

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LAO HOLDINGS N.V.

(Claimant)

v.

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

(Respondent)

ICSID CASE NO. ARB(AF)/12/6

**DECISION ON CLAIMANT'S AMENDED APPLICATION
FOR PROVISIONAL MEASURES**

ARBITRAL TRIBUNAL:

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

Secretary of the Tribunal:

Anneliese Fleckenstein

September 17, 2013

Introduction

A hearing on provisional measures was held on September 2, 2013, in London, U.K.

Present at the hearing were:

Members of the Tribunal:

Judge Ian Binnie, President of the Tribunal
Prof. Brigitte Stern, Arbitrator
Prof. Bernard Hanotiau, Arbitrator

ICSID Secretariat:

Ms. Anneliese Fleckenstein, Secretary of the Tribunal

Attending on behalf of the Claimant:

Counsel

Mr. David W. Rivkin, Debevoise & Plimpton LLP
Mr. Christopher Tahbaz, Debevoise & Plimpton LLP
Ms. Natalie L. Reid, Debevoise & Plimpton LLP
Ms. Leigh E. Sylvan, Debevoise & Plimpton LLP
Mr. Andrew Esterday, Debevoise & Plimpton LLP
Mr. Todd Weiler, Barrister & Solicitor

Witness

Mr. John K. Baldwin, Lao Holdings N.V.
Mr. Shawn Scott, Vice Chairman Sanum Investments Limited
Mr. Richard A. Pipes, Sanum Investments Limited
Mr. Clay Crowth, Savan Vegas and Casino Co., Ltd.

Attending on behalf of the Respondent:

Mr. David Branson, King Branson LLP
Dr. Bountiem Phissamay, Government of The Lao People's Democratic Republic
Ambassador Ouan Phommachack, Government of The Lao People's Democratic Republic
Mr. Sith Siripraphanh, Government of The Lao People's Democratic Republic

Mr. Werner Tsu, LS Horizon, Singapore
Mr. K.P. Santivong, LS Horizon, Vientiane, Lao PDR

1. This is an Application for Provisional Measures brought by the Claimant, Lao Holdings N.V., a national of Aruba, Netherlands (the “Claimant”), in an arbitration initiated against the Respondent, the Government of the Lao People’s Democratic Republic (“Lao PDR” or simply the “Respondent”) by Notice of Arbitration dated 14 August 2012. The Notice was delivered pursuant to Articles 2 and 3 of the Arbitration Rules (Additional Facility) of the International Centre for Settlement of Investment Disputes (the “ICSID-AF Rules”). The Claimant relies in particular on Articles 9 and 14 of the *Agreement on Encouragement and Reciprocal Protection of Investments* between the Lao People’s Democratic Republic (PDR) and the Kingdom of the Netherlands (“the Investment Treaty”).

2. In brief, the Claimant asserts a claim to “no less than US\$400 million” invested in gambling and tourism facilities located in the Lao PDR said to be at risk by acts of the Respondent for the benefit of itself and certain Lao nationals. The Claimant says it has made direct investments of over US\$85 million through Sanum Investments Limited (“Sanum”), a Laotian company wholly owned by the Claimant since 17 January 2012.

3. The investments at issue in this Arbitration include at various locations in the Lao PDR:

- (i) The Savan Vegas Casino, a large luxury hotel, spa and conference center with extensive gambling facilities;
- (ii) A number of slot machine facilities at Thanaleng, Lao Bao, and the Savannakhet Ferry Terminal.

4. The essence of the Claimant’s allegations are set out at paragraph 41 of its Amended Notice of Arbitration, dated 22 May 2012, as follows:

Sanum's present dilemma is a classic case of the foreign investor being lured into establishing profitable investments in the territory of a host State, with promises of fair and equitable treatment, vouchsafed by the rule of law and personal assurances from high government officials. After the foreign investor has risked its capital and developed an important new economic resource for the country – here tourism – it is suddenly and arbitrarily stripped of all of its rights and entitlements in the investment enterprise by the government of the host State, either directly or by abetting the seizure of its investments by the favored local entrepreneur under color of domestic law.

