

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. 5

(Document Production)

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

18 May 2018

1. Pursuant to the procedural timetable schedule set forth in Annex A to Procedural Order No. 4, the Parties exchanged document production requests, followed by objections and replies. The Parties' completed schedules related to their respective document requests were submitted to the Tribunal on 4 May 2018. The Parties also submitted additional correspondence regarding these issues on 4 May 2018 (Respondent), 8 May 2018 (Claimants), and 9 May 2018 (Respondent). On 9 May 2018, the Tribunal communicated that it did not require further submissions on disclosure considering the fulsome submissions already received from the Parties.
2. The Tribunal notes that with respect to Respondent's schedule, the Parties had resolved all but one of Respondent's nine requests, two by Claimants' agreement to produce and five by Claimants' statement that no responsive documents exist. The Tribunal's decision on the one contested request is set out in Annex A accompanying this Order.
3. With respect to Claimants' schedule, the Tribunal notes that Respondent objected to all 70 requests (including all additional 164 subparts thereto), with the result that it stated it would not voluntarily produce any documents at all. This outcome appears in part a response to the Claimants' propounding of extremely expansive requests, including many that were duplicative of requests previously made in prior proceedings. It appears that Claimants made little apparent effort to limit their requests to narrow and specific categories of documents that were *not* previously produced, and that moreover are demonstrably *material* (and not peripheral or collateral) to the outcome of the *claims already pleaded* in this case, as opposed to documents that might start a train of inquiry or permit evaluation of potential further claims. At the same time, the outcome is also due to Respondent's position that requests *denied* in prior proceedings were therefore *ipso facto* not material to this dispute, even though (a) the parameters of this dispute are somewhat different than in those proceedings, and (b) this Tribunal in any event is not bound by the determinations of other tribunals as to whatever documents might be appropriate for production in the context of other cases.
4. In particular, the Tribunal is guided by its understanding that this case concerns the following:
 - a. Alleged treaty violations arising out of State conduct *subsequent to* the Parties' entry into the Settlement Deed dated 15 June 2014 (followed by a side letter

dated 18 June 2014), related to certain alleged investments connected to that Deed;¹

- b. Alleged treaty violations through actions of Respondent's judiciary with respect to "Case 48";² and
 - c. alleged treaty violations accepted as an ancillary claim on behalf of Lao Holdings (not Sanum), involving the Lao courts' decision not to enforce a 2016 SIAC award in a private arbitration against the ST Group with respect to the Thanaleng Slot Club.³
5. With respect to the first category of claims, while some State conduct arising after the Settlement Deed may have been examined in other proceedings to determine if it constituted a violation of the Settlement Deed,⁴ that contractual question is not necessarily co-extensive with the treaty claims before this Tribunal, and the Tribunal is not bound by the materiality decisions of such tribunals, in the context of their consideration of disclosure requests. For this reason, the Tribunal cannot accept Respondent's blanket objection that similar requests have been addressed (and either granted or denied) by other tribunals.
6. At the same time, it cannot be disputed that Claimants already have had access to significant documents through the prior proceedings, and to that extent it would be improper under the IBA Rules and otherwise for them to seek re-production of the same materials, which already are in the possession, custody or control or which they were given the opportunity to inspect and copy in the prior proceedings. While the general introduction to Claimants' request states in principle that they do not seek re-production of documents already produced, they make no apparent effort in the individual requests to acknowledge what they now have, and to explain what specific additional materials are *now* requested. Instead, Claimants seek to shift the burden to Respondent to examine the entire universe of potentially responsive materials, sort

¹ These were previously identified as (1) the Savan Vegas Casino; (2) the Ferry Terminal Slot Club; (3) the Lao Bao Slot Club; and (4) an alleged contractual agreement to negotiate a potential non-gaming PDA in Thakhet. *See* Procedural Order No. 2, ¶ 12.

² Procedural Order No. 3, ¶ 12.

³ Procedural Order No. 3, ¶¶ 13-15.

