

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**LAO HOLDINGS N.V.
AND
SANUM INVESTMENTS LIMITED**

Claimants

and

LAO PEOPLE'S DEMOCRATIC REPUBLIC

Respondent

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

PROCEDURAL ORDER NO. 8

HEARING ORGANIZATION

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. Mercedes Cordido-Freytes de Kurowski

Date: November 16, 2018

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I. INTRODUCTION

1. This procedural order addresses the organization of the hearing on jurisdiction and the merits (but not on quantum) in this case (the “**Hearing**”). It reflects (a) the agreement of the Parties as submitted to the Tribunal on November 9, 2018, as well as (b) the Tribunal’s rulings on such issues as were not previously agreed, based on the Tribunal’s consideration of the Parties’ respective positions and discussion of open issues during the Pre-Hearing Organizational Conference of November 13, 2018.

II. EARLIER RULINGS

2. The Tribunal recalls the following sections of Procedural Order No. 1 dated May 16, 2017 (“**PO-1**”), which shall remain valid unless they are changed or amended by later sections of this PO-8.

12. Procedural Language(s), Translation and Interpretation

Administrative and Financial Regulation 30(3) and (4); Article 30 of the ICSID Arbitration (Additional Facility) Rules

[...]

12.6. The testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted simultaneously.

12.7. The parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see §20 below), which witnesses or experts require interpretation.

12.8. The costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.

17. Submission of Documents

Administrative and Financial Regulation 30; Article 32 of the ICSID Arbitration (Additional Facility) Rules

[...]

17.6. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided always that such slides or materials reflect evidence on the record (with citations to such evidence) and do not constitute or introduce any

new evidence, whether directly or indirectly. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

19. Examination of Witnesses and Experts

Article 42 and 43 of the ICSID Arbitration (Additional Facility) Rules

- 19.1. By the date set forth in Annex A, each party shall identify the factual and expert witnesses of the opposing party (having filed written statements and expert reports) whom it intends to cross-examine. Shortly after the parties' notifications, the Tribunal shall indicate whether there are any witnesses and experts not called by the parties that it wishes to question.*
- 19.2. Parties may not call their own witnesses or experts for direct testimony if neither the opposing party nor the Tribunal has indicated an interest in examining such witness or expert. To the extent a party considers that there have been new developments since the date of the witness statement or report about which its witnesses or experts may have material evidence or opinion and that constitute exceptional circumstances for allowing additional testimony, the appropriate mechanism is not to seek to call for such witnesses or experts for direct testimony at the hearing, but rather for that party to seek leave as soon as possible after the new development to submit a supplemental written statement limited to the new developments, pursuant to paragraph 18.2.*
- 19.3. Examination by video-conference may be permitted at the discretion of the Tribunal, if the requesting party provides justified reasons.*
- 19.4. If a witness who has been called by a party for cross-examination fails to appear without good cause, the witness statements or reports filed on behalf of such witness shall be disregarded and adverse inferences may be drawn by the Arbitral Tribunal.*
- 19.5. Those witnesses and expert witnesses who are not called for examination by the opposing party will not be subject to an adverse inference determination. The party which submitted the witness statement or expert report may rely on the statement or report in its argument and the opposing party similarly may rely upon or challenge the statement or report in its argument.*
- 19.6. Witnesses shall be examined by each party under the control of the Tribunal. At the hearing, the examination of each witness shall proceed as follows:*
 - 19.6.1. The written witness statement or report of each witness called for cross-examination shall stand in lieu of the examination by the party producing the witness ("direct examination"). However, the party who presents the witness may briefly examine the witness for purposes of asking introductory questions*

and to enable the witness to confirm and/or correct that witness's written statement.

19.6.2. The adverse party may then cross-examine the witness on matters addressed in the statement of the witness and matters going to the credibility of the witness, with the latter limited to matters that are relevant and of which the witness has direct knowledge.

19.6.3. The party who has presented the witness may then conduct a redirect examination of the witness with respect to any matters arising out of the cross-examination.

19.6.4. The Tribunal may examine the witness at any time, either before, during or after examination by one of the parties. Counsel for either party may re-examine the witness with respect to any matters or issues arising out of the Arbitral Tribunal's questions.

19.7. Unless the parties and the Tribunal agree otherwise, fact witnesses shall not be permitted to be present during the examination of other witnesses, or to otherwise hear or view such proceedings, until after they have been cross-examined on their own testimony. Expert witnesses shall be allowed in the hearing room at any time.

19.8. Notwithstanding paragraph 19.7, Claimant's and Respondent's designated representatives shall be permitted to attend the hearing or to otherwise hear or view such proceedings at all times. In the event any such representatives are also fact witnesses, the Tribunal may consider, in consultation with the parties in advance of the hearing, whether to schedule their examination for the beginning of the hearing, prior to the examination of other witnesses.

