INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

LAO HOLDINGS N.V.
Claimant

and

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC
Respondent

DECISION ON COSTS

ARBITRAL TRIBUNAL

The Honourable Ian Binnie, C.C., Q.C., President
Professor Bernard Hanotiau, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Anneliese Fleckenstein, ICSID

Date of dispatch to the Parties: 5 November 2015

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I. INTRODUCTION

1. In its Decision on the Merits dated 10 June 2015, the Tribunal directed, pursuant to Article 58 of the ICSID Arbitration (Additional Facility) Rules, that the Government of Laos People's Democratic Republic (the "Government") be awarded costs against the Claimant, Laos Holdings (the "Claimant"), as a result of the unsuccessful allegation by the Claimant of a material breach of the Settlement Agreement dated 15 June 2014 and side letter dated 17 June 2014 (the "Material Breach Application").

II. THE LAW AND THE FACTS

a) The law

2. Article 58 of the ICSID Arbitration (AF) Rules provides that:

> **Article 58**
> (1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.
>
> (2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.

3. This Article gives a broad discretion to the Tribunal in the allocation of costs, according to all the circumstances of the case.

b) The facts

4. Pursuant to the Decision on the Merits, counsel for the Government has submitted a claim for fees in the sum of USD $684,007.75 and disbursements of USD $78,698.08 for a total of USD $762,705.83.

5. The Material Breach Application was based essentially on an allegation that the Government had either licensed or agreed to license a rival casino contrary to the 50-year monopoly conferred on the Claimant's subsidiary by agreement with the Government. The establishment of a rival casino, according to the Claimant, destroyed much of the value of its investment and essentially rendered it unmarketable except at an unacceptable discount to the fair market of its gambling facilities predicated on a monopoly concession.

6. The Government's ultimate success turned on the testimony of public servants and other witnesses given at the hearing in Singapore on 13-14 April 2015. The Claimant's allegation of a breach of its monopoly was shown to be based on erroneous newspaper reports and the activities of promoters of a rival casino who acted without the Government's approval or encouragement.

7. The Claimant was unable to present direct evidence in support of its Material Breach Application and such secondary inferences as were available were persuasively refuted by testimony by the Government officials most directly involved.

8. A list of the submissions, decisions and hearings in the Material Breach Application is attached hereto as **Appendix "A"** to these reasons.

9. In assessing the Government's costs of its successful defence, the Tribunal should attempt to assess a *quantum* that is fair and reasonable to both parties in all the circumstances.

c) The Government's bill of costs

10. The Government's skeleton bill of costs is set out in a one and a quarter page chart identifying the lawyers or paralegals who worked on the case, their hourly rate and total billing for each individual, as well as a statement of disbursements. The document is attached as **Appendix "B"** to these reasons.

11. The Tribunal has been provided with little in the way of submissions by either party.

12. The Claimant takes the position that considerable time and costs were unnecessarily thrown away on an ultimately unsuccessful jurisdictional challenge and related procedural issues. To further its argument, the Claimant requested copies of the billing records of the Respondent Government to determine how much time was spent on various unsuccessful procedures in the course of its defence against the Material Breach Application. The records were refused by the Government on the basis that at New York law, being the governing law of the Deed of Settlement, "billing time sheets are privileged and are not produced to opposing counsel". The Claimant contests that position. The Tribunal considers it unnecessary to resolve this particular dispute and will proceed on the basis of the material now made available to it.

III. THE TRIBUNAL'S ANALYSIS

a) Reasonableness of time and hours spent

13. The Tribunal has taken into account the following considerations:

(a) The *quantum* of costs claimed by the Government is proportionate to the importance and the complexity of the issues at stake.

(b) The *amount of time* docketed by the various lawyers and paralegals is not excessive given the degree of responsibility assumed by counsel acting on behalf of the Government and the monetary value of the matters in issue.

(c) The *rates* are reasonable in the surrounding circumstances. Lead counsel for the Government are experienced lawyers in matters of international commercial law and their rates are in line with rates charged by counsel of comparable skill and experience in matters of similar value and complexity.

(d) The *work's organisation* was efficient. It appears from the distribution of hours amongst counsel that appropriate measures were taken by senior counsel to delegate to more junior counsel (at a lower hourly rate) work suitable to their level of experience.

