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 SECOND 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

18 March 2015

I. Introduction

A hearing on the Claimant's second application for provisional measures was held by telephone conference on 10 March 2015.

Participating during the call 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
Ms. Mercedes Cordido-Freytes de Kurowski, Legal Counsel, ICSID

Participating on behalf of the Claimant:

Mr. David W. Rivkin, Debevoise & Plimpton LLP
Mr. Chrispoher Tahbaz, Debevoise & Plimpton LLP
Ms. Samantha Rowe, Debevoise & Plimpton LLP
Mr. Corey Whiting, Debevoise & Plimpton LLP
Mr. John K. Baldwin, Lao Holdings N.V., Sanum Investments Limited
Mr. Shawn Scott, Lao Holdings N.V., Sanum Investments Limited
Ms. Deborah Deitsch-Perez

Participating on behalf of the Respondent:

Prof. Don Wallace, Georgetown University
Mr. John Branson, Parker Poe Adams & Bernstein
Mr. Nicholas Birch

1. This is a second Application for an Order for Provisional Measures ("PMO") brought by the Claimant, Lao Holdings N.V., a national of Aruba, Netherlands (the "Claimant").

2. The initial PMO application was made (and granted) in an arbitration initiated against the Respondent, the Government of the Lao People's Democratic Republic (the "Government" or simply the "Respondent") by Notice of Arbitration dated 14 August 2012, pursuant to Article 9 of the *Agreement on Encouragement and Reciprocal Protection of Investments Between the Lao People's Democratic Republic and the Kingdom of the Netherlands* (the "BIT Treaty"). The procedure is governed by the Arbitration Rules ("Additional Facility") of the International Centre for Settlement of Investment Disputes (the "ICSID-AF Arbitration Rules").

3. In that arbitration, the Claimant asserted a claim of US $690 million on account of its investments in gambling and tourism facilities located in the Lao PDR said to be at risk of *de facto* expropriation by acts of the Respondent for the benefit of itself and certain Laotian nationals. The Claimant's principal asset is Sanum Investments Limited, a Laotian company wholly owned by the Claimant since 17 January 2012, which in turn owns the Savan Vegas Hotel and Casino, a large hotel and conference center with extensive gambling facilities, plus other assets elsewhere in Laos.

II. The Settlement of the BIT Arbitration

4. On 15 June 2014, at the hearing on the merits in Singapore, the parties made a settlement of the BIT arbitration by a Deed of Settlement dated 15 June 2014 and its Side Letter dated 18 June 2014. Upon the parties' joint request, the Tribunal issued an Order on Consent suspending the BIT arbitration as of 19 June 2014.

5. The settlement process was described in general terms on 17 June 2014 by counsel for the Government as follows:

> We started negotiating on Thursday. We negotiated all day Friday. I imposed the terms, here are the terms: "We pay them nothing; they dismiss their claims, they sell their casino for what they can get, and they leave Lao. Those are the terms." (Transcript, 17 June 2014, p. 25)

6. The Deed of Settlement contemplated negotiations of a Flat Tax arrangement within 45 days of 15 June 2014. The Claimant would then have ten months to complete a sale, with an extension of time if necessary to accommodate a closing date. During that time the Claimant and its affiliates would continue to run the businesses subject to the "monitoring and oversight" of the Government's agent, RMC Gaming Management LLC ("RMC"). At the end of 10 months, if no sale has materialized, "the Claimants and Laos shall have the right to appoint RMC or any other qualified operator" to step in and manage the gambling assets "in place of the Claimants until the sale is complete" (Article 12 of the Deed of Settlement).

