INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceeding between

LAO HOLDINGS N.V.

Claimant

and

THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

Respondent

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

RULING ON MOTION TO AMEND THE PROVISIONAL MEASURES ORDER

Members of the Tribunal

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

Professor Bernard Hanotiau

Professor Brigitte Stern

Secretary of the Tribunal

Mrs. Anneliese Fleckenstein

I. FACTUAL AND PROCEDURAL ASPECTS

The relief requested: The application is for the modification not the original making of a provisional measures order

1 The Respondent Government of the Lao People's Democratic Republic (herein referred to as the "Respondent" or the "Respondent Government") seeks amendment to the Provisional Measures Order ("PMO") dated September 17, 2013 in respect of the prohibition "against taking any steps that would alter the *status quo ante* or aggravate the dispute." The requested modification would permit the Respondent to further its criminal investigation into alleged illegal conduct by employees of the Claimant, as well as the alleged corruption of officials of the Respondent Government connected with the investments that are the subject matter of the arbitration. The modification request, as redrafted by the Respondent at the hearing of this application on 12 May 2014, is the following:

> *Respondent shall be permitted to investigate criminal activity by:*
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> *(1) Obtaining relevant documents in Laos;*
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> *(2) Interviewing and deposing potential witnesses; and*
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> *(3) Seeking assistance from the government and courts of the United States or other countries or international organizations in connection with those activities;*
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> *Provided that:*
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> *(1) Opposing counsel will be provided notice and invited to attend any interview or deposition of a potential witness; and*
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> *(2) Respondent will provide to claimant's counsel copies of all documents it obtains pursuant to this authority;*
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> *And further provided that, prior to the hearing on the merits:*
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> *(3) Respondent will not attempt to interview or otherwise contact any current Sanum or Savan Vegas employee;*

(4) *Respondent will not seize any records from Sanum or Savan Vegas in Laos.*

And further provided that:

Respondent shall not prohibit claimant from transferring funds outside Laos provided that claimant uses Laos banks or otherwise complies with Laos banking laws.

The subject matter of the arbitration

2 The Claimant investor contends that the Respondent has through confiscatory taxation and other measures contrary to its treaty obligations effectively expropriated the Claimant's investment in gambling and related businesses located in Laos. The investments were made through affiliated corporations, including Sanum Investments Ltd., and pursuant to a joint venture agreement with ST, a Laotian company owned by Laotian nationals. The joint venture resulted in three major projects, The Savan Vegas Hotel and Casino ("Savan Vegas"), The Paksong Vegas Hotel and Casino ("Paksong Vegas") and a third enterprise that invested in slot machine clubs in at least three locations in Laos, namely Thanaleng, Lao Bao and the Ferry Terminal. The Claimant values its loss at hundreds of millions of dollars. In addition to denying any *de facto* expropriation or other unfair or improper conduct, the Respondent now asserts in its Counter-Memorial and Counterclaim, dated 20 February 2014, that the Claimant's investment is tainted by bribery, embezzlement and money-laundering.

3 The Respondent's motion to vary the PMO was launched on February 20, 2014. In the intervening weeks the allegations and cross-allegations of serious misconduct have multiplied. The hearing on the merits of this arbitration is scheduled to commence in Singapore on 17 June 2014. The parties are in the midst of trial preparation.

4 The Tribunal dismisses the application for the following reasons:

In the Tribunal's view, once the Respondent had formally put in issue the allegations of illegal conduct by or on behalf of the Claimant, the alleged "illegalities" became part of the "dispute" before this Tribunal. The Respondent has not established the

requisite ground on which to modify the existing PMO to allow it to pursue concurrent criminal proceedings arising out of the same facts and at the same time as the arbitration. In particular:

i. the Respondent, prior to the making of the PMO, advised the Tribunal that "Lao Court proceedings to hold Claimant to account for $20 million in back taxes and the investigation into money laundering have been stayed due to this arbitration, because the Government has made conciliatory efforts to allow the arbitration process to proceed in an environment conducive to timely action by the Tribunal." (E-mail dated 28 August 2013) (emphasis added);

ii. the Respondent, based on its "conciliatory" position, consented to the provision in the PMO "against taking any steps that would alter the *status quo ante* or aggravate the dispute;"

iii. criminal proceedings launched in the midst of final preparations for the arbitration, and running concurrently with the hearing would considerably broaden and aggravate the dispute between the parties, in threatening the integrity of the arbitral process; and

iv. the Respondent has not established a change of circumstances sufficient to justify its proposed modification of the PMO or the necessity and urgency for so doing on the eve of the merits hearing.

The factual basis for the present application to modify the Provisional Measures Order

5 The Respondent says it has "unearthed substantial evidence of violations of Laotian criminal law by the Claimant and its ultimate owners, John Baldwin and Shawn Scott" and some of their employees and agents. [*Motion to Amend PMO*, 20 February 2014 at para. 4] The principal allegations of criminal conduct include:

i. bribery of an unidentified official of the Respondent Government to terminate an ongoing government-ordered audit of Savan Vegas Casino by Ernst & Young ("E&Y") on 10 July 2012. According to the Respondent:

> The bribe stopping the audit has deprived the [Respondent] of a conclusive opinion from E&Y... if the audit had been completed, E&Y would have concluded that Sanum had embezzled substantial sums from its Sanum Vegas operations and engaged in pervasive money laundering. [*Motion to Amend PMO*, 20 February 2014 at paras. 34-35]

