INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

LAO HOLDINGS N.V.

Claimant

and

THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

Respondent

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

INTERIM RULING ON ISSUES ARISING UNDER THE DEED OF SETTLEMENT

Members of the Tribunal
The Honourable Ian Binnie, C.C., Q.C., President
Professor Bernard Hanotiau
Professor Brigitte Stern

Secretary of the Tribunal
Mrs. Anneliese Fleckenstein

Date of dispatch to the Parties: December 19, 2014.

REPRESENTATION OF THE PARTIES

Representing Lao Holdings N.V.:

David W. Rivkin
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
United States of America
and
Christopher K. Tahbaz
DEBEVOISE & PLIMPTON LLP
21/F AIA Central
1 Connaught Road Central
Hong Kong
and
Dr. Todd Weiler
Barrister & Solicitor
#19 – 2014 Valleyrun Boulevard
London, Ontario N6G 5N8
Canada

Representing The Lao People's Democratic Republic:

Mr. David Branson
3 Bethesda Metro Center
Suite 700
Bethesda, Maryland 20814
and
Werner Tsu c/o LS Horizon (Laos)
Unit 4/1.1, 4th Floor
Simoung Commercial Centre
Fa Ngum Road, Phiavat Village
Sistanak District, Vientiane, Lao PDR
and
Professor Jane Willems
3 Bethesda Metro Center
Suite 700
Bethesda, Maryland 20814
and
Professor Don Wallace Jr., Professor of Law
Georgetown University Law Center
Chairman, International Law Institute
1055 Thomas Jefferson St. N.W.
Suite M-100
Washington, DC 20007

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

BIT or Treaty	*Agreement on Encouragement and Reciprocal Protection of Investments* between the Lao People's Democratic Republic (PDR) and the Kingdom of the Netherlands
Gaming Assets	Savan Vegas Casino, Lao Bao Slot Club and Savannakhet Ferry Terminal Slot Club
Government	Respondent Government of The Lao People's Democratic Republic
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID-AF Rules	Arbitration Rules (Additional Facility) of the International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
Paksong Vegas	Paksong Vegas Hotel and Casino
PDA	Savan Vegas Project Development Agreement
RMC	RMC Gaming Management LLC
Savan Vegas	Savan Vegas Hotel and Casino
SIAC	Singapore International Arbitration Centre

I. OVERVIEW

1. The issue on this Application is whether an **alleged** violation of the terms of a settlement between the parties reached in Singapore on 15 June 2014 now permits the Claimant to pursue its *pre*-settlement claims against the Respondent Government of The Lao People's Democratic Republic (the "Government"). The allegations **which have yet to be investigated at any evidentiary hearing**, are that the Government has infringed the Claimant's gambling monopoly rights in Savannakhet Province, Laos, contrary to the terms of the Settlement, by licencing a rival casino or casinos. The Settlement was based, the Claimant says, on the Government's undertaking to assist in maximizing the sale price of the Claimant's gambling assets in Laos and that such licencing of rival(s) strikes at the foundation of the Settlement bargain. Under the circumstances, according to the Claimant, it is entitled to a revival of the arbitration under the Additional Facility Rules of the *International Centre for Settlement of Investor Disputes* ("ICSID").

II. SUMMARY OF DISPOSITION

2. The Tribunal, having convened a hearing in Washington, DC on 14 October 2014 to hear submissions on the legal objections to its jurisdiction raised by the Government, and having considered the oral and written material submitted, rejects the Government's objection to its jurisdiction to entertain the Claimant's allegation of breach of the terms of settlement. However, the Tribunal has also concluded, for the reasons set out below, that given the ambiguous wording of Article 6 of the *Deed of Settlement* on which the Claimant relies, and the difficulty of making any final disposition of the remaining legal arguments in the absence of any factual evidence to provide context to the dispute, that:

i. a further hearing is to be held as soon as may be practible to hear and consider the factual evidence concerning the alleged breach of the *Deed of Settlement*,

ii. at which time the Tribunal wishes to hear further argument from counsel on the legal issues hereinafter set forth.

III. HISTORY OF THE DISPUTE

3. The Claimant, incorporated under the laws of Aruba in the Netherlands Antilles, originally submitted its dispute with Laos to ICSID under the *Agreement on Encouragement and Reciprocal Protection of Investments* between Laos and the Kingdom of the Netherlands which entered into force on 1 May 2005, and the *Arbitration Rules (Additional Facility)* of ICSID which entered into force on 10 April 2006.

4. The initial dispute related to alleged Government fiscal, regulatory and administrative measures beginning in 2011 against the Claimant's investment in gambling facilities in Laos, allegedly at the instigation of the Claimant's erstwhile but now estranged Laotian partners. These measures, according to the Claimant deprived it of part or all of the value of its investment in the gaming and tourism industry. The Claimant values its *pre*-Settlement losses at between $690 million and $1 billion.

5. The Government denies any violations of the Claimant's gambling monopoly rights and says that even if there was (or continues to be) such a violation of the monopoly it would not entitle this Tribunal to restore the *status quo ante* and revive the *pre*-settlement ICSID claims. The Claimant's entitlement to relief, if any, lies with arbitral proceedings before the Singapore International Arbitration Centre ("SIAC").

IV. THE *DEED OF SETTLEMENT* DATED 15 JUNE 2014 AND THE SIDE LETTER

6. By *Deed of Settlement* dated 15 June 2014 to be read together with a Side Letter dated 18 June 2014, the Claimant agreed with the Government to "suspend" the hearing of the ICSID arbitration and

the parallel UNCITRAL arbitration pending before the Permanent Court of Arbitration on their merits to permit implementation of the terms of a Settlement.

(i) Factual Background

7. The Claimant has invested substantial monies since 2007 in three major projects in Laos, the Savan Vegas Hotel and Casino ("Savan Vegas"), the Paksong Vegas Hotel and Casino ("Paksong Vegas") and other enterprises (with local partners) that operated slot machine clubs. Under the terms of the investment, the Government had agreed in 2007 to grant the casinos a licensed monopoly on gambling rights and a "Flat Tax" arrangement to remain in effect, at least initially, for a period of five years.

8. On 20 December 2011, the Laotian legislature enacted a casino tax of 80% of casino *revenues* (not profits). The Flat Tax Agreement expired 31 December 2013. In the ordinary course, the new tax law would apply to Savan Vegas commencing 1 January 2014. The Claimant says the casino could not survive the impact of an 80% tax on revenue. Hence it sought and was granted by the ICSID Tribunal a Provisional Measures Order staying (on agreed terms) the application of the 80% tax pending the outcome of the ICSID arbitration.

9. In addition, the Claimant grounded its claims on an array of measures allegedly initiated by the Government beginning in April 2012. These included what the Claimant regards as unfair and oppressive audits of its Savan Vegas Hotel and Casino. This "harassment", the Claimant says, was instigated by and for the benefit of its estranged Laotian business partners, a Laotian company called ST and its principals who are Laotian nationals. In the end, the Government issued fresh tax claims against Savan Vegas which the Claimant says are invalid but, being unpaid, led to the freezing of the Savan Vegas bank accounts in Laos. The series of Government measures taken together, the Claimant says, amounts to *de facto* expropriation.

10. The Government, for its part, says that the Claimant and its related companies had for years been operating its gambling operations using impenetrable accounting procedures, and in some respects acting illegally, including through the corruption of Laotian Government officials. In 2013, the Government declared its intention to initiate criminal investigations of the Claimant and its principals who are U.S. citizens. Counsel for the Government made the submission at the 6 January 2014 hearing that:

> [The Claimants] decided, for their own reasons, that they would put all their money into Thailand; well, they had been putting their money in Thailand for the last five years. And it is illegal, it is against the law in Laos for any Lao corporation to have a bank account outside the country, and they had seven bank accounts outside the country for the last five years. We can tell from some of the documents we received from Ernst & Young that in one of those bank accounts in 2011, a year before the "freezing order", they put $11 million into a Thai bank account. That's against the law. (Transcript, pages 19-20).

11. These extracts provide the flavour of the underlying ICSID dispute. In the result, the Claimant and its U.S. principals wanted to rid themselves of threatened criminal investigations and to withdraw entirely from Laos and the Government wanted to see them gone. Under the concept of the Settlement, the money necessary to achieve this mutually desired objective would come from a third party purchaser of the Claimant's assets in Laos. The Government itself did not agree to pay any compensation.

