

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. 2

(Decision on Respondent's Applications of 18 September 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

23 October 2017

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I. PROCEDURAL BACKGROUND

1. As reflected in Annex A to Procedural Order No. 1 in ICSID Case No. ARB(AF)/16/2 (the “*Lao Holdings Case*”), the Parties requested during the First Session, and the Tribunal agreed, to dispense with a reasoned decision on the issue of possible bifurcation of jurisdictional objections.
2. Pursuant to that understanding, by letter of 24 April 2017, the Secretariat informed the Parties that the Tribunal had received the Parties’ completed exchanges on Respondent’s Notice of Objection to the Tribunal’s Competence and Request for Bifurcation of 20 February 2017, and issued its decision on the bifurcation request dispensing with its reasons. Respondent had sought bifurcation to address four grounds of objection: “(1) the alleged dispute is a contract claim, not a treaty claim; (2) the arbitration claims contradict the principles of *lis pendens*, *res judicata*, and *collateral estoppel*; (3) the arbitration claims are an abuse of process; and, (4) in any event, the tribunal lacks material jurisdiction over several if not all claims.”¹ Having reviewed the Parties’ submissions, the Tribunal declined Respondent’s request for bifurcation. The Tribunal nonetheless requested the Parties “to keep it informed of any ruling rendered in the other proceedings, without prejudice to the parties making arguments in the future regarding the weight to be given to any such decision or the implication of any such decision for the breadth of inquiry in this case.”²
3. Following the Tribunal’s constitution in ICSID Case No. ADHOC/17/1 (the “*Sanum Case*”) and the Parties’ agreement to consolidate the *Lao Holdings Case* and the *Sanum Case*, the Tribunal proposed a first session for the *Sanum Case*. On 3 May 2017, Respondent communicated the Parties’ agreement that a first session in the *Sanum Case* was unnecessary “as the parties will consent to the form of Procedural Order No. 1 being replicated in this case.” With respect to this proposal, the President of the Tribunal requested Respondent “to confirm that it will not in that event be seeking bifurcation with respect to any jurisdictional objections in the *Sanum case* that are materially different from

¹ Respondent’s Notice of Objection to the Tribunal’s Competence and Request for Bifurcation of 20 February 2017, ¶ 2.

² *Lao Holdings Case*, Secretariat Letter of 24 April 2017.

those already considered by the Tribunal in its decision on bifurcation” in the *Lao Holdings* Case. By email of 3 May 2017, Respondent stated that “since the Tribunal did not agree to bi-furcate [the objections in the *Lao Holdings* Case], we will not ask it to bi-furcate *Sanum*; we will make objections to jurisdiction in the normal sequence.”

4. On 4 May 2017, the Tribunal proposed a procedural schedule for the consolidated cases, without any bifurcation of jurisdictional objections, leading to a plenary hearing on both jurisdiction and the merits in July 2018. On 5 May and 8 May 2017, respectively, the Parties confirmed their acceptance of this schedule. The agreed schedule was therefore confirmed on 16 May 2017, in an identical Annex A to Procedural Order No. 1 in the *Sanum* Case and Revised Procedural Order No. 1 in the *Lao Holdings* Case. The Secretariat informed the Parties that “from this point on, any subsequent submissions and rulings in the two cases can be presented in a single document bearing both case headers (rather than separate but duplicative documents with different headers).”
5. Following a schedule adjustment agreed between the Parties and accepted by the Tribunal, on 1 September 2017, Claimants filed their Memorial on the Merits and Respondent filed its Opening Memorial on Competence. As discussed further herein, Respondent’s Opening Memorial on Competence relied heavily on a development occurring subsequent to the Tribunal’s 24 April 2017 decision on bifurcation, namely the 29 June 2017 issuance of a final award in an arbitration between the Parties administered by the Singapore International Arbitration Center (the “**2017 SIAC Award**”). Respondent presented four jurisdictional objections, described as follows in the section headers of its submission: (1) “Claimants’ ‘Treaty Claims’ are Barred by the Application of the Preclusion Doctrines”; (2) “Claimants’ Multiple Successive Claims Arising from the Same Measures and for the Same Relief are Inadmissible and an Abuse of Process”; (3) “Claimants’ Claims are Contract Claims, Not Treaty Claims”; and (4) Lack of Material Jurisdiction.”³
6. On 18 September 2017, Respondent submitted a letter entitled “Notice of Objection” (the “**Notice**”) which essentially contained two applications. First, Respondent objected to Claimants’ inclusion in their Memorial on the Merits of an “ancillary claim,” not

³ Respondent’s Opening Memorial on Competence, 1 Sept. 2017, Sections III.A, III.B, III.C and III.D.

referenced in the Request for Arbitration in the *Sanum* Case, that Respondent improperly denied recognition of a 2016 arbitration award in Sanum’s favor against a third party, ST (the “**2016 SIAC Award**”).⁴ Second, Respondent invoked the 2017 SIAC Award and the “imminent decisions” of ICSID and PCA tribunals in related cases as the basis for requesting reconsideration of the Tribunal’s decision on bifurcation. Respondent requested that the current briefing schedule be suspended while the Tribunal entertained briefing to address these two applications.

7. On 20 September 2017, the Secretariat acknowledged Respondent’s filing and invited the Claimants to provide their comments by 2 October 2017. By letter of 22 September 2017, Claimants submitted their comments opposing both the Respondent’s request for reconsideration and its objection to Claimants’ ancillary claim (the “**Response**”). Claimants contended, in essence, that Respondent’s arguments with respect to both the implications of the SIAC Award and the ancillary claim could be presented within the briefing structure and schedule already in place.
8. By email of 26 September 2017, Respondent requested the Tribunal to set forth a briefing schedule on the applications raised in its communication of 18 September 2017.
9. On 27 September 2017, the Tribunal invited the Parties to submit any additional comments on two issues: “(i) the legal basis or bases for the Tribunal to reconsider or not reconsider its Decision on Bifurcation as well as the legal criteria/circumstances that would allow the Tribunal to reconsider or not reconsider its Decision; and (ii) the legal basis or bases for the Tribunal to exercise or not to exercise jurisdiction with respect to Claimants’ new claim.”
10. On 6 October 2017, Respondent filed its submission on the questions above (“**Respondent’s Comments**”). On 10 October 2017, Claimants filed their submission on these questions (“**Claimants’ Comments**”).

⁴ See generally Memorial on the Merits, Sections II.H.5 (“The Government Denies Sanum Recognition of its Arbitral Award against ST”), IV.B (“Refusal to Recognize Arbitral Award”), VI (“Ancillary Claims”).