The Claimant denies having tried to stop the audit. On the contrary, it points to communications protesting its premature termination. Moreover, an internal E&Y memo dated 25 September 2012 reports that the Respondent Government "is not happy with our [E&Y] report due to the report does not support MOF [Ministry of Finance] on the law sue [suit] (sic)" [Exhibit C-483.];

ii. an allegation of potential bribery (the "documents raise questions") of an official in the Respondent's Ministry of Finance, Ms. Manivone Insisiengmai, to support and promote an extension of the Flat Tax Agreement between the Claimant and the Respondent otherwise due to expire on 31 December 2013. The Claimant denies the allegation. The Flat Tax Agreement was not extended. The failure to extend it is one of the Claimant's complaints in the arbitration;

iii. attempted corruption of a former Prime Minister with a "cash bribe of $7 million" to obtain permission to open a casino in the capital city, Vientiane (*Motion to Amend PMO*, 20 February 2014, para. 50). The Claimant denies any such attempt, points out that permission for its proposal was denied, and explains that the $7 million letter was sent to satisfy the standard requirement that proposed investors provide the government with evidence of sufficient financial strength to implement their development proposals;

iv. various other amounts of cash the Respondent says were paid by the Claimant directly or through intermediaries to bribe government officials. In some cases, the basis of the allegation is an entry in a general ledger disclosed in the previously mentioned E&Y report of 20 July 2012. The Claimant acknowledges the payments shown on the general ledger of Savan Vegas were made but says Laos is a "cash economy" and the payments were legitimate fees for consulting or other services and were retained, as intended, by the identified recipients for their own benefit.

v. it is further alleged that the Claimant engaged in a "massive scheme of money laundering depositing $21 million into Thai banks in 2011 alone." [*Motion to Amend PMO*, 20 February 2014, para. 68]. The Claimant denies money laundering and says deposits in Thai banks were legitimate receipts in Thai currency from Thai "junket operators" or other Thai businesses and gamblers;

vi. the Respondent contends that the Claimant's casino records produced to E&Y in 2012, including the general ledgers from 2009, 2010 and 2011, show "a clear pattern of embezzlement." [*Motion to Amend PMO,* para. 73] Moreover "there is also evidence that illegal transfers were made from Savan Vegas to Baldwin's and Scott's two new

businesses in Cambodia." [*Motion to Amend PMO*, para. 80] The Claimant denies embezzlement and says the recorded "transfers" were perfectly legitimate inter-corporate transactions.

6 In summary, the Respondent alleges serious potential criminal behaviour by or on behalf of the Claimant in relation to Respondent government officials. The Claimant does not dispute the payments to which it was a party, but offers a different explanation of their purpose. It says the recipients were not "intermediaries" and that it will establish the truth of its position at the Singapore merits hearing.

7 The Claimant denies unlawful activity. No corruption. No money laundering. No embezzlement. Its position is that the Respondent is simply seeking improperly to use its criminal law machinery to collect evidence on the eve of the June arbitration hearing to advance its defence on the merits in the current arbitral proceeding.

II. THE TRIBUNAL'S ANALYSIS

The authority to modify provisional measures and the scope of such authority

8 There is no doubt that the Tribunal has the authority to modify a decision on provisional measures. This is stated in ICSID Additional Facility Rules, Article 46(1): "Unless the arbitration agreement otherwise provides, either party may *at any time* during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal." (Emphasis added).

9 Such a modification has to be based on changed circumstances, which make it urgent and necessary to adopt a new decision on provisional measures, which can suspend, terminate or modify the scope of the provisional measures initially granted.

The burden of proof

10 The Respondent contends that a Claimant must overcome a "particularly high threshold" before a criminal investigation may be enjoined. [Resp. Reply para. 47] In this case however the PMO agreed to by the Respondent, already enjoins conduct disruptive of

the *status quo ante*, to protect the integrity of the arbitration. As mentioned, the Respondent consented to the non-aggravation provision, notwithstanding its expressed concern about money laundering and embezzlement. It is therefore incumbent on the Respondent to establish a change of circumstances sufficient to justify its proposed modification, as well as the necessity and urgency for so doing on the eve of the merits hearing.

The rights to be preserved by the granting or modification of provisional measures

11 It is the Tribunal's view that the rights which may form the basis for a recommendation of provisional measures or a modification of such by an ICSID tribunal are not to be limited to the rights which form the subject matter of the dispute before the Tribunal on the merits. Other rights relating to the dispute, among them procedural rights, can also be protected by provisional measures. However, it has to be emphasized that not every right a Claimant considers to be in danger can be protected through provisional measures. To be so protected, the right must be related to the dispute. As emphasized by the tribunal in *Plama Consortium Ltd. v. Bulgaria*, if rights other than those forming the very subject matter of the dispute in the arbitration are invoked as requiring protection, those rights must nonetheless relate to the specific dispute before the arbitral tribunal, and to the claims made and relief sought therein:

> "The rights to be preserved ... may be general rights, such as the rights to due process or the **right not to have the dispute aggravated**, but those general rights must be **related to the specific disputes in arbitration**, which, in turn, are defined by the Claimant's claims and requests for relief to date."[1]

12 The right which is at stake in this request for a modification of the initial provisional measures are the rights to the *status quo ante* and to the non-aggravation of the dispute. As stated by the Tribunal in *Burlington v. Ecuador*, these latter rights are self-standing rights.[2]

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[1] *Plama Consortium v. Bulgaria,* .ICSID Case No. ARB/03/24, Order on Provisional Measures, Sept. 6, 2005, at para. 40.

[2] *Burlington v. Ecuador,* Procedural Order No. 1 of 29 June 2009, para. 60.