(ii) The Settlement

12. 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)

* * *

> I told you, I imposed the terms. I've been trying my best to make it possible for them to work the deal. So, any time they asked me for anything that would make it easier for them to sell, make it easier for them to do this or that, I would put it in the Agreement. I bent over backwards. (Transcript, 17 June 2014, p. 33) (emphasis added)

There is an additional and important qualification to this summary. The Claimant's financial claims against the Government for conduct *pre*-dating the settlement were 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, which provides as follows:

> **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 Sections 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.

13. The ink was barely dry on the *Deed of Settlement* and Side Letter when on 4 July 2014, 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.

14. The Claimant places particular reliance in Article 6 (as clarified by the Side Letter):

> **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 concluding (underlined) words of Article 6.

(iii) The Prospective Purchaser

15. Counsel for the Claimant explained the origins of the settlement:

> The settlements arose--the possibility of the Settlement arose a couple of weeks ago when Claimants received an offer to purchase their--the Savan Vegas properties, and it became clear that that might be a means to resolve the disputes. But, of course, Claimants can only sell the Savan Vegas and the other properties they own with the cooperation of the Laos Government and with certain steps taken by the Laos Government that make the properties salable. (Transcript 19 June 2014, pp. 49-50) (emphasis added)

The Government surmises that this expected offer did not materialize, and the Claimant is using the present Application to seek delay and play for time in the hopes that other prospective purchasers emerge.

(iv) The Sale Process

16. The *Deed of Settlement* contemplated a resolution of the Flat Tax issue 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*).

17. The Claimant, having filed the present Application on 4 July 2014, declined to join in the agreed process to arrive at a new Flat Tax Agreement.

18. The Government's position is that the Claimant's strategy at this point is to maintain its control over the operations of its business investments for so long as it can.

V. THE GOVERNMENT'S OBJECTION TO THE TRIBUNAL

19. The Government objects to the jurisdiction of the Tribunal to decide if there has been a material breach of the *Deed of Settlement*. The Government submits that this mandate has been confided by the parties to the *exclusive* jurisdiction of SIAC.

20. In order to decide whether or not the Tribunal has jurisdiction, several questions must be answered.

21. **The first question** is whether this Tribunal has jurisdiction to decide its own jurisdiction under the *Deed of Settlement* and the BIT or whether, in this respect, it must defer to SIAC.

22. **The second question** is linked with the timing of the different procedural acts. One question is whether the fact that the Claimant did not respect the 45 day notice period provided for in Section 32 is a bar to the Tribunal's jurisdiction. The other question is whether the jurisdictional objection of the Government was filed too late and out of time.

23. **The third question** arises only if the Tribunal considers that it has jurisdiction to decide on its own jurisdiction. The question then becomes the *scope* of its jurisdiction. The question is two-fold. It

is firstly, whether under Section 32 it has jurisdiction to determine the existence of a material breach under Article 6. It is secondly, whether this jurisdiction encompasses the interpretation of Article 6. Considering that the *Deed of Settlement* gives jurisdiction to SIAC on all disputes relating to the Deed, the parties disagree about what happens when an issue of interpretation is raised (as here) during the process of determination of the existence of a material breach of the *Deed of Settlement*. In such a case does the task of interpretation fall on the Tribunal or on SIAC? Alternatively, is there concurrent jurisdiction?

24. **The fourth question** arises only if the Tribunal considers that it has the power to interpret the sections of the *Deed of Settlement* relevant to a determination of a material breach, which is mainly in this case Article 6: the specific question here, as presented by the parties, is the *interpretation of Section 6*, i.e. whether a material breach of Article 6 encompasses a material breach of the Savan Vegas Project Development Agreement ("PDA"). The Claimant submits that such a material breach if established on the facts would trigger reinstatement of the ICSID arbitration. The Government argues that the effect of Article 6 is merely to extend the PDA for a further 7 years, namely to 15 June 2064. (Fifty years from the Effective Date of the *Deed of Settlement*.)

25. The Tribunal will proceed to examine these questions in the order thus presented.

A. Does the Tribunal have jurisdiction to decide on its own jurisdiction?

26. The principle of *compétence-compétence* – described by the Claimant during the hearing as "the fundamental concept of kompetenz-kompetenz"[1] – is one of the most widely accepted general principle in international arbitration. As aptly summarized by an author[2]:

> The competence-competence doctrine is almost **universally accepted** in international arbitration conventions, national legislation, judicial

[1] Transcript, pp. 51-52, line 22 and line 1.

[2] Born, Gary, International Commercial Arbitration (Kluwer Law International, 2014), at 1050-51, CLA-216.

> decisions, institutional rules and international arbitral awards. Authority in each of these sources recognizes with relative unanimity some version of a competence-competence doctrine. As a consequence, the basic proposition that an international arbitral tribunal presumptively possesses jurisdiction to consider and decide on its own jurisdiction must be considered a **universally recognized principle of international arbitration law**. That is confirmed by the almost complete absence of any authority denying the power of arbitral tribunals to consider and decide jurisdictional challenges, subject to subsequent judicial review. It is also confirmed by long-standing recognition of the competence-competence doctrine in the related fields of state-to-state and investment arbitration. (emphasis added)

27. This general principle has been embodied in the ICSID (AF) Rules.

28. ICSID (AF) Rules, Article 45(1):

> The Tribunal shall have **the power to rule on its competence**. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included. (emphasis added)

29. The Tribunal does not see on what basis it could be deprived of the competence to decide its own competence, which belongs to each and every international tribunal, and considers therefore that it does have jurisdiction to decide on the existence and scope of its own jurisdiction. It here agrees with the following statement by counsel for the Claimant at the 14 October 2014 hearing:

> It's clear that these Tribunals do possess the power. Again, both the ICSID and the UNCITRAL Rules say that the Tribunal shall have the power to rule on its own jurisdiction or its own competence.[3]

30. One of the arguments of the Government is that these Tribunals lack competence because they "derive their jurisdiction from two Treaties that do not contain a consent to apply New York law." The Tribunal cannot accept this submission.

[3] Transcript, pp. 65-66, line 22 and lines 1-3.

31. The present ICSID (AF) arbitral Tribunal has been instituted under the respective Treaties. In an ICSID Additional Facility arbitration, the tribunal has to apply the applicable law as defined in Article 54(1) of the Arbitration (AF) Rules:

> The Tribunal shall apply **the rules of law designated by the parties as applicable to the substance of the dispute**. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable. (emphasis added)

32. It is common for an international arbitral tribunal to hear contractual disputes – and the *Deed of Settlement* is a contract between the parties – and in doing so, to apply the choice of law referred to in the contract. In this case, the law designated by the parties in Article 42 of the *Deed of Settlement* is the law of New York. Clearly, a tribunal constituted under the ICSID (AF) Rules is not only authorized to apply the law of New York but is required ("shall") do so.

33. In sum, the Tribunal reiterates that it is evident that it has the power to decide on the existence and scope of its jurisdiction, in line with the general principle of *compétence-compétence*.

B. Does the Tribunal have jurisdiction *"ratione temporis"*?

34. Under this heading, the Tribunal addresses two arguments of the parties dealing with deadlines. According to the Government the Application of the Claimant was too early, and according to the Claimant the Objection to jurisdiction of the Government was too late.

i. Is the non-respect by the Claimant of the 45 day cure period of Section 32 a bar to the Tribunal's jurisdiction?

35. The Government argues that the Claimant was not at liberty to file its Application before 11 August 2014, i.e. 45 days after 27 June 2014, when its Notice was sent to the Government alleging a

material breach of the *Deed of Settlement*. Having been filed on 4 July 2014, the Application is *premature* by more than a month. The conditions provided for in Section 32 are conditions pertaining to the consent to arbitration of the parties, and if such conditions are not fulfilled, the consent must be deemed nonexistent. According to the Government, the 45 day cure period is of utmost importance:

> Cure periods are inserted into contracts to prevent litigation. That's the purpose of a cure period. … if the Contract has a cure period, the breaching Party has an opportunity to cure the breach before there's litigation. That's the purpose of the clause. [4]

36. To this jurisdictional objection, the Claimant presents two lines of defence: the first is that compliance with the 45 day cure period is not a jurisdictional condition, but a question for the merits stage of the arbitration. The second argument is that, even if it were a jurisdictional condition, compliance is futile in this case as the material breach cannot be remedied, and as a consequence, the cure period does not need to be respected.

