

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Lao Holdings N.V.
and
Sanum Investments Limited**

v.

Lao People's Democratic Republic

**(ICSID Case No. ARB(AF)/16/2)
(ICSID Case No. ADHOC/17/1)**

PROCEDURAL ORDER NO. 3

(Decision on Claimant's Clarification Request of 23 October 2017)

Members of the Tribunal

Ms. Jean E. Kalicki, President of the Tribunal
Prof. Laurence Boisson de Chazournes, Arbitrator
Mr. Klaus Reichert, SC, Arbitrator

Secretary of the Tribunal

Mrs. Anneliese Fleckenstein

14 November 2017

Contents

I. PROCEDURAL BACKGROUND AND PARTIES' POSITIONS	3
II. THE TRIBUNAL'S ANALYSIS	5
III. PROCEDURAL IMPLICATIONS.....	11
IV. DECISION.....	13

I. PROCEDURAL BACKGROUND AND PARTIES' POSITIONS

1. On 23 October 2017, the Tribunal issued Procedural Order No. 2 (“**PO2**”), which *inter alia* sustained Respondent’s objection to Claimants’ inclusion, in their Memorial on the Merits filed in the consolidated *Lao Holdings* and *Sanum* Cases,¹ of additional claims related to non-recognition of a 2016 arbitration award in Sanum’s favor against a third party, ST (the “**2016 SIAC Award**”). The Tribunal concluded, for reasons explained at some length, that the China-Laos BIT – which is the arbitration agreement on which Sanum relies for jurisdiction – provides agreement only to *ad hoc* arbitration, and the Parties’ secondary agreement to this Tribunal’s hearing the *Sanum* Case under the ICSID Additional Facility Rules extended only to the particular dispute represented by Sanum’s “filing,” *i.e.*, its Notice of Arbitration. In these circumstances, the Tribunal was unable to find Sanum’s additional claims to be within the scope of consent to these proceedings, within the meaning of Article 47(1) of the Arbitration (Additional Facility) Rules, which allows timely filed ancillary claims to be admitted “[e]xcept as the parties otherwise agree, ... provided that such ancillary claim is *within the scope* of the arbitration agreement of the parties.”²
2. Following its receipt of PO2, Claimants wrote on 24 October 2017 to request clarification as to whether PO2 was intended *also* to apply to additional claims regarding non-recognition of the 2016 SIAC Award filed by *Lao Holdings* under the Netherlands-China BIT, rather than by Sanum under the China-Laos BIT.³ Claimants referenced paragraph 31 of PO2, which explained that “[t]he situation would be different for an investment treaty that *directly* authorizes submission of claims under the ICSID Convention or the ICSID Additional Facility Rules, because then there would be no need to examine the scope of any additional, subsequent agreement to access the applicable rules.”⁴ Claimants contended that their Memorial on the Merits had raised additional claims on behalf of *both* Lao Holdings and Sanum, and “[i]f Claimants inadvertently gave the impression that they

¹ Short-forms used here are intended to refer back to the items defined in PO1.

² PO2, ¶ 18 (emphasis added).

³ Claimants’ letter of 23 October 2017, at p. 1 (transmitted on 24 October 2017).

⁴ Claimants’ letter of 23 October 2017, at p. 2.

would want the Tribunal to hear” the additional claims only if Sanum itself could prosecute such claims, “they apologize, as that is not the case.”⁵ Claimants stated that Lao Holdings “remains prepared to move forward with its ancillary claims before this Tribunal under the ICSID(AF) Rules,” while “Sanum will promptly bring an *ad hoc* arbitration” to pursue its claims regarding the 2016 SIAC Award.⁶ Claimants sought clarification that the portions of their consolidated Memorial on the Merits addressing the 2016 SIAC Award from the perspective of Lao Holdings’ investment interest and claims, rather than Sanum’s, would remain in the case and be subject to briefing “in the schedule set forth in Annex A to Procedural Order No. 2.”⁷