13 More precisely, in general, provisional measures, when granted as measures necessary to prevent the aggravation of the dispute, have concerned the behaviour of the parties in dispute, whether they were measures necessary to maintain – or restore – peace between the parties, or to prevent one party from starting or pursuing other litigation, for example in the national courts, that could directly undermine the international proceedings. As stated in Procedural Order No. 3 in *Biwater Gauff v. Tanzania*:

> It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might **(1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute.** [...] Both concerns have a number of aspects, which can be articulated in various ways, such as the need to:
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> -- preserve the Tribunal's mission and mandate to determine finally the issues between the parties;
> -- preserve the proper functioning of the dispute settlement procedure;
> -- preserve and promote a relationship of trust and confidence between the parties;
> -- ensure the orderly unfolding of the arbitration process;
> -- ensure a level playing field;
> -- minimise the scope for any external pressure on any party, witness, expert or other participant in the process;
> -- avoid "trial by media."[3]

14 The issue here, however, is whether the right to the non-aggravation of the dispute set out in the PMO, prevented the Respondent from pursuing the intended criminal investigation whether at the time of the issuance of the PMO or now on the eve of the merits hearing. As will appear below, the answer was not the same in September 2013 as it became in February 2014: initially, the general rule that a State ought not to be prevented from enforcing its criminal law in the usual way applied. However, at the time the present Motion to Amend the PMO was made, events related to the conduct of the Respondent had developed to the point where, exceptionally, the initiation of a criminal investigation would so seriously disturb the *status quo ante* as to threaten the integrity of the arbitral process.

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[3] *Biwater Gauff v. Tanzania,* ICSID Case ARB05/22, Procedural Order No.3, 29 Sept. 2006, at para. 135. Emphasis added.

The principle of non-aggravation of the dispute and its relation with the launching of a criminal procedure

15 The Respondent readily acknowledges the fundamental principle that the *status quo ante* should be protected while the arbitration proceeds, so that the dispute is not aggravated. Accordingly, while the PMO was made after a proceeding that was protracted and contested on some issues, the Respondent consented to para. 30(5) which enjoined "both parties from taking any steps that would alter the *status quo ante*, or aggravate the dispute." The "non-aggravation" clause agreed to by the parties reflects the more elaborate formulation of the principle in *Tokios Tokelés v. Ukraine*, Case No. ARB/02/18, Order No. 1, para 2 (ICSID, 1 July 2003):

> … parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, and in general refrain from any action of any kind which might aggravate or extend the dispute or render its resolution more difficult.

16 In the making of the PMO dated 17 September 2013, the Tribunal satisfied itself, as it was required to do, that in the absence of such an order there was "a real and imminent risk that irreparable prejudice may be caused to the rights in dispute" before a decision could be given on the merits: *Belgium v. Senegal, Provisional Measures, Order* of 28 May 2009, I.C.J. Reports 2009, pp. 152-153, para. 62. However, the possibility of a criminal investigation was not specifically addressed at the PMO hearing on 2 September 2013 or in the PMO as issued.

17 The Tribunal wishes to make it clear that the PMO did not, and could not in such general terms inhibit the Respondent's anti-corruption drive. The criminal laws of the Respondent prohibit bribery, embezzlement and money laundering. Finance Minister Phouphet in a statement filed with the Tribunal, advised that Laos is a party to the *United Nations Convention Against Corruption* and is committed to its enforcement. The PMO did not purport to inhibit the Respondent from investigating the possible corruption of its own officials or others doing business with government.

18 The Tribunal considers it necessary here to restate the principles applicable to the relations between an ICSID arbitration and local court proceedings, be they civil or criminal.

19 The Tribunal recalls that there is a right to the exclusive jurisdiction of ICSID, once an ICSID arbitration is started, as was clearly expressed by the tribunal in *Tokios Tokelés v. Ukraine*, which stated:

> "Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative." [4]

20 A similar view was expressed by the ICSID tribunal in *Plama Consortium Ltd. v. Bulgaria*:

> "Provisional measures are appropriate to preserve the exclusivity of ICSID arbitration to the exclusion of local administrative or judicial remedies as prescribed in Article 26 of the ICSID Convention. They are also appropriate to prevent parties from taking measures capable of having prejudicial effect on the rendering of an eventual award [...]."[5]

21 This rule however applies only to civil proceedings having the same parties and same subject matter as the arbitral proceeding and does not concern criminal procedures. The ICSID Convention extends only to investment disputes. In this case, the criminal provisions at issue are not *ad hoc* measures aimed at influencing the outcome of the dispute but the ordinary criminal laws of general application prohibiting bribery, corruption, money laundering and embezzlement. Issues of such criminal liability by definition fall outside the scope of the Centre's jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT imposes a prohibition on a State that enjoins it from exercising criminal jurisdiction over such matters. In particular, they do not exempt suspected criminals from investigation or prosecution by virtue of their being investors. The Tribunal rejects any suggestion that ordinary domestic criminal law of general application was intended to be or

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[4] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, at para. 7.
[5] *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No ARB/03/24, Order, 6 Sept. 2005 at para. 38.

is constrained by the initiation of ICSID proceedings under the BIT. As expressed by the Respondent, "[a]n arbitration clause is not a license for general lawlessness."[6]

22 This has been recently confirmed in *Abaclat v. The Argentine Republic*, where the panel wrote that an "Arbitral Tribunal can in principle not prohibit a Party from conducting criminal court proceedings before competent state authorities."[7]

23 Therefore, the Tribunal agrees in principle with the Respondent's assertion of its sovereign right to pursue a criminal investigation both within Laos as well as invoking the assistance of other states, but, as will be mentioned below, the facts here are unusual given the history of the dispute and the Respondent's belated application to involve the prosecutors and police at a time of final trial preparation for the arbitration. The Tribunal takes note with satisfaction of the Statement of Mr Phouphet Khamphounvong, Minister of Finance of Laos:

> The Government has struggled for many years to improve the investment climate for foreign investment ... The Government is a party to and has ratified the United Nations Convention Against Corruption.
>
> Domestically, the Government has enacted laws to make bribery, money laundering and embezzlement criminal offenses.
>
> It is necessary that the Sovereign be allowed to investigate criminal activity under its criminal laws and to utilize assistance of the United States under the United Nations Convention Against Corruption.

24 It is on this basis of a right of the State to enforce its criminal laws, that "Respondent submits that the facts stated above justify the Request made by Minister of Finance Phouphet to amend the decision of September 17, 2013 to allow the Government to initiate proper investigations into criminal conduct. That is a right and obligation of the Sovereign under its domestic laws and international treaties. The Laos-Netherlands BIT states in Article 2 that

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[6] Respondent's Reply in Support of its Motion to amend the decision on Provisional measures, para. 39.