37. As to the first argument the Claimant distinguishes between the time of the *initiation* of the procedure of revival and the time of the *disposition* of the procedure of revival. The Claimant differentiates between a cure period that would bar the Tribunal from reinstating the arbitration before the expiry of 45 days after the Notice of a material breach and, on the other hand, a cure period of 45 days that would bar the Claimant from filing of a request for reinstatement of the arbitration by the Claimant. In support of this submission, it cites several New-York cases that make a distinction between different types of cure periods, a cure period which is a condition precedent to the initiation of a suit or a cure period for other purposes. As argued by the Claimant at the hearing, "it's the revival of the arbitrations and not the filing of an application that has to be suspended for 45 days."[5]

[4] Transcript, p. 114, lines 10-17.

[5] Transcript, p. 98, lines 1-3.

38. The second argument of the Claimant is the argument of futility: here again, it cites New York cases in which courts have decided that if a cure period relates to an application instituted in order to seek a remedy to a breach, such period need not be respected if the breach is incurable. It cites to that effect the case *Sea Tow v. Pontin*, in which the Court asserted that "the Court finds, as a matter of law, that if a breach was incurable, plaintiff was under no obligation to adhere to the ten-day cure provision."[6]

39. In order to analyse this issue, it is necessary to quote again the relevant part of Section 32:

> The Claimants shall only be permitted to revive the arbitration in the event that Laos is in material breach … 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. (emphasis added)

40. The Tribunal cannot accept the Claimant's submission, as developed, for example, during the hearing that the 45 day cure period is not a condition precedent to initiate a suit for revival of the arbitration. Counsel for the Claimant declared that:

> The terms of the Contract, Section 32, does not say--does not say we shall not bring a claim under Section 32 until they've had a 45-day cure period. It says that the arbitration shall not be revived until the end of the 45-day cure period. That is an important difference …[7]

41. If Section 32 really said "the arbitration shall not be revived until the end of the 45 day cure period", it would indeed make sense that this would apply to the Tribunal, as argued by the Claimant, as the Tribunal is the only entity capable of reviving the arbitration. However, this is not what Section 32 says. Its wording is the following: "The Claimants shall only be permitted to revive the arbitration … after reasonable written notice is given to Laos by the Claimants of such breach and such breach is

---

[6] *Sea Tow Servs. Int'l, Inc. v. Pontin*, 607 F. Supp. 2d 378, 388 (E.D.N.Y. 2009), CLA-224.

[7] Transcript, p. 160, lines 10-15.

not remedied within 45 days after receipt of notice of such breach." This means that two conditions are to be fulfilled before the Claimant can seek revival of the arbitration: the first condition is to give a reasonable notice of the alleged breach to the Respondent Government, the second condition is to wait for 45 days to allow the Government to cure the breach (if there is one) prior to initiating a suit for revival of the arbitration.

42. Section 32 says "(t)he Claimants shall only be permitted to revive the arbitration."[8] The Tribunal does not accept the Claimant's statement in its Comments of 1 October 2014 that

> The language of Section 32 is clear: either the Claimant can revive the arbitrations or the Tribunals can do so if they resolve in Claimant's favour a dispute as to whether or not Laos is in material breach of the Settlement.[9]

43. In the Tribunal's view the Claimant does *not* have a power unilaterally to revive the arbitration. The only way it can seek to have the arbitration revived is by application to the Tribunal under s. 32 of the *Deed of Settlement*.

44. The Tribunal agrees therefore with the Government's submission that the lapse of the 45 day cure period is a jurisdictional condition precedent to initiate suit before this Tribunal in order to obtain a revival of the arbitration.

45. **It is common ground that this condition precedent has not been respected.** The question which arises is therefore the consequence of this non respect of the cure period on the Tribunal's jurisdiction.

---

[8] This is one more example of an ambiguous disposition, which needs interpretation. As stated by counsel for Respondent during the hearing: "it's the judges' job to help us clear up the ambiguity by making sense of it." Transcript, p. 136, lines 3-4.

[9] Comments, para. 4.

46. There are conflicting decisions in the case law of arbitral tribunals dealing with conditions precedent to the filing of a claim by an investor against a State, but these mainly concern the condition found in a certain number of BITs, of the exhaustion of local remedies for a certain period of time. Some consider it as mere procedural requirement that can be disregarded without barring the arbitral tribunal's jurisdiction; others consider it as a jurisdictional condition, whose disregard results in a bar to the arbitral tribunal's jurisdiction. The Tribunal need not enter into this jurisprudence, as the condition stated by Section 32 is not a condition relating to certain steps that are required but which have not been respected – like presenting the claims to the national courts for 18 months for example – but a condition consisting of the mere passing of time.

47. It is common ground that the jurisdiction of a Tribunal or Court must normally be assessed on the date of the filing of the act instituting proceedings. This is also the position of New York law, as has been underscored in a question addressed to counsel for the Claimant by an arbitrator during the hearing:

> The position of New York law, but generally, the rights of the Parties are determined as of the date of the originating document, and the originating document here is the 4th of July, and you ask for a declaration, as of the 4th of July that the Respondent has materially breached Article 6. Does that not create a problem with the 45-days?[10]

48. However, the Tribunal is also mindful of the fact that if at the time the Tribunal takes its decision 45 days have by then elapsed since the filing of the Application, the Claimant could simply present its claim again and this claim on its own would satisfy the condition precedent to the Tribunal's jurisdiction. In this circumstance, it would be counterproductive for the Tribunal to decline jurisdiction because the condition – now fulfilled – had not yet been fulfilled at the time of the filing of the Application. As stated by Claimant's counsel at the hearing, "the 45-day cure period has now

[10] Transcript, p. 106, lines 6-13.

expired."[11] This fact is uncontested and it means that at the time of the Tribunal's decision – now – the jurisdictional condition is fulfilled.

49. This issue of premature filings of claims has been extensively dealt with by the PCIJ as well as the ICJ, and the Tribunal will take inspiration from their decisions, relying mainly on the Judgment of 11 February 1993 of the ICJ in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), (Yugoslavia v. Bosnia and Herzegovina) Preliminary Objections*, in which all the pertinent citations are quoted.

50. In that proceeding, an issue was raised concerning the possibility that Bosnia and Herzegovina had filed its case a few days too early, if the Court adopted a certain analysis of the consequences of the Yugoslavian State succession. The Tribunal thinks it appropriate to quote here extensive extracts of the mentioned judgement, with the references to other cases:

> However, the Court would recall that, as it noted in its Order of 8 April 1993, even if Bosnia and Herzegovina were to be treated as having acceded to the Genocide Convention, which could mean that the Application could be said to be premature by nine days when filed on 20 March 1993, during the time elapsed since then, **Bosnia and Herzegovina could, on its own initiative, have remedied the procedural defect by filing a new Application**. It therefore matters little that the Application had been filed some days too early. As will be indicated in the following paragraphs, the Court is not bound to attach the same degree of importance to considerations of form as they might possess in domestic law. (para. 24, emphasis added)

> **It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings**. However, the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which **it should not penalize a defect in a procedural act which the applicant could easily remedy**. Hence, in the case

[11] Transcript, p. 99, lines 18-19.

concerning the *Mavrommatis Palestine Concessions*, the Permanent Court said:

> "Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. **Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications**." (*P.C.I.J., Series A, No. 2*, p. 34.)

The same principle lies at the root of the following dictum of the Permanent Court of International Justice in the case concerning *Certain German Interests in Polish Upper Silesia*:

> "Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." (P.C.I.J., Series A, No.6, p. 14.)

The present Court applied this principle in the case concerning the *Northern Cameroons* (I.C.J. Reports 1963, p. 28), as well as *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*) when it stated: "It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do." (*I.C.J. Reports 1984*, pp. 428-429, para. 83, emphasis added)

In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, **the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect.** (para. 26, emphasis added)

51. It is the Tribunal's view that the exact same reasoning has to be adopted here, as far as the 45 day cure period is concerned. The Tribunal is mindful that it has to apply New-York law to the merits

of the case, but as an international arbitral tribunal, created under an international treaty, its procedure follows international law rules, and the example of the way the ICJ deals with the type of issue faced by the Tribunal is apposite. As from 11 August 2014, the Claimant could have filed its Application. It is now December 2014. Between these two dates, to paraphrase the ICJ, "the Claimant could, on its own initiative, have remedied the procedural defect by filing a new Application."

