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

LAO HOLDINGS N.V.
Claimant

and

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC
Respondent

DECISION ON THE MERITS

ARBITRAL TRIBUNAL

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

Secretary of the Tribunal
Ms. Mercedes Cordido-Freytes de Kurowski, ICSID

Date: June 10, 2015

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I. OVERVIEW

1. The Claimant, Lao Holdings N.C., owns gambling assets in Laos including the Savan Vegas Hotel and Casino Complex in Savannakhet Province. It is strategically located near the Friendship Bridge which spans the Mekong River, between Laos and Thailand. As a result of what it considered to be investment treaty violations, the Claimant, 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[1], and the *Arbitration Rules (Additional Facility)* of ICSID.[2]

2. The Claimant's original ICSID claims were based on a multiplicity of the Respondent Government's actions, including an 80 % tax on casino revenues and what the Claimant contended were unfair and oppressive audits of its Savan Vegas Hotel and Casino. The Claimant eventually valued its investment loss at between USD 690 million and USD 1 billion.

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[1] Signed on 16 May 2003, in force since 1 May 2005.

[2] As amended on 10 April 2006.

3. The ICSID claims were 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").

4. The Claimant now alleges a "material breach" of the Settlement by the Government which, it says, justifies the Tribunal in reviving the pre-settlement ICSID claims.

5. The Claimant's core allegation is that subsequent to the Settlement, the Government infringed the Claimant's gambling monopoly rights by approving and granting permission for the establishment of a rival casino or casinos within its area of exclusivity. The Government undertook in Article 13 thereof to facilitate the sale of the Claimant's gambling assets in Laos "on a basis that will maximize Sale proceeds to the Claimants and Laos". Instead, according to the Claimant, the Government's approval of a rival casino or casinos has so substantially destroyed the potential value of the Savan Vegas Hotel and Casino in the eyes of potential investors as to frustrate (and terminate) the Settlement.

6. The Claimant offers no direct evidence of such approval. Instead it has produced a variety of items of circumstantial evidence, including media reports, blogs, the continuing operation of a rival slot club or clubs in the Claimant's territory and activities of private individuals and entities (not the Government) from all of which, the Claimant argues, Government approval can be inferred.

7. The important question arises as to whether any of the conduct of various private entities (including a corporation in which the Government holds a minority 30% interest) which promoted creation of a potential rival casino can be attributed to the Government.

8. If the Tribunal is persuaded on the attribution issue, the further question arises as to whether the Government "cured" the alleged default within 45 days "after receipt of notice of such breach" as permitted by Article 32 of the Settlement, by making it clear that no rival casino would be permitted in the Claimant's territory during the balance of the 50 year life of the Claimant's concession.

9. The Tribunal's jurisdiction to revive the ICSID claims is conferred (and limited) by Article 32 of the Deed of Settlement which reads in part (as clarified by the Side Letter), as follows:[3]

> 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.** (emphasis added)

10. For reasons that follow, the Tribunal is of the view that even accepting *arguendo* the interpretation of the Deed of Settlement most favourable to the Claimant, the evidence

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[3] The full text of Article 32 as clarified by the Side Letter reads as follows:

> **Article 32**
>
> The Claimants shall only be permitted to revive the arbitration in the event that Laos is in material breach of Sections 5-8, 15, 21-23, 25, 27 or 28 above and only after reasonable written notice is given to Laos by the Claimants of such breach and such breach is not remedied within 45 days after receipt of notice of such breach. 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.

fails to establish on a balance of probabilities that the Government itself, directly or indirectly, "approved and granted" permission for a rival casino contrary to the Claimant's contractual entitlement.

11. The Tribunal notes the Claimant's contention that against a sovereign state a Claimant "is often unable to furnish direct proof of facts giving rise to responsibility" because, as the Claimant argues, such evidence is often "exclusively within the control of the Government".[4] Nevertheless where, as here, the Claimant's case is based on "inferences of fact and circumstantial evidence" (see Claimant's Submission, 27 March 2014, at para. 27) a Tribunal must be careful not to shift the onus of proof from the Claimant to the Respondent Government or to bend over backwards to read in inferences against "the sovereign state" that are simply not justified in the context of the whole case.

12. Further, even if it were accepted, *arguendo,* that some of the evidence is suggestive of some sort of "tacit" signal of approval to rival entrepreneurs, all of which is denied by the Government, it is the Tribunal's conclusion that any such alleged conduct was "cured" by the Government within 45 days. If there was any doubt before 26 June 2014 about the Government's policy against new casinos, there was none afterwards. The Government's position was not shouted from the roof tops to the extent the Claimant now insists upon but, in the Tribunal's view, there was no contractual obligation undertaken by the

[4] Relying on the *Corfu Channe*l Case, Judgment of 9 April 1949, at 18 and *Alpha Projektholding GmbH v. Ukraine*, (ICSID Case No. ARB/07/16), Award of 8 November 2010) at 373.

Government to have the Prime Minister make a high level denunciation of every potentially damaging newspaper report or other misinformation sourced in the private sector.

13. The Tribunal rejects the Claimant's argument that the violations of the Settlement by the Government, to the extent they have been established (if at all), created such serious prejudice to the Claimant as to render the violations incurable within the permitted 45 days. The curative measures that were taken extinguished whatever claim for revival might otherwise have arisen on the evidence before the Tribunal.

14. Accordingly, the Claimant's application for a revival of the arbitration pursuant to Article 32 of the Deed of Settlement must be dismissed. The disposition of costs will be dealt with as hereinafter provided, and together with this decision on the merits, will be incorporated in the Award to be issued under Article 52 of the *Arbitration* (*Additional Facility*) *Rules* of ICSID.

II. BRIEF HISTORY OF THE INVESTMENT

15. The Claimant has invested substantial monies since 2007 in three major projects in Laos, the Savan Vegas Hotel and Casino ("Savan Vegas"), the Paksong Vegas Hotel and Casino ("Paksong Vegas") and other enterprises (with local partners) that operated slot machine clubs. The Claimant's gambling assets are held through Sanum Investments Inc., a company incorporated in Macao.[5]

[5] The Government makes the curious submission that there is no "operating company" or "subsidiary" which is a party to the PDA. (Government Submission 3 April 2015 at para 119.) However, the Claimant's subsidiary Sanum is a party to the PDA. The Government's submission seems to have overlooked the fact

16. The ICSID dispute related to the Respondent Government's fiscal, regulatory and administrative measures allegedly targeting the Claimant's investment at the instigation of the Claimant's erstwhile but now estranged Laotian partners. These measures[6] according to the Claimant deprived it of part or all of the value of its investment in the Laos gaming and tourism industry. The Government, for its part, accused the Claimant of various acts of criminality.[7]

17. It is unnecessary for the purposes of this application to explore in any detail the particulars of the ICSID dispute. Suffice it to say that by the spring of 2014, the Claimant and its U.S. principals wanted to halt the threatened Laotian criminal investigations and to

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that Lao Holdings NC, not Sanum, is the only Claimant in the ICSID proceeding.

[6] The "oppressive" measures, the Claimant alleges, were instigated by powerful Laotian business and political leaders in part for the benefit of Sanum's estranged Laotian business partners, a Laotian company called ST and its principals who are Laotian nationals. Eventually, the Government issued fresh tax claims against Savan Vegas which the Claimant says were invalid but, being unpaid, led to the freezing of the Savan Vegas bank accounts in Laos. The series of Government measures taken together, the Claimant contended in the ICSID arbitration, amounted to *de facto* expropriation.