7. The Claimant's financial claims against the Government for conduct *pre*-dating the settlement were nevertheless subject to revival in the event of a *post*-settlement material breach of certain of the terms identified in Article 32 of the Deed of Settlement itself.[1] The jurisdiction of the Tribunal in the present case is grounded on the provision in Article 32 giving it

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[1] **Article 32**
The Claimants shall only be permitted to revive the arbitration in the event that Laos is in material breach of Sections 5 – 8, 15, 21 – 23, 25, 27 or 28 above and only after reasonable written notice is given to Laos by the Claimants of such breach and such breach is not remedied within 45 days after receipt of notice of such breach. The Sale Deadline and any other relevant time periods herein shall be extended by the length of time required to cure such breach. In the event that there is a dispute as to whether or not Laos is in material breach of Section 5 – 8, 15, 21 – 23, 25, 27 or 28 above, the Tribunals shall determine whether or not there has been such a material breach and shall only revive the arbitration if they conclude that there has been such a material breach.

jurisdiction to "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".

III. Claimant's Allegations of Material Breach of the Settlement Agreement

8. Shortly after the suspension of the ICSID arbitration, the Claimant filed an "*Application for Finding of Material Breach of Deed of Settlement and for Reinstatement of Arbitration*". The ground for relief was an allegation that the Respondent Government had granted gambling concession(s) to third parties in breach of the Savan Vegas casino monopoly rights, thereby ending (the Claimant said) any possibility of an advantageous sale.

9. On 14 October 2014, the Tribunal heard submissions from the parties on the legal objections to the Tribunal's jurisdiction raised by the Respondent concerning the Material Breach Application. On 19 December 2014, the Tribunal issued an Interim Ruling on Issues Arising under the Deed of Settlement, upholding its jurisdiction to hear the Material Breach claim under Article 32 of the Deed of Settlement.

10. Article 32 identifies a number of provisions of the Deed of Settlement which, if materially breached, would lead to a revival of the BIT arbitration including, in particular, Article 6 which (as clarified by the Side Letter) provides as follows:

> Article 6
>
> Laos shall treat the Project Development Agreement ("PDA") dated 10 August 2007 in respect of the Savan Vegas Casino and each of the licenses and land concessions issued in respect of the Savan Vegas Casino, the Lao Bao Slot Club and the Savannakhet Ferry Terminal Slot Club (collectively the "Gaming Assets"), as being restated as of the Effective Date, with a term in each of fifty (50) years as from the Effective Date. ST owns 40% of the Lao Bao and Ferry Terminal Slot Clubs. (emphasis added)

Much of the present dispute revolves around the disagreement of the parties about the meaning and effect of the underlined words in Article 6. As outlined in the Tribunal's Interim Ruling on 19 December 2015, the Claimant contends, and the Respondent denies, that if the Respondent Government is in breach of the Project Development Agreement by authorizing the building a rival casino within the geographic monopoly awarded to Savan Vegas, the effect is not only to revive the BIT arbitration but to rescind the entire settlement. The Respondent Government's position is that revival of the BIT arbitration would leave the Deed of Settlement otherwise intact, and under Articles 11 and 12 thereof, it is entitled as of 15 April 2015 to cause RMC, a qualified gambling operator, to "step in and manage the Gaming Assets" of the Claimant until a sale is completed, and thereafter to complete the sale.

IV. Second Application For An Order For Provisional Measures

11. Pursuant to Article 46 of the ICSID-AF Arbitration Rules, the Claimant submitted a second Request for Provisional Measures on 19 January 2015, to preserve what it considered to be the *status quo ante* pending the Tribunal's consideration of the merits of the Material Breach Application.

12. In general terms, the Claimant alleges that the Respondent Government has threatened to take measures putting at risk the effectiveness of any relief the Claimant may obtain in its effort to revive the BIT Arbitration, rescind the Settlement Deed and Side Letter. More specifically, the Claimant seeks to enjoin the Government from:

(i) taking control of, or taking any steps towards the sale of, Claimants' rights and assets, and in particular, seizing the management and control of its "Gaming

Assets" effective 15 April 2015 and moving to sell the casino, notwithstanding the pendency of Article 32 proceeding;

(ii) retroactively applying a 45% tax on gross gaming revenues of the Savan Vegas Casino in the interim;

(iii) declaring that it will treat Lao Holdings' rights to obtain a land concession and project development agreement for Thakhaek as forfeited and void; and

(iv) taking any steps that would alter the *status quo* or otherwise aggravate the dispute.