52. As a consequence, the Tribunal considers that in the circumstances the non-respect of the 45 day cure period does not bar the jurisdiction of this Tribunal.

53. The Claimant's second response to the jurisdictional issue – the alleged futility of respecting the 45 day cure period – could in any event only be decided at the merits stage, with production of evidence by both parties. As the Tribunal has rejected the Government's objection on other grounds the "futility" issue is moot and does not have to be addressed by the Tribunal.

C. Is the jurisdictional objection raised by Respondent out of time so as to bar the Tribunal's competence to deal with it?

54. In its Reply, the Claimant argued that the jurisdictional objection of the Government should be denied as it was untimely and therefore not properly before the Tribunal. As will be discussed below, the Government declared during the hearing that its Objection is timely because it was made in part to answer the Tribunal's question addressed to the parties on 21 August 2014 as to the scope of the Tribunal's jurisdiction.

55. The Tribunal will address this issue in light of the relevant article, which provides as follows:ICSID (AF) Rules, Article 45(2):

> Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial or, if the objection relates to an ancillary claim, for the filing of the

> rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

56. Although no *explicit* discretion is given to the Tribunal under the ICSID (AF) Rules, Tribunal is satisfied that under the general authority conferred by the ICSID (AF) Rules it has the flexibility to deal with a late objection to its jurisdiction. In particular Article 33(3) confers a broad discretion to relieve against time limits in "special circumstances:

> Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

57. Both parties have indeed addressed the question of the time limit to present an objection, and having reviewed the submissions the Tribunal exercises its discretion in the special circumstances of this case to permit it the Government's objection to proceed.

58. Specifically, the Tribunal considers the Government's delay to be justified under the very specific and unusual circumstances of this case. The *Application for Finding of a Material Breach of Deed of Settlement* was filed on 4 July 2014, a little more than two weeks after the Settlement, and a Response was delivered on behalf of the Government on 11 July 2014, a mere seven days after the Notice of the Application. The Tribunal accepts that the Government needed more time than was available between 4 July and 11 July 2014 to consider, formulate and file its objection to jurisdiction.

59. This is especially so in light of the multiplicity and complexity of the post-settlement proceedings. For example the Government alleges that the Claimant violated the *Deed of Settlement* by not paying important sums due to Laos. As a result the Government filed a Notice of arbitration before SIAC on 21 August 2014 under Article 35 of the *Deed of Settlement*. This was elaborated on in the Government's Response:

> On July 2, 2014 Mr. Rivkin sent a letter stating that Claimants were suspending performance under the Deed of Settlement. Claimants refused to pay RMC on July 1, 2014 pursuant to Annex E of the Deed of Settlement and refused to constitute the third member of the FT committee, making it impossible to establish a flat tax by the agreed date of July 31, 2014 to the detriment of the Government. The Government has the right under the Deed of Settlement to collect the flat tax as from July 1, 2014. That right was a condition for waiving tax for the period of January 1, 2014 through June 30, 2014, a bargain that now has been lost to the Government.[12]

60. Also, on 21 August 2014, the Tribunal asked the parties in Procedural Order No. 4 to make submissions on the scope of the Tribunal's jurisdiction under Section 32. This triggered an argument of the Government at the hearing to the effect that its objection was at least partially in answer to the question of the Tribunal put to the parties.[13] The Objection was filed three weeks after PO No. 4 and a little more than two months after the Claimant's *Application*. In the view of the Tribunal, this is not such a delay that would justify a refusal to hear and determine the Government's Objection.

61. In sum, the Tribunal considers that its jurisdiction is neither precluded by a premature filing of the *Application* for finding a material breach by Claimant, nor by the late filing of the Government's Objection to jurisdiction.

D. What is the scope of the Tribunal's jurisdiction?

62. The Claimant submits that the Tribunal (i) has jurisdiction to determine the existence of a material breach of any of the ten sections mentioned in Section 32 and (ii) has in particular jurisdiction to interpret Article 6, one of the sections mentioned in Section 32. The Government contends that this competence falls only to SIAC.

[12] Response, p. 2.

[13] See Transcript, p. 21, lines 14-16.

1. Does the Tribunal have jurisdiction to determine the existence of a material breach under Article 32 of the Deed of Settlement?

63. The Government submits that only SIAC is "competent to determine the scope of Section 42 and define the true construction of Section 32."[14] Its argument was succinctly stated in its Objection, but included the idea that although in theory it is possible to have two arbitration clauses in an agreement like the *Deed of Settlement*, this is not the case here as "there is only one clause in the Deed, Section 42, a standard SIAC arbitration clause."[15] This was reiterated at the hearing, when counsel for the Government declared that "Section 42 is as broad an arbitration clause as there is in the modern world. It gives SIAC arbitrators the jurisdiction to determine all aspects of the *Deed of Settlement*."[16]

64. Counsel for the Government then developed during the hearing a more complex analysis of how the arbitration clauses in Section 42 and Section 32 can be read together and articulated. The main contention was that the existence of a breach could be either agreed to by the parties without the intervention of the Tribunal, or decided by a SIAC arbitral tribunal. In either event the mandate of *this* Tribunal is restricted to deciding whether the breach thus determined to exist either by the parties or by SIAC is *material*. As stated by counsel for the Government:

> So, we gave these Tribunals in this Deed the limited power to consider whether a breach is sufficiently material that it justifies reviving the arbitration.[17]

…

[14] Objection, para. 10.

[15] Objection, para. 7.

[16] Transcript, p. 11, lines 6-9.

[17] Transcript, page 17, lines 5-8.

> Article 42 is an all-encompassing SIAC arbitration clause, and Section 32 is a limited brief for these Tribunals to consider a breach after a breach is either agreed or determined.[18]

65. The Government's submission rests on a truncated reading of Section 32 which, to repeat for ease of reference, provides that "(i)n the event that there is a dispute as to whether or not Laos is in material breach … the Tribunals shall determine whether or not there has been such a material breach." Article 32 does *not* say: "(i)n the event that there is a dispute as to whether or not a breach committed by Laos is material … the Tribunals shall determine the issue of materiality." It is not correct to isolate the concepts of "material" and "breach" from each other in order to bifurcate what is in fact a single issue and merely restrict the Tribunal's jurisdiction.

66. The power to apply a provision in a contract necessarily implies the power to interpret that provision. As stated by counsel for the Claimant at the hearing: "Clearly, in determining whether or not there has been a material breach in making a conclusion, you have to look at the facts. You have to interpret the Agreement. That's what Tribunals do. You don't have to have more language than that."[19] And this was reiterated later in the same presentation by Claimant's counsel:

> Clearly, the Parties agreed that the Tribunal would have the jurisdiction to decide the issues put to them in Section 32, and it is not necessary in such an arbitration clause to say, "And the Tribunal shall interpret the provisions of the Deed." It is not necessary to say, "You shall find facts and find the relevant law." That's what Tribunals do. That's what Tribunals do all the time, and that doesn't need to be listed in an arbitration clause. Of course, Tribunals have to interpret the Agreement that is to be determined.[20]

[18] Transcript, page 27, lines 17-20.

[19] Transcript, p. 52, lines 14-18.

[20] Transcript, p. 67, lines 8-18.

To say it differently, the power of contractual interpretation is inherent in the power of contractual application.

67. The Tribunal wishes also to note that neither Section 42 nor Section 32 refer to a power of interpretation, and there is therefore no textual basis to say that SIAC would have the exclusive power of interpretation of the *Deed of Settlement*, while this Tribunal would be deprived of any power of interpretation under Section 32, despite its mandate is to determine whether or not there exists a material breach of any of the sections therein identified.

68. In fact, if when applying a rule, a tribunal had no authority to interpret that rule, it is difficult to see how it could fulfil its mandate. The wording of Section 32 simply does not justify the interpretation that the Tribunal's role is centred exclusively on *materiality* rather than on the existence of the breach *and* its materiality.