[7] The Government contended that the Claimant and its related companies had for years been operating their gambling operations using impenetrable accounting procedures, and in some respects acting illegally, including through the corruption of Laotian Government officials. In 2013, the Government declared its intention to initiate criminal investigations of the Claimant and its principals who are U.S. citizens. Counsel for the Government made the submission at the 6 January 2014 hearing that:

> [The Claimants] decided, for their own reasons, that they would put all their money into Thailand; well, they had been putting their money in Thailand for the last five years. And it is illegal, it is against the law in Laos for any Lao corporation to have a bank account outside the country, and they had seven bank accounts outside the country for the last five years. We can tell from some of the documents we received from Ernst & Young that in one of those bank accounts in 2011, a year before the "freezing order", they put $11 million into a Thai bank account. That's against the law. (Transcript, 6 January 2014, pP. 19-20).

"maximize the Sale proceeds" of their gambling assets in Laos. Equally, the Government wanted to see them gone.

III. THE DEED OF SETTLEMENT DATED 15 JUNE 2014 AND THE SIDE LETTER OF 18 JUNE 2014

18. By Deed of Settlement dated 15 June 2014, which is to be read together with a Side Letter dated 18 June 2014, the Claimant agreed with the Government to end the hearing of the ICSID arbitration (and a parallel UNCITRAL arbitration involving Paksong Vegas that was pending before the Permanent Court of Arbitration).

19. The Settlement is governed by New York law. It contemplated that the money necessary to achieve a clean break between the Claimant and Laos would come from a third party purchaser of the Claimant's gambling assets. The Government itself did not agree to pay any compensation. Its position was described by its counsel as follows:

> We started negotiating on Thursday. We negotiated all day Friday. I imposed the terms, here are the terms: "We pay them nothing; they dismiss their claims, they sell their casino for what they can get, and they leave Lao. Those are the terms."
> (Transcript, 17 June 2014, p. 25)
>
> I told you, I imposed the terms. I've been trying my best to make it possible for them to work the deal. So, any time they asked me for anything that would make it easier for them to sell, make it easier for them to do this or that, I would put it in the Agreement. I bent over backwards.
> (Transcript, 17 June 2014, p. 33)

20. Counsel for the Claimant explained the origins of the Settlement somewhat differently:

> The settlements arose--the possibility of the Settlement arose a couple of weeks ago when Claimants received an offer to purchase their--the Savan Vegas properties, and it became clear that that might be a means to resolve the disputes. But, of course, Claimants can only sell the Savan Vegas and the other properties they own with the cooperation of the Laos Government and with certain steps taken by the Laos Government that make the properties salable.

(Transcript, 19 June 2014, pp. 49-50) (emphasis added)

The "certain steps taken by the Laos Government" included, in the Claimant's view, negotiation of a new Flat Tax Agreement and preservation of the casino monopoly acquired by Sanum under the *Project Development Agreement on Savan Vegas Entertainment Hotel and Casino in Savannakhet Province* dated 10 August 2007[8] between the Government and Sanum Investments and its private Laotian partners (hereinafter referred to as the "*2007 Sanum Agreement*").

21. Under the Settlement, the Claimant was entitled to attempt to complete a sale within 10 months from June 15, 2014, with an extension of time if necessary to accommodate a closing date. During that time, the Claimant and its affiliates would continue to run the businesses subject to the "monitoring and oversight" of the Government's agent, RMC Gaming Management LLC ("RMC"). At the end of 10 months, if no sale had materialized, the Claimants and Laos would have the right "to appoint RMC or any other qualified operator" to step in and manage the gambling assets "in place of the Claimants until the sale is complete" (Article 12 of the Settlement).

22. Central to the Claimant's argument is the interpretation of Article 6 of the Deed of Settlement (as clarified by the Side Letter):

> **Article 6**
>
> Laos shall treat the Project Development Agreement ("PDA") dated 10 August 2007 in respect of the Savan Vegas Casino and each of the licenses and land concessions issued in respect of the Savan Vegas Casino, the Lao Bao Slot Club

[8] Exhibit C-004 at p. 10

> and the Savannakhet Ferry Terminal Slot Club (collectively the "Gaming Assets"), as being restated as of the Effective Date, with a term in each of fifty (50) years from the Effective Date. ST owns 40% of the Lao Bao and Ferry Terminal Slot Clubs. [emphasis added]

Much of the present dispute revolves around the disagreement of the parties about the meaning and effect of the underlined words of Article 6.[9]

23. The Claimant says the effect of Article 6 is to make Sanum's casino monopoly enforceable not only by Sanum but also by its parent, the Claimant. The Government acknowledges the existence of the casino monopoly but says that only Sanum (not the Claimant) is entitled to enforce it. Moreover, the Government insists that any dispute under the *2007 Sanum Agreement* lies within the exclusive jurisdiction of the Singapore International Arbitration Centre (SIAC).

24. The parties agree that the Settlement governs the negotiation of any new *Flat Tax Agreement* (FTA), and that disputes in relation thereto are potentially within the jurisdiction of this Tribunal under Article 32 of the Settlement. The Claimant argues that the breach of the monopoly destroyed the Settlement, and with it a proper basis for the Claimant to negotiate a new FTA and thereby contributed to its losses. The Government responds that the Settlement is still in force and the continuing failure to reach a new FTA

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[9] In its 3 April 2015 Submission, the Government states that in its ruling of 19 December 2014,

> "the Tribunal never determines that the phrase "to treat as being restated" is ambiguous, and therefore it is error to interpret unambiguous words by reference to some supposed "purpose" not expressed in Article 13".

In fact, the 19 December 2014 ruling stated unequivocally in para. 2 that "the Tribunal has also concluded, for the reasons set out below, that given the ambiguous wording of Article 6 of the *Deed of Settlement* on which the Claimant relies…" (emphasis added)

has been, and continues to be, exclusively attributable to the intransigence of the Claimant, which has refused to name its nominee to the joint "Flat Tax Committee" contemplated under Article 9 of the Settlement.

25. The Claimant also expected to profit from a land concession and development of an airport and other amenities on 90 hectares of land at Thakhet under a memorandum of understanding dated 20 October 2010 as contemplated under Article 22 of the Settlement. When the Claimant declined to pay the required USD 500,000 fee in a timely way, the Government declared an end to the Claimant's potential participation in Thakhet.

(i) The Alleged Breaches of the Settlement by the Respondent Government

26. A few days after the celebration in Singapore of the signing of the Deed of Settlement and the Side Letter, the Claimant filed on 4 July 2014 an "*Application for Finding of Material Breach of Deed of Settlement and for Reinstatement of Arbitration"* ("the Material Breach Application"). The ground for relief was an allegation that the Respondent Government had "approved and granted" gambling concession(s) to third parties in the nearby "Savan City" project in breach of the Savan Vegas casino monopoly rights, thereby ending (the Claimant said) any possibility of a sale that "will maximize Sale proceeds to the claimant and Laos" as contemplated in Article 13 of the Settlement.[10] It

[10] The Government argues that Article 13 only applies to a sale by the Gaming Operator, RMC, if and when RMC takes control of the Gaming Assets in the event Sanum fails to "complete a sale on time" (Government Submission, 3 April 2015, at para. 109.). This is not correct. "Sale" is defined in Article 10 as "a Sale of the gaming assets". The context of Article 10 is a sale by the Claimant not the "Gaming Operator" RMC. Accordingly the "Sale" referenced in Article 13 could be by either the Claimant or RMC, depending on the circumstances, and in either case the purpose set out in Article 13 applies.

also alleged, as stated, that the Government, not the Claimant, is responsible for the failure to achieve a new FTA and the frustration of the Thakhet project.

