

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re Application of Thai-Lao Lignite
(Thailand) Co., Ltd. & Hongsa Lignite (Lao
PDR) Co., Ltd. for an Order Directing
Discovery in Aid of Foreign Proceeding from
Électricité de France International Pursuant to
28 U.S.C. § 1782

***Ex Parte* Petition for Assistance in Aid of a
Foreign Proceeding Pursuant to 28 U.S.C.
§ 1782**

Petitioners Thai-Lao Lignite (Thailand) Co., Ltd. (“TLL”) and Hongsa Lignite (Lao PDR) Co., Ltd. (“HLL”) (together, “Petitioners”) hereby petition for discovery in aid of a proceeding pending before a foreign legal tribunal pursuant to 28 U.S.C. § 1782, as follows:

I. Background

A. The Parties

1. On November 4, 2009, Petitioners obtained an arbitration award (the “Award”) against the Government of the Lao People’s Democratic Republic (“Laos”), which awarded to Petitioners, on a joint basis:
 - a. damages in the sum of US\$ 56,210,000, with interest to accrue at the New York statutory judgment rate of 9% per annum (Award, ¶ 145); and
 - b. a sum of US\$ 1,000,000 in attorneys fees based on a finding that Petitioners were the prevailing parties in the arbitration (Award, ¶ 146).

See Declaration of Charlene C. Sun, dated May 31, 2011 (“Sun Decl.”), ¶ 8; Ex. B.
2. Laos has not paid any part of the Award. *See* Sun Decl. ¶ 9; Ex. C.
3. On July 15, 2010, Petitioners commenced an *exequatur* proceeding in the Paris Court of First Instance (the “Paris Court”) to confirm the Award against Laos under the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (June 10,

1958), 21 U.S.T. 2517, 330 U.N.T.S. 38 (the “New York Convention”). The Paris Court entered an order granting *exequatur* of the Award on August 4, 2010 (the “*exequatur* order”). See Declaration of Jérôme Barzun, dated May 24, 2011 (“Barzun Decl.”), ¶¶ 3-4; Ex. A.

4. Petitioners seek to obtain evidence from Électricité de France International (“EDFI”) concerning any French assets owned by or commercial debts owed to Laos, including, without limitation, monies payable to Laos in connection with Laos’ equity stake in the Nam Theun 2 hydroelectric power facility, a 1.07 gigawatt hydroelectric project located in the Khammouane Province of Laos in which EDFI owns the largest ownership stake and for which EDFI serves as the lead operator, as any such assets are currently and immediately subject to attachment and execution under French law in aid of the *exequatur* order and the Award.

5. EDFI maintains an office located at 1300 I St. NW, Suite 305e, Washington, D.C. 20005. See Sun Decl. ¶¶ 20-21; Exs. H, I.

B. The *Exequatur* Proceeding

6. The *exequatur* proceeding was an *ex parte* summary proceeding available under French law initiated to confirm the Award under the New York Convention, to which France is a signatory and party. See Barzun Decl. ¶¶ 3, 5; Sun Decl. ¶ 10.

7. Under French law, recognition and enforcement is obtained through an *exequatur* order (“*ordonnance d’exequatur*”), such as that obtained by Petitioners from the Paris Court on August 4, 2010. The Paris Court granted the *exequatur* order upon establishing that the Award existed and that it was not contrary to French or international public policy. See Barzun Decl. ¶¶ 3, 6; Ex. A.

8. Under French law, once an enforcement order has been obtained, the petitioner is permitted to immediately initiate interlocutory measures to freeze the respondent’s assets. See

Barzun Decl. ¶ 7. As in the United States, a party seeking to execute against a foreign state in France may only freeze and attach assets that are commercial in nature.

9. Publicly-available documents demonstrate that EDFI has made substantial investments in the energy industry in Laos. Specifically, EDFI is the principal shareholder, was the lead construction contractor, and is the lead project operator of Nam Theun 2. *See* Sun Decl. ¶ 22; Ex. J.

10. Nam Theun 2 was financed by a consortium that includes at least one French bank. *See* Sun Decl. ¶ 23; Ex. K; Barzun Decl. ¶ 8.