(e) In the end result, *the Government was entirely successful* on the merits in resisting the Material Breach Application of the Claimant.

b) The unsuccessful jurisdictional challenge

14. While the Tribunal accepts that the time shown in the Government's bill of costs was in fact spent by each of the persons listed, and that their hourly rates are reasonable, the Government's success rested almost entirely on the factual evidence presented in Singapore on 13-14 April 2015. Prior to that date, there was much procedural skirmishing, particularly in relation to the Government's unsuccessful challenge to the jurisdiction of the Tribunal even to embark on its mandate to consider the Claimant's Material Breach Application. The Tribunal gave extensive reasons for its conclusion that there was no merit to this challenge. After the point was decided adversely to the Government, it launched an

unsuccessful Request for Re-consideration which essentially repeated the arguments already made and already rejected by the Tribunal in the original (and unsuccessful) jurisdictional challenge.

15. In the Tribunal's view, while the Government was certainly entitled to bring its jurisdictional challenge, it is not fair and reasonable to ask the Claimant to fully indemnify the Government against the cost of procedural skirmishing that served no purpose other than a distraction from the factual issues before the Tribunal.

c) Are there other elements to take into consideration?

16. In the Tribunal's view, the Government case was made in a professional manner with due regard to economy and efficiency. However, the assessment of the Government's costs must take into account its unnecessary and unsuccessful procedural manoeuvres. Reference should also be made to the fact that the Claimant lost two successive Requests for Provisional Measures, respectively dated 19 January 2015 and 2 April 2015. The Tribunal rejected both requests, respectively on 18 March 2015 and 14 April 2015.

17. As the Government has declined to produce records that would enable the Tribunal to calculate more precisely the amount of time consumed by its jurisdictional challenges and related motions, the Tribunal will simply apply a percentage reduction as hereinafter specified.

d) Disbursements

18. The Tribunal has no reason to doubt the justification for any of the disbursements. As the Government points out, USD $93,849.00 is a reasonable sum for out-of-pocket expenses for a ten-month case where the client is in Laos, witnesses were in Laos and Kuala

Lumpur, and hearings were held in Washington and Singapore. The Claimant requested the presence in Singapore of the Government officials for whose expenses it is now being called on to pay.

19. The Washington hearing (and associated costs), however, was entirely dedicated to the Government's unsuccessful jurisdictional challenge and related issues.

IV. CONCLUSION

20. In light of the foregoing considerations, the Tribunal concludes that the *quantum* of costs claimed by the Government, exceeds what is fair and reasonable to call upon the Claimant to pay.

21. As the Government has declined to produce any breakdown of the activities in respect of which costs are claimed (apart from research on the interpretation of the Deed of Settlement under New York law and development of the Government's position in that regard), the Tribunal is left with the option of assessing a global factor to determine a fair and reasonable award of costs relative to the work done and the result accomplished.

22. The Tribunal concludes that the decision should be 70% of the total claim of USD $762,705.83.

23. The Tribunal therefore awards to the Respondent costs and legal fees of USD $533,894.08.

24. Pursuant to paragraphs 31 and 32 of the Settlement Agreement dated 15 June 2014, this proceeding remains suspended.

DATED THIS 5th DAY OF NOVEMBER 2015.

[Signed]

Professor Brigitte Stern
Arbitrator

[Signed]

Professor Bernard Hanotiau
Arbitrator

[Signed]

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

APPENDIX A

June 17- 19, 2014	Hearing on the merits in Singapore.
June 19, 2014	The proceeding is suspended, pursuant to the parties' agreement.
July 4, 2014	Claimant's Application for a Finding of Material Breach of Deed of Settlement and for Reinstatement of Arbitration
July 11, 2014	Respondent's Response to Claimant's Application
August 1, 2014	Claimant's Reply on its Application
August 8, 2014	Respondent's Rejoinder to Claimant's Application
August 21, 2014	Procedural Order No. 4 (one day hearing would be held in order to hear the parties on the Claimant's Application for a Finding of Material Breach and for Reinstatement of the Arbitration)
September 12, 2014	Respondent's Objection to Jurisdiction and Motion to Suspend
September 17, 2014	Claimant's Response to Respondent's Objection and Motion
September 19, 2014	Procedural Order No. 5 (affirmed PO No. 4)
October 1, 2014	Claimants' Submission on the Legal Issues Raised in the Tribunals' Letters of 21 Aug 2014
October 14, 2014	Hearing on Claimant's Application for a Finding of Material Breach in Washington, D.C.
December 19, 2014	Interim Ruling on Issues Arising under the Deed of Settlement
January 19, 2015	Claimant's Provisional Measures Application
January 27, 2015	Respondent's Request for Reconsideration of Interim Ruling
January 28, 2015	Respondent's Reply to Claimant's Provisional Measures Application
January 29, 2015	Claimant's Response to Respondent's Request for Reconsideration (by letter)
February 2, 2015	Respondent's Reply to Claimant's Response to Request for Reconsideration (by email)
February 5, 2015	Procedural Order No. 6 (Request for Reconsideration and Provisional Measures)
February 18, 2015	Claimant's Response to Respondent's Reply to Provisional Measures Application
March 10, 2015	The Tribunal and the parties hold a conference call on the Second Request for Provisional Measures
March 18, 2015	Decision on Second Request for Provisional Measures
March 27, 2015	Claimant's Memorial Submission on Material Breach
March 27, 2015	Following exchanges between the parties, the Respondent files a request for the Tribunal to decide on production of documents and disclosure of information.
March 31, 2015	The Claimant files observations on the Respondent's request for the Tribunal to decide on production of documents and disclosure of information.