11. This Order sets forth the Tribunal’s decision regarding the Respondent’s application of September 18, 2017.

II. THE OBJECTION TO CLAIMANTS’ ANCILLARY CLAIM

A. The Parties’ Positions

12. In its Notice, Respondent argues that the Tribunal should dismiss Claimants’ new claim as inconsistent with the scope of the existing disputes: “this new claim does not arise out of or relate to the same investments as the Claimants’ existing claims before this Tribunal, and the Government’s consent to consolidate the Sanum claims with the [Lao Holdings] claims before this Tribunal does not extend to Sanum’s new claim.” Respondent argues that the “existing claims” reflected in the Notices of Arbitration in the *Lao Holdings* and *Sanum* Cases are “limited to the Government’s alleged actions arising out of or relating to the ‘terms of the Settlement Deed’ and the Claimants’ investments related to the performance of those contract terms,” which extends only to four investments: “(1) the Savan Vegas Casino; (2) the Ferry Terminal Slot Club; (3) the Lao Bao Slot Club; and (4) the contractual agreement to negotiate a potential non-gaming PDA in Thakhet (which is not an investment).”⁵ According to Respondent, the new claim “is unrelated to the alleged Governmental measures taken after the settlement’s execution to the Government’s performance under the Deed of Settlement,” but rather “arises out of contractual rights developed in 2007 between Sanum and ST Group, a local Lao company—not the Government,” and involves the Thanaleng Slot Club, a different investment. As such, Respondent argues, the new claim – which relates to the decision by the Lao courts not to enforce the 2016 SIAC Award – “has no connection to any of the existing claims or investments that are included in the Notice(s) of Arbitration,” and “relates to an entirely different Governmental body, the Lao judiciary, not to any Ministry overseeing the successful execution of the Deed of Settlement.” Respondent states that it “did not, and does not consent to consolidate the Sanum and LHNV matters before one tribunal for the purposes of this new claim,” did not consent to the ICSID Additional Facility Rules for

⁵ Notice, p. 2.

purposes of this new claim, and is entitled to procedural protections with regard to that claim, including the possibility of filing a Rule 45(5) objection that the claim is “manifestly without merit” and “the right to request that the Government must be permitted to plead its jurisdictional or admissibility objections.”⁶

13. In their Response, Claimants assert that Respondent seeks “to multiply proceedings by seeking to dismiss an ancillary claim that Claimants properly included in their Memorial on the Merits. There is no legal or factual basis to dismiss that claim....”⁷ Claimants assert that when Respondent consented to the ICSID Additional Facility Rules for both the *Lao Holdings* and *Sanum* Cases, this included consent to “Claimants’ right to submit an ancillary claim by or before their reply memorial on the merits,” pursuant to Article 47 of the Additional Facility Rules. Claimants accuse Respondent of “choos[ing] to manufacture a handful of inconsistent tests for dismissal” which do not reflect the standard in Article 47.⁸ According to Claimants, the only requirements of Article 47 are “(i) “that the claim must fall within the scope of the arbitration agreement; and (ii) that it be asserted no later than in the reply.”⁹ These requirements are complied with in the present case. Claimants argue that Article 47 does not impose the additional requirement for ancillary claims under Article 40 of the ICSID Rules, namely that it must “arise directly out of the subject matter” of the initial dispute.¹⁰ However, the ancillary claim would qualify even under an ICSID Convention analysis, because the 2016 SIAC Award and the other claims before the Tribunal arise out of “the very same investments,” because “all of Claimants’ gaming investments in Laos” – including the Thanaleng Slot Club as well as the Ferry Terminal Slot Club, the Lao Bao Slot Club, and the Savan Vegas Casino – were governed by the same 2007 Master Agreement, and “Respondent cannot reasonably argue that investments

⁶ Notice, p. 3.

⁷ Response, p. 2.

⁸ Response, p. 4.

⁹ Response, p. 5.

¹⁰ Response, p. 6.

arising out of a single instrument are not related.”¹¹ Moreover, the ancillary claim is not the only one that pertains to the judicial branch, as the case already includes allegations of judicial expropriation through “Case 48,” which involves the same third party company, ST. Claimants also object that Respondent has mischaracterized its existing claims as relying the Settlement Deed, when “their claims are not predicated upon the Settlement Deed.”¹² Finally, Claimants argue that dismissal of the ancillary claim “makes no practical sense” and would actually increase costs and time, which Respondent proclaims to be a concern, since Claimants then would have to bring the claim in a separate arbitration.¹³

14. In its subsequent Comments, Respondent argues that Claimants’ ancillary claim is admissible only if it is “(1) within the Tribunal’s jurisdiction *and* (2) comports with the ancillary claim standard in Article 47 of the ICSID (AF) Rules.” Respondent contends that the new claim does not meet these requirements.¹⁴ First, the 2016 SIAC Award “is not an asset that was contributed to or invested in Laos” and therefore does not fall within the definition of “investment” under the applicable BITs, and even if an award could be characterized as arising out of an underlying investment or investment agreement, “the new claim must nevertheless fail because the award and the underlying investment ‘remain analytically distinct’.”¹⁵ Claimants’ original contract rights with ST were “litigated, appealed, and extinguished in Lao domestic court in 2012,” and Claimants challenged those court decisions in earlier BIT claims that it released in the Deed of Settlement; “[t]he rights Claimants attempt to vindicate here exist only in the form of the foreign award – which is not itself an investment,” as it “involves no contribution to, or relevant economic activity within, Laos.”¹⁶ The new claim in any event is beyond the Tribunal’s jurisdiction

¹¹ Response, p. 8; *see also id.* (stating that the Thanaleng Slot Club, and the rights that arise out of the 2016 SIAC Award, are “part of the very same set of gaming investments” that include the other slot clubs and casino that are before this Tribunal).

¹² Response, p. 8.

¹³ Response, pp. 8-9.

¹⁴ Respondent’s Comments, p. 10.

¹⁵ Respondent’s Comments, pp. 10-12 (citing **RLA-078**, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011).

¹⁶ Respondent’s Comments, pp. 12-13.

as it is outside the scope of the issues that the Respondent agreed to consolidate in these proceedings.¹⁷

15. Even aside from this jurisdictional infirmity, Respondent argues, the new claim is “still inadmissible because it is not ‘ancillary’ within the meaning of Article 47.” Respondent rejects Claimants’ effort to posit a more liberal standard under Article 47 than under ICSID Arbitration Rule 40(1), and contends that under both, “the new claim must arise directly out of the subject-matter of the original claim.”¹⁸ Respondent cites to *Itera v. Georgia*,¹⁹ an ICSID Rules case where an ancillary claim was found inadmissible because it related to a different investment project. According to Respondent, “the standard for admissibility reflected in *Itera*, based on ICSID Rule 40, is whether the ancillary claim arises ‘directly out of the subject matter of the dispute.’ In turn, the test to determine whether a claim does arise ‘directly’ out of the subject matter of the dispute is ‘whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute.’”²⁰ Respondent also invokes *ADF v. United States*, an Additional Facility Rules case that dismissed a new claim as not arising out of the same investment project as the existing claims.²¹ Here, the Respondent contends, the new claim does not arise out of the subject-matter of the original claim, which involved Laos’ “conduct and performance of the Deed of Settlement.”²²
16. Claimants reject Respondent’s position as to both jurisdiction and the requirements for ancillary claims. First, they contend that under both BITs applicable to this case, the term “investment” is defined in broad terms.²³ Claimants refer to *Saipem v. Bangladesh*,²⁴

¹⁷ Respondent’s Comments, p. 13.

¹⁸ Respondent’s Comments, p. 14.

¹⁹ **RLA-079**, *Itera International Energy L.L.C. and Itera Group N.V. v. Georgia*, ICSID Case No. ARB/08/7, Decision on Admissibility of Ancillary Claims (4 Dec. 2009).

²⁰ Respondent’s Comments, pp. 15-16.