11. While Petitioners believe that revenues generated by commercial energy-generating facilities such as Nam Theun 2, in which Laos has an executable property interest, are in, or pass through, French financial institutions. Petitioners further believe that such assets constitute commercial assets subject to attachment and execution under French law. The ultimate determination of whether such assets are subject to execution in aid of the *exequatur* order, however, will be made in a subsequent French court proceeding. *See* Barzun Decl. ¶ 9. Such proceedings would qualify as “proceedings before a foreign or international tribunal” within the meaning of 28 U.S.C. § 1782.

12. While French law, like U.S. law, reflects a robust public policy favoring the prompt enforcement of foreign arbitration awards, through judicial execution if necessary, it does not provide any judicial mechanisms pursuant to which the holder of an *exequatur* order may obtain discovery of assets that may be subject to execution. There is no French public policy that would be violated by this Court’s permitting discovery of Laos’ French assets to proceed, however. *See* Barzun Decl. ¶ 10.

II. This Court Should Grant the Judicial Assistance Requested Hereby

13. 28 U.S.C. § 1782(a) provides, in pertinent part, that

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

14. Each of the statutory prerequisites for this Court to order discovery in aid of the French execution proceedings is present, as:

- a. Petitioners are “interested persons” within the meaning of 28 U.S.C. § 1782 and are entitled to seek assistance thereunder.
- b. French judicial proceedings in aid of the *exequatur* order to determine the existence, ownership, and character of Lao assets in France are reasonably contemplated, and thus any assistance granted by this Court would be in aid of a proceeding before a “foreign or international tribunal.”
- c. EDFI, by virtue of its maintenance of an office in this district, is “found in this district.” *See* Sun Decl. ¶¶ 20-21; Exs. H, I.

15. Granting the discovery sought hereby would promote the strong public policy – enshrined in both U.S. and French law, as well as in the New York Convention – favoring the enforcement of foreign arbitration awards and the expeditious resolution of disputes. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (noting that the New York Convention was designed to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts”); *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 122 (Kluwer Law International 2009) (observing that the provisions

of the French New Code of Civil Procedure which govern international arbitrations and arbitral awards “have produced a strongly pro-arbitration legal framework for international commercial arbitration”).

16. Laos’ refusal to pay the award voluntarily contravenes both its contractual obligations under the Project Development Agreement between Petitioners and Laos (which, through its incorporation of the UNCITRAL Rules, required Laos to “implement the award without delay,” and which expressly prohibits any attempt to “appeal or [seek] any review of such award by any court or tribunal of competent jurisdiction,” *see* Sun Decl., ¶ 4; Ex. A, Art. 14(vi)) and the policies referenced above. That refusal has been substantially prejudicial to Petitioners, who remain uncompensated for Laos’ breach of the PDA (despite the passage of over 18 months since the arbitral tribunal rendered the Award, almost one year since the commencement of judicial enforcement proceedings, and over eight months since the *exequatur* order was issued) and who have had to expend a substantial amount of time and resources in an attempt to enforce the Award judicially. Because it appears, from publicly-available documentation, that both EDFI and other parties in France have played, and continue to play, a critical role in the financing and development of Laos’ commercial hydroelectric energy resources, this Court’s grant of the assistance sought hereby will help ensure that the Award is enforced.

17. Furthermore, this Court should grant aid in discovery because it would provide an efficient means of assistance to Petitioners, who have made several unsuccessful attempts to serve executions on EDFI in France (as well as on the banks that have participated in the financing syndicate that underwrote Nam Theun 2). None of the executions served to date has succeeded in freezing any of Laos’ assets. Such executions are costly to initiate, and without

discovery, Petitioners are at a significant disadvantage by being forced to initiate such executions with no information to guide them. *See* Barzun Decl. ¶ 11.

18. This Court's grant of judicial assistance would permit Petitioners to appropriately target their execution efforts, vindicate the *exequatur* order, promote the policies embodied in the New York Convention (which, Petitioners note, expressly contemplates multiple judicial proceedings to enforce unsatisfied arbitral awards, and which should therefore be seen as encouraging international judicial cooperation to expedite and facilitate enforcement proceedings) and help bring these multilateral enforcement proceedings to a conclusion by facilitating execution of the Award.