69. The Government's interpretation would lead to an absurd result, as a matter of procedural efficiency: it would indeed mean that in case of an allegation of a material breach, there would be two proceedings, one before SIAC to determine whether a breach has occurred and then one before this Tribunal to decide whether the breach is material. Issues might arise in the subsequent hearing before this Tribunal to necessitate a return trip to SIAC. Bifurcation could become trifurcation and so on.

70. The Tribunal concludes that Section 32 gives the consent of the parties to the jurisdiction of the Tribunal to decide whether there has been a breach *and* whether the breach thus established is material, *and* in the event the Tribunal finds such a material breach, to revive the arbitration.

71. Some subsidiary comments can be added to this conclusion, which reinforce it.

72. The Tribunal is aware that there are three arbitration clauses in the *Deed of Settlement*, two of them being possibly concurrent, and two of them being redundant. There is indeed a general arbitration

clause in **Section 42 applying to both parties** and referring to "(a)ny dispute arising out of or in connection with this Deed, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre." There is also **Section 35 applying to the Respondent** only and which covers part of the disputes mentioned in Section 42, as it states that Laos can file a SIAC arbitration if the Claimants violate the *Deed of Settlement*: this indeed is already possible under Section 42, which is why the Tribunal considers these two articles as redundant. And there is also **Section 32 applying to the Claimants only** which can ask this Tribunal to revive the arbitration in case of a material violation not of any section of the *Deed of Settlement*, but of ten (10) specified sections of the Deed. In a certain sense, Section 42 and Section 32, as applied to Claimant, could appear as somewhat contradictory and this contradiction must be resolved.

73. One solution to solve the apparent conflict between Section 42 and Section 32 is to accept that it gives a choice to the Claimant to either go to SIAC under Section 42 or to this Tribunal under Section 32. There is nothing that prevents concurrent jurisdiction of more than one tribunal. Counsel for the Government recognized as much, during the hearing. To the question posed by an arbitrator: "Do you accept as a general proposition that there can be concurrent jurisdiction?" the answer of counsel was: "Yes. It happens many times."[21] And the Claimant agreed, stating: "… there is no conflict between the two [this tribunal and a SIAC tribunal] … You can have concurrent jurisdiction. You can have different sets of claims brought to them."[22]

74. Moreover, even if considered to be contradictory and on their face irreconcilable, there is a legal principle in New York law to solve the issue, which is that the specific clause prevails over the more

[21] Transcript, p. 38, lines 5-7.

[22] Transcript, p. 94, lines 12-14.

general clause. This was explained by counsel for Claimant at the hearing: "even if there were a conflict where a contract is governed by New York law and it contains both a specific and a general dispute resolution clause, the specific provision removes issues within its purview from the scope of the general arbitration clause."[23] And to illustrate this principle, counsel for Claimant cited a number of New York cases applying it:

> Established case law . . . holds that disputes under agreements containing both specific and general arbitration clauses **must be arbitrated under the particularized clauses**.[24] (emphasis added)

> Under normal circumstances, when an agreement includes two dispute resolution provisions, one specific (a valuation provision) and one general (a broad arbitration clause), **the specific provision will govern** those claims that fall within it.[25] (emphasis added)

75. A last comment is apposite. Counsel for the Government has provided the Tribunal with some modifications suggested by the Claimant on 16 June 2014 to the text of the *Deed of Settlement*. It appears that the Claimant proposed a clarification in Section 42 relating to the articulation of the three different arbitration clauses included in the *Deed of Settlement* by the addition of the following wording: "**In addition to any rights conferred on the Parties in Section 32 and 35**, any dispute arising out of or in connection with this Deed, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre." The Tribunal is aware of the fact that this addition was not retained in the final version of the *Deed of Settlement*, but it shows that at least the Claimant considered the different arbitration clauses to be cumulative and not mutually exclusive and it appears the Government did not seek any clarification to a contrary effect.

---

[23] Transcript, p. 94, lines 15-20.

[24] *Whirlpool Corp. v. Philips Elec., N.V. (In re Whirlpool Corp.)*, 848 F.Supp. 474, 479 (S.D.N.Y. 1994), CLA-214.

[25] *Katz v. Feinberg*, 290 F.3d 95, 97 (2d Cir. 2002), CLA-211.

76. For all the mentioned reasons, the Tribunal considers that it has jurisdiction under Article 32 to proceed to the next phase of the argument presented by the parties.

VI. THE INTERPRETATION OF ARTICLE 6

77. For ease of reference the Tribunal repeats the essence of the settlement "bargain" as described in general terms by counsel for the Government:

> 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)
>
> * * *
>
> I told you, I imposed the terms. I've been trying my best to make it possible for them to work the deal. So, any time they asked me for anything that would make it easier for them to sell, make it easier for them to do this or that, I would put it in the Agreement. I bent over backwards. (Transcript, 17 June 2014, p. 33) (emphasis added)

78. The Claimant's position is that breach of its monopoly rights in Savannakhet Province was a violation of Article 6 and delivered a fatal blow to the commercial foundation on which the settlement was constructed. If so, Article 32 potentially puts back in play the Claimant's *pre*-settlement claims of $690 million to $1 billion.

79. This aspect of the application presents a mixed question of fact and law.

80. In support of the allegation of breach of Article 6 the Claimant filed various newspaper reports and press releases naming as sources some developers active in the Special Economic Zone adjacent to the Savan Vegas Casino. The materials included a map which the Claimant says identifies the precise site of a planned rival casino. The allegations are denied by the Government, which notes that none of these "announcements" or plans were issued by official Government spokespersons.

81. The Claimant says that prior to this alleged derogation of its monopoly the Savan Vegas Hotel and Casino itself, as an operating business, but only one part of the Claimant's investment in Laos, was worth between $250 and $275 million.

82. The Claimant contends that the loss of the Savan Vegas monopoly position in Savannakhet Province drastically reduces the Casino's value because competition from rival casinos would reduce the expected income stream over the next 50 years and therefore reduce the present market value of the Savan Vegas Hotel and Casino by (it claims) more than 50%. More broadly, it claims, the Government's conduct depresses the value of its entire investment because any potential purchaser would not be inclined to trust the Government to fulfill its other obligations to investors in Laos.

83. **The Tribunal emphasizes that it has not determined whether or not the Claimant has made even a *prima facie* case on the facts.** A certain amount of material and a number of witness statements have been filed on the monopoly controversy by both sides but at this stage of the proceeding, none of this factual material has been tested. The Tribunal is therefore in the uncomfortable position of being asked to determine a mixed question of fact and law without the benefit of a proper examination of the facts.

(v) The Legal Content of Article 6

84. The Government submits that the monopoly issue is of no concern to this Tribunal because Article 6, properly understood, does not protect and indeed has nothing to do with the Savan Vegas casino monopoly. In its submission Article 6 contains only one obligation and that is to extend the life of the project development agreements, licenses and land concessions to 50 years from 15 June 2014.

> **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)

The Claimant contends that, contrary to the Government's view, Article 6 contains two distinct obligations separated textually by the comma in the penultimate line.

85. As to the first (pre-comma) obligation, the Claimant contends that the reference to the PDA and other obligations in Article 6 "as being restated" means that they are incorporated sufficiently to revive the arbitration of *pre*-settlement losses in case of a *material* breach of one of the identified documents:

> What we said in our First Submission is, it was incorporated in reference sufficiently to bring in the protections of those agreements here to make sure that a buyer knew what he was getting. That's the same as what I said to you today, which is that Laos undertook the obligations to comply with those agreements in Article 6. [26]

The second distinct (post-comma) obligation, as the Government agrees, is to extend the existing project framework for another 50 years.

86. The Claimant's essential argument is that Article 6 imposes an obligation enforceable by the Claimant against the Government to preserve the *status quo ante* established by the project agreements, licences and land concessions referred to, including in particular maintenance of the Savan Vegas monopoly rights and continuance of a Flat Tax Agreement which the Claimant says are key drivers of the casino's market value. The Government says the wording of Article 6 is incapable of supporting any such interpretation.

[26] Transcript, p. 146, lines 6-12.

87. The Tribunal agrees with the Claimant that Article 6 embraces two obligations for the following reasons.

(i) A Textual Analysis

88. The Tribunal observes that the flow of the first sentence in Section 6 is interrupted by the placement of a comma after the first reference to "Effective Date". This makes the sentence susceptible of two possible readings. The comma may indicate a break between the two parts of the sentence in the sense that Laos shall restate the PDA licences and land concessions *and* the PDA licences and land concessions shall be extended to a fifty-year term. Alternatively, the phrase that follows the comma may simply be an explanation of the purpose and effect of the documents being “restated”.

