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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Lao Holdings N.V. v The Lao People’s Democratic Republic (ICSID Case No. ARB(AF)/12/6) – Award – 6 August 2019.

Case Report by: Runyang Liu**, Editor Diego Luis Alonso Massa***

Summary: A Dutch investor, Lao Holdings N.V., brought an action for relief against the Government of Laos pursuant to the Agreement on Encouragement and Reciprocal Protection of Investments between the Lao People’s Democratic Republic (PDR) and the Kingdom of the Netherlands (the “**Laos-Netherlands BIT**”, or the “**BIT**”), alleging, *inter alia*, expropriation. The Tribunal found that the Claimant had not established these allegations on factual basis and found bad faith in Claimant’s conduct, and thus dismissed the claims with costs awarded to the Respondent.

Main Issues: Burden of proof for claims of bribery and corruption, bad faith.

Tribunal: The Honourable Ian Binnie, C.C., Q.C. (President), Professor Bernard Hanotiau, and Professor Brigitte Stern.

Claimant’s Counsels: Ms. Deborah Deitsch-Perez, Mr. Jeffrey T. Prudhomme, and Mr. Alexander Hinckley (Stinson LLP, Dallas Texas, U.S.A.); Dr. Todd Weiler (Barrister & Solicitor, London, Ontario, Canada); and Mr. Ken Kroot (Lao Holdings N.V., Aruba, Laos).

Respondent’s Counsels: Mr. David J. Branson (People’s Republic of China); Mr. John D. Branson, Ms. Emily Doll, and Mr. Russ Ferguson (Womble Bond Dickinson (US) LLP).

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Digest:

1. Relevant Facts

Two U.S. entrepreneurs, Mr. John Baldwin and Mr. Shawn Scott, incorporated Lao Holdings N.V. (“**LHNV**”) in the Netherlands and its subsidiary Sanum Investments (“**Sanum**”) in Macau, China (LHNV and Sanum are collectively referred to as the “**Claimants**”) (Award, ¶ 1). The Claimants partnered with a Laotian conglomerate, ST Holdings, in two casino projects and three slot machine clubs in Laos (Award, ¶ 1). One of the casinos, the Savan Vegas Hotel and Casino (“**Savan Vegas**”), was built and operated successfully, while the second casino, Paksong Vegas Casino (“**Paksong Vegas**”), was never built (Award, ¶ 1).

Three years later there was a falling out between the Claimants and ST Holdings, which led ST Holdings to cease cooperation with Sanum, and initiated litigation against Sanum and shut Sanum out of the most profitable slot clubs, Thanaleng. LHNV initiated arbitration under the Laos-Netherlands BIT and Sanum initiated arbitration pursuant to the Agreement between the Government of the People’s Republic of China and the Government of The Lao People’s Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments (the “**China-Laos BIT**”) (Award, ¶¶ 2-3). The Claimants alleged expropriation without compensation and breach of treaty in respect of their investments in the Savan Vegas Casino and three slot clubs (Thanaleng, Lao Bao, and Savannakhet Ferry) described in the Project Development Agreement (“**PDA**”) (Award ¶ 65). The Claimants based their treaty claim on an 80% tax on casino revenues, “unfair and oppressive audits” of the Savan Vegas Hotel and Casino, and abuse of sovereign authority to assist ST Holdings to acquire other assets that belonged in whole or in part to the Claimants (Award, ¶¶ 65; 69). The Claimants estimated their loss as of 31 August 2016 at between US\$690 million and US\$1 billion (Award, ¶ 69).

2. Procedural History

Claimant filed a Notice of Arbitration on 14 August 2012 under the Arbitrations Rules of the International Centre for Investment Disputes (“**ICSID**”) (Additional Facility) and Article 9 of the Laos-Netherlands BIT (Notice of Arbitration of 14 August 2012). The Tribunal was constituted on 26 March 2013 (Procedural Order No. 1, ¶ 2.1) and held the first session on 8 May 2013 (Procedural Order No. 1, p. 3). The Tribunal issued a decision on Jurisdiction on 21 February 2014 which rejected the Lao Government’s jurisdictional challenge (Decision on Jurisdiction of 21 February 2014). Subsequently, the parties reached a Settlement Agreement on 15 June 2014 (Settlement Agreement of 15 June 2014). However, the settlement somehow failed and the arbitration proceedings continued. The Tribunal issued 14 procedural orders and several other decisions as follows: (i) Decision on the Merits on the First Material Breach of 10 June 2015, (ii) Decision on Costs of 5 November 2015, and (iii) Decision on the Second Material Breach of 15 December 2017 (Award, ¶ 10).

A hearing on the merits was held in Singapore from 3 to 7 September 2018 (Award, ¶ 55). The Respondent and the Claimant each filed their submission on costs on 22 February 2019 and 7 March 2019, respectively (Award, ¶ 61). The proceeding was closed on 17 July 2019 (Award, ¶ 63).

3. Three main issues in the Award

3.1 *The Claim for Corruption and Appropriate Standard of Proof*

3.1.1 *The Respondent's Position*

The Respondent asserted that the claims should be dismissed on the merits because of corruption in both the initial investment and subsequent conducts in relation to the investment (Award, ¶ 98). The Respondent submitted that the “red flag” approach should be adopted which would require the Claimant to provide an exculpatory explanation of their “suspicious conduct” (Award, ¶ 107).