²¹ Respondent’s Comments, p. 16 (citing **RLA-074**, *ADF v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 144).

²² Respondent’s Comments, p. 17.

²³ Claimants’ Comments, pp. 8-9.

²⁴ **CL-0068**, *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/7, Award (20 June 2009).

where the tribunal found a claim for refusal to enforce an arbitral award within its jurisdiction, as the award was part of an overall investment in the host State and in effect constituted a crystallization of “residual contract rights under the investment.”²⁵ The Claimants contrast this case with the *GEA* case on which Respondents rely, where the tribunal was specifically asked to decide whether a settlement agreement and an arbitral award could be considered *individually* as an investment. In the present case, Claimants assert that the 2016 SIAC Award arises directly out of their investment in the Thanaleng Slot Club, which was created and governed by the same 2007 Master Agreement that granted the Government a 20% interest in all Claimants’ casino ventures, including Savan Vegas, and under which all of Claimants’ gaming investments were established. The 2016 SIAC Award crystallized Claimants’ rights and fell “squarely with[in] the both BIT definitions of claim/claims ‘to money... or to any performance having an economic value.’” According to Claimants, “by denying Sanum its right to enforce the award in Laos, and thereby recognize the fruits of its investment, Respondent ... expropriated the Thanaleng slot club just as certainly as if it had seized it by force.”²⁶

17. Claimants reiterate that by agreeing to consolidate both cases under the ICSID Additional Facility Rules, Respondent consented to the introduction of an ancillary claim under those Rules.²⁷ Further, the Claimants restate that the plain text of Article 47 contains no “directly related to” requirement for ancillary claims, but that even if such a requirement could be analogized from the ICSID Convention, a sufficient relationship exists here, given that the the 2016 SIAC Award and the other disputes before the Tribunal “arise out of the *very same investments*,” namely the 2007 Master Agreement governing all the Claimants gaming investments in Laos. Claimants also distinguish the *Itera* case on the grounds that there, the claimant had already litigated the proposed ancillary claim for several years in another forum and deliberately chose not to include it with its original claim, whereas here

²⁵ Claimants’ Comments, p. 9.

²⁶ Claimants’ Comments, p. 9.

²⁷ Claimants’ Comments, p. 10.

the ancillary claim “did not fully ripen until shortly before the Claimants’ Memorial was due.”²⁸

B. The Tribunal’s Analysis

18. The admissibility of ancillary claims in cases governed by the ICSID Additional Facility Rules is addressed by Article 47 of the Arbitration (Additional Facility) Rules, which provides as follows:
- 1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.
 - (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
19. As a threshold matter, the Tribunal declines Respondent’s invitation to simply substitute, for purposes of analysis, the different language with respect to ancillary claims that is reflected in Article 40 of the Arbitration Rules, governing cases proceeding under the ICSID Convention. As explained in Article 2 of the Additional Facility Rules, these Rules exist to govern disputes that fall *outside* the scope of the ICSID Convention, but which parties nonetheless have agreed to resolve under the Additional Facility Rules, such as proceedings between a State and a national of another State “which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State.”²⁹ The Rules accordingly expressly provide that “[s]ince the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, *none of the provisions of the Convention shall be applicable to them* or to recommendations, awards, or reports which may be rendered therein.”³⁰ Instead, the Additional Facility Rules envision a specific agreement between the parties, “providing for ... arbitration proceedings under the Additional Facility in respect of existing or future

²⁸ Claimants’ Comments, p. 11.

²⁹ Article 2(a) of the Additional Facility Rules.

³⁰ Article 3 of the Additional Facility Rules (emphasis added).

disputes”³¹ That agreement provides the basis for application of the Arbitration (Additional Facility) Rules set forth in Schedule C to the Additional Facility Rules, including Article 47 with respect to ancillary claims. In this context, it would circumvent the deliberate exclusion of Convention provisions in Article 2 of the Additional Facility Rules to simply import into Article 47 the different wording of the ancillary claims provision applicable to cases proceeding under the Convention.

20. The other threshold principle is that a dispute proceeds under the Additional Facility Rules not as a matter of right, but as a matter of party agreement. Article 1 of the Arbitration (Additional Facility) Rules states that “[w]here the parties to a dispute have agreed that it shall be referred to arbitration under the Arbitration (Additional Facility) Rules, the dispute shall be settled in accordance with these Rules”³² The reference to “*a* dispute” and an agreement by the parties to refer “it” (*i.e.*, *that* dispute) necessarily suggests that jurisdiction under the Additional Facility is confined to the scope of the dispute covered by the parties’ agreement. This is consistent with the general notion, which applies to both ICSID Convention and Additional Facility cases, that a sovereign State may not be compelled to arbitrate matters that it has not affirmatively consented to submit to arbitration.
21. With this predicate, the specific wording of Article 47 with respect to ancillary claims becomes important. Article 47(1) covers two different types of ancillary claims, described as “incidental” and “additional” claims. The word “incidental” is not defined, but the plain meaning of the term connotes something that happens in connection with something else, as a minor consequence of or an accompaniment to the other matter.³³ As a result, a

³¹ Article 4(1) of the Additional Facility Rules.

³² Article 1 of the Arbitration (Additional Facility) Rules.

³³ While dictionary definitions are by no means conclusive of the meaning of words used in an international treaty, they can assist in understanding the common usage of terms in the absence of evidence that a particular meaning was intended. For various dictionary definitions of the word “incidental,” *see, e.g.*, <https://www.merriam-webster.com/dictionary/incidental>, <https://en.oxforddictionaries.com/definition/incidental>, and dictionary.cambridge.org/us/dictionary/english/incidental.

connection or relationship with an existing claim is a definitional requirement of an incidental claim. By contrast, the word “additional” does not, in and of itself, require a connection to an existing claim. This may be why additional language requiring a connection was included in Article 40 of the Arbitration Rules, limiting a party’s ability to present an additional claim to those claims “arising directly out of the subject-matter of the dispute.” 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. An 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, and generally 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). The Tribunal is thus unable for present purposes to adopt Respondent’s suggestion that the two provisions simply be treated as presenting identical analyses, even though their wording is facially different.³⁴

22. This is not the end of the analysis, however, because Article 47 contains its *own* conditions for presentation of incidental or additional claims. Aside from the temporal condition in Article 47(2) – which it is undisputed was satisfied in this case³⁵ – there are also two

³⁴ Cf. **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), which analogized the Additional Facility Rules to the Arbitration Rules in order to derive a “requirement of a close relationship with or connection to the original or primary claim,” but without explaining the reasons for assuming the Additional Facility drafters intended to maintain this requirement while omitting the express language that would reflect it. 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 that claim, submitting “no evidence of any kind ... at any time” with respect to the project supposedly at issue in the ancillary claim. *Id.* ¶¶ 142-143, 145 (deeming this to be a “failure of evidence” as to “both the factual basis of the [claims] and the fundamental aspect of liability of the Respondent,” on the basis of which “[t]here has been ... nothing for the Respondent to controvert and disprove or rebut,” thereby risking “material prejudice” had the claim been deemed admissible).

* *Procedural Note*: The Tribunal notes that in several instances, Respondent resubmitted legal authorities already submitted by Claimants, except with an alternate RLA- designation. In order to avoid confusion and minimize duplicate files in the record, the Tribunal requests the Parties in future simply to refer to exhibits or authorities by the first designation assigned them in these proceedings, rather than resubmitting the same documents with an alternate designation.