89. It must be said that in the case of the first alternative, it would have been clearer to break the sentence in two and openly state that there exists two different obligations with their corresponding verbs: "to restate" and "to extend". On the other hand, the second reading in fact eliminates the comma and raises the question of why it is necessary to repeat "as from the Effective Date" in respect of restated *and* in respect of the extension. If the sentence was intended to create only one obligation, then one reference would suffice.

90. On balance, the Tribunal finds that an examination of the text supports an intent to create two distinct obligations.

(ii) No Part of a Contractual Term Should be Interpreted as Superfluous

91. New York law requires that meaningful effect be given to each part of Article 6. As stated in Banks, Glen, *New York Contract Law* (West’s New York Practice Series) § 10:7:

> The goal of contract construction is to avoid an interpretation that would leave a clause meaningless. A construction should be avoided if it ignores the interplay of the terms and renders one or more of the terms inoperable. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation. In interpreting a contract, a court will strive to give meaning to every sentence, clause and word. (emphasis added)

The Government's "single obligation" theory does not satisfy this test.

(iii) The Subsequent Conduct of the Parties

92. The Tribunal's view that Article 6 encompasses two obligations is reinforced by the exchange of emails between counsel to the parties in June 2014 subsequent to the Settlement. Counsel for the Claimant wrote:

> As discussed at our meeting [with counsel for the Government], *we are restating* the PDA and related documents in a manner that would maximize the attractiveness to potential buyers. Having reviewed the PDA and other docs [sic], due to the garbled English and the fact that many of the provisions don't make sense now that the SV [Savan Vegas] is built, the most coherent and *best approach would be to redraft the agreements* (and not just attach an amendment). [27] (emphasis added)

93. Counsel for the Government replied:

> PDA and others: send us the redrafts of the PDA and you [sic] best convenience, and we will forward them to [the Government of Laos]. Should you need input form [sic] us before sending the draft - as mentioned in your email - just let me know. [28]

94. In the Tribunal's view this exchange shows that at the very least the parties shared an intention to clean up and update the PDA and related documents, and that the restatement was not limited simply

[27] Submission on Legal Issues, para. 13 citing Ms. Amirfar's email (C-821). Emphasis in the original.

[28] Ibid. para. 14 citing email of Ms. Willems . Exhibit C-797.

to an extension of the term in the agreement, licences and land concessions referred to. The Government's view is that such a "clean up" was a matter of courtesy not contractual obligation. The Claimant argues that a simple clean up of the documentation did not exhaust the content of the Article 6 obligation.

95. Having carefully considered the submissions the Tribunal is satisfied that Article 6 contains two obligations not one. The second obligation is not controversial. The extension has been confirmed in writing by the Government.

96. At issue, therefore, is the task of interpreting the content of the *first* Article 6 obligation.

VII. POSSIBLE INTERPRETATIONS OF ARTICLE 6

97. The mandate of the Tribunal is limited to the interpretation and enforcement of obligations between the Claimant and the Government. The Tribunal's mandate is not to enforce the underlying agreements and licences which involve other parties, This Tribunal is concerned only with *pre*-settlement damages, and whether under the terms of the Settlement those claims have been revived by the Government's *post*-settlement conduct.

98. The Tribunal recognizes the merits of the legal arguments put forward on both sides of the controversy regarding the proper interpretation of Article 6. The text is convoluted and leaves scope for both of the contending positions.

99. In order to provide guidance to the parties the Tribunal will now outline its views of the competing interpretations of Article 6 urged by the Government, as well as a more "purposive" approach used by the Claimant, which might lead the Tribunal to a different result.

100. **FIRST POSSIBLE INTERPRETATION: the words of Article 6 are not capable of supporting the interpretation urged by the Claimant. A breach of the monopoly provision of the**

Project Development Agreement, cannot give rise to a potential revival of the *pre*-settlement arbitration.

101. The Claimant relies in its arguments on the text and context of Article 6 and on the purpose of the Deed of Settlement. As to the text, the Claimant contends that "to treat as being restated" means that the obligations owed by the Government to Savan Vegas under the PDA have now become obligations owed by the Government to the Claimant (who was not a party to the PDA) under the *Deed of Settlement*. The Claimant's argument treats the expressions "to restate", "to affirm", and "to comply" as if equivalent.

102. According to the Respondent, the Claimant's argument necessarily seeks to incorporate by reference the terms of the PDA into the *Deed of Settlement*, which is not possible under New York law unless the parties' intention to do so is clear, and there is no such clarity in Article 6.

103. To "restate" in plain English means, "to state or express over again or in a new way",[29] or "put into more intelligible or convincing words"[30] or "to say (something) again or in a different way especially to make the meaning clearer."[31] While "to treat" means "to act towards, behave to". For the Tribunal, to read an obligation *to comply* into Article 6, as argued by Claimant, requires overcoming the significant hurdle that in no accepted definition of "to restate" does the term mean "to incorporate" or "to comply with". The combination with "to treat" is not helpful in this respect.

104. To breach the disparity between the plain meaning of "to treat as being restated" and the meaning attributed to this expression by the Claimant, the Tribunal would be required to accept the argument that the breached obligation under a restated instrument is also a breach of the obligation to restate.

[29] The Compact Oxford Dictionary
[30] The Concise Oxford Dictionary
[31] Merriam-Webster Dictionary.

However, breach of a restated obligation does not mean that the obligation to restate is breached or without effect. To restate an obligation is to clarify it and, once restated, its breach may be easier to determine because it has been restated. For example Article 6 of the *Deed of Settlement* is "restated" in the Side Letter; the exchange of correspondence between counsel quoted above (paragraphs 92-93) is also an example of what "*to restate*" means; as would be the elimination from the PDA and related documents of the garbled language and the outdated provisions now that the Savan Vegas hotel and casino have been built.

105. The Claimant has also relied on the purpose and context of Article 6 to support its arguments. The Claimant has explained that Article 6 and the following three sections have as their purpose to facilitate the sale of the Gaming Assets and to maximize the proceeds of the sale, as required by Section 13. According to the Claimant, a breach of the exclusivity clause of the PDA would be in detriment of both.

106. It is evident from the correspondence of the Claimant and the Respondent referred to above (paragraphs 92-93) that the Claimant attached importance to cleaning up the garbled documents for the purpose of selling the Gaming Assets. As acknowledged by both counsel, the *Deed of Settlement* was drafted under great pressure in the course of three days prior to the scheduled start of the June hearing, and there was no time to engage in a "clean up" of the PDA and related documents. It is also undisputed that to extend the terms of the PDA and the licenses to 50 years was of assistance in attracting potential buyers. But the Claimant has argued that these items were not sufficient for the Claimant to give up its ability to pursue it claims before this Tribunal.

107. At the hearing, Mr. Rivkin stated in response to a question of a member of the Tribunal:

> The object and purpose, the relationship of the Article 6 to the other terms of the Agreement made clear that the way we have interpreted makes sense, and that we were not going to give up a major protection,

> a major right we had, which was the ability to appear before you on June 17th and pursue our claims for close to a billion dollars without assurance that Laos was going to comply with its obligations to make the property saleable, it was not going to undercut it, and that if it did so in a material way, we could come back to you. And that's exactly the protection we negotiated for.[32]

108. In replying to a follow-up question of a member of the Tribunal on the vast difference between an obligation to clean up a garbled text and, on the other hand, reading into Article 6 the elevation of any material breach of the underlying documents into a revival of the *pre*-settlement arbitration(s), Claimant's counsel replied:

> "Well, it's not. Because the **restatement of the terms, the incorporation of the obligations into the Settlement Agreement** is shown by this because it shows how important the restatement of the Laos' obligations were to a potential buyer. It shows that both parties understood that, and that it had an obligation to carry out--**it undertook in the Settlement Deed the obligation to carry out its obligations under the PDA.** Otherwise, it would--there would be no need to be redrafting for a buyer. That's why the **incorporation of the obligation in the PDA**, which is our position, is consistent with this exchange."[33]

On further questioning on the meaning of the obligation to restate beyond cleaning up an unclear document, Claimant's counsel replied:

> It does give meaning. It gives meaning that we've argued for and that I think Members of the Tribunal have raised in their questioning. And then the question is, having undertaken the obligation **to restate and comply with the terms of the PDA**, what is the consequence? And I agree. The consequence isn't set out in these e-mails. The consequence is set out in Section 32. If you breach that obligation, and the obligation is **to restate** in a manner and **to reaffirm** the obligations in a manner that a buyer will be attracted to the property, then the consequence of breaching that obligation is set out in 32 because that would be a material breach, as we've argued, and because we would no longer be able to fulfill the mission of the Settlement, which is to sell for the

[32] Transcript, page 152, lines 6 to 16. Counsel refers to the exchange of emails between Mmes. Amirfar and Willems. Highlighted by the Tribunal.

