

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

BETWEEN:

LAO HOLDINGS N.V.

Claimant,

AND

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

Respondent

ICSID Case No. ARB(AF)12/6

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**CLAIMANT'S SECOND MATERIAL BREACH APPLICATION**

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ARBITRAL TRIBUNAL:

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

26 April 2016

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## I.

### INTRODUCTION

1. Pursuant to Section 32 of the Deed of Settlement entered into between the Parties on 15 June 2014 (the “Deed”) and the Side Letter dated 18 June 2014 (the “Side Letter,” and together with the Deed, the “Settlement”), Lao Holdings N.V. ( “Claimant” or “Lao Holdings”) respectfully submits this application seeking a declaration from the Tribunal that the Government of the Lao People’s Democratic Republic (“Respondent,” “Laos,” or the “Government,” and together with Claimant, the “Parties”) is in material breach of Sections 5-8, 15, 22-23, and 27 of the Settlement, and that, as a result, the present arbitration proceedings are no longer suspended.

2. As the Tribunal will recall, the primary purpose of the Settlement was to permit Claimant to sell its remaining assets in Laos—the Savan Vegas Hotel and Casino (the “Casino”) and Ferry Terminal and Lao Bao Slot Clubs (defined together in the Settlement as the “Gaming Assets”)—for “maximum Sale proceeds.” As this Tribunal previously found, “for the purposes of contractual interpretation, the [Parties] ‘common objective’ was to expedite the sale of the hotel and gambling assets *at the best price obtainable.*”<sup>1</sup> This, in turn, required the Government to take the steps set out in the Settlement. Among other things, the Settlement required the Government to establish, together with Claimant, a neutral committee to set a fair and reasonable flat tax to apply to the Gaming Assets; to treat the 2007 Savan Vegas Project Development Agreement (the “2007 PDA”) as being restated; and to allow Claimant to manage the sale process and Gaming Assets for an initial (but extendable) ten-month period, failing which a “qualified” operator would be “jointly” appointed to take over operations.

3. Over the course of the past year, however, Laos has undertaken a series of actions—while claiming to be implementing the Settlement—that in fact have materially

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<sup>1</sup> Interim Ruling on Issues Arising Under the Deed of Settlement, dated 19 December 2014 ¶ 117.

breached multiple provisions of the Parties' agreement and, when viewed as a whole, have eviscerated the Settlement, rendering it a complete nullity. At this point, there is no hope for a sale of the Gaming Assets that will even closely approximate "maximum Sale proceeds" for the two Parties.

4. Notably, the facts on which this Application is based are, in large part, undisputed. The Government admits expropriating Savan Vegas, through a series of actions that commenced with its physical seizure and culminated in a transfer of assets to the Government through legislative decree. This is undoubtedly a material breach of Section 5 of the Settlement, which provides that Claimant owns an 80% share of the Casino. The Government further admits that it plans to deprive Claimant of *any* of the sale proceeds for the Casino, claiming that the Casino will sell for only US\$120 million or less, while it claims to be entitled to deduct or "offset" over US\$130 million from those proceeds.<sup>2</sup>

5. Indeed, there can be no doubt that the Gaming Assets will sell for far below their "maximum" value where the Government has (i) ignored the Settlement's directive that a fair and reasonable flat tax for the Gaming Assets be established through a joint procedure with Claimant, instead unilaterally imposing a 28% *ad valorem* tax on the Gaming Assets' gross gaming revenues (a tax that is neither flat nor fair and reasonable, and that will undermine the ability for the future purchaser to turn a profit); (ii) drafted a Project Development Agreement (the "2016 Draft PDA") for the new purchaser of the Gaming Assets that departs in several material aspects from the 2007 PDA, not least by imposing vague and nebulous Government approval and conduct requirements on the new purchaser; (iii) removed the Ferry Terminal and Lao Bao Slot Clubs ("Slot Clubs") from the sale process, thereby depriving the future purchaser of

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<sup>2</sup> C-910, Claimant's Response to Respondent's Amended Provisional Measures Application ("Cl.'s Response to Resps.' Amended PM App"), SIAC Arb. No. ARB143/14/MV, dated 29 May 2015, at 9; C-911, Email from John Branson to Samantha Rowe et al., dated 19 January 2016, at 1.

Savan Vegas of the promised monopoly; and (iv) unilaterally managed the sale process in a manner that has chilled bidding and will significantly depress the price for which the Gaming Assets will be sold.

6. The Government's other, numerous breaches relate, *inter alia*, to its failure to discontinue criminal and tax proceedings against Claimant and its affiliates and personnel; to forgive and waive all taxes and fees incurred prior to the Settlement; and to negotiate in good faith concerning a land concession and project development agreement at Thakhaek.

7. The Government's disregard for the clear terms of the Parties' agreement is particularly egregious in light of Claimant's full compliance with the Settlement, and its good-faith efforts to work with the Government to facilitate a successful sale of the Gaming Assets. In response to Claimant's attempts to engage with the Government in order to ensure that the Casino is sold for the maximum value and to ensure that the proceeds of such sale are distributed as agreed in the Settlement, the Government has acted unilaterally and with total disregard for its obligations under the Settlement. Put simply, there is at this point nothing left of the Parties' bargain.

8. In light of the breaches set out above and in further detail below, Claimant respectfully requests an order:

- i. Declaring that Respondent has materially breached Sections 5-8, 15, 22-23 and 27 of the Settlement;
- ii. Declaring that, as a result, Claimant is entitled to revive the *Lao Holdings* arbitration proceedings;
- iii. Setting a date for an in-person procedural conference to establish a schedule for the resolution of Claimant's Material Breach Application; and
- iv. Ordering such other and further relief as may be just and appropriate in the circumstances.

