The Government impermissibly diverted US \$26,659,000 million of the \$42 million purchase price into its own treasury in purported satisfaction of the Claimants’ alleged tax liability.<sup>132</sup> Such a unilateral “taking” was not permitted by the Settlement.

---

<sup>131</sup> Section 15 provides:

15. All Sale proceeds shall be received directly from the buyer into an escrow account at TMF Trustees Singapore Limited in Singapore under instructions to be jointly issued by the Claimants and Laos. No moneys shall be withdrawn from such escrow account except in compliance with this document. The Claimants and Savan Vegas (in the case of assets sale rather than corporate sale) shall have no liability to pay any withholding or capital gains taxes in respect of the Sale.

<sup>132</sup> Memorial, para. 141, Reply, paras. 19(e), 32.

189. This Section 15 breach is independent of whether or not the Gaming Assets were sold for maximum value. Rather, Section 15 is separate and apart from Section 13 and requires **all** proceeds, regardless of the amount, to be deposited directly into escrow.<sup>133</sup>

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

190. The escrow account was established in consultation with the SIAC Tribunal. The Claimants were bound and determined to undermine the Settlement and giving them a veto over the payment of funds from a jointly controlled escrow account would have allowed them to create endless mischief and delay. The SIAC Tribunal in effect endorsed this view in its Award of 29 June 2017. In any event, the Claimants ultimately received their full financial entitlement under the order of the President of the SIAC Tribunal annexed to the Award of 29 June 2017. If there was a breach, therefore, it was not material.

**(c) The Tribunal's Ruling**

191. In the course of the SIAC proceedings, the escrow procedure was modified. After ordering the parties to work together to establish the escrow account and issue "joint instructions",<sup>134</sup> the SIAC Tribunal directed payment of the sale proceeds into an

---

<sup>133</sup> Reply, para. 30.

<sup>134</sup> C-1095, Order on Respondents' Request for Provisional Measures and Claimant's Motion for a Stay of Discovery and Motion Practice, SIAC, 6 January 2016, para. 10:

The Tribunal grants the request to the extent of requiring the parties to work together to establish the escrow account by 30 March 2016 and issue before that date joint instructions to TMF Trustees Singapore Limited for procedures for the receipt and disbursement of funds. The Tribunal cannot at this time, on this record, resolve the question of the amount to be deposited into escrow under the Deed. The Tribunal will examine the question anew if the parties do not submit the joint instruction by the date required (30 March 2016) or if either party submits a motivated request for interpretation

escrow account under the control of the President of the SIAC Tribunal. It is evident from the SIAC Award of 29 June 2017 that the Claimants continued to favour the sale of the Casino (albeit on different terms from those favoured by the Government) in their appearances before the SIAC Tribunal.) “Interim” arrangements for an escrow account were worked out in conjunction with the SIAC Tribunal. The President of the SIAC Tribunal signed a “Tribunal Payment Notice” attached to the SIAC Award of 29 June 2017 clearing the escrow account.

192. The escrow account as established accomplished its functional purpose. While its terms differed from the arrangements described in Section 15, the differences do not amount to a material breach. The Claimants have not established any loss or other damage flowing from the escrow arrangements.<sup>135</sup>
193. Accordingly, the Tribunal declines to find a material breach of Section 15.

**v. Did the Government’s Failure to Include the Right to Extend the Savannakhet Airport Runway as Part of the Gaming Assets Constitute a Material Breach of Section 25?**

**(a) The Claimants’ Position**

194. The Claimants contend that the right to expand the Savannakhet Airport was a key contributor to the potential value of the Casino. The Government, it says, falsely represented to prospective purchasers (in the RSE report) that expansion to accommodate Boeing 737 type aircraft was not feasible. However, the Government

---

of the Deed including a substantiated record of the positions taken by the parties and defining the dispute on interpretation to be resolved.

<sup>135</sup> The Government contends that the Claimants’ desire for “joint” control was to enable them to precipitate an impasse and foil any sale.

was obligated to do what was necessary to enable the Claimants (at their own expense) to extend the runway at Savannakhet Airport.<sup>136</sup>

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

195. Both parties acknowledge that there is not enough land at Savannakhet Airport to lengthen the runway sufficiently to accommodate the normal operations of a Boeing 737 size aircraft. At no time did the Government represent otherwise.
196. Moreover, the Government gave no undertaking, express or implied, to expropriate private land for the benefit of a private developer.