⁴ This includes the proceedings before a SIAC tribunal that led to issuance of a 29 June 2017 award (the "2017 SIAC Award"), as well as the so-called "Material Breach" proceedings before ICSID and PCA tribunals, to determine whether treaty claims relating to State conduct *prior* to the Settlement Deed may now be revived under the terms of the Settlement Deed itself.

out what it previously produced, and now produce only the remainder, while also demanding that Respondent “identify which requested Documents it is not producing on the grounds that such Documents have been produced previously.”⁵ Claimants’ demand that Respondent itemize previously produced documents, or correlate such previous produced documents by relevance to Claimants’ current document requests, is neither appropriate nor constructive. The Tribunal’s rulings with respect to these requests (to the extent otherwise sustained) are therefore limited only to such additional material as Respondent can determine with reasonable effort were not previously produced, such as materials residing with custodians or in files that were not previously searched for responsive materials, or covering time periods not included in prior searches.

7. More generally, the unfortunate result of the Parties’ respective positions regarding Claimants’ schedule, including the failure of both Parties to propose possibly acceptable compromise formulations, is that the onus was shifted entirely to the Tribunal to determine whether overbroad or duplicative requests might be narrowed in some fashion, to cover relevant and material documents while reducing excessive burdens. This is not consistent with the Parties’ duties with respect to the taking of evidence within the framework laid down by this Tribunal, which required them both to formulate narrow and specific document requests, and also to cooperate reasonably in the process of achieving such formulations with respect to each other’s requests, including agreeing to produce voluntarily such documents in their possession as are appropriate and material to this arbitral proceeding. The Tribunal expects the Parties to do so now with respect to the rulings set forth. The Tribunal’s decision on Claimants’ contested requests is set out as Annex B accompanying this Order.
8. One repeated dispute that arises is with respect to Claimants’ requests for documents in the possession of or involving communications by Respondent’s counsel, as to which Respondent asserts legal privilege. The Tribunal confirms that its production orders are understood to apply only to *non-privileged* material. To avoid subsequent disputes over the scope of applicable privilege for purposes of this case, and to maintain equality of treatment as between the Parties, the Tribunal adopts the formulation reflected in Article 9(3)(a) of the IBA Rules, namely that the Parties need not produce documents (or portions of documents) that reflect communications “made in connection with and for the purpose of providing or obtaining *legal advice*,” which

⁵ Claimants’ Stern Schedule, p. 4, general instruction #7.

is to be distinguished (*inter alia*) from business advice. Where only a portion of a document meets this definition, the Parties are expected to produce the other portions of the document with appropriate redactions. At the same time, the Tribunal rejects for present purposes Claimants' insistence that Respondent prepare a privilege log to justify any withholding or redaction on this basis.⁶ The Tribunal expects Respondent's counsel to engage in a responsible, good faith privilege review on the basis of the definition hereby provided, in the understanding that the Tribunal does not rule out a possible later return to the privilege log issue, if there are reasons later to suspect an overly broad application of that definition.

9. Another dispute that arises with respect to a number of Claimants' requests is to the extent to which it may inquire into Respondent's conduct with respect to other gaming enterprises in the Lao People's Democratic Republic. Claimants contend that broad investigation of the treatment of other enterprises is proper inquiry in light of their pleading of discrimination claims; Respondent contends *inter alia* that this is both improper "fishing" and would reveal confidential information about third parties. As indicated by its rulings in Annex B, the Tribunal considers that only a very *limited* degree of inquiry into comparative treatment of other enterprises is warranted, and emphasizes that to the extent documents of this nature are produced, such documents may be used only for the purposes of these proceedings.
10. Finally, the Tribunal notes that its decision on the Parties' contested requests is not intended to provide an implied decision on any issue in dispute between the Parties. Accordingly, if a request is denied, or granted in a modified fashion, that should not be taken as any indication as to the Tribunal's views on the merits, and the Parties should not hereafter plead or allege that the Tribunal's decision to uphold or deny a request was indicative of a position either in their favour or against them. If a request is denied, for example, that does not mean that the requested party can consider that its own burden of proof has been discharged. Moreover, if a party refuses to produce documents on an issue for which it bears the burden of proof, notwithstanding a Tribunal order of such production, then such party runs the risk of having the issue resolved in due course as not proven. The Parties are expected to bear this in mind in

⁶ Claimants' Stern Schedule, p. 8. The Tribunal also rejects Claimants' request that the Tribunal authorize Claimants to pursue particular documents or a deposition pursuant to an application in U.S. courts under 28 U.S.C. § 1782. Claimants' Stern Schedule, pp. 7-8.

facilitating disclosure of relevant and material documents in compliance with the Tribunal's rulings.

On behalf of the Tribunal,

[Signed]

Ms. Jean Kalicki
President of the Tribunal