## II.

### FACTUAL BACKGROUND

9. As the Tribunal is aware, the *Lao Holdings* arbitration was suspended on 19 June 2014 on the consent of both Parties. That consent arose out of the Parties' agreement that they had reached a full and final settlement of the dispute, the terms of which were set out in the Deed and Side Letter. It was further agreed that the proceedings before this Tribunal would be suspended, pending performance of the terms of the Settlement, and that the arbitration would be terminated only upon Laos's full compliance with its obligations thereunder.

10. Section 32 permits Claimant to revive the *Lao Holdings* arbitration "in the event that Laos is in material breach" of certain enumerated sections of the Settlement:

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, 28 or the obligation in 30 to grant any necessary approvals with regard to the Sale 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 or the obligation in 30 to grant any necessary approvals with regard to the Sale 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.

11. As the Tribunal will recall, on 4 July 2014, Claimant filed a Material Breach Application, alleging that Laos was in material breach of Section 6 of the Settlement, and seeking revival of the ICSID arbitration (the "First Material Breach Application"). In accordance with the directive in Section 32 that "[t]he Sale Deadline

and any other relevant time periods herein shall be extended by the length of time required to cure such breach,” Claimant suspended its performance of the Settlement.

12. On 11 August 2014, Laos filed for arbitration with SIAC against Claimant and Sanum Investments Limited (“Sanum”) for breach of the Settlement (the “SIAC Arbitration”), seeking a declaration that “the Respondents are in material breach of the Deed,” “elect[ing] to affirm the Deed and Side Letter,” and “insist[ing] that the Respondents comply with the terms of the Deed.”<sup>3</sup> On 16 January 2015, the SIAC Tribunal issued an order “temporarily defer[ring] ruling on the Respondent’s Motion to Stay this Arbitration” which essentially postponed any further action in the SIAC Arbitration until June 2015.

13. Unwilling to wait for this Tribunal’s decision on the First Material Breach Application, or the SIAC Tribunal’s decision on its own claims, Laos stated its intention to expropriate and sell Claimant’s assets, in breach of the Settlement and international law, on 15 April 2015 (the purported “Sale Deadline” under the Settlement).<sup>4</sup> Claimant filed a provisional measures application with this Tribunal seeking to prevent Laos’s unlawful action while the First Material Breach Application was pending. The Tribunal denied Claimant’s provisional measures application on 14 April 2015, on the grounds that “Claimant has failed to establish all of the requisite elements for such an order” because “the Claimant had not established even a *prima facie* right to the relief sought,” *i.e.*, to a finding of material breach and an order reviving the ICSID arbitration. Notably, this Tribunal did *not* find that Laos’s proposed course of action would be in compliance with the Settlement.

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<sup>3</sup> C-912, Notice of Arbitration, *The Government of The Lao People’s Democratic Republic v. Lao Holdings N.V. and Sanum Investments Ltd.*, SIAC Arb. No. ARB143/14/MV, dated 11 August 2014 ¶¶ 37-38.

<sup>4</sup> C-832, Email from David Branson to Christopher Tahbaz et al., dated 25 November 2014.

14. On 10 June 2015, the Tribunal rejected the First Material Breach Application.

15. In the meantime, on 16 April 2015, Claimant and Sanum had filed an application for provisional measures (which was subsequently amended on 8 May 2015) with the SIAC Tribunal. In light of this Tribunal's denial of the First Material Breach Application, Claimant sought performance of the Settlement according to its terms, as well as provisional measures to protect its right to this relief, including requests that the Government return Savan Vegas to Sanum's control, not assess taxes in a manner inconsistent with the Settlement, and not terminate the 2007 PDA.

16. While the First Material Breach Application *and* Claimant's application for provisional measures before the SIAC Tribunal were pending, Laos commenced its campaign to eviscerate the bargain reached in the Settlement:

- On 16 April 2015, Laos unilaterally “assume[d] control and management of the Savan Vegas and Casino Co., Ltd. in Savannakhet, Laos.”<sup>5</sup> The Government also unilaterally appointed “its operators [to] enter the Casino and start their management functions” and purported to give the Government's designated managers “full authority over all personnel matters and all financial matters.”<sup>6</sup> Rather than appoint “RMC or any other qualified gaming operator” together with Claimant to manage the casino pending the sale, as Section 12 of the Settlement requires, Laos unilaterally hired Ms. Kelly Gass of San Marco Capital (“San Marco”) as CEO, Mr. Travis Miller as CFO and Mr. James Kochel as CFO of the Casino. Laos's appointees had no experience running or selling a casino (and Mr. Kochel was well-known to Sanum, as he had been fired from a banking affiliate of Sanum for theft).

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<sup>5</sup> C-913, Letter from the Ministry of Planning and Investment to John Baldwin and Christopher Tahbaz, dated 16 April 2015, at 1.

<sup>6</sup> *Id.*

- On 22 April 2015, the Government seized physical control of Savan Vegas.<sup>7</sup>
- On 29 April 2015, Mr. Crawford was terminated from his employment at Savan Vegas, to make room for Mr. Kochel, who had no casino, CFO or accounting management experience, despite the fact that Section 19 of the Settlement expressly provides that Mr. Crawford will retain his position as CFO in the event that a gaming operator is appointed to manage the property.
- Laos further made clear that it would proceed to sell Savan Vegas alone, without input from Claimant.<sup>8</sup>
- At the SIAC hearing to determine Claimant’s request for provisional measures, held on 16 June 2015 (and after having first tried to assess a total of US\$11.2 million in taxes against the Casino, calculated in respect of the period 1 July 2014 through 31 December 2014, pursuant to the 45% tax rate on gross gaming revenues supposedly applicable at that time under Laos’s Tax Law<sup>9</sup>), the Government revealed that it had unilaterally sought the appointment by the Macau Society of Registered Accountants of a sole member of a “flat tax committee,” Mr. Quin Va, to set the “flat tax” that would be applied to Savan Vegas from 1 July 2014.<sup>10</sup> On 15 July 2015, Laos revealed that Mr. Va had set the applicable tax (*not* a flat tax, as the Settlement requires, but an *ad valorem* tax) at a rate of 28% of gross gaming revenues.<sup>11</sup> If, pursuant to Laos’s stated intention, this rate is imposed on the Casino’s gross gaming revenues, without regard to junket fees, this will cause the Casino to operate at a loss.