**(c) The Tribunal's Ruling**

197. The "right" asserted by the Claimants is found in Section 25 which reads in relevant part that:

The Claimants or a new owner of the Gaming Assets (the "SV Owner" as the case may be) shall have the right to make the necessary investment (free of all cost to Laos) to extend the existing runway at Savannakhet Airport sufficiently to accommodate planes up to Boeing 737 size ...

198. The Claimants contend that "if an expansion had not been feasible because the Government was unwilling to exercise its eminent domain powers or, alternatively, to allow jets to use the Airport with payload and range restrictions, there would have been no point to the Parties' inclusion of Section 25 in the Deed."<sup>137</sup> However, there is no persuasive evidence in the Settlement documentation or elsewhere that

---

<sup>136</sup> Memorial, para. 144, Reply, para. 19(g).

<sup>137</sup> Memorial, para. 145.

the Government undertook either of these measures. The exercise of power of eminent domain is certainly not mentioned in the Settlement.

199. In the view of the Tribunal, this ground is without merit. The new owner of the Gaming Assets is free to make “the necessary investment” itself by acquiring land from the current owners if suitable terms can be worked out by private contracts.
200. There is no evidence to suggest any legal or regulatory restraint on the Casino owner’s expenditure of private monies for this purpose. However, in the Tribunal’s view, there is no obligation on the Government to facilitate such an acquisition of land belonging to other private owners for the private benefit of the Claimants or their successors.
201. The Tribunal concludes that there is therefore no material breach in connection with the extension of the Savannakhet Airport.

**vi. Did the Government’s Alleged Failure to Negotiate the Thakhaek Agreements “in Good Faith” Constitute a Material Breach of Section 22 of the Settlement?**

202. The Thakhaek Free Enterprise Zone is an area some distance from the Savan Vegas Hotel and Casino complex. The Claimants desired about 90 hectares for development “completely separate from the provision for sale of the Gaming Assets.”<sup>138</sup> Such a potential development had been the subject of a Memorandum of Understanding with Savan Vegas dated 20 October 2010.

---

<sup>138</sup> Reply, para. 36.

203. A condition precedent to negotiations for the Thakhaek development was the payment of US \$500,000 to the Government which was paid by the Claimants.<sup>139</sup>
204. In the course of negotiations, a dispute arose over the inclusion (or not) of a 16 hectares' portion of land fronting National Road 13. It emerged that the 16 hectares' parcel was privately owned.

**(a) The Claimants' Position**

205. The Claimants assert that the 16 hectares parcel of private land with its highway frontage was critical to the success of the contemplated development. It was included in the parcel of 90 hectares as shown on a map attached to the said Memorandum of Understanding and referred to in a number of subsequent "draft agreements." The Claimants then say the "Government summarily rejected without explanation Claimants' proposal for an alternative concession arrangement that would compensate it for the loss of the 16 hectares."<sup>140</sup>

---

<sup>139</sup> Section 22 provides as follows:

22. Subject to the Claimants' payment of US \$500,000 to Laos, the Parties will negotiate in good faith and conclude a land concession and project development agreement with respect to the 90 hectares of land at Thakhaet identified in the MOU signed on 20 October 2010 between Savan Vegas and Governor Khambhay Damlath of Khammouane Province, LAO PDR, on the basis that no gaming activities whatsoever will be allowed at or in connection with that 90 hectares site. The Claimants acknowledge and agree that: (i) there shall be no gaming license, sublicense or other grant of gaming rights issued by Laos at any time in respect of such 90 hectares site; (ii) any development of, at or pertaining to such 90 hectares site shall be in the form of commercial, non-gaming activities only; and (iii) the Claimants shall have no right to claim or receive any compensation from Laos in regard to the prohibition of gaming activities at such 90 hectares site. Fees and charges, if any, imposed in connection with the project at the 90 hectares site shall be commensurate with those charged in connection with any similar site or project in the Thakhaek Free Enterprise Zone.