[7] Case No. ARB/07/5, Procedural Order No. 13, paras 39, 45 (ICSID Sept. 27, 2012).

investments are made "subject to [Lao PRD] rights to exercise powers conferred by its laws or regulations . . . ."[8]

25 Laos has the sovereign power to prosecute conduct that may constitute a crime on its own territory if it has sufficient evidence to justify prosecution. Laos also has the power to investigate whether Claimants made their investments in Laos in accordance with the legal requirements of the laws of general application. However, such prosecutorial powers of course must be exercised in good faith and with due respect for Claimants' rights. In fact it is evident from some of the records placed before the Tribunal on this application, including the private bank records of a private Laotian citizen Mme Sengkeo obtained in or about January 2014, that the Respondent's investigation into potential unlawful conduct related to the Claimant's investment has been ongoing for some time despite the existence of the PMO: this was not in violation of the PMO because, as of the making of the PMO on 17 September 2013 "the dispute" referred to in the non-aggravation clause was the dispute with regard to the allegation that the government breached its treaty obligations, not the misconduct now alleged against the Claimant.

26 This general rule having been reaffirmed by the Tribunal, however, there are however a number of exceptional circumstances in this case which lead the Tribunal to depart from the general rule entitling a State to enforce on the national level its criminal laws. In particular, the Tribunal is satisfied on the evidence that the primary purpose for which the Respondent intends to use the powers of criminal investigation, at least in the first instance, is to collect evidence for use at the arbitration, which, in the result, will undermine the integrity of the arbitral process.

There is to-day a direct relationship between the proposed criminal investigation contemplated by the PMO modification and the arbitration proceeding

27 The Respondent's position is that while the criminal investigation may (or may not) generate sufficient evidence to initiate criminal charges, any evidence turned up by the

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[8] Respondent's Motion to Amend the Decision of September 17, 2013 on Provisional Measures, para. 85.

investigation of assistance to the Respondent's case in the arbitration will be so used. Respondent's counsel advised the Tribunal at the 12 May 2014 hearing that:

> ... if we got the information and it was relevant to the information, we could use it in the arbitration but some of it is not relevant to the arbitration. (Emphasis added, Transcript p. 25)
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> ***
>
> Now, for example, let's assume that we are able to take the deposition of Mr. Douglas and Mr. Kochel in the next month, well that information would be available to the Tribunal at the hearing. It would also be information available to the United States Department of Justice, and to the Laos Anti-Corruption Office. But they don't have to overlap. If they do, okay; if they don't, that's okay too. (Emphasis added, Transcript p. 27).

28 The Tribunal considers that through these statements, Laos has admitted that at least one of the objectives of the threatened criminal proceeding is to enable it to develop evidence that will serve as part of its defense in the present arbitration proceedings. As a consequence, there is no doubt that the criminal investigation intended by the Respondent is directed at precisely the conduct in respect of which it requires evidence to defend its claim in the arbitration and support its Counterclaim.[9]

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[9] Indeed, much of the language in the Respondent's *Motion to Amend* dated 20 February 2014, under the heading, "*Evidence of bribes and attempted bribes*" is faithfully reproduced in its Counter-Memorial of the same date under the heading "Claimant's Unlawful Acts of Bribery, Embezzlement and Money Laundering Warrant Dismissal of its Claims", as follows:

Respondent's Motion to Amend the Provisional Measures Order 20 February 2014	***Respondent's Counter-Memorial dated 20 February 2014***

29 This would however not necessarily be sufficient as a basis for enjoining a State to pursue a criminal case on its territory. As was stated by the tribunal in *Quiborax*, in a situation of the same type as the one encountered here:

> Thus, the Tribunal finds that the criminal proceedings initiated by Respondent do not threaten the exclusivity of the ICSID proceedings. Even if the criminal proceedings result in evidence that is later used by Respondent in this arbitration, that would not undermine the Tribunal's jurisdiction to resolve Claimants' claims, if such jurisdiction is established at the appropriate procedural instance. [§ 130]

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1. EVIDENCE OF BRIBES AND ATTEMPTED BRIBES

16. Bribery is a serious criminal offense under Lao Law. The Lao Penal Law specifically prohibits any person from "bribing or agreeing to bribe a civil servant." Persons who violate the law are subject to up to two years of imprisonment, plus a fine equal to the amount or value of the bribe, or – if the bribe was "substantial" –up to five years of imprisonment, plus a fine equal to twice the amount or value of the bribe. Under Lao law, a bribe occurs whenever a government official "receive[s], claim[s], request[s], or agree[s] to accept material items or benefit from someone else" in exchange for "using one's position, power and duties to provide direct or indirect benefit to the person giving the bribe."

17. Laos's prohibition on bribery reflects public policies of the highest order. In 2005, Laos promulgated its Law on Anti-Corruption, which supplemented existing law by imposing criminal penalties for ***taking*** bribes. Government officials "with position, power and duty" are specifically prohibited from "receive[ing] money, material items, or other benefits from any individual or organization that relates to his functions which cause damages to the interests of the State and society, or the rights and interests of citizens." Confirming the importance of the issue, in 2009 the Lao Government ratified the United Nations Convention Against Corruption, which specifically targets bribery of Government officials.

18. Sanum violated all those criminal prohibitions during its reign of corruption in Laos.

B. Claimant's Unlawful Acts of Bribery, Embezzlement, and Money Laundering Warrant Dismissal of its Claims

1. Evidence of Bribes and Attempted Bribes

63. Bribery is a serious criminal offense under Lao Law. The Lao Penal Law specifically prohibits any person from "bribing or agreeing to bribe a civil servant." Persons who violate the law are subject to up to two years of imprisonment, plus a fine equal to the amount or value of the bribe, or – if the bribe was "substantial" –up to five years of imprisonment, plus a fine equal to twice the amount or value of the bribe. Under Lao law, a bribe occurs whenever a government official "receive[s], claim[s], request[s], or agree[s] to accept material items or benefit from someone else" in exchange for "using one's position, power and duties to provide direct or indirect benefit to the person giving the bribe."