³⁵ Article 47(2) requires that an incidental or additional claim “shall be presented not later than in the reply,” a provision that has been interpreted as “ensur[ing] fairness” by allowing the opposing party sufficient “notice and opportunity to address issues” relating to the ancillary claim in its subsequent rejoinder. **CL-0066** and **RLA-080**,

references in Article 47(1) to the importance of the parties' agreement. Specifically, the permission to present an ancillary claim is provided only "[e]xcept as the parties otherwise agree," and with the additional proviso "that such ancillary claim is within the scope of the arbitration agreement of the parties." This dual language makes it imperative that the Tribunal carefully examine the arbitration agreement in this case, and any other associated agreements between the parties, to determine whether the terms of such agreements either *encompass or exclude* potential future additional claims of the sort that Claimants now seek to present, with regard to the non-recognition of the 2016 SIAC Award.

23. As the additional claim is presented by Sanum, in whose favor the 2016 SIAC Award was issued, the appropriate place to start with assessment of the parties' agreement is the Agreement Concerning the Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic (the "**China-Lao BIT**"), which Sanum invokes as the basis for an agreement to arbitrate.³⁶ Article 8 of the China-Lao BIT provides, in relevant part, as follows:

1. Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.
2. If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
3. If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.

Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award ¶ 68 (30 August 2000). Here, Claimants presented their additional claim in their Memorial on the Merits.

³⁶ See similarly **CL-0173**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶¶ 52-54, 57-58 (6 December 2000) (interpreting the Additional Facility Rules' proviso that ancillary claims must be within the scope of the parties' arbitration agreement as requiring assessment of that agreement as reflected in the NAFTA text, which "lists three alternative bodies of eventually applicable arbitration regimes," including the Additional Facility Rules).

5. The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center for Settlement of Investment Disputes.

24. Two elements of this provision are relevant here. The first is that under Article 8(3), the Contracting Parties to the China-Lao BIT agree that an investor may submit its dispute “to an ad hoc arbitral tribunal.” This is not an agreement either to the ICSID Arbitration Rules (in the event both Contracting Parties become parties to the ICSID Convention) or to the ICSID Arbitration (Additional Facility) Rules (if one or both do not). It is precisely what it says, an agreement to arbitrate before an *ad hoc* arbitral tribunal. The second relevant passage is in Article 8(5), where the Contracting Parties specify that the *ad hoc* tribunal “shall determine its own procedure,” although it “may ... take as guidance” the “Arbitration Rules” of ICSID. The latter does not distinguish between the Arbitration Rules applicable in Convention cases and the Arbitration (Additional Facility) Rules applicable in non-Convention cases, but in any event, the reference is to “guidance” and is left to the tribunal’s discretion (“may”).
25. By its terms, then, the China-Lao BIT reflects agreement to an *ad hoc* arbitration under which the tribunal shall determine its own procedure, without being bound to any particular set of procedural rules. But this does not complete the inquiry, as the China-Lao BIT does not supply the full arbitration agreement leading to this particular Tribunal and these particular proceedings. That process involved several steps leading to a further agreement between the Parties with respect to the *Sanum* Case.
26. First, Sanum presented Respondent with a Notice of Arbitration dated 17 February 2017 (the “**Sanum Notice of Arbitration**”), which described a particular dispute. In a section entitled “Nature of the Claim,” Sanum stated as follows:

This claim arises out of governmental conduct that occurred following the conclusion of a Deed of Settlement between the Parties on or about 15 June 2014, which also included, as a party, Sanum’s parent, Lao Holdings, N.V. (“L.H.”). Copies of the Deed of Settlement and an accompanying side letter dated 18 June 2014 are attached as Exhibit A.

Whilst purporting to exercise its governmental authority in unilateral compliance with the terms of the Settlement Deed, Respondent has directly expropriated Claimant's largest investment without the payment of prompt, adequate and effective compensation, and indirectly expropriated Claimant's remaining investments through a series of measures adopted and maintained by both executive and adjudicative branches of State.³⁷

27. The Sanum Notice of Arbitration went on to delineate the specific measures about which it complained, both respect to what it deemed in paragraph 3 as its "largest investment" (Sanum Vegas Casino) and with respect to what it deemed its "remaining assets." Paragraph 62 of the Sanum Notice of Arbitration alleged as follows:

Examples of expropriation, for which the amount of compensation must be determined, in this case, include the direct expropriation of Sanum's interest in Savan Las Vegas, which Respondent has admitted constitutes an expropriation, but for which no compensation has been paid, as well as each act of cancellation or nullification or license, grant, or permit, and *the taking of the totality of Sanum's remaining assets by judicial order*.³⁸

The only reference to the Thanaleng Slot Club was in the context of this reference to a "judicial order," and it identified the challenged order as one issued in 2016:

Finally, on 4 May 2016 Respondent used its judiciary to cancel Claimant's foreign investment license and its enterprise registration certificates. It used an ostensibly private action, to which it was not a party, purporting 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 (including any established in Luang Prabang).³⁹

28. By its terms, therefore, the Sanum Notice of Arbitration did not put into dispute the issue currently raised in Claimants' additional claim, namely non-recognition of the 2016 SIAC Award. Claimants do not contend otherwise, but explain that this was because the non-recognition crystallized afterwards.

³⁷ Sanum Notice of Arbitration ¶¶ 2-3.

³⁸ Sanum Notice of Arbitration ¶ 62 (emphasis added).

³⁹ Sanum Notice of Arbitration ¶ 47.

29. Be that as it may, the question remains what dispute the Parties agreed to submit to this Tribunal proceeding under the ICSID Additional Facility Rules. The Tribunal was constituted originally only for purposes of the *Lao Holdings* Case, proceeding under the Additional Facility Rules. During the First Session in the *Lao Holdings* Case, held on 7 March 2017, the Parties discussed the possibility of agreeing to have the same Tribunal also hear the *Sanum* Case, and the particular terms and conditions upon which such agreement might be predicated. Following the First Session, on 24 March 2017 Respondent notified the ICSID Secretariat that “the Government has agreed ... to consolidate the Sanum *ad hoc* filing with the Lao Holdings proceeding, both to be administered by ICSID.” The Secretariat invited Claimants “to confirm ... agreement to these terms,” and on 27 March 2017, they responded that “[t]hese terms are acceptable.” On 28 March 2017, the Secretariat further invited the Parties “to confirm whether it may take the parties’ agreement to also include agreement to proceed under the AF Rules, so as to have both cases moving forward under the same procedural framework.” On 28 March 2017, Respondent replied that “[t]he Government agrees to the AF Rules for both cases,” and Claimants responded that they “also agree to AF rules.” It was only following this exchange, on 29 March 2017, that Claimants submitted to ICSID for registration the previous Sanum Notice of Arbitration, now described in the cover letter as Sanum’s “Request for Arbitration.”
30. As this exchange reveals, Respondent’s agreement to have the *Sanum* Case heard by this particular Tribunal and under the Additional Facility Rules – rather than as an *ad hoc* case with no binding rules of procedure, as envisioned under the China-Laos BIT – was stated to extend to “the Sanum *ad hoc* filing.” The “filing” at issue clearly referred to the Sanum Notice of Arbitration. This agreement placed the disputes delineated in that Notice of Arbitration before this Tribunal and under the Additional Facility Rules. But language is important: the agreement did not extend to matters outside “the Sanum *ad hoc* filing.” Claimants confirmed that “[t]hese terms” – *i.e.*, Respondent’s terms agreeing with respect to “the ... filing” – “are acceptable.”
31. In these circumstances, the Tribunal concludes that (1) the China-Laos BIT provides agreement only to an *ad hoc* arbitration, and (2) the Parties’ secondary agreement to this