3. On 24 October 2017, the Tribunal invited Respondent to submit its observations on Claimants’ request, on or before 31 October 2017.
4. On 31 October 2017, Respondent objected to the request, describing it not as a true request for “clarification,” but rather as one for “reconsideration” of the Tribunal’s prior analysis and decision.⁸ According to Respondent, “[t]here is no evidence that Lao Holdings’ ancillary claims were not included in the Tribunal’s decision.”⁹ Respondent contends that the Tribunal’s use of the plural word “*Claimants*” in the operative part of PO2, ordering that Respondent’s “objection to Claimants’ inclusion” ... of claims relating to non-recognition of the 2016 SIAC Award “is sustained,” makes it “crystal clear” that the decision barred additional claims by Lao Holdings and not just those by Sanum.¹⁰ In these circumstances, it suggests, Claimants were incorrect to posit that the Tribunal overlooked Lao Holdings’ assertion of parallel additional claims.¹¹ Since the Tribunal (in Respondent’s view) already has decided this question, Claimants’ request must be seen as

⁵ Claimants’ letter of 23 October 2017, at p. 2.

⁶ Claimants’ letter of 23 October 2017, at p. 2.

⁷ Claimants’ letter of 23 October 2017, at p. 3.

⁸ Respondent’s letter of 31 October 2017, at p. 1.

⁹ Respondent’s letter of 31 October 2017, at p. 1.

¹⁰ Respondent’s letter of 31 October 2017, at pp. 1-2.

¹¹ Respondent’s letter of 31 October 2017, at p. 2.

one for reconsideration, which should be “summarily denied” in the absence of any changed circumstances.¹²

II. THE TRIBUNAL’S ANALYSIS

5. At the outset, the Tribunal observes that this issue is fairly flagged as requiring clarification, because PO2 did not expressly address possible distinctions between the Sanum additional claims pleaded under the China-Laos BIT, and any separately pleaded additional claims by Lao Holdings under the Netherlands-Laos BIT. One of the consequences of post-registration consolidation of two separately filed requests for arbitration is that the consolidated case involves different initial pleadings presented by different parties. In this case, the two parties are proceeding under two different BITs. Subsequent to consolidation by the Parties’ agreement, it is natural that both the Parties and the Tribunal tend to adopt the plural usage of “Claimants,” such that every letter, submission or application is described in short-hand as being made by “Claimants,” not by one or the other Claimant, or jointly by *both* Claimants but each presenting a right independent of the rights of the other. This reflexive use of the plural has the potential, however, to obscure the reality that the Claimants here assert different rights under different instruments that in some cases may require separate analysis. The current situation is an example of the confusion that may result absent careful effort to distinguish between the rights of the two Claimants.
6. In PO2, the Tribunal inaccurately presumed that while the additional claims were *presented* formally in a consolidated Memorial on the Merits by “Claimants,” they related to rights asserted by Sanum, such that Claimants (plural) essentially were contending that Sanum (singular) should be permitted to proceed with the additional claims. The Tribunal expressly reasoned that “[a]s the additional claim is presented by Sanum, in whose favor the 2016 SIAC Award was issued, the appropriate place to start” is with the China-Laos BIT.¹³ The Tribunal did not appreciate that Lao Holdings was asserting independent

¹² Respondent’s letter of 31 October 2017, at pp. 2-3.

¹³ PO2, ¶ 23.

standing to bring claims about non-recognition of the 2016 SIAC Award, presumably as an *indirect* investor in the underlying investments, who was complaining about reflective loss sustained through its share ownership in Sanum, the direct investor in the underlying investments. This separate assertion of standing by Lao Holdings was not expressly debated in the Parties' submissions on Respondent's objection to the additional claims, and the Tribunal did not identify this as an issue on its own. However, based now upon a re-review of the passages of Claimants' Memorial on the Merits that they referenced in their letter of 23 October 2017, the Tribunal accepts that the Memorial did refer at least in passing to additional claims being asserted by "Claimants" (plural) under *both* treaties.¹⁴ In these circumstances, PO2 did not fully address the admissibility of the additional claims, to the extent that it focused on the scope of consent under the China-Laos BIT and not on the separate question of consent under the Netherlands-Laos BIT. For these reasons, the Tribunal accepts Claimant's request as properly one for clarification, not reconsideration, of PO2.