64. Laos's prohibition on bribery reflects public policies of the highest order. In 2005, Laos promulgated its Law on Anti-Corruption, which supplemented existing law by imposing criminal penalties for ***taking*** bribes. Government officials "with position, power and duty" are specifically prohibited from "receive[ing] money, material items, or other benefits from any individual or organization that relates to his functions which cause damages to the interests of the State and society, or the rights and interests of citizens." Confirming the importance of the issue, in 2009 the Lao Government ratified the United Nations Convention Against Corruption, which specifically targets bribery of Government officials.

65. Claimant violated all those criminal prohibitions during its reign of corruption in Laos.

> The Tribunal agrees with Claimants that the criminal proceedings exacerbate the climate of hostility in which the dispute is unfolding ...[but] the Tribunal cannot concur with Claimants'' argument that the criminal proceedings have changed the status quo of the dispute ... If there are legitimate grounds for the criminal proceedings, Claimants must bear the burden of their conduct in Bolivia. [§ 138]

30 In other words, a criminal proceeding does not *per se* violate the principle of exclusivity of ICSID arbitration, or aggravate the dispute. *Something more* has to be at stake to justify a tribunal enjoining a State to suspend or defer a criminal investigation. The Tribunal is convinced that such exceptional circumstances exist in this case.

31 Indeed, a number of indicia lead the Tribunal to consider that allowing at this stage the Laotian police and prosecutors to pursue criminal proceedings, depose witnesses and collect documentation would aggravate the dispute in the prohibited sense of harming the integrity of the arbitral process.

32 What is now being sought, a month before the merits hearing, is an intrusive criminal investigation of potential witnesses during the period of final trial preparation. Rule 1782(a) of the *United States Code,* sought to be invoked by the Respondent, may according to its terms, be used in aid of criminal investigations conducted even before formal accusation[10]. A criminal investigation, according to the Claimant, crosses the line between the government's general concern about corruption and enters the forbidden territory of using the process of the criminal law to obtain an unfair advantage in the arbitration proceedings over the Claimant, aggravating the inequality of arms between the parties.

33 The position of the Respondent is that the conduct of a criminal investigation in this case on the terms it proposes would have little if any impact on the arbitration. There may

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[10] Rule 1782(a) [*Assistance to foreign and international tribunals and to litigants before such tribunals.*] reads in part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. . .

well exist the sort of confrontation or hostility inherent in any criminal investigation it says, but this sort of thing is well below the threshold that would justify an ICSID Tribunal imposing a restraint on a sovereign right to investigate crime. In this respect, the Respondent relies upon the observation of the ICSID panel in *Caratube v. Kazakhstan:*[11]

> Criminal investigations and measures taken by a state in that context require special considerations. They are a most obvious and undisputed part of the sovereign right of a state to implement and enforce its national law on its territory. (para. 134)
>
> The Tribunal feels that a particularly high threshold must be overcome before an ICSID Tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a State. (para. 137)
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> See also Burlington Resources Inc v Republic of Equador, Case No. ARB/08/5, Procedural Order No 1 on Request for Provisional Measures (ICSID June 29, 2009, (CLA-129).

34 Nevertheless various ICSID panels have ordered a stay or deferral of criminal investigations in appropriate circumstances: *Tokios Tokelés v. Ukraine,* Case No. ARB/02/18, Order No. 3 at para 11 (ICSID, 18 January 2005) [CLA 160]; *City Oriente Limited v. Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, Case No. ARB/06/21, Decision on Provisional Measures at paras 61-66 (ICSID, 19 November 2007) [CLA 132]; *Quiborax, S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia*, Case No. ARB/06/2, Decision on Provisional Measures paras 118, 122 (ICSID, 26 February 2010).

35 As always, the authorities are very fact sensitive. The Tribunal considers that the "high threshold" allowing a tribunal to prevent a State from pursuing criminal investigations in its national legal order has been overcome in this case.

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[11] *Caratube International Oil Co. LLP v. Republic of Kazakhstan*, Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures at para. 137 (ICSID, 31 July 2009 [RA 129].

36 The Tribunal has come to the conclusion that because of the timing and direct relationship between the criminal proceedings and this ICSID arbitration the rights invoked by the Claimant merit protection in the specific circumstances of the case.

The direct relationship between the arbitration and the intended criminal case aggravates the dispute in that it threatens the integrity of the arbitral proceeding

37 In order for this Tribunal to enjoin a sovereign State from pursuing a criminal case in its own legal order, it must be convinced that there is a strong linkage between the criminal proceedings and the legal dispute arising out of the investment which is before it, and that such a situation threatens the integrity of the arbitral process.

38 The allegations the Respondent intends to make the subject of the criminal investigation relate directly to the subject matter of the arbitration. As counsel for the Respondent acknowledged at the hearing of the present Motion, it is "absolutely correct, that the basis for the illegality defence are the same acts that would be at issue in public law [criminal] proceedings" (Transcript p. 93, ll 6-9).

39 As to criminal investigations, the question is one of timing. In the Tribunal's view, the integrity of the arbitral process would be compromised by permitting the Respondent to run a criminal investigation concurrently with the arbitration directed to the same people and the same facts at the same time.

40 Firstly, the criminal investigation contemplated by the Motion as amended would be disruptive. It would inevitably divert at least some of the Claimant's resources from final preparation of the hearing next month to dealing with issues arising out of police interviews with people now or in the past associated with the Claimant (though not current employees of Sanum Investments of Savan Vegas, who are excluded from the scope of the Motion as amended) as well as potential seizure of documents from any location within Laos or elsewhere (except Sanum Investments or Savan Vegas in Laos) and any derivative evidence arising therefrom.