5. The Claimant says it owns other investments in the Lao PDR that have allegedly been subject to similar hostile acts by the Respondent, but they are the subject of a separate, parallel UNCITRAL arbitration, and are not before this Tribunal.

The Application for Provisional Measures

6. Pursuant to Article 46 of the ICSID-AF Rules, the Claimant initiated a Request for Provisional Measures on 19 April 2013, as amended on 28 May 2013, to preserve what it considered to be the *status quo ante* pending resolution of the Arbitration, to prevent further aggravation of the dispute, and ultimately, to enable the Tribunal to grant effective relief in any final award in favour of the Claimant.

(a) Allegations against the Respondent

7. In general terms, the Claimant alleges the following conduct against the Respondent, which the Claimant says violates the Investment Treaty:

- (1) The initial term of the Savan Vegas Flat Tax Agreement (“FTA”) is to expire at the end of 2013. Savan Vegas will become subject to an 80% casino tax beginning 1 January 2014 if its FTA is not extended. Savan Vegas has attempted unsuccessfully to negotiate

the terms of an extension, which it says is required by the Lao Government's prior assurances, but the Lao Government refuses even to discuss a renewed FTA on any terms. Without an FTA, Savan Vegas says it would also be subject to a 10% Value Added Tax ("VAT"), meaning that 90% of its gaming revenues (not just profits) would be taxed. No other casino in Lao, the Claimant says, faces the threat of these prohibitive taxes, which, according to it, will force Savan Vegas to shut down.

- (2) On 26 April 2012, the Office of Economic Dispute Resolution, which reports to the Respondent's Minister of Justice, purported to order without notice the removal of slot machines from the Thanaleng Club.
- (3) On 26 July 2012, during proceedings in a private litigation with ST, its Laotian partner in Sanum, before the Laotian People's Court, the Claimant says Sanum was served with a Seizure Order issued by the court the previous day, which sequestered and/or froze some of Sanum's bank accounts. Sanum says it had no notice that such an Order was being considered, much less that it had already been decided before any trial had begun. Execution of the Court's Order was made upon several of the banks at which Sanum held accounts in U.S. dollars, Thai baht, and Lao kip.

- (4) Further, the Claimant says, the Laotian People's Court authorized cancellation of all contracts with Sanum regarding the Thanaleng Club – imposing a loss for Sanum of more than US\$220 million (later amended to US\$416 million). The Court also awarded damages to its Laotian partner, in addition to imposing a penalty on Sanum, payable to the Respondent government in the amount of 2% of the amount of Sanum's (denied) counterclaims. This penalty amounts to approximately US\$5 million.
- (5) On or about 28 June 2012, following what the Claimant contends was a flawed and biased audit, the Lao PDR central government issued three notices and demands for payment against Sanum concerning three tax debts, alleged to be owed by the Lao fiscal authorities (including penalties and interest). These tax demands were denominated, respectively, as a “construction tax,” a “brokerage tax,” and “overtime charges,” totaling US\$23,759,229. The Claimant disputes the demands.

8. The Claimant contends that if the Lao PDR enforces its New 80% Tax Law and 10% VAT against Savan Vegas, or takes enforcement action based on taxes recently levied against the Lao Bao and Ferry Terminal slot clubs, it will significantly aggravate the dispute, impair the rights Lao Holdings seeks to rely upon and vindicate through this arbitration, and interfere with the Tribunal's ability to grant effective relief should Lao Holdings ultimately prevail on the merits.

