

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

Lao Holdings N.V.
v.
The Lao People's Democratic Republic
(ICSID Case No. ARB(AF)/12/6)

PROCEDURAL ORDER NO. 11

Judge Ian Binnie, C.C., Q.C., President of the Tribunal
Professor Brigitte Stern, Arbitrator
Professor Bernard Hanotiau, Arbitrator

Secretary of the Tribunal
Catherine Kettlewell

Date: June 25, 2018

I. Background

A. Introduction

In this application dated 15 May 2018, the Government of the Lao People's Democratic Republic (the "Government") seeks entry of three categories of material as "additional evidence" for the merits hearing in Singapore scheduled for 3 to 7 September 2018 ("Application"):

- (A) two SIAC awards (one being the Award in SIAC Case No ARB143/14 (2017)¹ and the second being a SIAC award in favour of the Claimants against their erstwhile partners ST in 2016²),
- (B) documents relating to allegations of corruption and bribery against officers of the Claimants and, in particular, the President Mr John Baldwin, and
- (C) the BDO "forensic" audit of Savan Vegas books and records conducted after the Government takeover of the casino in April 2015.

The Claimants provided their response on 30 May 2018 to the Application to adduce fresh evidence, to which the Government replied on 15 June 2018.

B. The Parties' "frozen record" agreement

The starting point is clause 34 of the 15 June 2014 Settlement which provided that "*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 claim or evidence to the arbitration nor seek any additional relief not already sought in the proceedings.*"

While initially the Government argued that the Tribunals' jurisdiction to hear the merits scheduled for 3 to 7 September 2018 derived from the Settlement Agreement,³ it now concedes that the Tribunals' jurisdiction is "treaty-based."⁴ The Tribunal hearings were suspended by the parties' 15 June 2014 Settlement, but have now reverted to the *status quo ante*, with the usual authority under the ICSID/PCA rules to determine the admissibility of evidence.⁵

Nevertheless, in general, the Tribunal will defer to what the parties agreed in clause 34. The Government recalls the 3 April 2017 ruling of the LHNV Tribunal (at a time when the proceedings of the PCA Tribunal were suspended) that while the Tribunal would normally give effect to the parties' agreement respecting evidentiary matters, the Tribunal retained a residual discretion to chart a different course "if compelling

¹ GOL SIAC Final Award, *GOL v. Sanum & LHNV*, SIAC Case No. ARB/143/14MV, dated June 29, 2017.

² ST SIAC Final Award, *Sanum v. ST Group, et al*, SIAC Case No. ARB/184/15, dated August 22, 2016.

³ See Application ¶2.

⁴ Government's Reply ¶6.

⁵ See ICSID AF Rule 41(1) and UNCITRAL Rule 27(4).

circumstances were shown to exist.”⁶ In that instance, the ICSID Tribunal declined to find “compelling circumstances.” A similar approach was taken in *Vivendi v Argentina* ICSID ARB(AF)/12/6, quoted by the Government at paragraphs 11 to 13 of its Reply.

In the result, the Tribunal concludes that the 2014 record should remain “frozen” as provided in clause 34 unless satisfied that there are “compelling circumstances” to, exceptionally, admit fresh material. (Notwithstanding the Government’s objection to terminology, the proffered evidence is characterized as “fresh” because its admission would post-date by four years the Settlement wherein the parties, by agreement, froze the record.) The principle guiding this approach is party autonomy and the parties’ freely negotiated bargain of which clause 34 of the Settlement is an important and inextricable element.

The Government proposes that its’ application should be allowed in full because the evidence is relevant, material, reliable and does not take the Claimants by surprise. Such a test gives little or no weight to clause 34. Both parties cite US court cases. New York law is relevant because clause 34 is in the Settlement Agreement and the parties agreed that interpretation of the Settlement Agreement would be governed by New York law. Nevertheless, the Tribunal finds the judicial decisions largely inapplicable as they deal for the most part with post-trial applications and the judges were not constrained by a clause 34 nor did they have in mind the unusual procedural context in which the Tribunal finds itself.

The Government thinks it relevant that most of the “fresh evidence” is already on the record in the Material Breach Applications. However, those applications were under the auspices of the Settlement, and were quite separate from the hearing on the merits, which the Government now concedes is treaty based. The evidence in the material breach applications, to the extent it is not already on the record in the 2014 treaty hearing, has no automatic entry into the evidence at the merits hearing.