3.1.2 *The Claimant's Position*

The Claimant asserted that neither the BIT nor the customary and general principle of international law affords authority to dismiss on the basis of corruption (Award, ¶ 102). The Claimant also denied corruption and any causal link between the alleged corruption and the claims (Award, ¶ 103). The Claimant contended that the applicable standard of proof should be “clear and convincing evidence”, which requires the substantial facts instead of mere inferences (Award, ¶ 108).

3.1.3 *The Tribunal's Ruling*

The Tribunal considered the proof of corruption in every stage of the investment relevant and considered that the United Nations Convention Against Corruption (“UNCAC”) as a principle of customary international law applicable to the present arbitration (Award, ¶ 105). Although the Tribunal had some reservation in incorporating the doctrine of “clean hands”, it found “serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country” (Award, ¶ 106). The Tribunal held that “there need not be ‘clear and convincing evidence’ of every element of every allegation of corruption, but such ‘clear and convincing evidence’ as exists must point clearly to corruption. An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although of course proof beyond a reasonable doubt would be conclusive” (Award, ¶ 110).

3.2 *The Claim for Bribery*

3.2.1 *The Respondent's Positions*

The Respondent alleged that the Claimant, *inter alia*, (1) bribed to obtain the 2009 Flat Tax Agreement, (2) bribed to extend the Agreement after the five-year expiration, (3) bribed to shut down the audit of Savan Vegas and to cause the Laos Government to shut down the Thanaleng Slot Club to the disadvantage of ST Holdings, (4) arranged another US\$575,000 transfer to Madam Sengkeo to prevent her from testifying in the proceedings, and (5) bribed to restore control of Savan Vegas (Award, ¶¶ 113-120, 124-125, 128-133, 140-144, 149-152, 165, 168).

3.2.2 The Claimant's Positions

The Claimant denied all of these allegations and contended that all the amounts involved are legitimate fees and expenses (Award, ¶¶ 121-122, 126, 134, 145-147, 153, 166).

3.2.3 The Tribunal's Ruling

The Tribunal first noted that it is “disturbing that no prosecutions have been brought against any persons alleged to have accepted bribes, nor has there been evidence of due diligence in any investigation” (Award, ¶ 112). The Tribunal did not find that the Respondent established its burden of proof for some of the bribery allegations (Award, ¶¶ 123, 127, 139, 148, 156, 167, 168), however it found for several claims for bribery on the lower probabilities standard (Award, ¶¶ 148, 162).

3.3 The Claim for Expropriation

3.3.1 The Claimant's Positions

Regarding its investment in several casinos and slot clubs, the Claimant argued that they were substantially deprived of investment by the totality of the Respondent's treatment, including interference with domestic court proceedings (Award, ¶¶ 175-176).

3.3.2 The Respondent's Positions

The Respondent submitted that the Lao courts' decision concerned only a private dispute between ST Holdings and Sanum, and the Claimant abused the process by pursuing contradictory claims in parallel arbitrations against the Lao Government (Award, ¶ 180).

3.3.3 The Tribunal's Ruling

The Tribunal dismissed all the claims for expropriation on the merits (Award, ¶¶ 190, 206). Specifically in terms of the license renewal of the Bolikhamxay Slot Club, the Tribunal found that the Claimant had not demonstrated that it has a right to the renewal (Award, ¶ 213). In addition, the Tribunal found bad faith on Mr. Baldwin in negotiating throughout his deals with the Respondent, which was attributed to the Claimant (Award, ¶¶ 206, 214, 223).

4. Other Treaty Claims in the Award

4.1 The Claimant's Lack of Good Faith

The Tribunal started its analysis by finding that the Claimants acted in bad faith with the Respondent from the initial investments to the operation of the investments (Award, ¶¶ 233, 238-239).

4.2 The Claim for Unfair and Inequitable Treatment

With respect of the Thanaeng Investment, the Tribunal did not find breach of fair and equitable treatment or other violation, nor did it find wrongful treatment by the Laos judiciary by denial of justice or otherwise (Award, ¶ 258). With respect to the Savan Vegas Investment, the Tribunal similarly found no breach of contractual or Treaty obligations as the

Laos Government did not conduct in bad faith or in an arbitrary and abusive way (Award, ¶¶ 265-270). The Tribunal dismissed claims of treaty violations with respect to the Paksan Slot Club, Lao Bao and the Savannakhet Ferry Dock as they were resolved in the 2014 Settlement (Award, ¶ 271).

4.3 The Umbrella Clause Claims

The Tribunal dismissed the Umbrella Clause Claims because the complaints were moot pursuant to the Settlement, and the Claimant has not established that the Respondent's conducts were wrongful and unreasonable (Award, ¶ 273).

4.4 The Claims for Discriminatory and Less Favourable Treatment

The Tribunal dismissed the claims because the Claimant failed to establish any factual foundation for such complaints and even if there was breach, the Claimant could not justify the compensation that it is seeking by showing of any loss or damage (Award, ¶¶ 276-277).

4.4 The Claims for Bad Faith

Lastly, the Tribunal stressed that the Claimant's bad faith performance throughout the investments and the arbitral proceedings provided additional reason to deny the Claimant treaty protection (Award, ¶ 280).

5. Costs

The Tribunal ordered the Claimant to bear the full arbitration costs and expenses incurred by the Tribunal and ICSID in connection with the arbitration proceedings (Award, ¶ 291), and to reimburse the Respondent its legal costs and expenses in the sum of US\$1,293,720.27 (Award, ¶ 287).