7. Unlike the China-Laos BIT, the Netherlands-Laos BIT (in Article 9) directly consents to arbitration under the Additional Facility Rules. In these circumstances, the *facial* requirements of Article 47(1) of the Arbitration (Additional Facility) Rules would appear to be met, since the text refers only to whether a timely filed ancillary claim is within the scope of the arbitration agreement of the parties.¹⁵ The Tribunal interprets this as referring to the same basic threshold for admissibility of claims referenced in Article 4 of the Additional Facility Rules (governing the Secretary General's approval of access to the Additional Facility), not to the eventual resolution by the Tribunal of any and all potential jurisdictional objections to the ancillary claim. Article 47 does not require a mini-trial and decision on all potential jurisdictional objections in order to determine, at the threshold stage, if an ancillary claim even may be admitted for examination. If the same claim could have been admitted to the Additional Facility for further proceedings had it had been included in an original request for arbitration, then Article 47's threshold admissibility

¹⁴ Claimants' letter of 23 October 2017, p. 2.

¹⁵ Article 47(1) addresses in identical fashion three different types of "ancillary claims": incidental claims, additional claims, and counterclaims. It is common ground that the claims at issue here are additional claims, not incidental claims or counterclaims.

inquiry – into whether that claim is within the scope of the arbitration agreement of the parties for purposes of admitting it as an ancillary claim – is likewise satisfied. This still leaves a respondent State free to present jurisdictional objections to the ancillary claim, as it could for any claim that was pleaded in the original request for arbitration.

8. The question, though, is whether Article 47 *implicitly* contains an additional requirement – beyond the facial requirements set forth in its terms – that an ancillary claim must bear some relationship to the existing claims before it can be admitted to the proceedings. As noted in PO2, Article 47 does not contain the additional language included in Article 40 of the Arbitration Rules (governing Convention cases), which limits ancillary claims to those “arising directly out of the subject-matter of the dispute.”¹⁶ The Tribunal noted in PO2 that it would have been easy for the drafters of the Arbitration (Additional Facility) Rules to include the same language in Article 47, but they did not do so.¹⁷ All the same, the Tribunal observed that “[a]n argument could be made that the criteria of some relationship between the existing claims and the additional claim is still implied, but that would be an inference, not drawn from the text of Article 47 itself”¹⁸ The Tribunal noted that this was the approach followed by the tribunal in *ADF v. United States*, which applied such a “requirement of a close relationship with or connection to the original or primary claim,” but without explaining its reasons for doing so other than by positing an analogy to the ICSID Convention and Arbitration Rules.¹⁹ The Tribunal suggested that any more rigorous discussion of whether such a requirement should be implied into Article 47 “would require a degree of evidence that the Parties have not presented here, about the intended relationship generally of the Arbitration (Additional Facility) Rules (for cases not governed by the ICSID Convention) to the Arbitration Rules (for cases so governed).”²⁰
9. The Parties have not returned to this issue in their exchange of letters following issuance of PO2, so the Tribunal has no further briefing than it did before regarding the possibility

¹⁶ PO2, ¶ 21.

¹⁷ PO2, ¶ 21.

¹⁸ PO2, ¶ 21.

¹⁹ PO2, n.34 (citing **CL-0174** and **RLA-074**, *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, ¶ 144 (9 January 2003).

²⁰ PO2, ¶ 21.

of implying a relationship or connection requirement into the Arbitration (Additional Facility) Rules, even though no such requirement is stated in its express text. The Tribunal has debated whether to engage in such an analysis on its own, in order to try to render a definitive decision on the issue. In the end, however, the Tribunal is persuaded that there is no need to go down this road, and therefore ultimately does not express any view on whether, with regard to the requirements for admissibility of ancillary claims, there is a difference in approach or a basic similarity between the ICSID Convention and the Additional Facility. This is because even assuming *arguendo* that a connection to the original claims is required implicitly for cases proceeding under the Additional Facility, that connection still could be established in this case.