19.9. The Parties and the Tribunal will consider at the pre-hearing organizational meeting whether any expert witnesses should be examined by the Tribunal in conference by topic, following their examination individually by the Parties.

20. Pre-Hearing Organizational Meetings

Article 29 of the ICSID Arbitration (Additional Facility) Rules

20.1. On the date set forth in Annex A, a pre-hearing organizational meeting shall be held by telephone between the Tribunal, or its President, and the parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing. The Tribunal will circulate an agenda in advance of the organizational meeting, to facilitate discussions between the parties regarding the matters to be discussed.

21. Hearings

Article 21(2) of the ICSID Arbitration (Additional Facility) Rules

- 21.1. *The oral procedure for either jurisdiction alone (in the event of bifurcation) or jurisdiction and merits combined (in the event of no bifurcation) shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.*
- 21.2. *The hearing shall be held at a place to be determined in accordance with paragraph 11 above.*
- 21.3. *The hearing shall take place on the dates set forth in Annex A.*
- 21.4. *The allocation of time during the hearing, as well as specific protocols for implementing that allocation, will be addressed during the pre-hearing organizational meeting addressed in paragraph 20 above.*
- 21.5. *The Members of the Tribunal shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.*
- 21.6. *The Respondent requested that hearings be open to the public, but the Claimant did not consent. In light of the Claimant's objections and pursuant to Article 39(2) of the ICSID Arbitration (Additional Facility) Rules, the hearings shall be held in camera. This confidentiality also extends to any transcripts prepared of the hearings. (Other than with respect to the hearings, the ICSID Arbitration (Additional Facility) Rules do not address the issue of confidentiality of proceedings, and no party to date has sought entry of any protective order providing for such confidentiality.)*

22. Records of Hearings and Sessions

Article 28(1)(g) of the ICSID Arbitration (Additional Facility) Rules

- 22.1. *Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Tribunal Members.*
- 22.2. *Verbatim transcript(s) in the procedural language shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.*
- 22.3. *The parties shall agree on any corrections to the transcripts within 20 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts ("revised transcripts"). The Tribunal shall decide upon any disagreement between the parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.*

23. Post-Hearing Memorials and Statements of Costs

Article 58(1) of the ICSID Arbitration (Additional Facility) Rules

- 23.1. *At the close of the hearing the Tribunal shall inform the Parties whether it would consider it useful to receive Post-Hearing submissions on any issues, in which event it will indicate expressly which issues shall be addressed by the parties therein and establish a schedule for the simultaneous exchange of any such submissions.*

23.2. *Statements of costs shall be due 30 days after the latter of the conclusion of a hearing (on jurisdiction or the merits) or the date established for the submission of Post-Hearing Memorials, if any.*

23.3. *Notwithstanding the Respondent’s position in general regarding the costs of the arbitration, as reflected in paragraph 10.2 above, the parties agree that the cost of any transcripts and recordings shall be borne by the parties in equal part. ICSID will arrange for the service and pay for the service at the end of the hearing or session. ICSID would then issue a detailed invoice to the Respondent requesting one half of the final invoice to be paid to the Centre within a certain period of time. The financial statement will reflect the total cost of the hearing with the cost allocation as per agreement. Since the invoice issued to the Respondent is tailored to the total cost there will be no refund due to the Respondent should there be any funds left at the end of the proceeding.*

3. The Tribunal also recalls that the procedural schedule set forth in Annex A of PO-1, was subsequently revised by PO-4 of November 27, 2018, and by the Tribunal’s communications of October 5, 2018 and October 11, 2018 when the Tribunal fixed the following revised procedural schedule:

| <i>Description</i> | <i>Party/Tribunal</i> | <i>Date</i> |
|--|-----------------------------|---|
| <i>Rejoinder on Jurisdiction and the Merits (but not Quantum)</i> | <i>Respondent</i> | <i>November 1, 2018</i> |
| <i>Notification of Witnesses/Experts for Cross-Examination</i> | <i>Parties</i> | <i>November 7, 2018</i> |
| <i>Call of Witnesses/Experts not Called by the Parties, if any</i> | <i>Tribunal</i> | <i>November 9, 2018</i> |
| <i>Pre-Hearing Organizational Meeting (by telephone)</i> | <i>Parties and Tribunal</i> | <i>November 12, 2018¹</i> <i>(Starting at 8 am EST, 2 pm CET – not to exceed two hours)</i> |
| <i>Hearing</i> | <i>All</i> | <i>January 8-17, 2019</i> <i>(8 days maximum)</i> |
| <i>Post-Hearing Briefs if requested by the Tribunal</i> | <i>Parties</i> | <i>TBD</i> |
| <i>Statements on Costs</i> | <i>Parties</i> | <i>TBD</i> |

¹ Subsequently shifted to November 13, 2018, with consent of the Parties.

