

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

PROCEDURAL ORDER NO. 14

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

Secretary of the Tribunal
Catherine Kettlewell

Date: July 31, 2018

The Tribunal is in receipt of an Application from the Claimants dated 16 July 2018 to introduce “fresh evidence to Rebut Respondent's Fresh Evidence”. In accordance with the Tribunal's previous ruling, the proffered evidence is said to be limited to the Government's allegations of corruption and bribery and the ST double recovery issue (the “**Exceptional Issues**”). By letter dated 25 July 2018 the Government concedes the admissibility of most of the rebuttal material, as listed below. However, objection is taken to a number of the forty documents, as follows:

1. The Government objects to the addition of “**piecemeal**” portions of **six witness statements** of John Baldwin, Angus Noble, William Greenlee and Clay Crawford filed in SIAC proceedings ARB 143/14/MV. The Government's position is that “Claimants cannot cherry-pick witness statements” and “if such witness statements are admitted, then *all* statements from a particular witness must be admitted and the statements must be admitted *in their entirety* -- not in excerpts.” By response dated 26 July 2018 the Claimants contend that the effect of the Government's position is to expand rather than focus the area of dispute well beyond the Exceptional Issues and is inconsistent with the Government's earlier filing of C-1053 [which is the second SIAC statement of John Baldwin] without at the same time offering any of Mr Baldwin's other three SIAC witness statements.

The Tribunal's Ruling on Issue 1

The Tribunal has already affirmed the “frozen record” provision of the 2014 Settlement subject to two exceptions, the allegations of corruption and the potential issue of a ST double recovery. The Tribunal is conscious of the very serious nature of the allegations of bribery and corruption. The record on those issues must be fully and fairly presented. However, the Government's attempt to introduce the entire portfolio of witness statements by Messrs Baldwin, Noble, Greenlee and Crawford extends into controversies well beyond the scope of these exceptions. To the extent the Government argues that the Claimants by way of attempted rebuttal have “cherry-picked” the excerpts of these witnesses to address the allegations in a misleading way, and that other excerpts of their evidence would present a properly balanced view, the Government is at liberty to present such additional extracts *relevant to those issues* to the Claimants and to the Tribunal for consideration for admission into the record. Such extracts need not be “pin-point” references, but must be limited to the portion of the documents relevant to the Exceptional Issues. Accordingly, the extracts offered by the Claimants are admitted, and the Government is given until **Friday, 10 August 2018** to provide any *additional* extracts it believes to be necessary to provide a “full and balanced” record on the Exceptional Issues.

2. The new witness statement of J Tucker Baldwin dated 16 July 2018 (C 1244)

The Claimants say this fresh witness statement “shows corruption by the Respondent” and relates to the “ST SIAC” award in that it demonstrates Government misconduct. Specifically, in their submission of 26 July 2018, the Claimants argue that “in June 2014 the government argued [before the ICSID Tribunal] that the Thanaleng matter remained pending before the Lao Supreme Court whereas in fact, by June 2014, the Lao Supreme Court had already rejected Claimants appeal in April 2014, unbeknownst to the Claimants.” The Government argues that the Tribunal has not invited fresh witness statements, especially from entirely new witnesses, and that the evidence in any event is irrelevant.

The actual Supreme Court judgment of 4 April 2014 re the Thanaleng Slot Club is being admitted on consent as new Exhibit C 1238 (Parts A and B) and C 1239.

The Tribunal's Ruling on Issue 2

The “exceptional issues” relate to the Government’s allegations of bribery and corruption against Mr Baldwin and his associates. As to the Claimants’ first point, the Tribunal is not embarking on an inquiry into corruption in Laos generally. As to the second point, whether or not the Government *knew* in June 2014 of the 4 April 2014 dismissal of the Claimants’ appeal in the ST case when the Claimants themselves did not know despite being a party, is not relevant to the Exceptional Issues. The witness statement of J Tucker Baldwin is not admitted.