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<sup>7</sup> C-914, Letter from Ministry of Justice to Michael Gore and Clay Crawford, dated 21 April 2015, at 2.

<sup>8</sup> C-915, Email from David Branson to Deborah Deitsch-Perez, dated 4 May 2015, at 1.

<sup>9</sup> C-916, Letter from David Branson to the SIAC Tribunal, dated 20 April 2015, at 3; R-66, Payment Request from Ministry of Finance Tax Department to John Baldwin, dated 20 April 2015.

<sup>10</sup> C-917, 16 June 2015 Tr., SIAC Arb. No. ARB143/14/MV, at 87:18-24 (Branson).

<sup>11</sup> C-918, Letter from David Branson to Sanum, dated 15 July 2015, at 5.

17. On 30 June 2015, the SIAC Tribunal denied Claimant’s application on the grounds that, *inter alia*, “any interim harm suffered by Sanum, if proven at the Final Hearing, can be compensated by money damages.”<sup>12</sup> The Tribunal did, however, order Laos to provide Claimant with regular and ongoing financial information, as well as “regular and ongoing information pertaining to the marketing and other efforts being made to sell the casino,” and to consider any suggestions and input from Sanum in good faith.<sup>13</sup> Again, the SIAC Tribunal did *not* find that Laos’s proposed course of action was in compliance with the Settlement.

18. Since the SIAC Tribunal issued its decision denying Claimant’s request for interim relief:

- On 1 July 2015, Laos acted upon its threat to terminate the Savan Vegas PDA, as well as “any and all permits, licenses, concessions, certificates, leases, approvals and registrations granted to [Sanum] or as to which [Sanum was] the recipient or beneficiary, whether provided under or in relation to the PDA, the Law on Investment Promotion or otherwise.”<sup>14</sup> Laos based the termination on Sanum’s alleged failure to comply with its tax obligations and Laos’s false claims of “bribery and attempted corruption.”<sup>15</sup>
- On 28 September 2015, Laos completed its expropriation of Savan Vegas, when the Government decreed that all assets then owned in Laos by Savan Vegas would be transferred to Savan Vegas Lao Limited (“Savan Lao”), a company 100% owned by Laos, which the Government specifically created as

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<sup>12</sup> C-919, Order on Respondents’ Amended Application for Provisional Measures, SIAC Arb. No. ARB143/14/MV, dated 30 June 2015 ¶ 33.

<sup>13</sup> *Id.* at ¶ 34.

<sup>14</sup> C-920, Letter from Ministry of Planning and Investment Promotion to Sanum, dated 1 July 2015; *see also* C-921, Letter from Ministry of Planning and Investment to Sanum, dated 18 June 2015.

<sup>15</sup> *Id.*

a vehicle to own and operate Savan Vegas.<sup>16</sup> Astonishingly, Laos *admits* that its actions are expropriatory, although it claims that the expropriation is lawful and that any claims seeking redress for the expropriation under a bilateral investment treaty would be deemed inadmissible as a result of Laos’s unfounded allegations of corruption.<sup>17</sup>

- On 19 October 2015, Laos began the sale process by issuing a Solicitation of Interest, followed by a Request for Offers (“RFO”) on 23 October 2015. Laos has also drafted the 2016 Draft PDA for the Casino, which will be signed by the Government and the purchaser of the Casino.<sup>18</sup>
- The deadline for submission of offers to participate in the bidding process expired on 25 January 2016, and on 26 March, Laos informed Claimant that it had selected six qualifying bidders out of thirteen who had submitted offers to participate. The six qualifying bidders will participate in a closed auction to purchase Savan Vegas.
- Laos intends to select the winning investor on 16 May 2016, and to close the sale within approximately three months of that date, once the investor has obtained all of the required regulatory approvals.

19. On 2 November 2015, Claimant issued a Material Breach Notice (the “2 November 2015 Notice”) to Laos, notifying the Government of its breaches, among others, related to the expropriation of the Gaming Assets, the terms of the proposed sale of the Casino, and the continued pursuit of tax and criminal investigations against Claimant.<sup>19</sup> The Government did not cure any of the material breaches enumerated in the 2 November 2015 Notice within the 45-day cure period, which expired on 17 December

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<sup>16</sup> See C-922, Request for Offers, dated 23 October 2015 (“RFO”).

<sup>17</sup> C-923, Claimant’s Response to Respondents’ Request for Interim Relief and Claimant’s Request for a Stay of Discovery and Motion Practice, SIAC Arb. No. ARB143/14/MV, dated 24 October 2015, at 11.

<sup>18</sup> C-924, Draft Project Development Agreement, dated 2 March 2016 (“2016 Draft PDA”).

<sup>19</sup> See C-925, Claimant’s Material Breach Notice, dated 2 November 2015.