[33] Transcript pages 153 lines 16-22 and154 lines 1-9. Highlighted by the Tribunal.

> maximum price. You have to read Article 6 in light of those other provisions.[34]

On this view, however, the Tribunal would still be at a loss to explain why "to treat as being restated" should be taken to mean "to comply".

109. To "treat as being restated" is not an ambiguous term, it was chosen by experienced English-speaking counsel who had the opportunity to change it in the negotiations that immediately followed the signing of the *Deed of Settlement* and resulted in the Side Letter. If compliance with the PDA and related documents under the terms of the Deed was so crucial for the sale of what were termed "the Gaming Assets", it begs the question why such obligation would not have been expressed in clear and unambiguous terms.

110. To read into Article 6 the meaning urged by Claimant would mean that any breach of the obligations contained in the PDA and related documents could potentially become a material breach of the *Deed of Settlement*. This adds a far-reaching consequence to the phrase "to treat as being restated" that is not evident from the plain meaning of these terms.

111. On this view of the matter, once the text of the PDA and related documents has been cleaned up and restated, the Government undertook to treat the restated provisions as if the restatement had happened at the time of the Effective Date of the *Deed of Settlement*. This understanding of Article 6 gives meaning to all its terms and supports its purpose even if not to the extent contended by the Claimant.

112. The fundamental point is that *to restate or treat as being restated* and *to comply* are two distinct obligations. Restatement of a document may facilitate the determination of whether a covenant has

[34] Ibid. p. 154 lines 20-22 and p.155 lines 1-21. Highlighted by the Tribunal.

been complied with because of the improved clarity as a result of the restatement exercise, but failure to comply with an obligation does not mean that that obligation has not been restated. It is not a question of whether it is necessary to use the term comply for a covenant to be obligatory. Of course, it is not. The question is whether "to treat as restated" may ever mean that a breach of a restated document is a breach of the obligation to restate without further support than the overall purpose of the *Deed of Settlement.*

113. On this view the breach of the monopoly set out in the PDA does not and indeed cannot constitute a breach of Article 6 of the *Deed of Settlement*.

114. **THE SECOND POSSIBLE INTERPRETATION: flows from the emphasis of New York law on the object and purpose as well as the context of Article 6. The parties committed themselves in Article 13 to "maximize the sale proceeds". Violation of the monopoly guarantee would materially undermine the salability of the "gambling assets". It would destroy the basis of the settlement and, if established, justify a revival of the *pre*-settlement arbitration**.

115. In the interpretation of a contract New York law requires a court or Tribunal to have regard to:

i. **the purpose** for which the contract was entered into,[35]

---

[35] An authoritative statement of the principle is found in the *Restatement of the Law of Contracts* (2nd edition, American Law Institute) which states at Volume 5, Article 202:

> 202. **Rules in Aid of Interpretation**
>
> (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight. (emphasis added)

The related Commentary includes the following:

> c. Principal purpose. The purposes of the parties to a contract are not always identical; particularly in business transactions, the parties often have divergent or even conflicting interests. But up to a point they commonly join in a common purpose of attaining a specific factual or legal result which each regards as necessary to the attainment of his ultimate purposes.

ii. **the circumstances known to the parties** at the time of contracting to determine their intention as expressed in the language they have employed,[36]

iii. the actual words used by the parties having due regard to context,[37]

iv. the need to avoid rendering a contractual term, or part of a term, **superfluous**.[38]

116. A Tribunal, seeking to put itself in the position occupied by the parties at the time the *Deed of Settlement* was concluded, would recognize not only the tortured history of the dealings between the Claimant and the Government but also their mutual objective to speed the Claimant's departure from

---

[36] The Restatement continues:

> Determination that the parties have a principal purpose in common requires interpretation, but if such a purpose is disclosed further interpretation is guided by it. Even language which is otherwise explicit may be read with any modification needed to make it consistent with such a purpose. (emphasis added)

The same purposive approach to contractual interpretation is emphasized in a leading American text, Corbin on Contracts Vol 5 (1998), at para. 24.10, p. 63:

> Extrinsic evidence consists of evidence other than the contract itself. The term "extrinsic" means that such evidence derives from a source "outside of" the contract, whether the contract terms are written or oral.
>
> It is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence be admitted to make the court aware of the surrounding circumstances. (emphasis added)

[37] As Lord Hoffman, not a New York judge but speaking in terms consistent with New York law, stated:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. (*Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) per Lord Hoffman at p. 115.)

A more elegant formulation of the distaste of the common law for an unduly formalistic or literal approach was delivered in classic form by Justice Oliver Wendell Holmes who wrote:

> A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.
>
> *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

[38] As stated in Banks, Glen, *New York Contract Law* (West's New York Practice Series, 2006) §10:7:

> The goal of contract construction is to avoid an interpretation that would leave a clause meaningless. A construction should be avoided if it ignores the interplay of the terms and renders one or more of the terms inoperable. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation. In interpreting a contract, a court will strive to give meaning to every sentence, clause and word. (emphasis added)

Laos by efforts directed to "*maximize* sale proceeds to the Claimants and Laos…" (Article 13). It is of no significance, in this respect, that Article 13 is not listed in Article 32. Article 13 is not relied upon as a ground to reinstate the arbitration. However, it serves as an authoritative agreed-upon statement of the *purpose* or *objective* of the parties at the time the contract was made and is part of the appropriate framework within which to interpret the relevant terms of the Surrender Deed.

117. The most important aspect of the *commercial* context is that the Claimant receives nothing from the Government except an opportunity to sell its assets for whatever price it can get. (The Claimant also wanted to protect itself and its principals from criminal investigation but that is not a matter that concerns the sales protocol). The Government did not agree in the settlement to pay any compensation in respect of the *pre*-settlement claims. Accordingly if money is to be made available to offset those alleged *pre*-settlement losses and pave the way for the Claimant's exit from Laos, the money must come from a third party purchaser. The value of the hotel is related largely to the existence of the casino, which is what attracts the clientele, and in the eyes of a prospective purchaser the monopoly[39] and a continued Flat Tax Agreement is what puts the whole Savan Vegas operation on a firm and predictable financial foundation. The Government for its part, made no secret of its wish to be rid of the Claimant as soon as possible. Accordingly, for the purposes of contractual interpretation, the

[39] The Project Development Agreement between Savan Vegas Entertainment Hotel and Casino in Savannakhet Province and the Government dated 10 August 2007 recognizes the monopoly rights in Article 24:

> 24. The Company has been granted monopoly rights for its Casino business operations only with the condition that the Government shall not approve and grant any other parties or entities who put up their applications for the operation of certain Casino business in the three (3) neighbouring provinces close to the Project development zone of the Company namely: Savannakhet, Khammouane and Bolikhamsay, throughout the concession period of 50 years.

Reference may also be made to Article 22 of the Deed of Settlement, which deals with development of a parcel of 90 hectares of land adjacent to the Savan Vegas hotel and casino property. It provides in part that development will be "on the basis that no gaming activities whatsoever will be allowed at or in connection with that 90 hectare site. The Government thereby put the Claimant on notice that its policy to refuse new gambling licences in Savannakhet Province would be applied to the Claimant as well as to other potential investors.

"common objective" was to expedite the sale of the hotel and gambling assets at the best price obtainable.

118. In this situation the exercise of Government power can facilitate, or, on the other hand, effectively wreck opportunities for a sale at an attractive price. Given the parties' statement in Article 13 that their joint and common purpose is to "maximize sale proceeds", the interpretation of the terms of Article 6 must be guided by this objective.