(ii) The Sanum "Monopoly Rights"

27. The parties appear to agree that any Government permission to open a rival casino would have a "material" impact on the income and future prospects of the Savan Vegas Hotel and Casino. In its 3 April 2015 Submission, the Government concedes that "the damages caused by a new casino could be large [and] when multiplied by 50 [i.e. the number of years of the monopoly] could be astronomical" [para. 22]. Lower future earnings as a result of increased competition would mean a lower current valuation and a correspondingly reduced price for the Claimant's gambling assets in the market place.

28. The "monopoly rights" are contained in article 9(24) of the *2007 Sanum Agreement*, which provides as follows:

> The **Company** has been granted monopoly rights for its Casino business operations only with the condition that the **Government** shall not **approve and grant** any other parties or entities who put up their applications for the operation of certain Casino business in the three (3) neighboring provinces close to the Project development zone of the Company namely: Savannakhet, Khammaouane and Bolikhamsay, throughout the concession period of 50 years.
>
> However, should there have any applications submitted by any parties or entities, all those shall be made through **the consent and approval of both the Government and the authorized investors** who have management rights (emphasis added)

The Government's position is that it has given no "approval and grant" of a casino licence in the Claimant's exclusive territory. The Claimant responds that Article 9(24) does not use the word "licence" and, in its view, may be breached without the actual grant of a licence. The Claimant says:

> "the provision of the PDA that underlies Claimant's Application does not refer to the grant of a gaming license, which in any event would be surprising at this early stage of development of the project, rather, it is the "approval" of "casino business," whether formal or informal that constitutes a breach of Savan Vegas's monopoly rights and a material breach of the Settlement. (Claimant's Submission, 27 March 2014, para. 7).

According to the Claimant, "informal" approval can be very informal, such as the Government's failure to shut down the non-conforming slot club(s) of Madam Kozy (discussed below) or the presence of the Vice President of the National Assembly at a signing ceremony on 26 June 2014[11] where private developers announced a $10 billion project for Savan City.

29. In the alternative, the Claimant argues that "even if the Tribunal declines to find that Laos has approved a new casino at Savan City, the refusal of the Prime Minister or political figure of equivalent authority to issue a single public statement denying approval

[11] As Claimant's counsel put it:

> How does the government show approval? Well, it shows approval by sending a senior official like the Vice President of the National Assembly to a signing ceremony which is highly-publicized within Laos and outside of the country; and at which the Vice President of the Lao National Assembly says that the goals of Savan City and the SEZ have been realized.
>
> You'll recall the testimony, you will recall those are in the words in the press release and you will recall Mr. Thongsay confirmed that is what he said. That is a statement of Lao government approval. It is a public statement of Lao government approval, and it fits in with all the rest of the evidence about what happened.
>
> (Submissions, 14 April 2015, at p. 161)

of a casino over the past nine months itself constitutes a separate and independent material breach of Section 6 of the Settlement".[12]

30. In the further alternative, the Claimant accuses the Respondent Government of attempting to mislead the Tribunal by submitting a "doctored" site map for Savan City and "the Tribunal should need no more than that to determine that Laos is liable."[13]

(iii) The Flat Tax Arrangement

31. The Claimant's previous 5-year FTA with the Government expired on 31 December, 2014.

32. The Settlement contemplated the negotiation of a new Flat Tax agreement within 45 days of 15 June 2014. The Claimant, having filed the present Application on 4 July 2014, declined to join in the agreed process to arrive at a new Flat Tax Agreement. It argued that because of the Government's alleged breach of the Savan Vegas monopoly rights, the contractual arrangements made in the Settlement were, as a matter of law, nullified. The Government's breach of the monopoly rights therefore had the knock-on effect of denying the Claimant the benefit of a new FTA as well as the opportunity offered by the potential development of the Thakhet site.

33. In the result, Savan Vegas has paid no income tax on casino revenues or earnings since 1 January 2015. It also withheld employment tax from January 1, 2015, until the

[12] Claimant's Submission, 27 March 2014, para. 11; Evidence of John Baldwin, 14 April 2015, p.20 ll 12-17

[13] Claimant's Submission, 27 March 2014, para. 15

week prior to the Tribunal's Singapore hearing on 13-14 April 2015, at which point Savan Vegas paid employment tax said to be owing of approximately USD335,000.[14]

IV. THE EVIDENCE DOES NOT ESTABLISH THE ALLEGED BREACH OF THE SAVAN VEGAS MONOPOLY RIGHTS

34. The Claimant contends that the Government has *approved and granted* permission to build and operate a rival casino in the "Savan City" project adjacent to the Savan Vegas Hotel and Casino in Savannakhet Province.

35. In the Tribunal's view, the evidence does not justify any such conclusion.

(i) The "Savan City Project"

36. The Government, in 2003, established a Special Economic Zone (SEZ) adjacent to what became the Savan Vegas Hotel and Casino property. The SEZ is administered by the Savan SENO Special Economic Authority, ("the SEZ Authority"), a Government entity.

37. Little if any development of this SEZ has occurred since 2003.

38. In 2007, the SEZ Authority entered into an agreement for the development of a portion of the SEZ called Site A with a private developer, the Thai Airports Ground Services Co. Ltd. ["TAGS"], under which a new operating company (eventually called

[14] Baldwin testimony 14 April 2015, p. 5, ll 9-15

"Savan City") would be formed.[15] For ease of reference, the 2007 Agreement will be herein referred to as "the *2007 Savan City PDA*".

39. Savan City, as it is now called, is owned 70% by private interests, who were responsible for raising the funds and developing the Project, and owned 30%, directly or indirectly, by the Government.

40. The *2007 Savan City PDA* attached a Master Plan for development. Over the ensuing years, TAGS failed to produce a viable development for Site A.

41. Between 2008 and 2012, the Claimant, through Sanum attempted to promote a development on site A.[16] In 2013 Sanum submitted a proposal of about 200 pages for development of Site A to the Deputy Prime Minister. This was not accepted.

42. In 2014, Savan City put together a development proposal for Site A in conjunction with a Malaysian private developer, Asean Union Inc.

43. At a press conference in Vientiane, the capital of Laos, on 26 June 2014, Savan City and Asean Union announced the new $10 billion project. The project was based on three development agreements for a portion of Site A that included an agreement for a financial centre[17] that would offer "off-shore" banking services (herein referred to as the

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[15] The Agreement is dated 13 June 2007 and made between the Savan SENO Special Economic Zone Authority ["SEZA"] and TAGS

[16] Evidence of the John Baldwin, April 14 2015, p. 24, ll 13-18, Exhibit c-272, p. 25, ll 1-5;

[17] Joint Venture Agreement dated 2 May 2014 in respect of establishing the ASEAN Union Bank between ASEAN Union Inc. and Savan City Co., Ltd. (Exhibit C-887)

"**Asean Bank Agreement**", a project that would require changes in Laotian banking law), an agreement for a substantial resort[18] (herein referred to as the "**Entertainment Complex**" agreement), and an Agreement to establish "**Savan Gateway**", a development that included a shopping centre, Tourist Information Centre, duty free shopping, a petrol station and other facilities.[19]

44. The Master Plan attached to the *Asean Bank Agreement*[20] and the *Entertainment Complex Agreement*[21] designated part of the site as the location of a casino. The casino designation in the Master Plan is heavily relied upon by the Claimant to prove its case.