10. First, Article 47 of the Arbitration (Additional Facility) Rules makes clear that the admissibility of ancillary claims is governed by the same regime whether the ancillary claim at issue is an incidental claim, an additional claim, or a counterclaim. No distinction is drawn between these three types of ancillary claims. The Permanent Court of International Justice had occasion in the well-known *Chorzów* Case to consider the degree of connection that should be required for admissibility of a counterclaim, under institutional rules which – very much like the Arbitration (Additional Facility) Rules – facially require only that the counterclaims “come within the jurisdiction of the Court.”²¹ The PCIJ found that since the counterclaim before it was based on the same governing instrument as other claims and defenses in the case – Article 256 of the Versailles Treaty – “consequently, it is *juridically connected* with the principal claim.”²² If a similar test for connection were to be applied under the Additional Facility Rules, then the same result would obtain here, since Lao Holdings’ additional claim for non-recognition of the 2016 SIAC Award is based on the same provisions of the Netherlands-Laos BIT as the claims that it asserted earlier in its Amended Notice of Arbitration.
11. Even if the arguably more stringent connection test of the ICSID Convention and Arbitration Rules were to be imported by analogy into the Arbitration (Additional Facility)

²¹ PCIJ, *Factory at Chorzów (Merits)*, Judgment of 13 September 1928, PCIJ series A, Judgment No. 13, at p. 38 (quoting Article 40 of the Rules of Court).

²² *Id.*

Rules, the result here would not necessarily be different. The *ADF* tribunal, which acknowledged that “these two instruments are not applicable to Additional Facility cases” but nonetheless considered them to supply relevant analogues, noted that the connection required was that the ancillary claims “aris[e] directly out of the subject matter of the dispute.”²³ The *ADF* tribunal interpreted this to mean that ancillary claims in its case must involve the same construction project (the “Springfield Interchange Project”) that was the focus of the original claims, and rejected ancillary claims arising out of other construction projects that were “physically distinct from and totally unrelated to the Springfield Interchange Project.”²⁴

12. Here, however, defining the “subject matter of the dispute” depends in part on which allegations in Lao Holdings’ Amended Notice of Arbitration one reviews. It is true that the *original* claims pleaded in Lao Holdings’ earlier Notice of Arbitration were focused on gaming investments (*not* including the Thanaleng Slot Club) that were the subject of a Settlement Deed, and challenged various actions by Respondent with respect to these investments taken after the date of that Deed.²⁵ However, the *amendments* to the original Notice of Arbitration added a rather different set of allegations regarding alleged treaty violations through actions of Respondent’s *judiciary*, including court actions that “purported to cancel the 2007 agreements under which Claimant had established its most profitable gaming assets, at Savannakhet and Thanaleng, and under which it was entitled to sixty percent (60%) of all gaming businesses of its local Lao partners”²⁶ The Amended Notice of Arbitration also alleged that “[t]he same judgment also purported to transfer ownership in Claimants’ remaining land and concessions to two Lao nationals whose family enjoys close ties to senior members of the Laotian regime”²⁷ While the

²³ **CL-0174** and **RLA-074**, *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, ¶ 144 (9 January 2003).

²⁴ As noted in PO2 at n.34, the *ADF* tribunal was clearly influenced in its decision not to admit an ancillary claim by the fact that throughout the case, and even by the time of the final Award, the claimant never attempted actually to litigate its claims regarding the other projects, submitting “no evidence of any kind ... at any time,” which was considered both a “failure of evidence and a basis for “material prejudice” to the Respondent, had the claim been deemed admissible. *Id.* ¶¶ 142-143, 145.

²⁵ *See, e.g.*, Amended Notice of Arbitration, ¶¶ 6-7, 28-44.