41 Secondly, the Claimant contends that the "chilling effect" of a concurrent criminal investigation will be a powerful deterrent to Laotian witnesses to give evidence contrary to the Respondent's position. According to the Claimant, "the very nature of these criminal proceedings is bound to reduce their [potential witnesses'] willingness to cooperate in the ICSID proceeding", citing *Quiborax*, at paras. 143-144 and 147:

> The Tribunal considers that the criminal proceedings may indeed be impairing Claimants' right to present their case, in particular with respect to their access to documentary evidence and witnesses. ...
>
> The Tribunal is also troubled by the effect that the criminal proceedings may have on potential witnesses. ...
>
> Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. In the words of the *Plama* tribunal, the Tribunal finds that, under the particular circumstances of this case, the rights invoked by Claimants and analyzed in this Section relate to Claimants'' "ability to have [their] claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal".

42 Allowing to-day, the Respondent to start the intended criminal investigation would raise exactly the same concerns. Such authorization should not be granted by the Tribunal, as it would aggravate the dispute, by endangering the procedural integrity of the arbitral proceeding.

There is no change of circumstances sufficient to authorize Laos to start criminal proceeding on the eve of the arbitration hearing

43 The Respondent acknowledged in its present motion that it must establish a "change in circumstances" that would "warrant modification of the provisional measure," citing *Ireland v. United Kingdom ("The MOX Plant Case"),* ITLOS Case No. 10, Order of June 24, 2003, see also *Costa Rica v. Nicaragua* (ICJ) at para. 31 [CLA-149]

44 However the allegations of criminality are not new. It is clear from the record that the Respondent and the Claimant were already trading accusations in respect of the Claimant's

alleged criminal conduct *prior* to the making of the PMO on 17 September 2013. In an email of 28 August 2013 counsel for the Respondent stated:

> The Government has many issues confronting it from Claimant's lawless behavior, including Claimant's admitted massive scheme of money laundering on an unprecedented scale. First, Claimant expelled Ernst & Young, the Government's appointed auditor, from the casino in July 2012, after only 5 days on site. Claimant has thus thwarted Respondent's ability to audit the casino's books. E&Y was unable to complete the audit and no audit has been possible since then. Second, Mr. Crawford's affidavit submitted to the Tribunal before the 8 May hearing trumpets that Claimant does not use the Laos banking system and instead is transferring all its revenues out of Laos without regard to Laos law on transfers of currency... the Savan Vegas Casino reported revenues of over $75 million USD in 2011--there has been no reporting since, but if revenues for 2012/2013 are of that magnitude, Claimant is carting $75 million across the Thai border in suitcases this past year. <u>That is criminal conduct</u>. (Emphasis added)

45 The Claimant replied by email of the same date:

> We will not reply here to Mr. Branson's unsupported and outrageous accusations of money laundering, evicting E&Y and other issues. The evidence in the record, continued in the affidavits submitted by Claimant's witnesses and exhibits, shows exactly the opposite.

46 Since the making of the PMO, the Respondent has, as its counsel put it, "unearthed" what it says is "substantial evidence of violations of criminal law", but for the most part such evidence does not disclose "changed circumstances" so much as it provides some additional evidence by which the Respondent will seek to prove the allegations of "unlawful conduct" of which it was already fully aware prior to original PMO hearing, but which admittedly have been amplified by other allegations detailed in the present motion to amend.

47 However, as stated by the Claimant, no reference is made to Lao criminal or evidentiary law to demonstrate that while the Government earlier lacked the power or authority to launch a criminal investigation on the basis of mere "suspicions or allegations," but that as a result of the new evidence of Ms. Sengkeo's bank records "its powers to

investigate Claimant's representatives have been triggered." [12] Indeed, it is quite evident that criminal investigations are launched precisely because there exist reasonable suspicions and not only when there is hard evidence of criminality. The record before the Tribunal indicates that the Respondent was quite well aware of alleged unlawful activity by or on behalf of the Claimant prior to the hearing on Claimant's request for provisional measures, or at least could have discovered them by employing a basic level of due diligence.

The policy of the Respondent prior to the making of the PMO was to stay its "investigation into money laundering ... to allow the arbitration process to proceed in an environment conducive to timely action by the Tribunal"

48 It is true that the Respondent's allegations of criminality are now more specific and extensive than at the time the PMO was made, but the Respondent's e-mail of 28 August 2013, based on what it then knew, was unequivocal in its choice of a "conciliatory" policy of non-aggravation conducive to the "timely" work of the arbitral tribunal:

> Lao Court proceedings to hold Claimant to account for $20 million in back taxes and the investigation into money laundering have been stayed due to this arbitration, because the Government has made conciliatory efforts to allow the arbitration process to proceed in an environment conducive to timely action by the Tribunal. (E-mail dated 28 August 2013).

49 What seems to have happened is not so much a "change of circumstances" as a change of tactics as the arbitration hearing date approached.

The Tribunal is not persuaded that a criminal investigation, which the Respondent was content in September 2013 to defer until after the arbitration award, has now become a matter of urgency and necessity.

50 Proof of urgency and necessity are key elements in seeking a modification of the PMO. The principle was clearly set out by the International Court of Justice in *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) Order at

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[12] Claimant's Rejoinder on Respondent's Motion to Amend the Tribunal's Decision on Provisional Measures dated 17 September 2013, para. 41.

paras 30-36, 16 July 2013 (CLA-149) where it was found that while Costa Rica had demonstrated a change of circumstances, it was not entitled to modification of the provisional measures granted because it had failed to demonstrate either urgency or necessity. See also *City Oriente Ltd. v. The Republic of Ecuador*, Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters at para 72 (ICSID 13 May 2008) [CLA 133].