Tribunal 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. The necessary inference is that any claims outside of that "filing" were not subject to this additional consent, and therefore do not satisfy the requirements of Article 47(1)'s dual reference to the contents of the parties' arbitral agreement. The 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. Here, the nature of the BIT (providing only for *ad hoc* arbitration) requires consideration of that second level of consent, including the precise contours of the dispute for which it was granted. In these circumstances, it would be bootstrapping to accept Claimants' argument that the consent to the Additional Facilities Rules itself connotes broad consent to any additional claims, since the opt-in to the Additional Facilities Rules was predicated in the first place upon a particular dispute that was described in a particular filing, and that did not extend to all possible other or future disputes arising under the China-Laos BIT.

32. As a matter of efficiency, of course, it would be better for all concerned if the dispute over non-recognition of the 2016 SIAC Award could be decided by the same tribunal considering other disputes between the Parties. That would prevent the further multiplicity of proceedings between Parties who already have confronted one another in too many proceedings over too many years – whereas the consequence of their *not* agreeing to consolidate the new claim with the proceeding will likely be the filing of yet *another* arbitration, presumably an *ad hoc* case under the China-Laos BIT. The Tribunal regrets the inefficiencies and the additional burdens and costs that inevitably will result. But this calculus is for the Parties to weigh, not for the Tribunal to consider in evaluating the admissibility of an additional claim under Article 47. For purposes of the latter determination, the Tribunal is mandated by the terms of Article 47 to consider the scope of the Parties' agreement to arbitrate in this case. For purposes of claims by Sanum, at least, that agreement to the ICSID Additional Facility Rules was limited to the matters contained in Sanum's Notice of Arbitration.

33. For these reasons, Respondent’s objection to Claimants’ inclusion in its Memorial on the Merits of claims relating to non-recognition of the 2016 SIAC Award is sustained. The Tribunal will disregard the relevant passages of Claimants’ Memorial. This leaves Sanum free, should it so wish, to pursue the claims separately through a new proceeding under the China-Laos BIT.

III. THE REQUEST FOR RECONSIDERATION OF BIFURCATION

A. The Parties’ Positions

34. With respect to the request for reconsideration of bifurcation, Respondent argues that the Claimants’ Memorial on the Merits is an abuse of process “copying and pasting verbatim large swaths” from previous submissions of the 2012 *Sanum I* and *Lao Holdings I* proceedings, while not acknowledging the implications of the recent 2017 SIAC Award, “in which every factual issue raised here (aside from the new ‘ST ancillary claim’) was decided against Sanum and LHNV.” This is said to be against international law, and Respondent should be entitled to a “bifurcated procedure on the existing claims to address this abuse.” Respondent states that it “understands that when its initial request for bifurcation was pending, the Government’s allegations of abuse of process and the promise of a definitive result from the SIAC tribunal were unsubstantiated assertions—but the SIAC Award now substantiates the Government’s serious concerns about the abusive nature of these proceedings and evidences the need for a legal review on the admissibility of Claimants’ claims before rehashing 5 years of facts that are no longer capable of dispute.”⁴⁰ In particular, Respondent asserts, the 2017 SIAC Award found that Sanum had materially breached the Deed of Settlement and that the Government had acted in good faith and sold the casino at maximum value on 31 August 2016. Respondent argues that international law would not support the Tribunal making “contradictory findings of fact or conclusions of law” from those made in the 2017 SIAC Award. In addition, Respondent asserts that decisions are “imminent” in the “material breach” applications before other ICSID and PCA tribunals, following hearings in July 2017. In these circumstances,

⁴⁰ Notice, p. 4.

“Respondent’s Request for Reconsideration is appropriate because the publication of the SIAC Award has now definitively addressed every factual predicate necessary for Sanum and LHNV to establish any of their existing claims—a substantial and material change in circumstances since the Tribunal denied Respondent’s Request for Bifurcation.”⁴¹

35. Claimants respond that issuance of the 2017 SIAC Award is insufficient basis for reconsideration, since the Tribunal was aware of the pending SIAC award and the findings it might contain when it denied Respondent’s earlier bifurcation request. Respondent had specifically argued at the time that the SIAC award “will deal directly with all, or at a minimum most, of the disputed facts and legal issues pled” in their case. Claimants also state that the request “remains premised on the same fatal misconception on which [Respondent’s Memorial on Competence] is founded – *viz.* the proposition that all of Claimants’ causes of action sound in breach of the Settlement Deed.” This proposition is belied by “[a] plain reading of Claimants’ Memorial on the Merits.”⁴² Moreover, the Claimants assert, the 2017 SIAC Award “does not decide against Claimants on ‘every factual issue raised [in the instant proceedings],’ as Respondent asserts.” The SIAC tribunal expressly stated that it was not addressing treaty claims, and in any event the 2017 SIAC Award “does not touch upon most of the facts critical to these proceedings, such as Case 48, the disruption of Claimants’ right to repayment of its loan to Savan Vegas, and the expropriation of Savan Vegas,” nor is it relevant to Claimants’ ancillary claims. According to Claimants, the existing briefing schedule addresses Respondent’s concern, since it allows for exchanges on the very “Competence” issues Respondent identifies.⁴³
36. In its subsequent Comments, Respondent responds that when the Tribunal issued its earlier decision on bifurcation, it associated its decision with the absence of decision in the then-pending SIAC arbitration and “material breach” proceedings before other ICSID and PCA tribunals, and invited the Parties to make arguments in future about “the implication” of any forthcoming decisions “for the breath of inquiry in this case.” According to

⁴¹ Notice, p. 6.

⁴² Response, p. 2.

⁴³ Response, p. 3.

Respondent, the 2017 SIAC Award now “thoroughly and conclusively resolved every factual and legal predicate essential for Claimants’ claims to succeed.” These changed circumstances justify reconsideration of the earlier bifurcation decision.⁴⁴

37. Respondent argues that the Tribunal has “plenary power to reconsider any procedural order,” as part of its authority under Article 35 of the ICSID(AF) Rules, equivalent to Article 44 of the ICSID Convention, to decide questions of procedure as it sees fit.⁴⁵ Respondent cites to *Churchill Mining v. Indonesia*,⁴⁶ during which the tribunal reconsidered its decision on bifurcation upon the respondent’s request and based on its broad powers under Article 44. The *Churchill* tribunal considered that reconsideration was permissible particularly in the context of bifurcation, where the standard involves furtherance of the efficiency of a dispute by considering matters that might significantly reduce its scope or complexity.⁴⁷ Respondent also cites to *Nova Group Investments, B.V. v. Romania*,⁴⁸ where the tribunal concluded that a request for reconsideration of a previous provisional measures recommendation would be appropriate in the event of changed circumstances.⁴⁹ According to Respondent, the 2017 SIAC Award “is a significant factual change in the record that represents the consummation of a three-year period of complex litigation that post-dated the Deed of Settlement. It is also only now evident that the Claimants again put at issue in their Memorial on the Merits the same factual predicates decided against them in the SIAC Award—in that way the record has also changed.”⁵⁰ For example, Claimants’ primary claim in this proceeding relates to the “seizure of Savan Vegas,” but Claimants rely on the same factual exhibits and witnesses as in the SIAC case,

⁴⁴ Respondent’s Comments, p. 2.