The Government says that unless the fresh evidence is admitted it would be denied the due process opportunity to present its full case, but the clause 34 limitation arises from the parties’ own agreement. It was not imposed by the Tribunal.

On the other hand, the Claimants effectively deny the authority of the Tribunal to admit fresh evidence without the agreement of the parties. For the reason given above, the Tribunal does not accept any such absolute bar to its consideration of the Government’s application.

II. Respondent’s New Evidence

A. Category One -- the SIAC Awards

The Government states explicitly that it “does not and has not argued that the SIAC Award should be submitted as additional evidence based upon the doctrines of *res*

⁶ Application ¶10.

judicata or issue preclusion.”⁷ Nevertheless the admission into evidence of the SIAC award in No. ARB143/14 would be problematic. The Award, filed in the Second Material Breach Application and therefore already familiar to members of the Tribunal, was based on a far larger evidentiary record than is in the frozen record, and much of it post-dated the 2014 Settlement. Insofar as the Award set out statements of fact they would supplement the factual record in this case in a way not permitted by clause 34. Insofar as the Award sets out the arbitrators’ opinions on issues of fact or law such opinions, while entitled to great respect, are not binding in any event. Every aspect of that case would be re-opened to argument. As an example of the difficulty, the Government in its application dated 15 May 2018, indicates that the SIAC Award No. ARB143/14 will deal with the Claimants’ claim in respect of the Thakhaek Slot Club,⁸ the Ferry Terminal,⁹ where, according to the Government, the SIAC Award “will be dispositive,” and the Lao Bao slot club.¹⁰ There is no compelling reason to admit the SIAC Award No. ARB143/14.

As to the SIAC Award arising out of the case between Sanum and the ST Group,¹¹ the Tribunal accepts the Government’s contention that if the ST Award is excluded, it may badly skew the Tribunal’s understanding of the situation in respect of the Thanaleng Slot Club and relations with the ST Group, and the possibility of the Claimants obtaining double recovery.

B. Category Two -- evidence of Bribery

The Government made allegations of bribery in 2014. It now offers additional evidence and arbitral authority in paras 36 to 46 of its Reply dated 15 June 2018 for the proposition that investor/state arbitration panels are obligated to delve into allegations of corruption which, if established, will disentitle the Claimants to any relief at all. Without in any way pre-judging the merits of the Government's allegations, the Tribunal is of the view that corruption issues, in general, are of over-riding importance to the rule of law and the integrity of the arbitration process. In the result, the Tribunal should have before it all relevant documents to get to the bottom of the allegations. On the basis of that “compelling circumstance,” the Tribunal will admit into the record the documents put forward by the Government and identified in its application dated 15 May 2018 as exhibits R-001, R 028, R 029, R- 034, R-035, R-036, R-055 and C-1053.

C. Category three -- the BDO Forensic Audit

The Claimants point out that the BDO Report is intended to provide another “expert opinion” in support of the Government's defense and counterclaim. The Savan Vegas casino was sold under the auspices of the SIAC Tribunal, which dealt with the claims and counterclaims of the Claimants and the government arising out of the operations of the casino, and its sale. The casino accounts have been settled by SIAC.

⁷ Government’s Reply ¶48.

⁸ Application ¶17.

⁹ Application ¶18.

¹⁰ Application ¶18.

¹¹ See the Government’s Reply ¶¶51-54.

Apart from the bribery allegations, there is no compelling justification for admission into the Record of the BDO “forensic audit” in the face of clause 34. Accordingly, the BDO forensic audit will be admitted insofar as it deals with the subject matter or otherwise assists in the resolution of the Government’s allegations of bribery and corruption but is otherwise excluded from the record for purposes of the Singapore hearing commencing 3 September 2018.

III. CONCLUSION

In the result the Government's application dated 15 May 2018 is allowed to the extent of the SIAC Award relating to the ST Group and the Thanaleng Slot Club, and the exhibits R-001, R-028, R-029, R-034, R-035, R-036, R-055 and C-1053 and portions of the BDO forensic audit relating to the allegation of bribery and corruption, and is otherwise dismissed.

[Signed]

The Honourable Ian Binnie, C.C., Q.C., President
For the Arbitral Tribunal
Date: June 25, 2018