51 The Tribunal readily acknowledges that the allegations against the Claimant and some of its employees raise issues of serious illegality. All reasonable steps should be taken to ensure the relevant evidence is produced in Singapore. Counsel for the parties are agreed on the need for a robust hearing. Counsel for the Respondent stated:

> … Any person who has knowledge relevant to these serious accusations should come to the Tribunal. I have said several times in my letters to the Tribunal about Ms Sengkeo: please bring her. Let's find out what she has to say. Nobody wants to have false evidence. We want to know the truth.
>
> If they will bring Ms Sengkeo, they obviously control her. They've just told you that [the Claimant's principal Mr Baldwin is prepared to guarantee a loan to Mme Sengkeo on commercial terms] of $575,000.
>
> Now, in my experience, when a corporation has a consultant who they are [willing to guarantee a loan for] $575,000, that consultant will come and testify if you ask them to. So please ask them to bring Ms Sengkeo.
>
> If Mr Burton will come and testify, I would be delighted to have him come and testify. Anyone should come and testify.
>
> Now, Mr Kochel, Mr Douglas, they are not employees, they can't make them come testify, that's why we may have to do depositions if they are in the United States, or interview them if they are in Cambodia.
>
> ***
>
> MR BRANSON: If I can get Ms Manivone to come to Singapore, she will be there. I couldn't get her to sign a witness statement in October, but if the Government will help me – now, she is a retired person, she

> doesn't work for the Government anymore, but if the Government can give her sufficient – as I said before, one person told me: well, they are going to die in Laos, they should help their country. If she will come to Singapore, she will be there. I say that about any witness. They should come to this Tribunal. [12 May 2014 Transcript, pp 82-83]

52 The Claimant is on notice that the evidence of Mr. Baldwin and Mr. Scott and other senior employees will be of great interest to the Tribunal and both parties are on notice that the same holds true for all the persons accused in the pleadings of illegal conduct, or complicity in illegal conduct.

53 The Respondent's argument turns largely on the impact of some inferences it seeks to draw from Mme. Sengkeo's bank records which the Respondent obtained, through banking channels in Laos, in January 2014.

54 Mme. Sengkeo's local representation of the Claimant has been well known to the Respondent since October 2009. Her Laotian bank records are safely in the possession of the Laotian authorities. The Tribunal is advised that at this point Mme. Sengkeo, though offered immunity from prosecution by the Respondent, has refused to talk either to the Respondent or to the Claimant.

55 A further wrinkle to the Mme Sengkeo situation was added at the 12 May 2014 hearing. Counsel for the Claimant disclosed his client's willingness to guarantee a $575,000 loan said to be required by Mme Sengkeo to repay a loan to ST, the Claimant's disenchanted Laotian partner.

> What we would like to do is be able to introduce [Mme Sengkeo] to an investment fund that does work in Asia called Leopard Capital, and because she is a Lao citizen and because it would take a long time to arrange that, Mr Baldwin [of the Claimant] would like to be able to guarantee the loan to her so that it could be arranged quickly and she could be provided with the funds that she needs in order to repay the loan to ST, which hopefully would, at least, eliminate one of the areas in which she feels she is being intimidated. [12 May 2014 transcript pp 5-6]

56 Such a proposed guarantee, of course, fuels the suspicion of the Respondent.

57 The Claimant and the Respondent have had a long running dispute about what lies behind the premature end of the E&Y audit or Savan Vegas. Both parties claim to be distressed by the termination. The Respondent seeks to tie the termination of the E&Y audit to the Claimant thorough entries in Mme. Sengkeo's bank records which it regards as suspiciously timed.

58 E&Y issued its interim report on 20 July 2012 clearly stating that its audit had been prematurely terminated by the government itself. On receipt of the interim report in July 2012, the Respondent, if it had any doubt about which of its officials spoke to E&Y and why the stop order was given, could have investigated (through the police or otherwise), if indeed senior officials at the Ministry of Finance disagreed with the stop order. The Respondent apparently saw no urgency or necessity in 2012 to look into the stop order issue even though the dispute with the Claimant was a live issue in the Ministry at the time.

59 In the Tribunal's view, the obtaining of Mme. Sengkeo's bank records does not warrant an urgent criminal investigation now as opposed to one deferred until the award is made in these proceedings.

60 The Respondent's major argument relates to the notation in Mme. Sengkeo's bank records of a deposit of $300,000 in July 2012. This corresponds to the time a premature end was ordered to the audit by E&Y of the Claimant's Savan Vegas casino. Money was withdrawn from the account in various amounts over succeeding days. The Sengkeo bank records do not identify the purpose for which the funds were used. However, in light of the timing, the Respondent says "it is reasonable to infer" this money was used to bribe government officials to put the premature end to the audit. The Claimant admits the deposit but says the money was a loan to Mme. Sengkeo to assist in the construction of her million dollar hotel. A photograph of the hotel is in evidence. Laos, the Claimant says, is a cash economy. Trades at work on the hotel were paid in cash in the ordinary Laotian way.

61 The Claimant insists that charges of corruption must be established not just on a balance of probabilities but by "clear and compelling evidence" (12 May 2014 transcript p. 106, l. 8). However, what the Respondent seeks now is simply the ability to go after the

evidence. The Respondent does not purport to have proof of corruption. Otherwise the investigation would be redundant. The only issue at this stage is whether it is appropriate for the Respondent to use the machinery of the criminal law in the hopes of finding useful evidence for the defence of its arbitration case.

62 Another unexplained deposit in Mme. Sengkeo's bank account and subsequent withdrawals) leads the Respondent to suspect that one of the Ministry of Finance officials, Ms. Manivone, was bribed in 2011 to advocate within the government the extension of the Claimant's Flat Tax Agreement ("FTA") scheduled to expire December 31, 2013. Ms. Manivone offered advice to the Minister of Finance supporting the extension of the FTA and her advice was rejected. If the Ministry doubted the good faith of her advocacy it could have investigated at that time. An unexplained entry in Mme. Sengkeo's bank account which is not linked to Ms. Manivone but only to the timing of the FTA negotiations is a tenuous basis on which to allege bribery, but in any event such speculation does not create a situation of urgency or necessity justifying a modification of the PMO on the eve of the merits hearing.