⁴⁵ Respondent’s Comments, pp. 2-3.

⁴⁶ **RLA-076** and **077**, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40.

⁴⁷ Respondent’s Comments, pp. 3-5.

⁴⁸ **RLA-081**, *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19.

⁴⁹ Respondent’s Comments, p. 6.

⁵⁰ Respondent’s Comments, p. 6.

and “the SIAC Award considered that claim and held that the Government assumed control of and sold the Savan Vegas in compliance with the Parties’ mutual agreement.”⁵¹

38. According to the Respondent, bifurcation is necessary “to inform the Parties what implication the SIAC tribunal’s findings of fact and conclusions of law have on Claimants’ current claims.” For example, “the conclusion that the Government did not violate Claimants’ rights in the ‘seizure’ of the casino has preclusive effect on the Parties and [sh]ould lead to the dismissal of these claims in their entirety....”⁵² Claimants’ submissions on other issues likewise support the benefits of bifurcation, since (for example) six of Claimants’ nine experts – including the same three damages experts – are the same ones the Respondent confronted in the SIAC case; “[t]he Government should not have to oppose them again without a determination that Claimants’ claims survive the Government’s competency objections.” Respondent emphasizes the expense it would have to incur retaining experts to respond again to the same damages reports. “To deny bifurcation condemns the Government to repeat incurring these expenses and essentially renders the Government’s Objections on Competence meaningless.”⁵³ By contrast, the Respondent asserts, there can be no prejudice to Claimants from bifurcation focusing first on issues of *res judicata* and *estoppel*, focused directly on the claims outlined in Claimants’ Memorial on the Merits.⁵⁴

39. In their corresponding Comments, Claimants respond that Article 35 of the ICSID(AF) Rules is not dispositive of the issue of reconsideration: Claimants agree the Tribunal has the power to decide the question, but “the issue is what standard should govern the Tribunal’s decision.” First, the Claimants argue, a tribunal needs to determine what it is reconsidering: (1) a provisional measure or procedural order; (2) a decision; or (3) an Award. The ICSID legal framework distinguishes between the three and it seems “accepted jurisprudence” that procedural orders and provisional measures can be reconsidered at any time, but Awards are entitled to the “strongest deference.” Decisions

⁵¹ Respondent’s Comments, pp. 6-7.

⁵² Respondent’s Comments, pp. 7-8.

⁵³ Respondent’s Comments, p. 8.

⁵⁴ Respondent’s Comments, p. 9.

lie somewhere in between, and here both the Tribunal and the Respondent have referred to the Tribunal's conclusion of 24 April 2017 as a "Decision."⁵⁵ Claimants refer to *Burlington Resources v. Ecuador*⁵⁶ as the "most recent comprehensive analysis of the standard for determining whether the reconsideration of a ... pre-award decision is warranted." The *Burlington* tribunal found that *res judicata* does not attach to decisions (as opposed to awards), but that "an issue resolved once in the course of an arbitration should in principle not be revisited in the same proceedings," because it would lead to procedural inefficiency and jeopardize legal certainty.⁵⁷ However, the *Burlington* tribunal did agree with the findings in *Standard Chartered Bank v. Tanesco*⁵⁸ that there may be exceptional circumstances justifying reopening a decision already made, such as where necessary to correct for determinations that have subsequently been called into question. Claimants characterize the *Burlington* standard for reconsideration as one that "balance[s] the competing considerations of procedural efficiency and correctness," and should be guided by the grounds for revision of the award and by the grounds for annulment found in Articles 51 and 52 of the ICSID Convention. Additionally, the party seeking reconsideration should do so promptly after the facts allegedly justifying such reconsideration are discovered.⁵⁹

40. According to Claimants, the circumstances in this case do not justify reconsideration of the Tribunal's prior decision with respect to bifurcation. Claimants argue that Respondent waited until after the Claimants filed their Memorial on the Merits to raise the issue, even though they were in possession of the 2017 SIAC Award since late June. They also contend that the 2017 SIAC Award does not meet the criterion of a "new fact," because the anticipated award – "and specifically the findings Respondent postulated it would contain

⁵⁵ Claimants' Comments, p. 2.

⁵⁶ **CL-0183**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No ARB/08/05, Decision on Reconsideration and Award, 7 February 2017.

⁵⁷ Claimants' Comments, pp. 2-3 (quoting *Burlington Resources*).

⁵⁸ **CL-0013**, *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Co. Ltd.*, ICSID Case No ARB/10/20.

⁵⁹ Claimants' Comments, pp. 2-3

– formed the very basis on which Respondent originally sought bifurcation.”⁶⁰ Moreover, the Respondent has not demonstrated that the 2017 SIAC Award “could form the basis for supervening findings of fact in respect of that decision,” namely that it would “change the appropriateness of bifurcation” by promoting judicial economy, taking into account the customary factors of whether an objection is intimately linked to the merits whether a decision on the objection could lead to dismissal of the case or considerable reduction in its complexity.⁶¹ According to Claimants, Respondent does not deny that its objections are all intimately linked to the merits of the case; rather, “Respondent confines its argument to the second factor, arguing that the 2017 SIAC Award forecloses all of Claimants’ claims.” This is not the case, however, and a close review would demonstrate “just how little the findings contained in the 2017 SIAC Award matter to Claimants’ BIT claims.”⁶² For example, with respect to the seizure of Savan Vegas that Respondent selects as its example, the cited portions of the 2017 SIAC Award do not address expropriation at all, but only conclude that the Parties were required to perform their obligations under the Deed of Settlement even while challenging whether the settlement continued in force. Claimants contend that this is not Claimants’ theory of expropriation, however. More importantly, Respondent ignores Claimants’ “many other claims” which are not impacted by the 2017 SIAC Award, including for example its “claims relating to Case 48, such as the seizure of residential and commercial (non-gaming) properties and interference with Savan Vegas’ ability to pay the Sanum loan,” as well as Claimants’ ancillary claim relating to the refusal to recognize the 2016 SIAC Award.⁶³

B. The Tribunal’s Analysis

41. The Tribunal begins by affirming that, as the Parties essentially agree, it has the authority and discretion to reconsider its earlier bifurcation decision, should it find that the circumstances so warrant. Although framed as a “decision,” the ruling on bifurcation necessarily concerned a matter of procedure, not a substantive finding on any contested

⁶⁰ Claimants’ Comments, p. 4.

⁶¹ Claimants’ Comments, pp. 5-6.

⁶² Claimants’ Comments, p. 5-6.