3. The 16 July 2018 Expert Report of Joshua Kurlantzick and supporting documentation (C 1247)

The Claimants submit this statement to “show corruption by the Respondent”. The Government responds that the report is merely a general opinion about “corruption in Laos” and does not in any way “reference the actions or factual scenarios before these Tribunals”. The Claimants reply that Mr Kurlantzick is “one of the foremost experts on the political and economic situation in Laos ... in which most legitimate business is conducted through cash transactions.” Moreover, Mr Kurlantzick can speak to the “the corrupt nature of the Lao Government, the utter lack of the rule of law in Laos and the environment in which the Claimants were *forced* to conduct their legitimate business activities.”¹

The Tribunal's Ruling on Issue 3

The Tribunal repeats that it is not conducting an inquiry into the general state of affairs in Laos. The issue is whether the Claimants' investments at issue in the Arbitration were obtained corruptly. The Report of Mr Kurlantzick would add a set of broad controversies beyond the permitted Exceptional Issues. If the Kurlantzick Report is admitted, the Government would be entitled to respond with its own report, and perhaps rejoinders etc. after that. The corruption issue has been part of the Government’s case throughout the arbitration. A number of the fact witnesses can speak to the “cash economy” issue. If the Claimants thought an expert Kurlantzick-type Report was necessary it ought not to have waited to act until the rejoinder stage of a fresh evidence application little more than a month before the hearing on the merits. The Kurlantzick Report is not admitted.

4. Excerpt from the Government’s opening Memorial in the 2016 SIAC arbitration (C-971)

The Claimants contend that this excerpt demonstrates a prior inconsistent position of the Government on the Thanaleng controversy. The Government responds with an argument that the extract can be explained away.

The Tribunal's Ruling on Issue 4

The extract is admissible. Statements by counsel on behalf of a party may be considered as admissions against interest. The Government’s explanation can be heard at the merits hearing when the full context will be before the Tribunal.

¹ This will lead, the Claimants indicate, to the argument that the Claimants were expelled “because of their *refusal* to engage in bribery and corruption -- rather than because they supposedly engaged in such conduct”.

5. Correspondence and documents related to discovery disputes in the currently pending ICSID Arbitration No ARB (AF) 16/2, being C 1252, C1253, C1254 and C 1255.

The Claimants seek the admission of these documents created in interlocutory proceedings in another ICSID case to demonstrate that the Government's conduct (or absence of conduct) at various times and documentation (or lack of documentation) shows the Government "never genuinely believed that Claimants were corrupt or otherwise unsuitable to invest in Laos".² The Government contends that the Tribunal ought not to plunge into discovery disputes between lawyers in a different arbitral proceeding.

The Tribunal's Ruling on Issue 5

The issue before this Tribunal is whether the Government can establish its allegations of bribery and corruption to the requisite standard of proof. The outcome will depend on the factual evidence before the Tribunal not on interlocutory steps taken by the lawyers in some other proceeding under the control of a different Tribunal. These documents are not admitted.

6. Witness Statement of Professor Joseph Kalt on Damages and Quantum

In addition, the Claimants proffer a further witness statement by their expert Professor Kalt on "new matters". The Government responds that there are no "new matters" relevant to Professor Kalt's area of interest since Professor Kalt's last report submitted by the Claimants on 9 May 2014.

The Tribunal's Ruling on Issue 6

In light of the Tribunal's deferral of the issues of damages and quantum *sine die*, the application in respect of the new Kalt Report is similarly deferred *sine die*.

THE TRIBUNAL THEREFORE ORDERS

1. The following documents submitted by the Claimants are admitted on consent:

Exhibits R-049, C-1240, R-046, C-1241, C-1242, C-0928, C-1243, C-1131, C-1244, C-1245, C-1246, C-774, C-755, C-1226, C-1248, C-1249, C-1250, C-1251, R-026, C-1238 A, C-1238 B, C-1239, C-1256, C-1257, C-1258, C-1259, C-1260, C-1261, C-1262, C-1263, C-1264, C-1265, C-1266.

2. The Tribunal admits the extracts of the Witness statements of John Baldwin, Angus Noble, William Greenlee and Clay Crawford submitted by the Claimants, but permits the Government to provide additional extracts from the same witness statements which the Government contends are necessary to give "balance" to the extracts submitted by the Claimants, as per the ruling in item 1 above.

3. The Baldwin Statement (Exhibit C-1244) and the Kurlantzick Report (Exhibit C-1247) are **not** admitted into evidence.

4. The Government's Opening Memorial in SIAC Arb 143/14/MV (Exhibit C-971) is admitted into evidence.

² See Claimants' Reply dated 26 July 2018 para. 18.

5. The interlocutory correspondence in ICSID Case No ARB (AF)/16/2 (Exhibits C-1252, C-1253, C-1254 and C-1255) are **not** admitted into evidence.

6. The admissibility of the further report of Professor Joseph Kalt is deferred pending a decision following the merits hearing as to whether a hearing on damages and quantum is required.

[Signed]

The Honourable Ian Binnie, C.C., Q.C., President
For the Arbitral Tribunal
Date: July 31, 2018