119. The Government does not dispute that the grant of casino licence(s) to rival operators in Savannakhet province would undermine the value of the Claimant's casino assets whose sale the Settlement is intended to facilitate. The Government's positions are that (1) it has not done so and (2) if the Claimant wishes to persist in its "frivolous" claim that the Government has breached its obligation in respect of monopoly rights, the remedy is for the Claimant's subsidiary Savan Vegas to initiate a SIAC arbitration. The Claimant says that consistently with the purpose of the *Deed of Settlement* it is only the risk of a revival of the *pre*-settlement claim that would provide a major incentive for the Government to cooperate in the sale of the Claimant's gambling facilities.

120. What then is the contractual significance of the words "Laos shall treat [obligations it owes, directly or indirectly, to the Claimant's subsidiaries] *as being restated*" in favour of the Claimant, which is not otherwise a beneficiary of those existing Government promises? As Laos is the only promisor under Article 6, and the Claimant is the only promisee, then unless these words in Article 6 are to be treated as superfluous, Article 6 must confer rights on the Claimant not previously owed to it by the Government. The rights listed in Article 6 involving the subsidiary companies [PDA, licences, land concessions] already exist. They are not creatures of the settlement. What must be new is that breach of these existing obligations by the Government now confers a contractual right on the other party to the settlement, the new promisee, the Claimant.

121. If this is the context of the first obligation of Article 6 what then is the remedy for breach? According to Article 32 the remedy for breach of Article 6 is the right to pursue a revival of the *pre*-settlement claims PROVIDING the effect of the Government's failure to respect the rights and obligations referred to in Article 6 is to MATERIALLY frustrate the commercial purpose and object of the Settlement, which is the sale of the Claimant's hotel and gambling assets on a basis that will MAXIMIZE sale proceeds.

122. The opening words of Article 6 are that "Laos shall treat the Project Development Agreement, etc. etc." (emphasis added). By this language Laos is not agreeing to "incorporate by reference" but simply to "treat" a breach of an obligation under the Project Development Agreement licences or land concessions as a trigger to reopen the issue of *pre*-settlement damages.

123. On this view, such an interpretation facilitates accomplishment of the purpose of the Settlement (which, so far as the Government is concerned, includes speeding the exit of the Claimant from Laos). Article 6 is, in a way, a "standstill agreement". The value of the Claimant's assets, whatever it may have been on the date of the Settlement, is to be protected from *material* devaluation *by unilateral* Government action such as the grant of gambling licenses to rival casinos.

124. The obligation of the Government "to treat" is not conditional on the creation of fresh documentation. The 2007 Project Development Agreement is not a lengthy or complex document. The operative part is fewer than 17 pages long. A sophisticated purchaser with $250 million or more to spend on the Savan Vegas Hotel and Casino would not require a "restated" document in order to clue into the fact the hotel is built and the casino is an ongoing business.

125. The operative obligation is "to treat" not to "restate". A present obligation "to treat as being restated" cannot be interpreted to mean a future obligation to prepare fresh documentation, however desirable such an exercise may be for marketing purposes. While it is no doubt an attractive marketing

tool to have "cleaned up and updated" documents, that is not what Article 6 is all about. The Government agrees in Article 6 to "treat" the paperwork "as BEING" restated…" The expression "being restated" does not mean "to be restated in due course" with or without retrospective effect.

126. As to the difference between "to restate" and "to comply," the other terms referred to in Article 32 of the *Deed of Settlement* for the most part do not refer specifically to compliance. There was no necessity for them to do so. Article 8, for example, provides that a new Flat Tax Agreement will be established to apply throughout the 50 year term of the Project Development Agreement but there is no separate statement, nor is there need for any, that "this provision is to be complied with". Yet the Government is taking the Claimant to SIAC because of the Claimant's alleged foot-dragging in naming its appointee to the "Flat Tax Committee" contemplated by Article 9.

127. In paragraph 70 above, in dealing with the issue of jurisdiction, the Tribunal stated that "the power of interpretation is inherent in the power of application". Here, similarly, the duty to comply is inherent in the restatement of contractual obligations owed by the Government to the Claimant's subsidiaries. Without compliance the restatement is of no contractual significance.

128. To summarize, in Article 6 the Government undertakes "*to treat* [the relevant obligations] as *being* restated as of the Effective Date." The Government was already obligated to comply with the relevant obligations in the underlying documents before the settlement. At that time non-compliance would have given rise to remedies at the suit of the Claimant's operating companies, but not at the suit of the Claimant itself. What is new in the *Deed of Settlement* is that as between the Government and the Claimant (which is not a party to the pre-existing obligations) non-compliance becomes a *trigger* for an application *by the Claimant* to the Tribunal for a reinstatement of the *pre*-settlement claims.

VIII. FAIRNESS REQUIRES FURTHER SUBMISSIONS ON THE PROPER INTERPRETATION OF ARTICLE 6

129. Fairness requires that the Tribunal not adopt an interpretation of Article 6 that may be dispositive of the Application but which departs somewhat from the submissions of the parties and has not been squarely put to the parties for their comment and submissions.

130. The Tribunal's dilemma is as follows. The Government has put forward a textual argument which does not appear to take into account the insistence of New York law on a **purposive** approach to contractual interpretation. What is put against the Government is encapsulated in the proposition that "the meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."[40] Counsel for the Government has not, in the view of the Tribunal, squarely addressed this divergence of texture from purposive principles of interpretation which could become dispositive of the outcome of the Application.

131. On the other hand, the argument of the Claimant was very much geared to the purpose of the settlement and its commercial concerns without acknowledging the difficulty of reconciling these broader considerations with the actual words used by the parties in Article 6. If Article 6 says what the Claimant says it means why wasn't the intention expressed in clear and unambiguous terms? Can it fairly be said that the language used gave the Government adequate notice of the extent of the obligations which, on the Claimant's interpretation, the Government was undertaking? The arguable dissonance between purpose and text was not a matter squarely addressed by Claimant's counsel at the 14 October 2014 hearing, and the Tribunal is reluctant to render a final decision on this issue without further assistance of counsel for both sides.

---

[40] Lord Hoffman, *supra* note 37.

IX. CONCLUSION

132. The Tribunal has set out alternative interpretations of Article 6 because of its concerns that on 14 October 2014 the parties failed to fully address the different contractual approaches to the interpretation of Article 6. From different approaches to interpretation may flow different outcomes. The Tribunal recognizes that its characterization of the opposing positions set out above, while in general terms reflecting the position of the parties, nevertheless introduces in each case some new points of argument which neither party has had an opportunity to address. To ensure fairness to both parties the Tribunal invites any further submissions counsel may wish to make.

133. In addition, the Tribunal now having ruled that it does have *jurisdiction* to deal with the Claimant's application wishes to hear from both parties' witnesses before making a final ruling on the merits of the Application, which raises mixed questions of fact and law.

134. The potentially dispositive issue raised by the Government is one of fact. Did the Government violate the terms of the monopoly granted in 2007? If so, the legal question arises whether its conduct, **if established by the evidence,** is *material* to the revival or non-revival of the *pre*-settlement arbitrations. The Tribunal has had the advantage of the parties' submissions to date on the law but has not yet had the benefit of hearing and testing the factual assertions of their witnesses.

135. In the view of the Tribunal, no legal arguments have yet been presented that would justify a refusal to hear the factual evidence to determine whether, under the terms of the *Deed of Settlement*, the Claimant's claim to *pre*-settlement damages is to be reinstated.

X. INTERIM RULING

136. Given the ambiguous wording of Section 6 of the *Deed of Settlement* on which the Claimant relies, and the difficulty of making any final disposition of the remaining legal arguments in the absence of any factual evidence to provide context to the dispute, the Tribunal rules that:

i. It has jurisdiction to hear the case presented to it and rejects the Respondent's Objection to its jurisdiction;

ii. A further hearing is to be held as soon as may be practicable to hear and consider the factual evidence concerning the alleged breach of the *Deed of Settlement*, at which time the Tribunal wishes to hear further argument from counsel on the legal issues hereinbefore set forth.

Dated at Washington this 19th day of December 2014.

[Signed]

Professor Brigitte Stern
Arbitrator

[Signed]

Professor Bernard Hanotiau
Arbitrator

[Signed]

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