⁶³ Claimants’ Comments, p. 6.

issues of fact or law. As such, the concerns about legal certainty that underlay prior tribunals' reluctance to reconsider issues they already substantively had resolved do not apply.⁶⁴ At the same time, tribunals still should not cavalierly change approaches even on purely procedural matters, since the parties may have relied on prior rulings to schedule their work. However, where changed circumstances arise, it is not cavalier to consider the implications of those circumstances, and indeed, the alternate approach of refusing to assess the procedural implications of new circumstances could be seen as excessively rigid, to the point of being equally cavalier. What is most important, in circumstances where a tribunal finds that changes to a procedural structure or schedule are appropriate to address new circumstances, is that they give appropriate consideration to the consequences of that change for the parties' case preparation. Tribunals should take to ensure sufficient notice to the parties of any change in procedural structure or schedule, and that the still are still afforded a full and fair opportunity to present their respective positions on the issues in the case.

42. Here, the issuance of the 2017 SIAC Award does have the potential to constitute a significant changed circumstance, although how significant that development may be remains to be decided based on further briefing. The Tribunal takes seriously both Respondent's concern that it not be forced to re-litigate endlessly issues that already have been fully and fairly decided between the Parties by a tribunal of competent jurisdiction, and Claimants' concerns that they not be foreclosed from a full and fair opportunity to present their treaty-based claims to this Tribunal. Both concerns are valid and deserve careful consideration.
43. First, it is agreed between the Parties, and self-evident on the face of the 2017 SIAC Award, that the tribunal issuing that Award (the "**SIAC Tribunal**") did not purport to decide any

⁶⁴ See, e.g., **CL-0183**, *Burlington Resources*, ¶ 91 (addressing an application to reconsider a prior decision on liability); **CL-0184**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. 07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 10.1 (30 Nov. 2012) (addressing its intent not to revisit decisions on jurisdiction, applicable law and liability, during a future phase on additional liability issues); **CL-0185**, *Amco Asia Corporation v. Republic of Indonesia*, ICSID Case No ARB/81/1 (Resubmitted Case), Decision on Jurisdiction, ¶ 30 (10 May 1988) (addressing in a resubmitted case the effect of matters determined in a prior Award); **CL-0114**, *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award ¶ 126 (12 May 2005) (stating in the award that it would not reconsider jurisdictional issues decided in a prior jurisdictional decision).

claims for violation either of the China-Laos BIT invoked in the *Sanum* Case, or of the Agreement on Encouragement and Reciprocal Protection of Investments between the Lao People’s Democratic Republic and the Kingdom of the Netherlands (the “**Netherlands-Laos BIT**”) invoked in the *Lao Holdings* Case. At the same time, the SIAC Tribunal did decide certain contested issues of fact based on the record and the arguments before it, and it also rendered certain findings with respect to interpretation of a significant contractual instrument (the Deed of Settlement), under its governing law of New York. These findings may well be *relevant* to the treaty claims before this Tribunal, although the extent of their relevance and materiality is debated between the Parties. Respondent argues that the findings must be give *preclusive* effect as to all matters they cover, and that if this is done, there can be no valid basis for a possible finding of treaty breach, because the SIAC Tribunal’s findings “definitively addressed every factual predicate necessary for Sanum and LHNV to establish any of their existing claims.”⁶⁵ Claimants disagree, contending that the 2017 SIAC Award “does not touch upon most of the facts critical to these proceedings.”⁶⁶

44. The Tribunal is unable at this juncture to resolve this debate. Among other things, Claimants’ Memorial on the Merits does not address the contents of the 2017 SIAC Award in any detail, in the context of Claimants’ various assertions and requests for findings by this Tribunal. As dictated by the prior briefing structure provided in Procedural Order No. 1, Respondent’s Opening Memorial on Competence in turn is based on Claimants’ assertions in their respective Notices of Arbitration, not on the far more detailed assertions in Claimants’ Memorial on the Merits, which was filed contemporaneously with Respondent’s Opening Memorial on Competence. As a result, neither document provides the kind of systematic comparison between the specific propositions upon which Claimants rest their case for treaty violations and the specific findings of the SIAC Tribunal. Yet that is precisely the kind of careful analysis the Tribunal would require, in order to render any

⁶⁵ Notice, p. 6.

⁶⁶ Response, p. 3.

determinations regarding possible “issue preclusion” or collateral estoppel based on particular findings in the 2017 SIAC Award.

45. The procedural question is whether it would be efficient to separate out the preclusion/estoppel issue from the remainder of the case, as Respondent requests, or to consider these objections together with full briefing on the merits. The Tribunal is not persuaded that the former approach would be workable. In order to resolve the preclusion/estoppel issue, the Parties will need to make submissions (*inter alia*) about the scope and reach of the prior SIAC proceedings and the 2017 SIAC Award, in specific relationship to the factual and legal propositions pleaded in this case. That briefing would be required for the Tribunal to determine whether the propositions presented here were both fully litigated and actually decided in the prior case. Such briefing would likely stray into arguments that the Tribunal would have to decide anyway if it rejects a formal preclusive effect of the 2017 SIAC Award, namely whether portions of that Award nonetheless should be deemed persuasive and therefore to be followed as a matter of logical reasoning, or alternatively should be deemed either not fully litigated or ultimately unpersuasive, and therefore to be either ignored or distinguished in this Tribunal’s reasoning. Sorting out these issues will involve substantial overlap with the ultimate merits issues in this case, and the Parties may well make assertions based on different or additional evidence or authorities than were presented to the SIAC Tribunal. The lines between the “bifurcated” issues and the “non-bifurcated” issues will be difficult to police, and any attempt to bifurcate could spawn considerable procedural dispute. The Tribunal sees little efficiency in going down this road. It would be particularly inefficient in the event the Tribunal finds, as Claimants assert, that at least *some* of their allegations and claims were not addressed, or at least not definitively resolved, by the SIAC Tribunal. In that event, the Parties still would have to commence a whole new round of merits briefing on the remaining issues, leading to yet another hearing.
46. For these reasons, the Tribunal denies Respondent’s reconsideration request, to the extent that it seeks to limit the remaining briefing only to the matter of issue preclusion/estoppel, presented as an objection to “competence” or jurisdiction and divorced from arguments about the Claimants’ case with respect to liability. On the other hand, the Tribunal sees

merit in deferring further briefing about *quantum* until the combined jurisdiction and liability issues are resolved. Respondent points to quantum briefing as a particularly expensive part of its defense, given the need to retain quantum experts, and reasonably asserts that this exercise would be rendered entirely useless if the Tribunal ultimately accepts its position as to either jurisdiction or liability. The Tribunal is prepared to bifurcate proceedings as between jurisdiction/liability, on the one hand, and quantum on the other.