45. At the very public "signing ceremony" in Vientiane, the promoters announced a new "US $10 billion" project, to be called Asean Paradize Savan City. As stated, the Vice President of the National Assembly attended the signing ceremony and welcomed the potential $10 billion investment. The private promoters hoped to develop a new casino close to the Savan Vegas Hotel and Casino, but there is no evidence the Vice President was aware of the casino objective. The promoters' press release on that day did not make explicit reference to a casino:

> "The Integrated Entertainment resort, will become a major tourism attraction for Laos with theme parks, recreation,

[18] Joint Venture Agreement dated 2 May 2014 between ASEAN Union and Savan City in respect of establishing the Asean Union "Entertainment Resort" (Exhibit C-792)

[19] Joint Venture Agreement dated 28 May 2014 between ASEAN Union and Savan City in Respect of Establishing the Savan Gateway (Exhibit C-793)

[20] Exhibit C-887, 2 May 2014

[21] Exhibit C-792, 2 May 2014

> hospitality and food, and our objective is to rival some of Asia's top entertainment regions, as we combine Laotian hospitality with modern entertainment concepts and attractions".[22]

46. The Claimant learned about this announcement in a report published in *The Nation*, a Thai newspaper, on 27 June 2014, which *did* refer to a casino, as follows:

> Malaysian investor ASEAN Union Group has launched its second venture overseas – the Asean Paradize Savan City – in Laos with a total investment of USD$10 billion (B13T20 billion) comprising of offshore financial center, entertainment, casino and communities for foreigners. (emphasis added)

47. The story was taken up by other media including the *Asian Gambling Brief* which reported on June 27, 2014 that:

> Work is scheduled to start in July this year on a $10 billion project in Laos including an offshore financial centre, a casino and entertainment complex and community for foreigners, according to *The Nation* Newspaper. (emphasis added)

48. According to the Claimant, it was the published references to the construction of a rival casino adjacent to the Savan Vegas Hotel and Casino complex that led the Claimant to trade mutually accusatory correspondence with the Government and, eventually, to file its Material Breach Application on 4 July 2014.

49. The Claimant has identified and filed numerous blogs and websites referring to a casino project on Site A but none of these announcements are sourced with the Government. However, the Claimant says that if the casino publicity was untrue, the Prime

[22] Exhibit C-796, 26 June 2014

Minister himself should have publically said so. Instead, the Prime Minister stayed silent, and the only published denial at the ministerial level was contained in a report in *BCI ASIA* on 26 August 2014.[23] This was too little and too late, the Claimant says.

50. In addition, the Claimant relies on the evidence of Ms. Lisa McWilliams, a businesswoman who lives in Saipan who was sent by the Claimant to visit the premises of Asean Paradize (the marketing arm of Asean Union) on August 26, 2014, in Kuala Lumpur. She met with Aubry O'Hara, a senior employee. Ms. McWilliams indicated to him that she had clients who might be interested in making a direct investment in Site A. Mr. O'Hara, without prompting, suggested an investment in a casino. Ms. McWilliams held a similar meeting with Mr. Chew of Asean Union. Her evidence was that:

> "[Mr. O'Hara of Asean Paradize] explained that Savan City would have an Asean Paradize Bank, shopping malls, condos, off-shore banking, an entertainment centre, hotels and a casino". (para. 14) (emphasis added)
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> "[Mr. Chew of Asean Union] said a casino ultimately would be licensed by the Lao Government. . . and he was very confident that it would be built." (para. 23) (emphasis added)

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[23] See *BCI ASIA* 26 August 2014: "*Govt says casino not part of Savan City project*."

> The government has confirmed that there has been no agreement reached for a casino to operate under the Savan City project, in the Savan-Seno Special Economic Zone (SSEZ) in Savannakhet province.
> The Secretariat Office of the Lao National Committee for Special Economic Zones (S-NCSEZ) issued an official letter recently, denying a June 27 report by Thai media (The Nation) that a casino will be incorporated in the development.
>
> * * * *
>
> Vice Governor of Savan-Seno Special Economic Zone Authority Mr. Thongsay Sayavongkharmdy told *Vientiene Times* yesterday that he wondered howt he media (*the Nation*) got information about this project, saying that their information about the casino is inacurate.

There is no reason to doubt the witness statement of Ms. McWilliams. However, it simply confirms that ASEAN Union and its affiliates were doing whatever they could to promote development of the site. If the prize of a casino attracted investment so much the better. Ms. McWilliams' evidence does not establish any grant and approval of permission for a rival casino that can be attributed to the Government.

51. Similarly, the Claimant relies on the evidence of Mr. Eugene McCain, a developer based in Phukhet, Thailand**,** who was sent by the Claimant to visit the premises of Asian Engineering Consultants ("AEC") in Bangkok on February 16, 2015. He was told about an AEC project in Savannakhet and was shown a proposed Master Plan of Savan City that included a casino. His evidence was that:

> "[The AEC management team] explained that there would actually be two casino gaming facilities at Savan City." (para. 11)

Again, there is no reason to doubt the accuracy of Mr. McCain's recollection of his conversation with senior officials at AEC.[24] However, promotional efforts by AEC, an entrepreneurial engineering and planning firm in Bangkok, does not establish any approval and grant of permission by the Government of Laos.

[24] See the Agreement between Mr. Hassan's company, Insure Asia and AEC of 25 June 2014 (Exhibit C-795).

52. Mr. John Baldwin, the principal of the Claimant, acknowledged in cross-examination that he had no personal knowledge of any such Government approval.[25]

53. Moreover, as stated earlier, Article 9(24) of the *2007 Savan Vegas PDA* contemplates that applications *could* be submitted "by any parties or entities" for a new casino licence in the Claimant's monopoly area, but approval thereof would require the "consent and approval" of both the Government and the "authorized investors who have management rights" [i.e. Sanum itself, which is a subsidiary of the Claimant]. To the extent that Asean Union was attempting to round up funding for a casino project on Site A prior to making such a submission to the Government, there was no breach of the *2007 Savan Vegas PDA*, to which in any event, of course, Asean Union was not a party. In theory, at least, Sanum might have given its consent, as indeed in 2013 Sanum discussed a joint arrangement with Madam Kozy's slot machine clubs within Sanum's exclusive territory, as described below.

(ii) The Doctored Evidence

54. The Claimant alleges that the Government attempted to mislead the Tribunal with a "doctored" version of the Site A plan attached to the *2014 Asean Bank Agreement* and the *2014 Entertainment Complex Agreement*. The new Plan, produced shortly before the Singapore hearing, substituted the designation "CJHQ" for the word "casino" on a cross-

[25] Evidence of John Baldwin, Transcript 14A, p. 34, ll 3-6.

hatched portion of the Site Plan.[26] The "doctored evidence" was so serious a matter, the Claimant says, as to justify rescinding the Settlement.

55. In the Tribunal's view, the evidence does not warrant or justify this allegation. The Site plans attached to two of the three Asean Union Agreements ***do*** indicate a site for a casino. Mr. Chanchai in paragraph 11 of his 18 December 2014 statement acknowledged this fact.[27] The Claimant's position was shown to be correct.

56. When Mr. Chanchai was subsequently asked by counsel for the Respondent Government for a clearer copy of the *original* site plan, Mr. Chanchai says he decided that the designation of a casino should be removed from the map because it was misleading, and he did so. He testified (as translated) in cross-examination as follows:

> I changed this map because when there are problems, Mr. Thongsay asked me to submit the whole document for him to double-check whether I have any agreement with Asean Union. When Mr. Thongsay consider and then he complained that the casino, why it is under the plan, casino is the activity that the Government is not allow, so please do not deviate or to mislead people there is casino, so I have to eradicate it so that it is correct. We have this new plan.[28]

57. The Claimant objects that the "new plan" was not identified as a "new plan" when transmitted to its counsel but erroneously passed off as a legible copy of the original plan.

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[26] Transcript, 13 April at p. 32

[27] Chanchai witness statement dated 18 December 2014, para. 11:
> When we were drafting the agreement at the last minute, I placed a map that showed a hotel with a casino labelled on the map in the agreement because it was an old one in my files.