<sup>140</sup> Memorial, para. 157.



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

206. The 16 hectares parcel is in private ownership and was not included in the 90 hectares contemplated for development. The original survey attached to the MOU showed about 105 acres, which included 15 acres in private ownership. The Government made no promise of land it did not own. Eventually, the Government offered the Claimants an alternative 90 acres in the same special Economic Zone, but the Claimants would not agree to develop the property themselves but suggested they would invite other investors to build within a type of "Dubai Free Trade Zone." This was a role reversal which the Government considered to be a fundamental departure from Section 22.<sup>141</sup>

**(c) The Tribunal's Ruling**

207. In the Tribunal's view, the Claimants have not established a land entitlement that includes the disputed 16 hectares, and there is no undertaking by the Government in Section 22 to use its powers of eminent domain to expropriate the existing private owners for the financial benefit of the Claimants. Refusal to expropriate private land for private gain of the Claimant does not constitute evidence of "bad faith."

---

<sup>141</sup> As explained by Government counsel:

... the parties went back and forth. The government offered, "If you want another 90 hectares in a Special Economic Zone, we have lots of land in the Thakhaet region that's in a Special Economic Zone", so they were making offers back and forth.

Then Mr. James wrote a letter, Mr. Menezes, and said, "Our proposal is to create a Dubai Free Trade Zone in Thakhaet, which means the business we build, we won't build our own business, we'll turn it into a Free Trade Zone, so other investors can come until and build buildings and they won't have to pay tax."

So the government said, "That's not acceptable, more than not acceptable", and that was the end of negotiations. They refused to make another offer. (Hearing Transcript 3 July 2017, p. 200)

208. Moreover, Section 22 does not oblige the Government to negotiate an alternative concession, especially when the Claimants' plan was to try to attract other developers rather than develop the property themselves.

209. In the view of the Tribunal, the Claimants' Section 22 argument is without merit.

**vii. Did the Government's Failure to Discontinue Criminal Investigations Against the Claimants and their Principals Constitute a Material Breach of Section 23 and Section 27?**

210. The Government has made numerous allegations of criminality against the Claimants and their principals, in particular, John Baldwin and Shawn Scott, as outlined above.

211. As part of the Settlement, the parties agreed in Section 23 that:

Laos shall discontinue the current criminal investigations against Sanum/Savan Vegas and its management or other personnel and shall not reinstate such investigations **provided that the terms and conditions agreed herein are duly and fully implemented by the Claimants.** (emphasis added)

212. Section 27 provided for mutual releases subject to similar conditions.<sup>142</sup>

---

<sup>142</sup> Section 27 provides:

The Claimants hereby wholly waive and release any and all claims whatsoever against Laos and all officials thereof and advisors, counsels and experts thereto related, and to forego the lodging of any dispute or claim against any of them, and shall ensure that each of the following persons – the direct and indirect shareholders, personnel, affiliates, subsidiaries and managers of the Claimants, John Baldwin and Shawn Scott – shall also wholly waive and release any and all claims whatsoever against Laos and all officials thereof and advisors, counsels and experts thereto related and forego the lodging of any dispute or claim against any of them. The Claimants shall fully indemnify Laos and all officials thereof and advisors, counsels and experts thereto in the event that any direct and indirect shareholders, personnel, affiliates, subsidiaries and managers of the Claimants, John Baldwin and Shawn Scott shall fail to provide such waiver and release. Laos hereby waives and releases any and all claims with respect to the matters addressed in the arbitrations against the Claimants, shareholders, officers and directors and the Gaming Assets companies. Notwithstanding the above, if the arbitrations suspended hereby, or either of them is or are revived or re-instated to any extent by either Party, then the releases and waivers provided herein shall be null and void and

**(a) The Claimants' Position**

213. The Government is currently pursuing applications for third-party discovery pursuant to 28 U.S.C. s. 1782 before U.S. federal courts ostensibly in support of the same allegations of bribery that the Government had asserted in the criminal investigation and in the SIAC arbitration as a ground for terminating the 2007 Savan Vegas PDA.<sup>143</sup>

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

214. The agreement to discontinue current criminal investigations was expressly conditional on the Claimants "duly and fully" observing the "terms and conditions agreed herein." The Claimants breached numerous "terms and conditions." The Government was therefore entitled to revive the "current criminal investigations."