(b) *Provisional Measures sought by Claimant*

9. The Claimant seeks the following Provisional Measures to remain in force during the pendency of this proceeding:

- (1) An order enjoining the Lao Government from (a) demanding that Claimant pay any amounts allegedly due pursuant to the New Tax Law; and (b) instituting or further pursuing any action, judicial or otherwise, to collect any payments Respondent claims are owed by Claimant pursuant to the New Tax Law, *or, in the alternative*, ordering that the terms of the existing FTA remain in force;
- (2) An order enjoining the Lao PDR from taking any enforcement action, judicial or otherwise, to seize or interfere in the operations of the Lao Bao and Ferry Terminal slot clubs based on any disputed tax amounts;
- (3) An order enjoining the Lao PDR from taking any action, judicial or otherwise, to freeze or seize funds that Claimant or its related entities place in accounts in the Lao banking system; and
- (4) An order enjoining the Lao PDR from taking any steps that would alter the *status quo ante*, aggravate the dispute or render ineffective any ultimate relief that this Tribunal may award.

(Claimant's Amended Application for Provisional Measures, para 17)

The Tribunal's Authority to Grant Provisional Measures

10. The parties agree that the Tribunal has the authority under Article 46 of the ICSID-AF Rules to grant Provisional Measures. That provision states: “ ... either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal.”¹ The Investment Treaty does not place any restrictions on the parties’ right to seek Provisional Measures.²

11. The general principle governing the grant of Provisional Measures was expressed in the following terms 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.

12. The parties also agree on the elements required to be established by a claimant to obtain an order for Provisional Measures, namely, (1) *prima facie* jurisdiction; (2) *prima facie* establishment of the right to the relief sought; (3) urgency; (4) imminent danger of serious prejudice (necessity); and (5) proportionality. (see, e.g. *Paushok et al. v. The Government of Mongolia*, Order on Interim Measures (UNCITRAL, 2 September 2008), para 45).

¹ See also Article 47 of the ICSID Convention, which provides as follows:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

² See generally, Loretta Malintoppi *Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order* published as Chapter 11 in International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer.

(a) *With Respect to Prima Facie Jurisdiction*

13. The Claimant, incorporated on 11 January 2011 in Aruba is a national of the Netherlands for purposes of the Investment Treaty, which includes “legal persons constituted under the law of [a] Contracting Party.” The Respondent accepts that the Claimant’s indirect ownership of 80% of Savan Vegas, through its 100% ownership interest in Sanum, constitutes an investment under the Investment Treaty, as does its indirect interest in the Lao Bao and Ferry Terminal slot clubs.

14. It should be noted that while existence of jurisdiction *prima facie* is not contested for the purposes of the Provisional Measures Application, jurisdiction is a live issue in respect of the Arbitration on the merits, and will be dealt with at a later date by the Tribunal in a bifurcated hearing, as ordered in Procedural Order No. 2 issued subsequent to this Order.

(b) *With Respect to Whether the Claimant Has Established a Right to the Relief Sought*

15. The parties agree that for the purpose of Provisional Measures

[T]he Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of the Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal.

(See, *Paushok*, para 55, and *City Oriente Limited v. Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, Case No. ARB/06/21, Revocation Decision, para 20 (ICSID, 13 May 2008) (“the party requesting the measure need only prove that its claim has the appearance of good right, *fumus boni iuris*, or, in other words, the petitioner must prove that the rights invoked are plausible”).

16. While the Respondent contends that the documentation relied upon by the Claimant to claim renewal of the FTA, shows that it is entitled to no more than an unenforceable “agreement to agree,” the ICSID tribunal stated in *Victor Pey Casado* that:

The right to be preserved only has to be asserted as a theoretically existing right, as opposed to proven to exist in fact. The Tribunal, at the provisional measures stage, will only deal with the nature of the right claimed, not with its existence or the merits of the allegations of its violation.³

17. The Respondent’s Counter Memorial is not due to be submitted until 29 October 2013. The Respondent has not at this stage filed any evidence to refute the allegations of unfair and discriminatory conduct made in the Claimant’s Application for Provisional Measures. In these circumstances, the Tribunal accepts that the combined operation of the new tax of 80% on revenue (not profit) to which will be added 10% VAT as of 1 January 2014, the as yet uncontested evidence of government seizure of bank accounts, and various other administrative actions taken or threatened against Lao Bao and Ferry Terminal slot clubs, has sufficiently established, in the absence of any evidence from the Respondent to the contrary, the “right to relief” within the scope of the ICSID jurisprudence on Provisional Measures.