[28] Transcript, 13 April, p. 188, ll. 2-11.

Be that as it may, Mr. Chanchai's admission with respect to the word "casino" was already in the record, and whatever miscommunication occurred when the map was provided to the Claimant in regrettable but of no great probative value.

58. The Claimant also contends, based on Mr. John Baldwin's evidence, that Savan City would not have announced the $10 billion project unless the casino had been approved.

59. Whatever may be Mr. Baldwin's experience, it is clear that Savan City and Asean Union did not comply with such a prudent "practice". They were prepared to make announcements before the grant of necessary licenses and approvals. This is confirmed by the fact that on 26 June 2014, the Asean Union itself announced not only a casino but the establishment of a significant "offshore" banking centre on Site A. The banking centre could not happen without a change in the laws of Laos governing banking. No such change had been made. Mr. Hassan of Asean Union testified:

> Q. You have said in your witness statements that you wish to develop a financial centre?
>
> A. Yes.
>
> Q. Inside there? [i.e. Site A]
>
> A. That is exactly what I want to do. That is my expertise.
>
> Q. You've said that you've approached the Government of Laos to have a financial regulatory laws passed by the national assembly?
>
> A. Yes, that is right. I submitted six inches of -- few thousand pages of laws which I expected them to go through and pass for an offshore financial centre to be created.
>
> Q. If the national legislature, national assembly of Laos, does not pass those laws, does not change the banking regulatory environment, will you invest any money in Site A?
>
> A. No point in investing there then.

Q. The answer is no?

A. No.

(Transcript 13 April, p. 200, l 14 to p. 201, l. 8) (emphasis added)

In other words, no changes had been made to the banking laws, yet the promoters announced the development of an "offshore" banking facility with fanfare on 26 June 2014 as part of a $10 billion investment for which approval had not been secured.

60. The Tribunal is of the view that no inference of Government prior "grant and approval" of permission for a casino can be drawn from the promoters' publicity at the 26 June "signing ceremony".

(iii) The "Integrated Entertainment Complex"

61. The Claimant argues that the expression "integrated entertainment complex", which appear in various of the promoters' documents, is well understood "in industry parlance" as a euphemism for "a complex built around a casino".[29] The *2014 "Entertainment Resort" Agreement* uses the expression "Integrated Entertainment Complex" in its preamble, as does more recent promotional material for "Savan Eco-City". Therefore, the Claimant says, a casino is still in the plan for Site A, albeit camouflaged by an euphemism.

[29] Claimant's Submission,, 7 March 2015, at para. 2

62. In the Tribunal's view, the Claimant puts more weight on this argument than is plausible in light of all the other evidence.

63. Whatever may be the understanding of the phrase "integrated entertainment complex" in some circles, this meaning was not acknowledged by the aspiring promoters of Savan City, neither of whom had any particular experience in the gambling industry. The Government witness Mr. Thongsay denied any such connotation in "our country". He testified as follows:

> Q. Did you ever try to understand what the words "integrated entertainment resort" or "integrated entertainment complex" meant in the world of tourism and gaming?
>
> A. The meaning of "resort" or "comprehensive" - or comprehensive, or "integrated entertainment", I do not understand how they interpret it in other regions, but for our country, it mean that it is related to promotion, tourism promotion, there are play areas for children, there are singing contests, TV programs so that people will have enjoyable activities, because our culture is related to the culture promoting arts, <u>but not about casino</u>. (emphasis added)
>
> (Transcript, 13 April, p. 156)

In any event, unless the Claimant could tie its understanding of the euphemism to the Government, and thereby attempt to link the Government to an *implicit* "grant and approval" of permission for a casino (which the Claimant is unable to do), this terminological argument is of insignificant probative value.

(iv) Conclusion with Respect to the Activities of the Promoters of Savan City

64. The Tribunal is satisfied that the private developers involved in Savan City promoted the idea of a casino on Site A. It seems probable that at the time of the "signing ceremony" on 26 June 2014, both Mr. Chanchai and Mr. Hassan optimistically thought the

Government might be persuaded to licence a new casino (however much they may have denied it when challenged by Madam Bouatha Khatthinda, a senior Government official on 2 July 2014). Madam Bouatha testified as follows:

> Q. Just so I'm clear, at the meeting, did they tell you that they never planned to build a casino in Site A?
>
> A. Yes. I asked them time and time again not to tell a lie because this is something that you can do it very lightly, and then they answer that, "we never have any intention to develop the casino in Site A", because the largest investor - they're Muslim - so they consider casino violating their belief, so representative Asean Union said so.
>
> Q. So the representative of Asean Union said it never had any intention to operate a casino in Site A; is that correct?
>
> A. Yes.[30]

It seems the developers may not have been candid with Madam Bouatha. But she, according to her testimony (which the Tribunal accepts), was very candid and categorical with them. There would be no casino on Site A.

65. In any event, the intended target of the Claimant's submissions is not the private promoters but to implicate the Government. There is no evidence that Mr. Chanchai or other private developer approached the Savan City Board, or the SEZ Authority or any other Government entity even to inquire about the potential availability of permission for a casino. There is no evidence that either Mr. Chanchai or Mr. Hassan was even aware before June 26, 2014 of the Government prohibition or the Claimant's monopoly entitlement.

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[30] Evidence of Madam Bouatha, Transcript, April 13, 2015, at p. 114, l. 19 to p. 115, l. 6

V. ACTIVITIES OF SAVAN CITY AND ITS PROMOTERS CANNOT IN THE CIRCUMSTANCES BE ATTRIBUTED TO THE GOVERNMENT

66. As stated, the Government, through its SEZ Authority, has a 30% minority interest in Savan City and three members of the seven members Board of Directors.

67. The evidence is clear that Savan City is a commercial corporation. It is not the Government. The *2007 Savan City PDA* lays the foundation for a public/private partnership. It bears many of the hallmarks of a shareholders' agreement and establishes a governance structure that considerably limits the authority of Mr. Chanchai and his "majority" shareholders.

68. The 70% majority shareholder, the Asean Union Inc., appoints the Vice Chairman of the Board who is also the chief operating officer (Mr. Chanchai) and three additional members, who together constitute a majority of the Board. The Vice Chairman of Savan City is required to run its day to day operations "in accordance with policies and strategies approved by the Board of Directors", but only the Board itself is authorized to make "major decisions". In particular, the *2007 Savan City PDA* provided that:

> In any Board of Directors meetings, the representatives from "both parties" shall attend and decisions on any major issues shall be made based on the consensus principle:
>
> The Board had the right and duty to consider and approve investment operational plans of the Company.

69. The uncontradicted evidence of Mr. Thongsay Sayavongkhandy, a Government-appointed Director of Savan City, was that in fact that the Board had not met "for a number of years" because implementation of the Site A project was not "progressing".[31]

(i) Mere Ownership of a 30% Minority Interest is not "Control"

70. It is elementary that 30% of the voting shares of a corporation, and a minority of seats on the Board of Directors, does not confer "control". Of course, the majority shareholders would be conscious in their decision making of the existence of such a sizeable 30% minority, especially when the minority shareholder is the Government of Laos.

71. Moreover, the Claimant points out, a fourth Board member, while not a Government employee, is "intimately connected to the Lao Government and a close relative of a number of senior and powerful Lao officials".[32]

72. The evidence of Madam Bouatha, head of the SEZ Secretariat, was that the Government representatives played a passive role in public/private partnerships in SEZs because of their inexperience:

> "We never take control, both because of our limited shareholdings and because we depend on the expertise and experience of our investing partners to run their business. We want our officials who serve on boards to learn the best practices so

[31] Transcript, 13 April, 2015, p. 128, ll 1-6.