13. As part of the relief sought, Claimant commits to paying the amount ordered in the First Provisional Measures Order, US$429,330, into escrow on the first day of each month, with retroactive effect to 1 July 2014.The Claimant contends, and the Respondent Government denies, that a finding of material breach would not only revive the BIT arbitration but have the effect, as a matter of the governing New York law, of rescission of the entire Deed of Settlement.[2] The Claimant argues that the provisional measures it requests are necessary to protect its rights if the Deed of Settlement is rescinded. According to the Respondent Government however, the Claimant "is asking the Tribunal to act outside the [Material Breach] proceeding and grant Claimant through provisional measures the relief it ultimately seeks through its Material Breach claim (release from its obligations under the Deed)."

14. The Thakhaek issue is moot as the Government is not now proposing to take any unilateral action concerning the Thakhaek property, but has filed an amended claim in an

[2] The Claimant seeks from the Tribunal a "declaration that Laos materially breached Section 6 of the Settlement and an order rescinding the Settlement and reviving the BIT Arbitration." Claimant's Response, para. 18 (emphasis added).

arbitration pending before the Singapore International Arbitration Centre (SIAC) seeking a declaration that Claimant has waived its rights to the Thakhaek property.

15. Moreover, the claim to a provisional measures order generally prohibiting the Respondent Government from "taking any steps that would alter the *status quo* or otherwise aggravate the dispute" is too broad and general. The parties to a proceeding are entitled to know with precision what acts are prohibited and what acts are permitted so that they may conduct themselves accordingly.

V. Prerequisites to an Order for Provisional Measures

16. The elements the Claimant must establish to obtain Provisional Measures are the following: (i) *prima facie* jurisdiction, (ii) *prima facie* establishment of the right to the relief sought, (iii) urgency or (imminent danger of serious prejudice), (iv) necessity, and (v) proportionality.[3]

17. The Tribunal is mindful of the caution expressed in *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Decision on Provisional Measures [2007]:

> Provisional measures are indeed not deemed to give to the party requesting them more rights than it ever possessed and has title to claim. In other words, provisional measures are deemed to maintain the *status quo*, not to improve the situation of the Claimant before the rendering of the Tribunal's award. The Tribunal considers that, far from seeking to maintain the *status quo*, the recommendations sought by the Claimant are plainly directed to affect a fundamental change to it, by improving the Claimant's situation. (emphasis added) (para. 37)

[3] *Caratube International Oil v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Provisional Measures [2014]; *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1 [1983]; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24 [2005], para. 40; *Sergei Paushok v. Mongolia*, UNCITRAL, Order of Interim Measures [2008], para. 92.10; *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures [2008], para. 35; *See, e.g. City Oriente Ltd. v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures [2008], para. 20.

VI. *Prima Facie* Jurisdiction to Grant Provisional Measures

18. The Tribunal having determined in its ruling dated 19 December 2014, that it does have jurisdiction pursuant to Article 32 of the Deed of Settlement in respect of the Material Breach Application, it follows that the Tribunal has jurisdiction to grant Provisional Measures, provided the other criteria are met, to protect the potential revival of the BIT Arbitration.

19. At this point, the Tribunal is not exercising jurisdiction as an ICSID Tribunal under the BIT Treaty and has no authority to grant provisional measures in that capacity.

20. The Provisional Measures Application is directed solely at the dispute over which the Tribunal does have jurisdiction under Article 32, namely the dispute arising out of the alleged violation of Article 6 of the Deed of Settlement.

21. Although, there is no mention in the Deed of Settlement of a power to grant provisional measures, the Tribunal considers that it has such inherent power in order to fulfill its jurisdictional mission. It can be mentioned here, for example, that, although the Iran-U.S. Claims Tribunal could apply Article 26 of the UNCITRAL Rules that were adopted by it, which provided for the possibility to grant provisional measures, it placed in fact great emphasis on its inherent power to issue interim measures "as may be necessary to conserve the respective rights of the Parties and to ensure that the tribunal's jurisdiction and authority are made fully effective." [4]

[4] It must be noted that, when the tribunal first addressed a request for interim relief, it based the measures it ordered not on Article 26 but on its inherent power. *See* George H. A Ldrich, The Jurisprudence of the Iran-United States Claims Tribunal, 137–38 (Clarendon Press 1996).