²⁶ Amended Notice of Arbitration, ¶ 46.

²⁷ Amended Notice of Arbitration, ¶ 48.

Amended Notice of Arbitration did not identify the particular court case, the local Lao partners or the family at issue, it is clear from Claimants' later Memorial on the Merits that these allegations in the Amended Notice of Arbitration related to "Case 48," and that the "local Lao partners" whose family was alleged to "enjoy[] close ties" to the Government, and who allegedly was the beneficiary of judicial action in violation of the Netherlands-Laos BIT, was ST.²⁸ The "2007 agreements" that the Amended Notice of Arbitration alleged were wrongfully cancelled by judicial action in Case 48 included the "Master Agreement," which was said to be the original source generally of all of Claimants' gaming rights in the country.²⁹

13. Given these allegations in Lao Holdings' Amended Notice of Arbitration, it is not a particular stretch to find that Lao Holdings' additional claims regarding *subsequent* judicial action – non-recognition of the 2016 SIAC Award – are related to the same general dispute already in this case. The additional claims likewise allege judicial conduct in violation of the Netherlands-Laos BIT, again purportedly in favor of ST, and again purportedly attributable to favoritism resulting from close ties between ST's owners and leading officials.³⁰ Some of this conduct is alleged to have been by "the same Judge that presided over Case 48,"³¹ the case discussed in the Amended Notice of Arbitration. Moreover, while the additional claims involve alleged extinguishment of Lao Holdings' rights in another gaming investment (the Thangaleng Slot Club), these rights are said to derive from the same 2007 Master Agreement that the Amended Notice of Arbitration claimed to have been wrongfully cancelled in Case 48.³²
14. The Tribunal emphasizes that it draws no conclusions regarding the validity or weight of any of these allegations, which at present are simply that: *allegations*. As in any case, it will be for the party presenting a claim to substantiate that claim by appropriate evidence.

²⁸ See, e.g., Memorial on the Merits, ¶¶ 215, 217, 220, 249; see also *id.*, ¶ 277 (alleging executive branch intervention in the court case in support of ST's position, purportedly in consequence of close ties between ST and leading figures in the Government).

²⁹ Memorial on the Merits, ¶ 253.

³⁰ Memorial on the Merits, ¶¶ 325, 334, 336.

³¹ Memorial on the Merits, ¶ 187.

³² Memorial on the Merits, ¶ 321.

The point, however, is that while the additional claims Lao Holdings now seeks to run certainly will require delving into further and different *facts* than the claims pleaded earlier in its Amended Notice of Arbitration, these claims still are not unrelated to the general *subject matter* of the earlier dispute, and certainly are presented under the same *judicial instrument* as the earlier claims. In these circumstances, the Tribunal is unable to conclude that even if Article 47 were interpreted as implying a “connection” test that does not appear on its face, the additional claims would not be inadmissible for failure to satisfy such a test. Of course, if the Tribunal instead were to limit itself to a textual reading of Article 47 (distinguishing it from the plain text of the Convention and Arbitration Rules), then the additional claims would be admissible in these proceedings without even having to show a connection between such claims and those earlier pleaded.

15. In these circumstances, the Tribunal concludes that Lao Holdings may proceed with its additional claims related to non-recognition of the 2016 SIAC Award. It naturally will bear the burden of proof on those claims, which includes a burden of demonstrating legal standing to complain about non-recognition of an arbitral award issued in favor of its subsidiary rather than itself. The Respondent remains free to present any objections it may wish to the additional claims, including both jurisdictional and merits arguments. The procedural implications of this decision are addressed further below.