III. THE PRE-HEARING ORGANIZATIONAL MEETING

4. Pursuant to Section 20.1 of PO-1, a Pre-Hearing Organizational Meeting was held by conference call on Tuesday, November 13, 2018 at 8:30 a.m. EST, Washington, D.C. time (7:30 a.m Dallas; 1:00 p.m. London, U.K.; 2:30 p.m. Geneva; and 9:30 p.m. Beijing) in preparation for the Hearing in this case.

5. Participating in the conference were:

Members of the Tribunal

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

ICSID Secretariat:

Ms. Mercedes Cordido-Freytes de Kurowski, Secretary of the Tribunal

On behalf of the Claimants:

Ms. Deborah Deitsch-Perez, Claimants' counsel

Mr. Jeff Prudhomme, Claimants' counsel

Mr. Todd Weiler, Claimants' counsel

Mr. Ken Kroot, Sanum in-house counsel

Mr. John Baldwin, Claimants' representative

Mr. Tucker Baldwin, Claimants' representative

On behalf of the Respondent:

Mr. John Branson, Respondent's counsel

Mr. Kurt Lindquist, Respondent's counsel

Ms. Emily Doll, Respondent's counsel

6. The Tribunal and the Parties considered: (i) the draft Agenda and draft procedural order circulated by the Secretary of the Tribunal on October 13, 2018, and (ii) the Parties' observations submitted on November 9, 2018.

7. An audio recording of the telephone conference was made and deposited in the archives of ICSID. The recording was subsequently made available to the Members of the Tribunal and the Parties.
8. The Parties' agreements and the Tribunal's decisions are reflected in this Order.

IV. ORGANIZATION OF THE HEARING

A. Hearing Dates, Schedule and Venue

9. As agreed by the Parties, the Hearing shall be held in Singapore at the Maxwell Chambers' facilities located at 35 Maxwell Road #03-01, Singapore 069115.
10. The Hearing shall take place **from Sunday, January 13, 2019 to Thursday, January 17, 2019**, presumptively from 9:00 a.m. to 5:30 p.m. (5:45 p.m. for the first day), with a lunch break (one hour), two fifteen-minute breaks, and all appropriate breaks for the court reporter and interpreters. The Tribunal may extend the length of any hearing day.
11. Further logistical details including **setup on Saturday, January 12, 2019**, entry passes, room assignment, internet connection and catering will be provided in due course.

B. Participants

12. Pursuant to section 21.6 of PO-1, the Hearing will be closed to the public.
13. ICSID will circulate a draft table in due course for the Parties to provide the names and affiliation of all the participants who will attend the Hearing, including witnesses, experts and Parties' counsel and representatives.

C. Notification of Witnesses and Experts

14. The Tribunal takes note of the Parties' respective notifications on **Wednesday, November 7, 2018**, of the names of the witnesses and experts called for cross-examination.
15. During the Pre-Hearing Organizational Meeting on Tuesday, November 13, 2018, the Tribunal informed the Parties that it would not require the attendance of any other witnesses or experts.

D. Witness and Expert Examinations

16. The examination of witnesses and experts shall be conducted in accordance with the relevant sections of PO-1 copied above.
17. Pursuant to section 19.3 of PO-1, the Parties are to indicate by **November 20, 2018**, whether they wish to have any of their witnesses testify by **video link** together with the specific reasons justifying such request. Each Party will then have until **November 30, 2018**, to respond. The Tribunal will then decide on the video link request(s).

E. Allocation of Time

18. The Parties shall have a maximum of 3.25 hours each for their opening statements, exclusive of time spent responding to Tribunal questions (3.5 hours reserved in total for each statement, including possible Tribunal questions). During the first day of the Hearing, the Claimants will have from 9:15. to 1:00 [including a 15-minute break]. The Respondent will have from 2:00 to 5:45 [including a 15-minute break].
19. The principle of equal time as between the Parties shall be observed in the conduct of the Hearing. Each Party is free to take less than its allotted time.
20. Taking into account the examination of witnesses and experts announced by the Parties, and also taking into account the total time reserved for the Hearing, the Tribunal has determined that Claimants and Respondent shall each have a maximum of 10.00 hours for their direct examination, cross-examination and re-direct examination of all witnesses and experts (**excluding** their Opening and Closing Statements).
21. On the final day of the hearing, the Parties shall have a maximum of 2.5 hours each for their closing statements, exclusive of time spent responding to Tribunal questions.
22. Time spent on housekeeping matters shall not be counted toward either party's time account. Time spent on direct or re-direct examination shall be counted toward the time account of the party presenting the witness or expert, whereas time spent on cross-examination shall be counted toward the opposing party's time account. Time spent on witness or expert conferencing, if any, shall be counted in half toward both Parties' time accounts.