2015. To the contrary, by letter dated 14 January 2016, the Government wholly rejected the 2 November 2015 Notice, stating that (i) “[t]he actions Claimants complain about were submitted to the SIAC Tribunal and that Tribunal refused to grant Claimants’ request for Provisional Measures to enjoin those actions”; (ii) its actions “were required to achieve the purpose of the Deed of Settlement, to sell the casino” and justified by Claimant’s refusal to perform under the Settlement while this Tribunal was adjudicating the Material Breach Application submitted by Claimant on 4 July 2014; and (iii) Claimants are not entitled to any relief under the Settlement “as the breaching part[ies],” including relief under Section 32.<sup>20</sup>

20. On 8 March 2016, Sanum and Lao Holdings issued a second Material Breach Notice to Laos (the “8 March 2016 Notice”), which notified the Government of several new material breaches based on actions taken by Laos subsequent to 2 November 2015, including but not limited to the Government’s refusal to establish the escrow account contemplated by the Settlement in accordance with the Settlement’s terms; its stated intention to withhold from escrow a portion of the consideration to be received from the sale of the Casino; and its failure to negotiate in good faith regarding the Thakhaek concession.<sup>21</sup> The Government responded on 21 April 2016, claiming again that “all the issues LHNV says it might raise in a material breach application are subjudice (*sic*) with the [ ] SIAC Tribunal.”<sup>22</sup>

21. The 45-day cure period for the breaches enumerated in the 8 March 2016 Notice expired on 22 April 2016.

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<sup>20</sup> See C-926, Letter from David Branson to Christopher Tahbaz, dated 14 January 2016.

<sup>21</sup> See C-936, Claimant’s Material Breach Notice, dated 8 March 2016.

<sup>22</sup> C-927, Email from David Branson to Christopher Tahbaz, dated 21 April 2016.

### III.

#### RESPONDENT HAS MATERIALLY BREACHED THE SETTLEMENT TERMS

##### A. Respondent's Expropriation of the Savan Vegas Casino Constitutes a Material Breach of Sections 5-6 and 19 of the Settlement.

22. Section 5 of the Settlement expressly affirms that Claimant owns 80% of Savan Vegas (and that the Government owns a corresponding 20% share). Consistent with Claimant's majority ownership, Section 11 of the Settlement provides that "Claimants shall have the right to continue to manage and operate the Gaming Assets through the completion of the Sale," and Section 12 stipulates that "[i]f the Sale Deadline is missed, the Claimants and Laos shall have the right to appoint RMC or any other qualified gaming operator to . . . step in and manage and operate the Gaming Assets [and] complete the Sale[.]"<sup>23</sup> Section 6 of the Settlement requires Laos to "treat the [Savan Vegas PDA] and each of the licenses and land concessions issued in respect of the Savan Vegas casino . . . as being restated as of the Effective Date."

23. As set out above in paragraphs 16-20, Laos's actions since April 2015 have materially breached these provisions; indeed, they have stripped Claimant of all of its remaining rights and assets in Laos, in a move that Laos itself admits consists of an outright expropriation. These actions include: (i) the physical seizure of Savan Vegas in April 2015; (ii) the unilateral appointment of San Marco, Ms. Gass, Mr. Miller, and Mr. Kochel to manage Savan Vegas and the sale process, despite the absence of any evidence that they are qualified to do so; (iii) the termination of the Savan Vegas PDA as well as "any and all permits, licenses, concessions, certificates, leases, approvals and registrations" granted to Sanum; and (iv) the express expropriation of Savan Vegas by

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<sup>23</sup> For the avoidance of doubt, Claimant does not allege that Laos's breaches of Sections 11 and 12 of the Settlement constitute a material breach of the Settlement entitling it to revival of the ICSID arbitration under Section 32, but rather includes discussion of these provisions as essential context for Laos's other multiple breaches of the Settlement.

Government Decree on 28 September 2015, which transferred all of Savan Vegas's assets to the Government-owned company Savan Lao.

24. Finally, Section 19 of the Settlement expressly provides for Mr. Crawford's retention through the completion of the sale, in recognition of the critical role that continuity of financial management plays in facilitating a sale and realizing value for the owners. Laos materially breached this provision when it removed Mr. Crawford from his position of CFO on April 23, 2015,<sup>24</sup> replacing him with the Government-appointed Mr. Kochel.

**B. Respondent's Failure to Conduct the Sale In Accordance With the Terms of the Settlement Is a Material Breach of Sections 6-10 and 15 of the Settlement.**

25. The Government's management of the sale of Savan Vegas also materially breaches a number of the provisions that trigger Claimant's right to revive the ICSID arbitration under Section 32. Specifically, Laos has (i) failed to abide by the directive in the Settlement that the flat tax applicable to the Gaming Assets should be determined by a neutral three-person committee in accordance with the procedure set out in Sections 7-9; (ii) failed to include the Slot Clubs in the sale, in breach of Sections 6 and 10; (iii) failed to treat the 2007 Savan Vegas PDA as being restated, in breach of Section 6; and (iv) failed to abide by its obligations to establish an escrow account under Section 15.

26. In sum, the terms on which the Government intends to sell the Gaming Assets will result in a marked decrease in the value of Savan Vegas as a going concern, in material breach of the Government's obligation under Section 13 to "maximize Sale proceeds," which, as the Tribunal has previously found, "serves as an authoritative agreed-upon statement of the purpose or objective of the parties at the time the contract

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<sup>24</sup> C-928, Witness Statement of Clay Crawford in support of Respondents' Amended Provisional Measures Application, SIAC Arb. No. ARB143/14/MV, dated 8 May 2015 ¶¶ 8-10.

was made and is part of the appropriate framework within which to interpret the relevant terms of the [Settlement].”<sup>25</sup>

- a. *Respondent’s Failure to Follow the Procedures Set Forth in the Settlement with regard to the Establishment of the Flat Tax*

27. Section 8 of the Settlement provides that:

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

28. In turn, Section 9 calls for a three-person Flat Tax Committee to determine a fair and reasonable flat tax applicable to the Gaming Assets, with one member to be appointed by each of the Parties, and the third member to be selected by the two appointees or by the President of the Macao Society of Registered Accountants if the appointees fail to reach agreement.