47. With respect to the core intertwined issues of jurisdiction and liability, moreover, the Tribunal has reconsidered the prior briefing structure provided in Annex A to Procedural Order No. 1 in each of the *Lao Holdings* and *Sanum* Cases. That structure, which envisioned jurisdiction and merits being briefed concurrently but in separate filings, with one party filing a merits submission while the other filed a jurisdictional submission, makes no sense in the context of jurisdictional objections that are fundamentally intertwined with the merits, resting on the assertion that certain merits propositions already have been decided and therefore are beyond the Tribunal's competence to decide again. The result of the current structure would be repeated instances of proverbial "ships crossing in the night." The next filings, for example, would be Claimants' Counter-Memorial on the Objection to Jurisdiction (which would have to respond to the preclusion arguments Respondent presented based on Claimants' earlier Notices of Arbitration, not on Claimants' subsequent Memorial on the Merits), and at the same time Respondent's Counter-Memorial on the Merits (which inevitably would repeat many of its preclusion arguments, only now based on Claimants' Memorial on the Merits rather than Claimants' earlier Notices of Arbitration). This structure now seems designed to breed confusion and duplication.
48. The Tribunal therefore determines that an alternate briefing structure should be adopted, focused on what it would find most helpful for moving forward. The structure starts with asking Respondent – now that it is armed with Claimants' detailed Memorial on the Merits, rather than simply their earlier Notices of Arbitration – to set forth in a plenary Counter-Memorial on Jurisdiction and the Merits, *methodically and with specificity* with respect to each material proposition Claimants advance:

- (a) whether Respondent contends that proposition was presented to the SIAC Tribunal, and if so, on what principal evidence by Claimants and with what corresponding rebuttal evidence by Respondent;
- (b) whether Respondent contends that proposition was fully resolved by the 2017 SIAC Award, and if so in what fashion;
- (c) to the extent Respondent contends it was resolved, why that resolution either binds this Tribunal or is sufficiently persuasive as a matter of reasoning that this Tribunal should follow it;
- (d) to the extent Respondent admits a particular material proposition was not presented to or fully resolved by the SIAC Tribunal, how the Respondent proposes this Tribunal resolve it, including with respect to what evidence or authority (to be submitted with the filing) in contrast to the evidence and authority Claimants submitted with their Memorial on the Merits; and
- (e) what Respondent contends the implications are of the above, with respect to the substantive treaty claims the Claimants have presented in the *Lao Holdings* and *Sanum* Cases.

Respondent's submission also should set out clearly its position with respect to relevant principles of international law, including doctrines of issue preclusion (collateral estoppel) and abuse of process, as well as the legal principles applicable to Claimants' substantive treaty claims.

49. In a plenary Reply on Jurisdiction and Liability, Claimants then could respond in kind to the questions above. Its response presumably would include presenting (again *methodically and with specificity*) any arguments about why certain propositions either were not decided by the SIAC Tribunal; were decided by it but based on different evidence than presented in this proceeding; or were decided by it wrongly or unpersuasively, so this Tribunal should not follow suit. To the extent the Respondent chooses in its Counter-Memorial on Jurisdiction and Liability to present any additional evidence or authority with respect to a proposition, beyond referencing the evidence or authority that the Parties previously provided the SIAC Tribunal, the Claimants also could respond to that additional material, including with reply evidence or authority. Claimants also should respond to the jurisdictional objections other than preclusion that Respondent raised in its Opening Memorial on Competence, and presumably will maintain in its plenary Counter-Memorial

on Jurisdiction and Liability. Respondent's Rejoinder on Jurisdiction and Liability in turn should respond in kind to Claimants' Reply on Jurisdiction and Liability.

50. The hearing would then focus on these combined issues, while deferring issues of quantum until a later stage to the extent necessary. Only upon receipt of this type of systematic, methodical briefing could the Tribunal render a meaningful decision, both (a) as to the preclusion/estoppel objections Respondent raises as part of its objections to competence, and (b) as to any liability issues under the Netherlands-Lao BIT and the China-Lao BIT that the Tribunal finds were not necessarily foreclosed by the SIAC Tribunal's predicate determinations on non-treaty issues.
51. The Tribunal believes this revised structure can be accomplished without sacrificing the hearing dates previously preserved. Attached as Annex A are the dates proposed. The Tribunal invites the Parties to confer promptly about any proposed minor adjustments to this schedule on the basis of mutual courtesy, taking the basic structure as a given, and to revert to the Tribunal within one week of this Procedural Order No. 2 with regard to any agreed or unresolved requests for minor adjustments to Annex A.

IV. DECISION

52. For the reasons above, the Tribunal holds as follows:
 - a. Respondent's objection to Claimants' inclusion in its Memorial on the Merits of claims relating to non-recognition of the 2016 SIAC Award is sustained.
 - b. Respondent's request for reconsideration of the Tribunal's prior decision on bifurcation is granted in part and denied in part, in the sense that the Tribunal (a) denies the request to consider and resolve Respondent's jurisdictional objections prior to the liability phase of this case; (b) agrees to consider and resolve the combined jurisdictional/liability issues prior to further proceedings with respect to quantum, if needed; and (c) establishes a revised structure briefing structure for the remaining submissions on jurisdiction and liability, as reflected in Annex A hereto, subject only to possible minor date adjustments to be addressed as discussed above.

On behalf of the Tribunal,

[*Signed*]

Ms. Jean E. Kalicki
President of the Tribunal
Date: 23 October 2017

ANNEX A
Revised Procedural Timetable

Description	Party / Tribunal	Period	Date
Memorial on the Merits	Claimant		1 Sept. 2017
Objection to Jurisdiction (<i>based on Notices of Arbitration</i>)	Respondent		1 Sept. 2017
<i>Revised Schedule following Procedural Order No. 2</i>			
Counter-Memorial on Jurisdiction and the Merits (but not Quantum) (<i>based on Memorial on the Merits</i>)	Respondent	Extended by 3 weeks from prior deadline of 3 Nov. 2017	24 Nov. 2017
Request for Production of Documents	Parties	3 weeks (same as before)	15 Dec. 2017
Objections to Requests for Production of Documents	Parties	3 weeks (extended from prior 2 weeks due to holidays)	5 Jan. 2018
Reply to Objections to the Request for Production of Documents – Stern Schedules Sent to Tribunal	Parties	1 week (same as before)	12 Jan. 2018
Production of Documents as to Which No Objection Was Made	Parties	3 weeks after decision not to object (same as before, with holiday extension no longer applicable)	26 Jan. 2018
Decision on Objections to Request for Production of Documents	Tribunal	2 weeks after receipt of Stern Schedules (reduced by 1 week)	9 Feb. 2018
Production of Documents Ordered by the Tribunal	Parties	2 weeks after Tribunal decision (same as before)	23 Feb. 2018
Reply on Jurisdiction and the Merits (but not Quantum)	Claimant	6 weeks (same as before)	6 April 2018
Rejoinder on Jurisdiction and the Merits (but not Quantum)	Respondent	6 weeks (same as before)	18 May 2018
Notification of Witnesses/Experts for Cross-Examination	Parties	10 days after conclusion of the written phase (same as before)	28 May 2018
Call of Witnesses/Experts not Called by the Parties, if any	Tribunal	1 week after parties' notification (same as before)	4 June 2018

Description	Party / Tribunal	Period	Date
Pre-Hearing Organizational Meeting (by telephone)	Parties and Tribunal	1 week after final witness notification (reduced by 1 week)	11 June 2018 ⁶⁷
Hearing	All	8 days maximum	4-12 July 2018 (8 days, excluding Sunday, 8 July)
Post-Hearing Briefs if requested by the Tribunal	Parties	TBD	TBD
Statements on Costs	Parties	30 days after conclusion of hearing or post-hearing briefs	TBD

⁶⁷ 7:30 a.m. Dallas/Mexico City, 8:30 a.m. NY/Ontario/Charlotte, 1:30 p.m. London, 2:30 p.m. Geneva, 8:30 p.m. Beijing)