**(c) The Tribunal's Ruling**

215. Section 23 is a limited undertaking by the Government restricted to "current criminal investigations of offences" known to the Government as of the date of Settlement (15 June 2014) and being investigated prior to the date of the Settlement.

216. The Government continues to pursue the benefits of the Settlement. In exchange for those benefits, a major consideration for the principals of LHNV and Sanum was the Government's agreement to discontinue the "current criminal investigations."<sup>144</sup> As a matter of New York law, as discussed previously, the

---

any and all claims previously made and facts asserted in the arbitration(s) are not waived and no liability of either party thereunder is waived or released.

<sup>143</sup> Memorial, paras. 165-166.

<sup>144</sup> As noted by the dissenting arbitrator in the SIAC Award of 29 June 2017, paras. 100, 101:

Government is not entitled to resile from a major benefit of the Settlement on the basis of breaches by the Claimants (that predate the multiple affirmations by the Government) while at the same time affirming its determination to sell the Gaming Assets under the authority of the same Settlement. Nevertheless, the Government is currently pursuing evidence of criminality in the U.S. Federal Courts in Idaho and the North Mariana Island.<sup>145</sup>

217. The Section 23 undertaking is limited. Section 23 does not cover acts of potential criminality that existed as of the date of the Settlement but were not known to the Government at that time, or were known but were not at the time of the Settlement the subject of a “current criminal investigation.” This means that the Settlement did not in any way (regardless of any material breach) impede the Government from launching a criminal investigation after the date of the Settlement into facts that pre-dated the Settlement provided there was no ongoing investigation at the time of the Settlement. Indeed, much of the alleged criminality now of concern to the Government were facts that predated the Settlement but became known to the

---

If Claimant chose to perform the Deed by taking the Casino, selling it, and setting a Flat Tax reportedly consistent with the Deed, it cannot deny Respondents the benefit of Paragraph 23 of the Deed.

I cannot join the Majority in reaching a conclusion that, as the Majority acknowledges, would give only Laos the benefit of the bargain while depriving Sanum entirely of one of the few benefits of the Deed it was entitled to.

<sup>145</sup> C-933, Order Denying Application for Issuance of Subpoenas, in *re* Application of the Government of the Lao People’s Democratic Republic, Case 1:15-mc-00018 (D.N. Mar. I. Apr. 7, 2016), p. 18:

The Court is also particularly swayed by GOL’s seeming disregard for the Deed of Settlement. In June 2014, GOL was apparently satisfied that Baldwin and other owners and managers at the Savan Vegas were not criminals. It agreed not to prosecute them as part of the settlement. Despite the failure of the settlement to actually resolve the issues facing the Savan Vegas, the parties agreed to be bound by its terms, including non-prosecution.

Government only after the date of the Settlement, when the Government gained access to the books and records of the Claimants, including allegations that:

- (a) The Claimants induced Mr. Angus Noble to sign a **fraudulent** MOU purporting to offer to buy the Gaming Assets and **knowingly suborned false testimony** from Mr. Noble [by paying him] \$10,000 per month for twenty-one (21) months;<sup>146</sup>
- (b) In late spring-early summer 2015, after the Settlement, Mr. Baldwin hatched a scheme to **bribe Government officials** in an attempt to recover control of Savan Vegas. The Government points to a draft consulting agreement with an unemployed security guard, Mr. Ben Gersten, disclosing (the Government says), the bribe that Mr. Baldwin was willing to pay to Government officials to permit Sanum to recover control of the Casino despite the Settlement;
- (c) The Government says it has discovered numerous **documented and uncontroverted acts of bribery and other illegality** uncovered after the Settlement was signed;
- (d) The Government says that it emerged after the Settlement that Mr. Baldwin authorized **a bribe** of \$30,000 to obtain the original 2009 Savan Vegas Flat Tax Agreement, and paid various other **bribes** to have the Thanaleng slot club shut down, to **tamper with witnesses** in the

---

<sup>146</sup> According to the Claimants, “the Government’s efforts to construct a conspiracy theory out of innocuous and unremarkable facts – that the MOU was negotiated quickly, that it was based on a template from a prior deal, and that Mr. Nobel had other dealings with the Claimants’ principals and one of their family members – prove nothing and require no further response. Reply, para. 86.

court case with his former partner, ST, and to **obtain a lottery license** in Cambodia.