29. The “flat” tax that Laos now purports to apply to Savan Vegas was decidedly not “established in accordance with the procedure described in the Section 9” of the Settlement. Rather, as described above in paragraph 16, Laos unilaterally appointed a single person, Mr. Va, to set the tax in a truncated procedure unauthorized by the Settlement.

30. Moreover, the tax that Mr. Va purportedly set—28% of gross gaming revenues per annum—is not a flat tax. By definition, a flat tax is a *fixed* amount. The tax that Mr. Va set is an *ad valorem* tax, assessed as a percentage of revenue. The RFO also suggests that the 28% tax will *not* be fully inclusive of all taxes and fees, as required by

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<sup>25</sup> Interim Ruling on Issues Arising Under the Deed of Settlement, dated 19 December 2014 ¶ 116.

Section 7 of the Settlement, as it does not purport to cover, *inter alia*, “applicable Laos PDR tax laws on relations with employees.”<sup>26</sup>

31. There can be no doubt that Laos’s breach of Sections 7 through 9 of the Settlement is material. A 28% tax on gross gaming revenues is materially different from and higher than the tax rates imposed on other gaming operations in Laos and competing markets and will make it virtually impossible for Savan Vegas to turn a profit. This will significantly, and detrimentally, impact the price for which the Casino will be sold.

b. *Respondent’s Failure to Include the Slot Clubs in the Sale*

32. Section 6 of the Settlement clearly defines the “Gaming Assets” as the “Savan Vegas Casino, Lao Bao Slot Club (located at the Lao border at Lao Bao) and Savannakhet Ferry Terminal Slot Club (located at the Savannakhet / Mukdahan checkpoint) all in Savannakhet Province.” Section 10 of the Settlement in turn makes clear that it is the *Gaming Assets* that are to be sold, requiring that “the Claimants shall take steps to establish and expeditiously carry out a sale of the Gaming Assets (the ‘Sale’) in compliance with applicable Lao laws” (emphasis added). The Side Letter notes that “ST owns 40% of the Lao Bao and Ferry Terminal Slot Clubs” (in other words, the Government was well aware that ST held a sizeable minority stake in the Slot Clubs when it agreed that they would be included in the sale).

33. Contrary to the Settlement’s express requirement that the Slot Clubs be included in the sale of Claimant’s assets, Laos has made clear that the *only* asset the Government intends to sell is the Casino, on the spurious ground that “a third party [ST] appears to be the sole owner of the license[s]” to operate the Clubs.<sup>27</sup> Laos’s failure to include the Slot Clubs in the sale is a straightforward, material breach of the Settlement, materially depleting the sale proceeds to be realized by the Parties.

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<sup>26</sup> C-922, RFO, at 10-11.

<sup>27</sup> C-918, Letter from David Branson to Sanum, dated 15 July 2015, at 3.

34. In addition, the failure to include the Slot Clubs in the assets being sold constitutes a material breach of the requirement in Section 6 that the Government treat the 2007 PDA as being restated. As the Tribunal will recall, the 2007 PDA expressly grants to Savan Vegas a full gaming monopoly in Savannakhet, Khammounae, and Bolikhamxay Provinces. However, excluding the Slot Clubs from the sale deprives the future purchaser of the Gaming Assets of its monopoly over gaming in those provinces (as they will, presumably, continue to be managed by the ST Group). As the Tribunal will recall, and as Laos itself admits,<sup>28</sup> the monopoly is critical to the financial stability of Savan Vegas and an essential component of its sale value. Failing to guarantee that monopoly thus has a material and detrimental impact on the value of the concession.

c. *Respondent's Failure to Treat the 2007 Savan Vegas PDA as Being Restated*

35. The Government also has imposed, in connection with the sale process, a number of obligations on the eventual purchaser of the Gaming Assets that are not present in the 2007 PDA, in violation of the requirement in Section 6 of the Settlement that Laos treat that agreement as being restated. As reflected in the 2016 Draft PDA, these obligations include, but are not limited to, significantly heightened Government oversight and regulation with respect to gaming operations, third-party contracts, and the hiring and training of local labor.<sup>29</sup> In addition, under the terms of the 2016 Draft PDA, the owner of the Casino, along with the owner's management, shareholders, and certain of its contractual counterparties, are subjected to the vague and nebulous concept of "international best practices," a concept absent from the 2007 PDA and ill-defined in the current 2016 Draft PDA.<sup>30</sup>

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<sup>28</sup> See Respondent's Reply to Claimant's 27 March 2015 Submission in Support of its First Material Breach Application, dated 3 April 2015 ¶ 22; Respondent's Rejoinder on Claimant's First Material Breach Application, dated 8 August 2014 ¶ 19.

<sup>29</sup> C-924, 2016 Draft PDA §§ 8-12.

<sup>30</sup> See, e.g., *id.* §§1(1), 4, 8, 10.