VII. *Prima Facie* Establishment of the Right to the Relief Sought?

22. Lao Holdings has at this stage put forward a slender claim to the relief sought under Article 32 of the Settlement Agreement

(a) Revival of the Arbitration and Rescission of the Deed of Settlement

23. This right that the Claimant asks the Tribunal to protect could only be based on a finding of a violation of the Claimant's monopoly rights. The Claimant's evidence of material breach to date consists largely of hearsay evidence and disputed press reports, together with an affidavit of John Baldwin based on belief rather than any direct evidence supporting the assertion that the Government is planning to licence a rival casino in an area to which Savan Vegas claims monopoly gambling rights.

24. The Tribunal's Interim Ruling dated 19 December 2014 states that "(t)he Tribunal emphasizes that it has not determined whether or not the Claimant has made even a *prima facie* case on the facts". [para. 83]

25. It is true, as this Tribunal affirmed in its first Provisional Measures Order, that in order to determine whether Claimant has established a right to Provisional Measures,

> the 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 favour of 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. [para. 15]

26. In the Tribunal's view, the Claimant has not met the requisite standard of proof to justify the issuance of a Provisional Measures Order at this time. The hearing of 13-14 April 2015 has precisely as one of its objectives, to ascertain whether or not the right the Claimant asks this

Tribunal to protect – the right to revive the arbitration because its monopoly rights have allegedly been violated – exists.

(b) Relief from Imposition of the 45% Tax in Gaming Revenue

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

28. The original Provisional Measures Order (in the BIT arbitration) prohibited the Respondent Government from taking action to collect an 80% income tax levy plus 10% VAT amounting to 90% of the casino's income.

29. The Tribunal has not been called on to consider let alone adjudicate the 45% tax that was enacted into law after the 15 June 2014 settlement. Article 34 of the Deed of Settlement, as amended by the Side Letter provides:

> In the event that the arbitration is revived pursuant to clause 32 above, neither the Claimants nor Laos shall be permitted to add any new claims or evidence to the arbitration nor seek any additional reliefs (sic) not already sought in the proceedings.

30. Prior to the end of December 2014, Savan Vegas had paid taxes pursuant to a Flat Tax Agreement which has neither been extended nor renegotiated.

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

32. When the Flat Tax Agreement expired on 31 December 2014, Savan Vegas became subject to the applicable tax laws of Laos. It is common ground that although Savan Vegas has continued to do business in Laos, it has not paid taxes either directly or in escrow since 1 January 2015. While it now offers to pay in escrow the sum of US$429,300 per month retroactive to 1 January 2015, there is no obligation on the Government to agree to such a figure or to any escrow arrangement.

33. The Government contends, and the Claimant denies, that it is open to the Government to have the Flat Tax Committee constituted without the cooperation of the Claimant by resorting under Article 9 of the Deed of Settlement, to the President of the Macao Society of Registered Accountants. The Claimant does not agree. However, this Tribunal is not seized with that issue.

34. The Claimant argues that its original claim regarding taxation in this arbitration was not limited to the 80% New Tax Law but was more generally "that the Respondent is attempting to use the tax law to expropriate Savan Vegas – the claim is not limited to a particular rate." [Claimant's Response, footnote 72] However, for so long as the Claimant continues to do business in Laos, it can reasonably expect to be bound by the Laotian income tax laws applicable to gambling casinos unless and until a new Flat Tax Agreement is negotiated.[5]

35. It appears from the record that the Government has initiated standard collection procedures which require a series of three notices of which the first was delivered in January 2015. The Government has offered to "suspend the tax invoices that have been sent to Claimant pending the determination of the new flat tax (assuming Claimant does not interfere in the

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[5] *RosInvest Co. UK Ltd. v. Russian Federation*, SCC Case No 079/2005, Final Award [2010], para. 574.
Quasar de Valores SICA SC and ors. v. Russian Federation, SCC Case No 24/2007, Award [2012], para. 181

procedure)" provided that as of 15 April 2015 the Claimant yields "managing and operating of Gaming Assets" to RMC under Article 12 of the Settlement Deed. These conditions are not satisfactory to the Claimant.