218. The Tribunal, of course, has no views on whether these more recent allegations by the Government are true or not. What is at issue under Section 23 in contrast, are acts of criminality that were known and were being “currently” investigated as of 15 June 2014.
219. As a matter of New York law, the Government was not entitled to disregard a major benefit of the Settlement to the Claimants or their principals involving their personal jeopardy on the basis of breaches of the Settlement by the Claimants while proceeding to sell the Casino under the authority of the same Settlement.
220. As to materiality, pursuit or renewal of the “current criminal investigations” clearly goes to the heart of the benefits promised to the Claimants in Section 23. Indeed revival of “current criminal” investigations deprives the Claimants of the **only** benefit promised the Claimants under Section 23.
221. The Government was not free to revive the “current criminal investigations” unless it had been willing to repudiate the Settlement, and had done so.
222. Having not done so, it was not open to the Government to deny the Claimants the major and significant benefit of Section 12 and on that account, as well, the Claimants are entitled to revival of the Treaty arbitration.

## **VII. CONCLUSION**

223. The Tribunal does not underestimate the Government’s frustration with the intransigence of the Claimants’ post-settlement conduct whose efforts from 4 July 2014 to June 2015 were clearly directed to undermining the Settlement and

extricating themselves from its terms. Unfortunately for the Government, it wanted to retain the Settlement as much as the Claimants wanted to get rid of it. Faced with this dilemma, the Government chose to affirm the Settlement.

## **VIII. COSTS**

### **(a) The Claimants' Position**

224. The Claimants claim costs if successful. If unsuccessful, the Claimants argue that the Government's claim for costs should be rejected because:

(a) New York's highest court has explained that, unless clearly provided in the underlying contract, the American rule that parties are responsible for their own attorney's fees applies. There is no language in the Settlement indicating any intent of the parties to indemnify each other for costs;

(b) In any event, the Tribunal would not have jurisdiction over a Section 28 claim for damages since its jurisdiction is reserved to the specific provisions listed in Section 32.<sup>147</sup>

### **(b) The Government's Position**

225. The Government also claims costs. In part, it relies on Section 28 of the Settlement, a general provision for indemnification of damages arising out of a breach of the Settlement.

---

<sup>147</sup> Reply, para. 98.

(c) **The Tribunal's Ruling**

226. Costs, including the costs of the Mareva injunction, are deferred until the Award on the Merits following the hearing on the revived treaty claims.

**IX. DECISION**

227. The Second Material Breach Application is allowed.

228. Pursuant to Section 32 of the Settlement, the Treaty arbitration is revived on the basis jointly and severally of the Government's breaches of:

(a) Section 8, which promised a "new flat tax", but instead the Government imposed a 28% *ad valorem* tax on gross gaming revenues;

(b) Section 23, which promised the Claimants relief from "current criminal investigations", which nevertheless have been revived.

229. Both of these breaches constitute material breaches that deprived the Claimants of the intended benefits (or "bargain") promised by each of Section 8 and Section 23.

230. Except as aforesaid, the grounds of revival relied on by the Claimants are rejected.

231. The parties are instructed to confer and propose to the Tribunal a timetable for the renewed Treaty arbitration within 30 days of the date of this decision.

232. A pre-hearing teleconference to resolve any outstanding issues will be held within 45 days of the date of this decision.

233. The issue of costs of this application is reserved to be dealt with at the conclusion of the hearing on the merits.



DATED THIS 15<sup>th</sup> DAY OF DECEMBER 2017.

*[Signed]*

*[Signed]*

---

Professor Brigitte Stern  
Arbitrator

---

Professor Bernard Hanotiau  
Arbitrator

*[Signed]*

---

The Honourable Ian Binnie, C.C., Q.C.  
President of the Tribunal