23. The time spent by the Parties responding to questions of the Tribunal will not be subtracted from the time account of the Parties. Despite any time expressly reserved for the Tribunal in the Hearing Agenda, its questions may be posed at any time.
24. In light of this Procedural Order No. 8, the Parties are requested to consult with each other with a view to establishing a scheduling proposal indicating the order of appearance of witnesses and experts and the likely date on which each witness or expert may be presented. The Parties are requested to submit such proposal to the Tribunal **by December 7, 2018**.
25. The Secretary of the Tribunal will provide time-recording at the hearing.

F. Documentation for and at the Hearing

26. The Tribunal does not require a hard copy of the entire record, but does require a USB key containing the entire record. The parties will confer prior to **December 7, 2018**, to settle on the contents and organization of this USB. The USB key and an index of its contents shall be sent to the Members of the Tribunal and the Secretary of the Tribunal by **December 12, 2018**. The Parties are reminded that both Ms. Kalicki and Prof. Boisson de Chazournes require USBs in Mac-compatible format.
27. PowerPoint presentations and demonstrative exhibits shall comply with the requirements set forth under section 17.6 of PO-1. Additionally, the following directions should be followed:
 - a. Each Party is to provide the other Party with copies of potential demonstrative exhibits to be used at the Hearing, including PowerPoint presentations, no later than the commencement of the hearing on the day on which such exhibit or presentation will be used.
 - b. Each Party shall make available to the Tribunal, the Secretary of the Tribunal, the interpreters, if any, the court reporter and opposing counsel hard copies of all PowerPoint presentations and demonstrative exhibits immediately before the presentation to which they relate.
 - c. Each Party shall additionally provide an electronic copy of such presentations and demonstrative exhibits at the end of the same day to be sent to the Tribunal Secretary, with copy to the Tribunal members and opposing counsel.

28. The documents for cross-examination of each witness and expert shall be provided in hard copy (the “cross-examination bundle(s)”). The Parties shall prepare separate cross-examination bundle(s) for the examination of each witness and expert, which are to be handed to the witness or expert at the beginning of his or her examination. At the same time, one copy shall be provided to each member of the Tribunal and the Tribunal Secretary, one copy for the interpreter(s), if any, one copy for the court reporters and, unless the Parties agree otherwise, one copy to the opposing party.
29. The party presenting a witness, or an expert shall provide to the witness or expert a hard copy of his or her statement or report.
30. The Parties are to ensure that each member of the Tribunal and the Secretariat, as well as the interpreter, if any, and the court reporter, have a copy of documents to which the Parties refer at the hearing.

G. Court reporting Services

31. Each Party is to be provided with 6 LiveNote connections, as requested, but only if such Party has paid in advance for LiveNote services and access. No Party is entitled to access LiveNote services without its prior payment for the same into the Costs Deposit.

H. Interpretation Services

32. In accordance with section 12.6 of PO-1, *the testimony of a witness called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted simultaneously.*
33. The Parties have confirmed that only one witness (Judge Bouavone) will require interpretation. To enable the Secretariat to make logistical arrangements to such effect, the Parties shall notify the Tribunal, as soon as possible, **and no later than noon Washington, D.C. time Tuesday, November 20, 2018**, which day Judge Bouavone will be called for examination.

I. Amendments

34. After consultation with the Parties, the Tribunal may amend or change any of the rulings in this Order, if it considers appropriate.

On behalf of the Tribunal,

[Signed]

Ms. Jean Kalicki
President of the Tribunal
Date: November 16, 2018

Attached: Annex A (Time Calculation)

Annex A to Procedural Order No. 8

Calculation of Hearing Time

| | Hours |
|---|-------------------|
| Time Available: 4 days of 8.5 hours, 1 day of 8.75 hours | 42.75 |
| Time Needed: | |
| Lunch breaks: (1 hour, daily) | 5.0 |
| Coffee Breaks (15 minutes, 2 daily) | 2.5 |
| Procedural Discussions, housekeeping, etc. (estimated) | 1.25 ² |
| Introduction by Tribunal President and questions by Tribunal | 2.5 |
| Total Time for other purposes: | 11.25 |
| This leaves the Parties a total of | 31.5 |
| Total time available for each side, including Opening and Closing Statements | 15.75 |
| Opening Statements (maximum) | 3.25 |
| Closing Statements (maximum) | 2.5 |
| Time available for each side, for witness/expert examination (excluding Opening and Closing Statements) | 10.0 |

² The time allocation above does not account for significant delays such as late returns from breaks. The Tribunal reminds the Parties to be mindful of timely returns, and in the event of significantly late returns, the Tribunal reserves the power to allocate against either or both Parties the time lost waiting to resume proceedings.