[32] Witness Statement of John K. Baldwin, 27 March 2015, para. 6

> when the concession terminates and reverts to the Government, we will have been training our officials."[33]

73. Similarly the Government official most intimately involved in the affairs of Savan City, Mr. Thongsay testified (in translation) in the course of cross-examination as follows:

> The press release broadcasted by Asean Union, they did not present to the board of director and they do not present it to our SEZ management, so it is beyond our jurisdiction and it not official document for government to be recognised on. (Transcript, April 13, 2015, p. 139, ll. 2-7)
>
> * * *
>
> In fact, I have not contacted with Asean Union, because Asean Union, they are not the partner of the government. (Transcript, April 13, 2015, p. 137, ll. 5-12)

74. Mr. Thongsay's attitude (and the Tribunal has no reason to doubt his description of the process) was simply that if the "private" partners brought forward a project, it would be processed in accordance with Government requirements.

75. It is to be noted that on 28 June 2013, a year before the events in question here, a Directive was issued to all SEZs confirming that they had no authority to licence new casinos.

> There must not be any authorization for establishment of casino or gambling related activities in the Special Economic Zones except for the agreements that have already been signed with the Government.[34]

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[33] Witness Statement of Madam Bouatha, 2 April 2015, para. 14

[34] Laos Ex. 11, 28 June 2013. Letter from Deputy Standing Head of SEZs to the Senior Management/Board of Directors of SEZs

The Claimant points out that this Directive did not purport to preclude the Prime Minister's office from granting permission. On the other hand, the bureaucratic road to the Prime Minister's office lies through Madam Bouatha, who testified that no application for a casino was made by or on behalf of the developers of Site A. There is no evidence of anyone following a different path to the Prime Minister's office and the Tribunal cannot proceed on the basis of Mr. Baldwin's unsupported speculation and innuendo that some such "unofficial" approach *may* have been made.

(ii) No Board of Directors Meeting of Savan City Was Called to Authorize the Signing of the 2014 Agreements

76. The evidence is that the Savan City Board of Directors never met to consider any of the three 2014 development agreements. The testimony (in translation) of Mr. Thongsay was as follows:

> "… signing of such contract have not communicated and channelled through the board of director of the company, and it is not approved by the Government. So it makes it just only signing among the private sector".[35]

77. The Claimant suggests that while the Government was formally in a minority position in terms of shares and board representation, in reality its influence as Government would prevail at the Board level on any "major issue". This may be so, but the evidence is clear and uncontradicted that no Board of Directors meeting took place.

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[35] Transcript, 13 April 2015, p. 133, ll 4-8

78. Counsel for the Claimant conceded that it is obvious that Board approval was required to authorize the three Asean Union agreements.[36] The Tribunal agrees. The requirement in the *2007 Savan City PDA* was that a meeting of the Board is to be called "on any major issues" and that the representatives from both parties "shall attend" and decisions "shall be made on the consensus principle". Moreover, as stated, the Board had the right and duty to consider and approve investment plans of the Company. On the evidence, then, corporate approval was required and no corporate approval was given.

79. The Claimant's argument was that either a meeting of the Savan City Board was in fact held as required and approval was in fact given to the Asean Union Agreements, and therefore that the Government witnesses were lying, or that in Laos corporations operate freely outside the framework of their governing laws. The more plausible conclusion,

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[36] Counsel for the Claimant submitted:

> It's in this context also that you have to consider the question of whether or not there was board approval. You have heard Lao's witnesses repeat many times that there was not board approval, that there hadn't been a meeting in years and therefore all these government representatives on the board had never seen the agreements and did not know what the project was all about. That is why they have to deny that there was any board approval.
>
> Well, we also saw and you saw yesterday, Mr. Thongsay confirmed and Mr. Khanpheth confirmed that the board of directors has to approve any major agreements. You saw that in the 2007 agreement in Article 6, you also saw in Article 10 that any hiring of a contractor had to be informed and bringing in of a new partner had to be approved.
>
> It is impossible to believe that the three agreements that bound Savan City to this project, and that realized the goals of Savan City - - these were binding agreements, these were not MOUs - - that those binding agreements are not operative agreements that had to be approved by the board of directors. The language of Article 6 in that 2007 agreement, which both sides agree is the operative document, made that clear.

(Submissions, 14 April 2015, p. 162, l 7 to p. 163, l. 6)

however, is that no meeting of Directors was held, no approval was given, and the Asean Union Agreements were unauthorized by the Savan City corporation.

(iii) There is no Evidence that Officials in the Prime Minister's Office Received Any Application for the Approval and Grant of Permission for a Rival Casino

80. The evidence of Madam Bouatha was that the approval for any new casinos licences would have to be decided at "a meeting" of the Prime Minister and Deputy Prime Minister. Such applications would be processed through her office as well as the Ministry of Planning and Investment.[37] She testified that no such applications were ever made with respect to Savan City.[38] The Tribunal has no reason to disbelieve her testimony.

VI. INTERNATIONAL LAW PRINCIPLES OF STATE ATTRIBUTION DO NOT IMPOSE LIABILITY ON THE GOVERNMENT

81. It is clear that a minority shareholding in a corporation is not sufficient in international law (as well as domestic law), of itself, to attribute the acts of a corporation to its shareholders. The result is no different where the minority shareholder is a Government. Professor (now Judge) James Crawford's *Commentary* on Article 8 of The International Law Commission text so states:[39]

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[37] Ibid., p. 124, l. 22

[38] Transcript, 13 April, 2015, p. 110, l. 16, p. 118, ll. 12-15

[39] See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 112-113 (Cambridge University Press 2002). See also *Gustav F W Hamester GmbH & Co KG v. Ghana*, (ICSID Case No. ARB/11/28), Award (March 10 2014); *EDF (Services) Limited v. Romania*, (ICSID Case No. ARB/05/13), Award (Oct. 8, 2009) at para 190-200; *Jan de Nul N.V. Dredging International N.V. v. Egypt*, (ICSID Case No. ARB/04/13), Award (Nov. 6, 2008) at para. 157; *Bayindir Insaat Turizm Ticaret vs Sanayi A.S. v. Pakistan*, (ICSID Case No. ARB/03/29), Award (Aug. 27, 2009) at paras. 119-25

> In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.

There is no evidence that Savan City was engaged in "fraud or evasion".

82. Of course, corporate acts may be attributed to the Government if the Government directs and controls the corporation's activities,[40] particularly if such control is exercised in relation to the subject matter of the dispute,[41] Article 8 stands in part for the proposition that:

> where there was evidence … that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.

However, there is no evidence of such direction or control in this case. On the contrary, both Madam Bouatha of the SEZ Secretariat, and Mr. Chanchai representing the private developers of Savan City, testified to the contrary, and both were present and cross-examined on this point at the Singapore hearing.

83. Madam Bouatha testified in her written witness statement:

> "I can state with personal knowledge that the Government has not had any input much less control over the Savan City project for many years. Mr. Chanchai was not able to raise any money and there were no decisions to make. There was silence from him. The Government was not involved in any way in the

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[40] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua)*, 1986 I.C.J. 14 (June 27), at para. 17; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (Feb. 26, 2007) at paras. 396-415

[41] *Jan de Nul*, *supra* note 39 at para. 173

> negotiations or plans Mr. Chanchai made with Asean Union that were announced in 2014."[42]

84. Mr. Chanchai made an equivalent written statement:

> "No Government official has had any involvement in design or engineering proposals I developed or SV Leasing developed over the past eight years to help me try to raise money to develop Site A. No Government official has had any involvement in developing websites for the company. No design plans I or others developed and the websites were never submitted to the Board or any Government agency or department for information or approval".[43]

85. Counsel for the Claimant in cross-examination expressed scepticism to both witnesses about the source of the drafting of their witness statements but there was no onus on the Government to establish that approval was *not* given. The onus was on the Claimant to establish on a balance of probabilities that approval *was* given. In any event the denials of Madam Bouatha and Mr. Chanchai were not shaken in cross-examination.