36. Further, the terms of the 2016 Draft PDA differ materially from the 2007 PDA with regard to the rights that the investor enjoys upon expiration of the agreement. Article 24(2) of the 2007 PDA provides that “[u]pon the natural expiration of this Agreement, the Company shall be entitled to sell, remove or leave their properties located on the development.”<sup>31</sup> Under the 2016 Draft PDA, however, the future purchaser of Savan Vegas will enjoy more limited rights with regard to the Casino’s assets once that PDA is terminated. The 2016 Draft PDA provides:

Upon the termination or revocation of this Agreement for any reason, ownership of and title to all Project Assets shall be automatically transferred to the Government, other than (i) unused inventory, (ii) leased equipment the rights to which are not assumed by the Government or its Designee pursuant to Section 4.3 and (iii) other Company moveable property which is not used in or required for the conduct of Gaming Activities and can be removed without damage to the Project Area.<sup>32</sup>

37. These provisions fundamentally deviate from the 2007 PDA and will detrimentally impact the price for which Savan Vegas can be sold.

d. *Respondent’s Failure to Abide by the Escrow Provisions of the Settlement*

38. Section 15 of the Settlement requires that “[a]ll Sale proceeds shall be received directly from the buyer into an escrow account at TMF Trustees Singapore Limited in Singapore under instructions to be jointly issued by the Claimants and Laos” and that “[n]o moneys shall be withdrawn from such escrow account except in compliance with this document.” Section 16 sets out the *only* permissible deductions from Claimant’s 80% share of the sale proceeds: (i) any amounts paid in respect of termination or claims of Mr. Richard Pipes and Mr. Hoolae Paoa and (ii) any and all costs associated with the sale.

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<sup>31</sup> C-004, 2007 PDA.

<sup>32</sup> C-924, 2016 Draft PDA § 17.10.

39. On 7 April 2016 the SIAC Tribunal ordered that “each party . . . submit to the Tribunal a proposed escrow agreement . . . . The escrow should be an interim escrow subject to the parties’ further agreement or this Tribunal’s Award following the merits hearing finding that the conditions for release had been fulfilled.”<sup>33</sup>

40. Laos’s submission in response to the SIAC Tribunal’s order, dated 20 April 2016, constitutes a material breach of Section 15. Laos’s proposed escrow agreement—which provides that “[t]he Government will, as soon as practicable after the closing of the sale of the Savan Vegas Complex, make a deposit into the Escrow Account”<sup>34</sup>—breaches Section 15 in two material respects. *First*, contrary to the directive in Section 15 that the sale proceeds “shall be received directly from the buyer” into escrow, Laos intends to act as an intermediary, receiving the sale proceeds from the buyer and placing them into the escrow account itself. *Second*, and again contrary to the clear language of Section 15, Laos does not intend to place “*all* Sale Proceeds” into the escrow account, but rather “a deposit”—an unspecified portion of the sale proceeds, which amount Laos will determine in its sole discretion.

41. More specifically, Laos’s 20 April submission makes clear that it intends to recover directly from the prospective purchaser of Savan Vegas the alleged unsatisfied tax liability incurred in connection with the operation of the Casino for the period from 1 July 2014 until the Government takeover on 16 April 2015—and that the amount in respect of this alleged liability will be withheld from the escrow account.<sup>35</sup> However, by diverting this portion of the total purchase consideration for the Casino away from the

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<sup>33</sup> C-929, Procedural Order No. 8, SIAC Arb. No. ARB143/14/MV, dated 7 April 2016 ¶ 3.

<sup>34</sup> C-930, Claimant’s Proposed Escrow Agreement, SIAC Arb. No. ARB143/14/MV, dated 20 April 2016 § 2.2.

<sup>35</sup> C-931, Claimant’s Submission on Escrow, dated 20 April 2016, SIAC Arb. No. ARB143/14/MV, at 7-8 (“As part of the sale process the winning bidder will agree to pay the assumed tax liability at closing, thereby extinguishing that assumed liability. The remaining amount that the winning bidder is willing to expend constitutes the “sale proceeds” to be placed in escrow.”).

escrow account, the Government is in breach of the requirement in Section 15 that *all* sale proceeds must be placed into escrow, and that no monies shall be withdrawn from the escrow account except in compliance with the Settlement’s terms.

42. Finally, Laos’s intention to deduct its alleged “damages claims” and other unspecified offsets from the escrowed sale proceeds represents a further breach of the directive in Section 15 that “[n]o moneys shall be withdrawn from such escrow account except in compliance with this document.”<sup>36</sup> As set out in the following section, it is clear that Laos intends to deprive Claimant of *any* of the sale proceeds for the Casino through these false claims.

**C. Respondent’s Failure to Discontinue Criminal and Tax Investigations is a Material Breach of Sections 23 and 27 of the Settlement.**

43. Section 23 of the Settlement requires that Laos “discontinue the current criminal investigations against Sanum/Savan Vegas and its management or other personnel and shall not reinstate such investigations or bring any criminal prosecutions provided that the terms and conditions agreed herein are duly and fully implemented by the Claimants.” Section 27 requires Laos to “waive[] and release[] any and all claims with respect to the matters addressed in the arbitrations against the Claimants, shareholders, officers and directors . . . .”

44. The Tribunal will recall that Laos raised a number of accusations of criminal conduct in the ICSID arbitration and threatened, on the eve of the merits hearing, to launch criminal and tax investigations into Claimant and its affiliates. The Tribunal previously found, in the context of Laos’s request for an order modifying the provisional measures order, that the criminal investigations conducted by Laos lacked good faith “at least in the first instance.”<sup>37</sup> The Tribunal was further compelled to note that “[w]hat seems to have happened is not so much a ‘change of circumstances’ as a

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<sup>36</sup> *Id.* at 4.