36. The Tribunal concludes that the Claimant has not made out a case for relief from compliance with the current Laotian tax laws.

(c) Preservation of the Claimant's Management and Control of its Gaming Assets Until the Material Breach Application is Determined

37. The issue arises only under Article 12 of the Deed, wherein an operator is authorized to "step in and operate the Gaming Assets in place of Claimants until the sale is completed and complete the sale…"

38. The Respondent Government points out that the change in control contemplated by Section 12 of the Deed of Settlement is entirely new in the Deed and did not pre-exist it. According to the Government, "if Claimant believes the Government is breaching Section 12 of the Deed, the appropriate forum in which to seek relief is in the SIAC proceeding."

39. That said, however, the change in control is a live issue in the Material Breach Application by reason of the rescission argument put forward by the Claimant.

40. While the Tribunal is of the view that the Claimant's evidence to date of the alleged material breach falls short even of the standard required to support a Provisional Measures Order, the Government's stated intention to put RMC in charge of the "gaming assets" is only effective from and after April 15, 2015. In the meantime, the Tribunal will have an opportunity to have the evidence of both parties tested at the hearing on the merits of the Material Breach

Application on 13 and 14 April 2015. It will be open to the Tribunal at the conclusion of the evidence to determine whether the record warrants a Provisional Measures Order keeping Savan Vegas in control of the Gaming Assets pending the Tribunal's decision on the merits of the Material Breach Application.

41. It is quite true, as the Respondent Government points out, that irrespective of the evidence, there remain some difficult questions of interpretation of Article 6 itself. However, to resolve those issues at this stage (as the Tribunal itself noted on 19 December 2014) would be to prejudge a mixed question of fact and law before the evidence is heard and the parties have been given an opportunity to make full submissions on the legal issues identified in that Ruling.

VIII. Urgency

42. As stated, the Government intends to have RMC, an entity considered by both parties in the Settlement Deed to be an acceptable manager, take over the control and management of the Claimant's gaming assets on 15 April 2015, in accordance with Article 12 of the now disputed Settlement.

43. The Deed of Settlement does not permit the Government to deny Savan Vegas management and control prior to the April 13/14 hearing.

44. In the Tribunal's view, urgency does not require a Provisional Measures Order in relation to the management and control of the Gaming Assets prior to the hearing on the merits at Singapore on 13 and 14 April 2015.

IX. Necessity of the Proposed Provisional Measures

45. The concept of "necessity" is related to the preservation of the *status quo* as may be required to ensure that any Order made on the merits by the Tribunal in respect of the Material Breach Application is not vitiated by measures taken by the Respondent Government during the pendency of the Tribunal's deliberations.

46. The Tribunal is not satisfied that there is any necessity to issue an order for Provisional Measures before hearing the evidence on 13 and 14 April 2015.

47. At the conclusion of the 13/14 April hearing, the Tribunal will be in a position to determine whether it is necessary and appropriate to issue a Provisional Measures Order restraining the Government pending the issuance of the Tribunal's decision on the merits from taking action under Article 12 of the Deed of Settlement to install RMC as manager.

X. Proportionality

48. An order which is grounded neither in urgency nor necessity is not a "proportionate" response to a threatened Government action which will take place, if at all, after the April 13/14 hearing.

XI. Disposition

49. The Tribunal therefore defers until the conclusion of the hearing on the Material Breach Application on 13/14 April 2015 its decision on the Claimant's application to enjoin the Government from causing RMC to "step in and manage and operate" the Gaming Assets, as well as advancing their sale, pending issuance of the Tribunal's decision on the merits. In all other respects, the Application for Provisional Measures is dismissed.

Dated this 18 day of March 2015

[Signed]

Professor Brigitte Stern
Arbitrator

[Signed]

Professor Bernard Hanotiau
Arbitrator

[Signed]

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