April 2, 2015	The Respondent files a response to the Claimant's observations of March 31, 2015 and withdraws its request concerning production of documents of March 27, 2015.
April 2, 2015	The Claimant files further observations on the Respondent's response of April 2, 2015.
April 3, 2015	Respondent's Reply to Claimant's 27 March 2015 Submission
April 5, 2015	Procedural Order No. 7 – Decision on Respondent's request for disclosure of information
April 8, 2015	Claimant's Reply Submission on its Material Breach Application
April 11, 2015	Respondent's Reply to Claimant's 8 April 2015 Submission
April 13 - 14, 2015	Hearing on Merits of Claimant's Application for Finding of Material Breach
April 14, 2015	The Tribunal decides on Claimant's request for provisional measures
April 29, 2015	The Respondent files a request for the Tribunal to decide on the admissibility of new evidence – ("Government's Request to Augment the Record With Claimant's Judicial Admission")
May 12, 2015	The Claimant files observations on the Respondent's request of April 29, 2015 by email.
May 13, 2015	The Tribunal decides on the admissibility of new evidence.
June 10, 2015	The Tribunal issues a decision on the merits.

APPENDIX B

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

Lao PDR Costs from 28 June 2014 to 23 April 2015

	Lawyers' Fees		
Description	**Rate**	**Hours**	**Total Fees in US$**
Branson, David J.	$800,00	652,30	$521 840,00
Willems, Jane	$800,00	26,70	$21 360,00
King, Anthony (King & Branson LLC)	$500,00	0,10	$50,00
Bey, Tiana A. (King & Branson LLC)	$260,00	69,20	$17 992,00
Branson, John (Parker Poe)	$250,00	231,80	$57 950,00
Hutchins, Sarah F. (Parker Poe)	$290,00	0,80	$232,00
Martin, Melissa J. (Parker Poe)	$140,00	0,30	$42,00
Skinner, Kathryn (Parker Poe)	$100,00	3,60	$360,00
General Litigation Support			
Sanford, Alex	$550,00	9,60	$5 280,00
Molo, Steven (Mololamken)	$550,00	2,00	$1 100,00
Kry, Robert (Mololamken)	$550,00	5,20	$2 860,00
Melendez, Joel (Mololamken)	$550,00	4,30	$2 365,00
Interpretation Deed under New York Law			
Wallace, Don Jr.	$500,00	63,50	$31 750,00
Birch, Nicholas J. (Stewart & Stewart) 2014	$185,00	3,55	$656,75
Birch, Nicholas J. (Stewart & Stewart) 2015	$200,00	98,15	$19 630,00
Public International Law Support			
Paralegals			
Lagvilava, Tamari (Stewart & Stewart)	$90,00	6,00	$540,00
Sub-total		**1177,10**	**$684 007,75**

Disbursements	**Total in US$**
Translators Fees	$4 350,00
Air/Train Fares (Branson, David J.)	$48 614,16
Ground Transportation/Parking (Branson, David J.)	$1 303,13
Hotel & Expenses (Branson, David J.)	$21 844,84
Office Supply/ Photocopying (Branson, David J.)	$421,86
Telephone/Internet charges (Branson, David J.)	$248,25
Visas (Branson, David J.)	$283,00
Telephone Conference (Wallace, Don Jr.)	$58,56
Travel (Parker Poe)	$809,96
Meals (Parker Poe)	$199,46
Photocopies and printing (Stewart & Stewart)	$25,80
Westlaw (Stewart & Stewart)	$539,46
Sub-total	**$78 698,48**

Lao PDR Costs from 28 June 2014 to 23 April 2015

GOL Expenses	**Total in US$**
GOL Personnel Travel	$5 000,00
Sub-total	**$5 000,00**

TOTAL	**$767 706,23**