III. PROCEDURAL IMPLICATIONS

16. While the Tribunal ultimately will permit Lao Holdings to proceed with its additional claims, this does not mean that there are no procedural consequences of Lao Holdings’ application to add such claims. In particular, the Tribunal recognizes that Respondent now faces the added burden of investigating and responding to the additional claims. The Tribunal accepts that the time remaining before Respondent’s scheduled Counter-Memorial on Jurisdiction and the Merits is likely insufficient for it to conclude these additional steps, and indeed that diverting its attention to investigating the additional claims could compromise its ability to meet the specified timetable for its briefing on the earlier claims. The Tribunal is unwilling to impose such foreseeable prejudice on Respondent, in

consequence of Claimants' decision to pursue Lao Holdings' additional claim before this Tribunal, rather than in a separate proceeding.

17. In these circumstances, there are at least three theoretically possible ways of ensuring that Respondent has sufficient time to investigate and address the new claims. Each of these has procedural consequences:
 - a. The first would involve maintaining the structure of the existing timetable but further adjusting the deadlines, to extend the date for Respondent's Counter-Memorial on Jurisdiction and the Merits sufficiently that this document – when filed – can meaningfully address both the earlier claims and the additional claims. This would be the neatest solution, as it would allow each further filing to address the complete set of claims now in the case. Given the tightness of the existing schedule, however, the required extensions likely could require adjourning the hearing presently scheduled for July 2018. The Tribunal would be willing to accept a one-time adjournment of the hearing if this option ultimately is deemed preferable after consultation with the Parties.
 - b. A second approach would be to defer briefing on the additional claims until after the Respondent files its forthcoming Counter-Memorial on the earlier claims, but setting a date for a Supplemental Counter-Memorial thereafter, to address both jurisdiction and merits related to the additional claims. This would enable Respondent to complete its current work on the current schedule, but would require it to prepare its Supplemental Counter-Memorial during the months that document production is proceeding simultaneously on the earlier claims. Depending on the date the Supplemental Counter-Memorial would be filed, however, this staggered briefing of two sets of claims could create follow-on burdens for Claimants too, for example commencing document production on the additional claims while they simultaneously are preparing their Reply on the earlier claims. The overlaps in deadlines between steps related to the earlier claims and those related to the additional claims could become messy. It is also far from clear that the supplemental schedule could be completed in time to allow the additional claims to “catch up” before the July 2018 hearing dates, although possibly a

hearing still could go forward then on the earlier claims, with a second-stage hearing on the additional claims to be held as soon as possible thereafter.

- c. The third possible approach would be to bifurcate the proceedings entirely, so as to move forward with the existing schedule for the earlier claims, and then proceed with “phase 2” briefing of the additional claims commencing immediately following the first hearing. This would allow the Parties to maintain the existing briefing schedule and hearing dates without the complication of the additional claims, but it also would postpone significantly the scheduling of a “phase 2” hearing, and therefore the resolution of the remaining issues in the case.
18. As noted, none of these alternatives is ideal, and the Tribunal wishes to obtain the Parties’ input before finalizing any decisions about adjustments to the procedural timetable. The Parties are requested to consider the possibilities and consult with one another, with a view towards trying to find a mutually agreed solution to the maximum extent possible, and presenting their preferred approach(es) to the Tribunal within 10 days of this Procedural Order No. 2. In the meantime, the Parties should assume that the present procedural timetable remains in effect for the earlier claims pleaded in Lao Holdings’ Amended Notice of Arbitration and by Sanum in its equivalent filing.

IV. DECISION

19. For the reasons above, the Tribunal decides as follows:
- a. Claimants’ request for clarification of PO2 is granted. This PO3 clarifies that PO2 was not intended to address the admissibility of additional claims asserted by Lao Holdings as opposed to Sanum; that issue is addressed instead in this PO3.
 - b. Respondent’s objection to admissibility of Lao Holdings’ additional claims related to the 2016 SIAC Award is denied. The claims may go forward, with the understanding that they are being pursued only by Lao Holdings and not by Sanum.

- c. The Parties are directed to consider and consult regarding the procedural implications of this decision, with a view towards trying to find a mutually agreed solution to the maximum extent possible, and to revert to the Tribunal on the timeline set forth above.

On behalf of the Tribunal,

[Signed]

Ms. Jean E. Kalicki
President of the Tribunal
Date: 14 November 2017