(c) *The Requirement of Urgency*

18. Article 46 of the ICSID-AF Rules does not specify the degree of urgency required to grant Provisional Measures. However, the tribunal in *Azuriz v. Argentina* associated urgency with the notion of imminence of the damage, in the following terms: “ ... given that the purpose

³ Chittharanjan F. Amerasinghe, *Jurisdiction of Specific International Tribunals*, referring to *Victor Pey Casado Fondation Président Allende v. Republic of Chile* ICSID Case No. ARB/98/2, Décision sur les mesures conservatoires sollicitées par les parties, 25 September 2001.

of the measures is to preserve the rights of the parties, the urgency is related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award.”⁴

19. The Tribunal’s attention was drawn to the view expressed by the *City Oriente* tribunal (which held that a provisional measures order was urgent, notwithstanding the fact that claimant was unlikely to have to pay the tax at issue for a year or more):

[P]rovisional measures [are] indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which claimant seeks to protect through this arbitration. (*City Oriente Limited v. Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, Case No. ARB/06/21, Decision on Provisional Measures, para 55 (ICSID, 19 November 2007).

20. In the Tribunal’s view, the Claimant has established “urgency” for the purpose of its Provisional Measures Application.

(d) *With Respect to the Requirement of Necessity*

21. The Tribunal is of the view that the increase in tax from the current \$745,120 *per annum* under the FTA presently in effect, to a tax of 80% of revenue which in 2013 is estimated to be about \$61 million (see Exhibit C-296) plus 10% VAT, and the other actions said to be taken (and not yet disputed by evidence from the Respondent) would, if implemented, have a destructive effect on the Claimant’s investments not adequately reparable by an award of damages (*Paushok* paras 68-69). On the facts of this case, necessity is derived from the principle (not disputed by the Respondent) that neither party may aggravate or extend the dispute (*City Oriente* para 10).

⁴ *Azurix v. Argentina* ICSID Case No. ARB/01/12, Decision on Provisional Measures, 6 August 2003, para 33, in Christoph H. Schreuer, *The ICSID Convention: A Commentary*, 2nd edition, p. 776.

(e) *Proportionality*

22. The real battleground in this Application for Provisional Measures is the fourth element, namely proportionality. The *Paushok* tribunal noted, under this branch of the analysis, that the Tribunal is “called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties” (para 79).

23. The Claimant contends that the harm it will suffer if the requested Provisional Measures are denied will substantially outweigh any harm (which it says is non-existent) to the Respondent if the Provisional Measures are granted. The Claimant says:

If Respondent seizes Savan Vegas’s bank accounts, equipment, property and other assets under the pretext of forcible collection pursuant to the New Tax Law or otherwise, Savan Vegas cannot operate and will be put out of business. Likewise, enforcement actions by Respondent against the Lao Bao and Ferry Terminal slot clubs would compromise their ability to continue to operate. Under such circumstances, the Tribunal would not be able to restore Lao Holdings, or Savan Vegas, to their original positions should Claimant prevail on the merits. (Claimant’s Amended Application for Provisional Measures, dated 28 May 2013, para 115)

24. The Claimant further emphasizes that its “hard assets” in the Lao PDR are sufficient to secure any monies which the Respondent, if it succeeds in the Arbitration, will be entitled to collect. (*City Oriente* para 59). In other words, if the Respondent were to prevail on the merits, it would be able without difficulty to obtain payment of the full amount owing to it.

25. As stated, the Respondent has submitted no evidence of harm if the Provisional Measures are granted. However, it objects on the ground that, if granted, the Provisional Measures would be an unacceptable interference with the “sovereign taxing power” of the Lao PDR.