VII. THE CLAIMANT'S THEORY OF A "TACIT" APPROVAL AND GRANT

86. Counsel for the Claimant advanced an alternate theory that even if there was no "approval and grant" of permission to a rival casino, the political culture in Laos is such that powerful people and those under their protection may operate businesses under tacit or "unofficial" permission. Thus, according to the Claimant, an inference of permission should be drawn against the Government based on the informality of local practice. The

[42] Witness Statement of Madam Bouatha dated 2 April 2015, at para. 14

[43] Witness Statement of Chanchai Jaturaphagorn, 3 April 2015, at para. 5

Claimant's evolving Submission on this aspect of the "attribution" issue is made in its 8 April 2015 Submission as follows:

> Claimant has not alleged, and does not allege, that Savan City is a state entity whose action "is in law an action by the Government." Claimant's case does not hinge on proving that the Government itself is responsible for Savan City's actions, including the content of its website. The point is rather that it is not credible to suggest that a company in which the Lao Government holds a significant shareholding, and enjoys a significant corporate governance presence, could have publicized that it would build a casino to future investors, and entered into a joint venture agreement to build a casino, without the Government at the very least knowing and approving of these facts. [para. 50] (emphasis added)

87. This position was supported by the evidence of the Claimant's principal, Mr. John Baldwin, as follows:

> While Laos's assertions that it has not granted a competing license might literally be true, my years of experience tell me that Laos must have at least tacitly approved a competing casino project in Savan City. As I stated previously, no developer begins to market a development to investors without at least some assurance that it has permission to build what it is marketing.[44]

The "prudent promoter" argument has already been dealt with. As to "tacit approval", the Claimant relied heavily on the existence of unlicensed slot club(s) owned by a Laotian citizen, Madam Kozy. In her case, the Claimant argues, Government approval consisted of no more than a wink and a nod, or simply looking the other way and ignoring her illegal use.

88. The Tribunal does not agree that based on Madam Kozy's situation the words "approve and grant" in Article 9(24) of the *2007 Sanum PDA* can be interpreted so loosely.

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[44] Witness Statement of John Baldwin, 27 March 2015 at para. 4

89. It seems that Madam Kozy had a relatively modest slot club operating before the signing of the *Savan Vegas PDA* in August 2007[45]. The Claimant suggests that Madam Kozy recently opened another club near the Friendship Bridge. The evidence on this point is unclear.[46] The Claimant also alleges that the Government drew the boundaries of the SEZ around Madam Kozy's operations so that the Government could continue to say (disingenuously) that there were no casinos permitted in the SEZs. Madam Kozy and her business partner were well connected socially and politically.

90. The Tribunal is prepared to assume that if Madam Kozy had formal licences for her slot club(s), the Government would have produced them (as requested) in this arbitration. The Tribunal concludes that no such formal licence(s) exist.

91. Madam Kozy's operation may or may not be evidence of discrimination or differential treatment. It seems the Government was prepared to shape the SEZ boundary to leave her gambling operations outside.[47] However, the fact that the Government has not shut down the slot club operations of Madam Kozy, which do not include a full service casino, is not of sufficient weight to persuade the Tribunal that the words "approve and grant" in Article 9(24) of the *2007 Savan Vegas Agreement* can be stretched out of shape because of alleged nods, winks and the single established instance of a non-compliant slot club operator (Madam Kozy). The fact that the Government may have turned a blind eye

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[45] Evidence of John Baldwin, 14 April 2015 at p. 16, ll 3-15

[46] Evidence of John Baldwin, 14 April 2015, p. 15, ll 4-7

[47] Madam Bouatha, Transcript, 13 April 2015, p. 108, l. 5 to 108 l. 7

to a relatively small slot machine operation or two does not mean that there is no formal casino approval process in place or that Article 9(24) refers to something other than a formal "approve and grant" process. Mr. Baldwin, the principal of the Claimant, and the source of the "tacit" approval theory, acknowledged that indeed a formal licencing system was in place.

> Q. Who in Laos has the authority to approve a casino licence?
>
> A. Officially or unofficially?
>
> Q. You mean there's an unofficial chain of command in the government of Laos?
>
> A. You have a 11-member politburo who are always trading favours between each other. If any one of them wants a casino licence and is willing to trade with the others for other things they want, a casino licence will appear. The president of the country who is also – would be able to grant a licence if he wished. The head of the party, if he wished to, I believe would be able to.
>
> Q. Who had the official authority in the government of Laos to grant a casino licence?
>
> A. It's been – I have been told, although I don't have proof of this, that the prime minister must grant casino licences.
>
> Q. That is the official position of the government? The prime minister is the only authority in the country who can grant a casino licence?
>
> A. Yes. That is what I have been told.
>
> (Transcript, April 14, 2015, pp 38-39) (emphasis added)

92. It seems therefore that the ability of powerful political interests to "get their way" is not inconsistent with the requirement of formal approval and grant of a casino license. The argument that certain people may be able to obtain such a license despite the general prohibition does not mean the need for such a license would be dispensed with. It seems obvious a major investor, particularly a foreign investor, would want a

formal written licence before making a major investment in Laotian gambling facilities, as did Sanum itself in 2007.

93. It should be noted that the Government's tolerance of Madam Kozy's slot club(s) is not put forward as an independent ground of complaint in the Claimant's Material Breach Application.

VIII. THE GOVERNMENT IS ENTITLED TO RELY ON THE 45 DAY "CURE" PERIOD PROVIDED IN ARTICLE 32

94. Even if it were established that the Government had approved and granted permission for a casino to operate in Site A with a wink or a nod on or before receipt of the Claimant's Notice of Breach on 27 June 2014, the Government had a contractual right to cure the breach within 45-days of receipt of such Notice and if it did so, there can be no revival of the ICSID arbitration.

95. Madam Bouatha testified that when she learned of the Claimant's complaint that permission had been granted for a Site A casino, she summonsed Mr. Thongsay, Mr. Chanchai and a representative of the ASEAN Union, Mr. Ellingham to a meeting on 2 July 2014, and made it clear that "only the Prime Minister" had the authority to approve.[48] She says that she was assured that there would be no casino in the Site A development.

96. Madam Bouatha instructed Savan City and Asean Union to contact *The Nation* and at least one other publication to correct the published misinformation about the plan for a

[48] Transcript, 13 April 2015, page 110

casino. This was done although it appears the demands made no specific reference to the casino.

97. Mr. Khanpheth Viraphondet, a senior legal advisor to the Government was dispatched to Savannakhet by the Prime Minister's office[49] to investigate. He met with representatives of Savan City and local officials on 4 August and 5 August 2014. Mr. Khanpheth testified that his investigation confirmed that the Savan City Board had not met and that no approval was granted or purportedly granted by the local SEZ Authority or any other Government entity or official. His evidence was not weakened on cross-examination.

98. The Tribunal is satisfied that the Government did respond promptly to the 26 June 2014 misreporting in the media about a rival casino and made it clear to the private developers in Savan City that no permission for a casino had been or would be approved or granted.

99. The Claimant contends that the post 26 June 2014 conduct of the Government was not sufficient to cure the damage done. The Government's action amounted to shutting the barn door after the horse had left the stable. Prospective purchasers would already have lost confidence in the promises of the Government, and even more effective remedial action would have been futile. The breach, the Claimant says, was incurable.