<sup>37</sup> Ruling on Motion to Amend the Provisional Measures Order, dated 30 May 2014 ¶ 26.

change of tactics as the arbitration hearing date approached.”<sup>38</sup> In the same vein, the Tribunal held that the “intrusive criminal investigation of potential witnesses” sought by Laos “a month before the merits hearing” would “aggravate the dispute in the prohibited sense of harming the integrity of the arbitral process.”<sup>39</sup> Finally, the Tribunal found that “the primary purpose for which [Laos] intends to use the powers of criminal investigation . . . is to collect evidence for use at the arbitration which, in the result, will undermine the integrity of the arbitral process.”<sup>40</sup>

45. Rather than comply with its obligations under the Settlement to discontinue these same investigations and release its claims, Laos has continued to threaten Claimant and its affiliates and personnel with criminal and tax investigations, relying on the very same allegations that were at issue before this Tribunal in the ICSID arbitration. Laos has stated in the context of the SIAC Arbitration that it will pursue RICO, fraud, tax, criminal and other “offset” claims against Claimant. Laos has further stated its intention to “deduct” these alleged offsets from the sale proceeds it receives for Savan Vegas, and it has stated that these alleged offsets will amount to “over” \$138 million, an amount *in excess* of the proceeds it expects to receive from the sale (which Laos values at just US\$120 million, at most).<sup>41</sup>

46. Laos is also currently pursuing applications for third-party discovery pursuant to 28 U.S.C. § 1782 before the U.S. District Court for the District of the Northern Mariana Islands (the “CNMI Court”) and the U.S. District Court for the District of Idaho (the “Idaho Court”)<sup>42</sup> against entities related to Claimant, among others—in an effort to publicly humiliate entities and persons related to Claimant, and in flagrant

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<sup>38</sup> *Id.* ¶ 49.

<sup>39</sup> *Id.* ¶¶ 31-32.

<sup>40</sup> *Id.* ¶ 26.

<sup>41</sup> C-910, Cl.’s Response to Resps.’ Amended PM App, at 9.

<sup>42</sup> C-932, *In re Ex Parte Application of The Government of the Lao People’s Democratic Republic*, Case No.: 1:15-mc-8232-EJL-REB (D. Idaho).

disregard of a request from the SIAC Tribunal that it suspend those proceedings while the arbitration is pending.

47. On April 7, 2016, the CNMI Court denied Laos's application, finding that Laos could not meet the requirements of the statute, but that "even if the requirements were satisfied . . . the Court would nevertheless decline to grant [Laos]'s application as a matter of sound discretion."<sup>43</sup> In a decision that tracks this Tribunal's own rejection of Laos's application to modify the provisional measures order in May 2014, the CNMI Court found that Laos's discovery request was "not for a justifiable purpose" because "the motivating factor is winning civil litigation rather than discovering and punishing criminal conduct."<sup>44</sup> The application before the Idaho Court remains pending.

**D. Respondent's Failure to Forgive and Waive All Pre-Settlement Taxes and Fees Constitutes a Material Breach of Section 7 of the Settlement.**

48. Section 7 of the Settlement requires Laos to "forgive and waive any and all taxes and related interest and penalties due and payable by the Claimants and the Gaming Assets up to 1 July 2014 in respect of the Gaming Assets." The taxes covered by Section 7 "are all taxes and fees including but not limited to those that are specifically indicated in Article 1 of the previously signed FTA [Flat Tax Agreement]" executed between the Government and Sanum in 2009.

49. Rather than abide by its obligation to "forgive and waive any and all taxes" incurred prior to 1 July 2014, Laos has claimed US\$70 million in back taxes in the SIAC Arbitration, on the spurious grounds that Savan Vegas had fraudulently obtained the 2009 flat tax agreement by bribing Government officials.<sup>45</sup> Laos's claim constitutes a

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<sup>43</sup> C-933, Order Denying Application for Issuance of Subpoenas, *In re Application of The Government of the Lao People's Democratic Republic*, Case 1:15-mc-00018 (D. N. Mar. I. Apr. 7, 2016), at 16.

<sup>44</sup> *Id.* at 17.

<sup>45</sup> C-910, Cl.'s Response to Resps.' Amended PM App, at 6 ("For a \$30,000 bribe, Savan Vegas avoided tax payments of approximately \$70 million over the five-year term of the agreement.")

material breach of the unambiguous requirement in Section 7 of the Settlement that it forgive and waive such taxes.

**E. Respondent’s Failure to Negotiate in Good Faith a Land Concession and Project Development Agreement at Thakhaek Constitutes a Material Breach of Section 22 of the Settlement.**

50. The Tribunal will recall that one of the investments at issue in the original *Sanum* arbitration related to Claimant’s planned development of a multi-purpose concession on 90 hectares of land in the Thakhaek Special Economic Zone (“TSEZ”), which the Governor of Khammouane Province had promised to provide in a Memorandum of Understanding dated 20 October 2010 (“MOU”).<sup>46</sup> The concession would have included a shopping mall, office buildings, hotel, warehousing, light industrial and factory sites, as well as a slot club and welcome center, which the Ministry of Information and Culture approved in February 2011.<sup>47</sup>

51. However, negotiations following the signature of the MOU stalled when the Prime Minister unexpectedly and without justification immediately canceled the approval that the Ministry of Information and Culture had provided to Sanum for the slot club and welcome center. Discussions came to a complete halt after the Khammouane provincial government reneged on the MOU by removing 16 hectares of highway frontage from the 90-hectare parcel that it had granted to Sanum pursuant to the agreement. The Government’s termination of the Thakhaek concession and license expropriated Sanum’s rights thereunder, which were valued at US\$179 million.

52. The essence of the Parties’ agreement in the Settlement with regard to Thakhaek was to require the Government, subject to a one-time payment of US\$500,000 from Sanum, to “negotiate in good faith and conclude a land concession and project

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<sup>46</sup> C-092, Memorandum of Understanding between Sanum and the Committee for the Laos-Thailand Friendship Bridge III, Khammouane Province, dated 20 October 2010.

<sup>47</sup> C-095, Letter from the Minister of Information and Culture to Savan Vegas, dated 21 February 2011.

development agreement with respect to the 90 hectares of land at Thakhet identified in the MOU signed on 20 October 2010 between Savan Vegas and Governor Khambay Damlath of Khammouane Province, Lao PDR, on the basis that no gaming activities whatsoever will be allowed at or in connection with that 90 hectare site.”