D. Any Discovery Ordered Hereby Should Encompass Assets Held By, and Debts Owed To, All Lao Government Organs, Including, Without Limitation, Lao Holding State Enterprise

19. Lao Holding State Enterprise ("LHSE") is a state-owned corporation established by Laos for the purpose of holding Laos' equity interest in commercial energy developments generally, and in Nam Theun 2 specifically. As demonstrated below, LHSE holds Laos' equity interest in the Nam Theun 2 project.

20. Based on publicly-available documentation, Petitioners believe that LHSE is an organ or corporate alter-ego of Laos, and that any revenues, royalties, or other payments made to Laos in connection with Nam Theun 2 and/or the Hongsa Power Plant project in the Lao PDR (the power project that was subject of the arbitration between Petitioners and Laos, the Award from which Petitioners seek enforcement of) are made to LHSE.

21. LHSE was established under Lao law as a "State Enterprise" pursuant to a "Prime Ministerial decision of 27 January 2005." *See* Sun Decl., ¶ 12; Ex. D, at 10. LHSE's registration certificate, issued on February 23, 2005, designated LHSE as "GOL's designated

holder of its shares in the Nam Theun 2 project.” *Id.* (Emphasis supplied.) Furthermore,

LHSE’s website describes LHSE as

a business entity of the Government of Lao PDR (GOL) for investment in electric power sector. It is intended by GOL to use LHSE for holding GOL shares in IPP project companies and administer GOL interests under project Shareholder Agreements. With GOL support, LHSE shall raise capital to meet GOL equity commitments, manage and disburse GOL receipts from dividend, re-financings, etc.

See Sun Decl. ¶ 12; Ex. E.

22. LHSE “is governed by a Board of Directors chaired by the Vice Minister of Finance.” The General Manager of LHSE is also a board member. *See* Sun Decl. ¶ 13; Ex. D, at 10.

23. LHSE’s website states that

[t]he Articles of Association of LHSE, Article 5 on Objectives, stipulates that the primary function of LHSE is to hold, manage and maintain on behalf of GOL, shares in Nam Theun 2 Power Company Limited (NTPC) and any other Power Project Companies which are acquired by LHSE or transferred to it by GOL, in an efficient and businesslike manner.

See Sun Decl. ¶ 14; Ex. E.

24. LHSE is responsible for “Investor Authority responsibilities,” *see* Sun Decl. ¶ 15; Ex. D, at 10, which include

hold[ing] shares in IPP projects on behalf of the Government of Laos, administer[ing] the Government’s interests under project Shareholder Agreements, rais[ing] capital to meet the Government’s equity commitments, manag[ing] the Government’s IPP share portfolio, prudently acquiring and divesting equity holdings to optimize shareholder benefits, and manag[ing] and disburs[ing] Government receipts from sources such as dividends and refinancing.

See Sun Decl. ¶ 15; Ex. D, at 6-7.

25. The website for the Nam Theun 2 hydropower project, for which LHSE was established, states that “LHSE was created as the entity through which the government’s Nam Theun 2 revenues will pass.” *See* Sun Decl. ¶ 16; Ex. F.

26. LHSE also holds substantial shares in the two companies established for the development of the coal-fired Hongsa Power Plant project. *See* Sun Decl. ¶¶ 17-19; Ex. G.

27. Given this publicly-available evidence, Petitioners believe that discovery concerning assets in France that are held by (or for the account of) or owed to LHSE is critical to permit proper discovery concerning the identification of assets that may be executed upon in aid of the *exequatur* order.

28. The discovery sought hereby is no broader than necessary to permit Petitioners to obtain the information necessary to identify and establish their right to execute upon any assets that are subject to execution in connection with the *exequatur* order. Accordingly, Petitioners respectfully request that the Court enter an order in the form attached hereto as Exhibit 1, and to direct EDFI to provide the requested discovery.

Dated: New York, New York
June 1, 2011

Respectfully submitted,



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