[49] Transcript, 13 April 2015, p. 72, ll. 15-25

100. The Tribunal does not accept the Claimant's argument that a misleading article in a Thai newspaper and subsequent and related postings inflicted such destruction on the value or marketability of Savan Vegas as to make the so-called breach incurable. Newspapers are known to most people to make mistakes. Blogs sometimes privilege speed over accuracy. The Government moved promptly to clarify its prohibition to the Savan City promoters. In any event, the evidence of Greg Bousquette, a merchant banker well versed in the gambling industry,[50] who was contacted by Mr. Baldwin following the Settlement, affirmed that "it is key that Buyers have comfort that they will get a monopoly signed off on at the highest levels of the Lao government."[51] (emphasis added) Serious buyers would not be put off by cyber-gossip.

101. The Tribunal accepts the evidence of the Government's expert, Mr. Govinda Singh, a principal at BDO. In Mr. Singh's opinion:

> … no investor would only consider a newspaper article. If an announcement is made which is not consistent with the market's understanding of the agreements in place, an investor would seek to understand the issues by undertaking further investigations.

Such "further investigations" would have demonstrated that permission had not been "approved and granted" for a rival casino, and that the Government had procedures in place to prevent permission for a casino without authority from a "meeting" of the Prime Minister and Deputy Prime Minister, which on the evidence was not initiated. Mr. Singh

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[50] Evidence of John Baldwin, 14 April 2015 at p. 49, l 22 to p. 50, l. 16

[51] C-856, Email from John Baldwin, dated 20 June 2014

was available in Singapore to be cross-examined but the Claimant elected not to cross-examine him.

102. In order to find the Government liable for what the Claimant regards as an in-sufficiently public Government denunciation of reports and blogs about the "rival casino", the Claimant must identify some source of a legal obligation on the part of the Government to do so. In the Tribunal's view, the Government did not, as a term of the Settlement, assume any undertaking, directly or indirectly, to respond publicly to misleading statements about Savan City in the media, blogs or websites. The Settlement obligation to complete the sale "on a basis that will maximize Sale proceeds" (Article 13) does not go so far, nor is such a positive obligation imported into the Settlement by the duty of good faith performance under New York law.[52] Assuming for the sake of argument the interpretation of the Settlement most favourable to the Claimant, its case put at its highest is that the Government was obligated to respect Sanum's monopoly. On the evidence, the Government did so.

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[52] Counsel for the Claimant put this aspect of his argument as follows:

> Q. Where do you ground that obligation to speak up?
>
> Mr. Rivkin: it's grounded in the obligation of good faith and fair dealing which is in every New York law contract. It is also grounded in the specific provision of the deed that says they are going to work with us to maximize the sale proceeds, and it's grounded in the way all of the provisions of the deed of settlement work together, including this provision, and the clear purpose of Article 6 and the restating of the monopoly provision was what I have described to you earlier, is letting the market know that you can trust Lao with respect to this; you can have a higher degree of trust anyway with respect to that, and so it's based on that..
>
> (Submission 14 April 2015, p. 166, l. 14 to p. 167, l. 3)

103. To the extent such misleading statements in the media and cyberspace might chill potential purchasers, such purchasers would, as Mr. Singh testified, have looked into the monopoly issue and verified the facts with senior Government officials. Upon inquiry they would have been told what Mr. Chanchai and Mr. Ellington were told. No rival casino had or would be approved.

104. The Tribunal's conclusions do not ignore Mr. Baldwin's evidence about the risk of powerful people in Laos getting their way at some future date and obtaining permission for rival gambling facilities (albeit such conduct could expose the Government to a claim for substantial damages by Sanum under s. 9 (24) of the *2014 Sanum Agreement*). However, the Tribunal is not tasked with speculation about what might happen in the future. In the Tribunal's view, the Government's default, if there was any default in June 2014 or otherwise as alleged by the Claimant, was cured within the 45 days permitted by the Settlement.

IX. THE PROPER INTERPRETATION OF ARTICLE 6 OF THE DEED OF SETTLEMENT

105. In its interim ruling of 19 December 2014, the Tribunal identified two potential interpretations of Article 6, one of which favoured the Claimant and the other, had it been adopted, favoured the Government.

106. In view of the Tribunal's conclusions on the facts, it is not necessary to revisit the issue of contract interpretation, which is no longer of practical significance.

X. DISPOSITION OF THE APPLICATION FOR PROVISIONAL MEASURES

107. The Tribunal deferred to the April 13/14, 2015 Singapore hearing the Claimant's Application for a Provisional Measures Order (PMO) to preserve the *status quo* against potential Government action between the date of the April hearing and the issuance of a final award.

108. By order dated 14 April 2015, having heard the evidence, the Tribunal dismissed the PMO Application for reasons to follow. The reasons are as follows.

109. As the Tribunal noted in its Provisional Measures Order of 17 September 2013, a PMO is only available when the following conditions are met (1) *prima facie* jurisdiction; (2) *prima facie* establishment of the right to the relief sought; (3) urgency; (4) imminent danger of serious prejudice (necessity); and (5) proportionality.[53] Each of these components except for (2) was met in this instance.

110. With respect to condition (2) however, the Tribunal was satisfied at the conclusion of the evidence on 14 April, after deliberation, that the Claimant had not established even a *prima facie* right to the relief sought.

111. The Claimant's application for a PMO was therefore dismissed.

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[53] See also *Paushok v. Government of Mongolia*, Order on Interim Measures at para. 45 (UNCITRAL Sept. 2, 2009).

> "[F]ive standards have to be met"… (1) *prima facie* jurisdiction. (2) *prima facie* establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality."

XI. DECISION ON THE MERITS OF THE MATERIAL BREACH APPLICATION

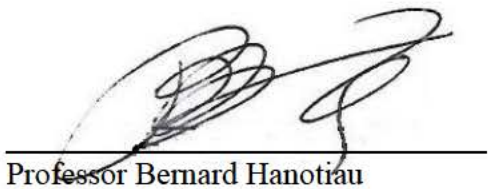
112. For the foregoing reasons the Claimant's Material Breach Application pursuant to Article 32 of the Deed of Settlement dated 15 June 2014 as clarified by the Side Letter dated 18 June 2014 is dismissed.

XII. DISPOSITION OF COSTS

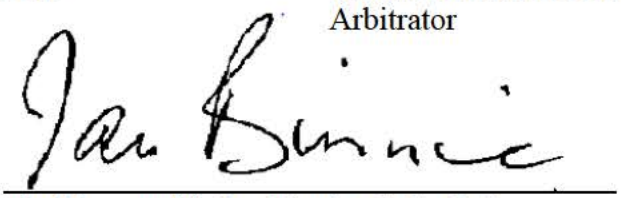
113. The Claimant will be ordered to pay the Respondent Government's costs of the arbitration. If the parties can agree on an appropriate amount, the said amount will be incorporated in the Tribunal's Award. If no agreement on costs is reached, the Respondent Government is to make its submission on costs to the Tribunal within 60 days of this date. The Claimant will have 30 days from the filing of that submission to reply to it. The Respondent will have 30 days from the filing of the Claimant's Reply to make its response. The Tribunal will then proceed to make its Award under Article 52 of the *Arbitration* (*Additional Facility*) *Rules* of ICSID incorporating both the reasons herein on the merits and its disposition of costs.

Made in Washington, DC.

Professor Brigitte Stern
Arbitrator



Professor Bernard Hanotiau
Arbitrator



The Honourable Ian Binnie, C.C., Q.C.
President