63 If called as a witness at the hearing Ms. Manivone, now retired, will be examined by both parties and her credibility will be tested and assessed in the usual way, without the overhang of a concurrent criminal investigation. There is no evidence that an investigation of Ms. Manivone would be prejudiced by deferral for a few months.

64 The Respondent says that a responsible authority in Paksan may have been bribed to allow one of the Claimant's facilities to continue operating even after the Prime Minister ordered it closed. Once again what the Respondent regards as "suspiciously timed" transactions recorded in Mme. Sengkeo's bank records are relied upon, but quite apart from the speculative nature of these inferences, the Respondent was aware in March 2011 that the Claimant's facility in Paksan continued to operate openly despite the Prime Minister's order. Any inquiry thought appropriate could have been initiated at that time, which predated the PMO by about 18 months.

65 Equally there is no evidence of necessity for urgent action in relation to the participants in the alleged attempt by the Claimant to bribe the Prime Minister to approve a

casino in Vientiane. The relevant employees of the Claimant are identified in the *Respondent's Motion to Amend* dated 20 February 2014 at para. 54. The Claimant says the letter was properly sent with its submission to project approval as proof of financial viability. Its witnesses will be available for cross-examination at the hearing.

66 The Respondent alleges a bribe of $25,000 was paid to an unknown person to obtain a slot licence for Thakhet. The allegation is said to be supported by an entry in the general ledger of the casino and disclosed in the E&Y Interim Report in 2011. Apparently no investigation was made at that time the Respondent received the E&Y report and no reason is provided for the delay.

67 The evidence is also equivocal in relation to a number of instances where the Respondent identifies employees of Savan Vegas it says were involved in corruption including:

i. money paid to government employees the Respondent says, to turn a blind eye to prohibited gambling by Laotian citizens. The Claimant says there were many activities at the casino complex in which Laotian citizens were free to participate in. Other activities were prohibited. The government employees were paid openly and properly for their services to a private employer, Savan Vegas, to supervise these activities.

ii. the Respondent alleges "bribes" were paid to Thai border guards to ease the passage of Thai gamblers. The Claimant says the payments were lawful and proper charges. They were recorded in the Savan Vegas general ledger and disclosed in the E&Y interim report in July 2012. No investigation was thought to be necessary by the Respondent's officials at that time.

iii. the Respondent has identified a former employee of the Claimant, Mr Yingling, who says he was ordered to offer a government official either

$6000 or $600 "spending money" but declined to do so. Mr Yingling is apparently cooperating with the Respondent. There is no urgency shown to investigate the truth of his allegations of an unlawful order he says he refused to follow.

68 The Respondent claims the Claimant engaged in money laundering by carrying suitcases of cash across the border for deposit in Thai bank accounts. The Claimant says this was lawful and proper. More importantly, the Respondent voluntarily agreed to stay its "money laundering" investigation prior to the September PMO hearing to facilitate an environment conducive to an effective arbitration. There are no circumstances suggesting any fresh necessity or urgency to proceed at this time.

69 The Respondent accuses the Claimant of embezzlement based largely on accounting records of the Claimant's auditors, Grant Thornton between 2009 and 2011. The Respondent has had the Grant Thornton records for some years. There is no evidence of fresh necessity or urgency to initiate a criminal investigation at this time.

70 The Respondent does express concern about possible "spoliation" of evidence by potential targets of a criminal investigation. However, much of the relevant financial documentation is held by banks and audit firms. Other evidence may be in danger of destruction but it is rather speculative to contend that while it has survived until now it will likely be destroyed between now and when an award is made by the Tribunal unless a criminal investigation intervenes.

71 In summary, there is no sufficient evidence of urgency to establish that a deferral of the police investigation for another few months will seriously prejudice the Respondent. The basis of the Respondent's concerns are largely found in financial records disclosed in the Ernst & Young Report of July 20, 2012, to which the Respondent has had the possibility of access since long before the PMO was made, or bank records of private Laotian citizens, to which the Respondent apparently has access through normal banking channels.

The proposed modification of the PMO would disproportionately prejudice the Claimant in preparing and presenting its case to the Tribunal

72 While the modified order now sought by the Respondent does build in certain protections for the Claimant, and is to be welcomed on that account, its effect would still be highly disruptive of the Claimant's ability to prepare and present its case. Although presented broadly as a part of the fight against corruption, the Respondent's proposed criminal investigation strikes directly at the people and issues involved in the arbitration.

73 There is no sufficient evidence of necessity or urgency to establish that a deferral of the criminal investigation for another few months until the witnesses are heard at the arbitration and an award is made, will prejudice the Respondent in any way proportionate to the potential prejudice to the Claimant of the diversion and distraction of a full-scale criminal investigation landing on top of the ICSID arbitration.

74 Looking at the protection of the sovereign rights of the Respondent, it is the Tribunal's view that such a deferral does not infringe in a serious manner the Lao sovereignty. The Tribunal considers that in respecting the present Decision, the Respondent need only await the decision on the merits, when the Provisional Measures Order will cease to have effect, to commence these investigations which it could have initiated in 2012.

75 In sum, the Tribunal is not persuaded that the relevant circumstances have changed sufficiently to warrant the modification of the PMO, or that the criminal investigation (having been put on hold voluntarily by the Respondent prior to the PMO) has become a matter of urgency and necessity, or that the potential harm to the public interest of Laos created by a delay in the investigation until the making of an award herein would outweigh the disruption and distraction to the Claimant and its employees of dealing with a criminal investigation in the midst of final preparation of their case for the arbitration next month.

CONCLUSION

76 In the view of the Tribunal, the Respondent has not satisfied the conditions precedent to justify a modification of the non-aggravation clause to which the Respondent consented at the hearing of 2 September 2013.