26. In the Tribunal's view, the balance of convenience in this case, on the present record, favours the Claimant. Nevertheless, there are countervailing circumstances. Proportionality also favours recognition of the legitimate demand of the Respondent that taxes payable by reason of the exercise of its "sovereign taxing authority" be respected. The Claimant continues to do business in the Lao PDR. It benefits from the infrastructure provided. It continues to exploit commercial opportunities which, but for the Respondent, would not exist. There is no reason why the Claimant should be granted, on an interim basis, the full measure of tax relief it would obtain if successful in the Arbitration itself.

27. In its Rejoinder dated 23 August 2013 to the Claimant's Request for Provisional Measures, the Respondent stated:

In a spirit of compromise solely for the purposes of the request for provisional measures, the Respondent will agree to collect taxes after 31 December 2013, the time when the flat tax agreement expires, at the rates specified for gaming operations and all businesses in the tax code that existed until the new tax code became effective (the prior tax code). Claimant should have no objection as it negotiated a five year flat tax agreement in 2008 and had to expect to be subject to the existing tax code on its expiration on 31 December 2013. These taxes in amounts to be determined under the **rates of the prior tax code** will be due and payable each month. (p 2. Emphasis added)

28. The Tribunal notes that according to the Claimant's own financial analysis (Exhibit C-296), the application of the pre-2014 rate "for gaming operations and other business" to the (anticipated) 2013 financial results for Savan Vegas would yield an income tax liability of Savan Vegas of approximately US\$10,303,920.

29. The Tribunal concludes that a balanced outcome in relation to Provisional Measures on the tax issue would be to reduce the sum of US\$10,303,920 by fifty (50) percent, (being \$5,151,960) having regard in particular to the Claimant's immovable "hard assets" located in

the Lao PDR. Accordingly, the Tribunal orders the payment by the Claimant into an escrow account in a bank in Singapore (or elsewhere by agreement of the parties) of an amount equal to one-twelfth of US\$5,151,960, being US\$429,330 on the first day of each and every month beginning 1 January 2014 and thereafter until the present Arbitration is concluded by settlement or final award.

Disposition

30. The Tribunal takes careful note that in its Counter-Memorial on Provisional Measures the Respondent stated that it was willing " to allow Claimant to pay the taxes that are due for the operation of the Ferry Terminal slot club and the Savan Vegas excise tax that will become due in January 2014 by placing the amounts due every month in an international escrow account under the control of the Tribunal" and that the Respondent was further willing to refrain from "steps to collect the tax assessments made against Sanum after the 2012 audit or the court fee arising out of the ST Group/Sanum litigation while the arbitration is pending." Having regard to the Respondent's concessions, and based on the analysis set out above, the Tribunal considers that a fair and balanced disposition of the application for Provisional Measures, is that during the pendency of this proceeding the Tribunal pursuant to ICSID-AF Rule 46,

- (1) enjoins the Lao Government from (a) demanding that Claimant pay any amounts allegedly due pursuant to the New Tax Law; and (b) instituting or further pursuing any action, judicial or otherwise, to collect any payments Respondent claims are owed by Claimant pursuant to the New Tax Law;

- (2) enjoins the Lao PDR from taking any enforcement action, judicial or otherwise, to seize or interfere in the operations of the Lao Bao and Ferry Terminal slot clubs based on any disputed tax amounts;
- (3) enjoins the Lao PDR from taking any action, judicial or otherwise, to freeze or seize funds that Claimant or its related entities place in accounts in the Lao banking system; and
- (4) these orders are under the condition that the Claimant deposits in an escrow account at a Singapore bank or other bank satisfactory to the parties under arrangements negotiated by the parties and approved by the Tribunal, the amount of US\$429,330 on the first day of each month commencing 1 January 2014.
- (5) enjoins both parties from taking any steps that would alter the *statu quo ante*, or aggravate the dispute.

31. The costs of this Application are reserved for the consideration of the Tribunal at the conclusion of the Arbitration.

[Signed]

Ian Binnie, C.C., Q.C.

On behalf of the Tribunal

Dated this 17 day of September 2013