53. In September 2015, Claimant paid in full the US\$500,000 contemplated by Section 22 and entered into preliminary negotiations with Laos for a concession in the TSEZ.<sup>48</sup> However, Laos has failed to satisfy its obligations under Section 22 in two respects.

54. *First*, Laos categorically refused to include *all* of the land specified in the MOU in the new concession agreement. Instead, the Government excluded the 16-hectare portion of land adjacent to National Road 13 at the corner of the road leading to the Laos-Thailand Friendship Bridge III (the “Bridge Road”), in material breach of its obligation under Section 22 to provide a land concession “with respect to the 90 hectares of land at Thakhet identified in the MOU.” However, this 16-hectare portion of the parcel is critical to the commercial viability of the project, given its access to the highway and proximity to the Thai border.

55. During the Parties’ post-Settlement negotiations, Laos claimed that the disputed 16-hectare portion is private property and therefore was never included in the 90 hectares contemplated by the MOU.<sup>49</sup> This claim, however, is wholly belied by the terms

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<sup>48</sup> C-934, Letter from Ministry of Planning and Investment to Sanum Investments Limited, dated 8 September 2015.

<sup>49</sup> C-935, Letter from Ministry of Planning and Investment to Philip James, dated 15 January 2016, at 4.

of the MOU and the map attached thereto,<sup>50</sup> and by the subsequent draft land concession and project development agreements that were negotiated on the basis of the MOU.<sup>51</sup>

56. *Second*, Laos has refused to engage with Claimant’s good-faith attempts to develop—or even to discuss—an alternative proposal that does not include the disputed 16 hectares.<sup>52</sup> To the contrary, the Government rejected that proposal outright, without identifying any specific concerns or suggesting any alternatives, in material breach of its obligation under Section 22 to negotiate in good faith with Claimant. It also threatened to terminate Claimant’s rights under Section 22 if Claimant failed to submit a new proposal by 15 February 2016.

57. In response, Claimant renewed its request that Laos consider its alternative proposal and to provide specific comments on elements of that proposal, and asked to meet with the Investment Promotion Department of the Ministry of Planning and Investment and the TSEZ. To date, Claimant has not received a response, and negotiations have stalled. In the event that Laos fulfills its threat to terminate Claimant’s development rights, it will be in further material breach of Section 22 of the Settlement, which does not provide the Government with any such right of termination.

#### IV.

#### THE GOVERNMENT’S DEFENSES TO CLAIMANT’S MATERIAL BREACH NOTICES ARE UNAVAILING

58. The Government has to date raised three defenses to Claimant’s two Material Breach Notices: (i) all of the actions that Claimant alleges give rise to a material breach of the provisions enumerated in Section 32 are already *sub judice* with the SIAC

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<sup>50</sup> C-092, Memorandum of Understanding between Sanum and the Committee for the Laos-Thailand Friendship Bridge III, Khammouane Province, dated 20 October 2010.

<sup>51</sup> C-467, Draft Land Concession Agreement, dated 25 November 2011; C-468, Draft Thakhaek Project Development Agreement, dated 26 November 2011.

<sup>52</sup> C-935, Letter from Ministry of Planning and Investment to Philip James, dated 15 January 2016.

Tribunal; (ii) all of the Government's actions are justified by Claimant's refusal to perform under the Settlement while the First Material Breach Application was pending; and (iii) Claimant is not entitled to any relief under the Settlement "as the breaching part[y]."

59. Claimant will provide its full response to these arguments in due course. It should be noted at the outset, however, that each of these defenses is entirely without merit, for reasons that include the following.

60. *First*, to the extent that the actions on which Claimant's material breach claims are based may *also* be the basis for claims before the SIAC Tribunal, that circumstance is immaterial to this Tribunal's *exclusive* jurisdiction over actions brought by Claimant under Section 32 to revive the underlying ICSID arbitration. Moreover, many of the actions set out above have taken place *after* the Parties submitted their claims, counterclaims and defenses in the SIAC Arbitration; as such, they simply are not before the SIAC Tribunal. Laos's suggestion that the SIAC Tribunal has already decided that Laos's actions are in compliance with the Settlement is clearly wrong. That Tribunal has issued nothing more than interim awards that address Claimant's requests for provisional relief; they do not opine on, much less decide, the propriety of Laos's actions under the Settlement.

61. *Second*, Claimant's decision to suspend performance under the Settlement while the First Material Breach Application was pending does not constitute a breach of that agreement. To the contrary, Section 32 explicitly states that "[t]he Sale Deadline and any other relevant time periods [in the Settlement] shall be extended by the length of time required to cure such [material] breach."

62. *Finally*, even if Claimant were in breach of the Settlement, Laos's argument that it is therefore justified in ignoring its own obligations under the Settlement and that Claimant has forfeited all entitlement to contractual relief as a result is absurd on its face and finds no support under New York law, which governs the Settlement. Laos

has repeatedly affirmed the Settlement, which therefore remains in effect and continues to place obligations on, and afford corresponding rights to, *all* of the contracting Parties—at least until this Tribunal issues an Award finding Laos to be in material breach of the Settlement.

## V.

### REQUEST FOR RELIEF

63. Accordingly, Claimant respectfully requests that the Tribunal issue an order:

- i. Declaring that Respondent has materially breached Sections 5-8, 15, 22-23 and 27 of the Settlement;
- ii. Declaring that, as a result, Claimant is entitled to revive the *Lao Holdings* arbitration proceedings; and
- iii. Ordering such other and further relief as may be just and appropriate in the circumstances.

64. Claimant respectfully requests that the Tribunal set a date for an in-person procedural conference to establish a schedule for the resolution of Claimant's Material Breach Application.

65. Claimant reserves its right to amend or supplement this request for relief at any time during the course of the proceeding.

Respectfully submitted,



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