INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

LAO HOLDINGS N.V.

Claimant

and

THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

Respondent

ICSID Case No. ARB(AF)/12/6

DECISION ON JURISDICTION

Members of the Tribunal
The Honourable Ian Binnie, C.C., Q.C., President
Professor Bernard Hanotiau
Professor Brigitte Stern

Secretary of the Tribunal
Mrs. Anneliese Fleckenstein

Date of dispatch to the Parties: February 21, 2014

REPRESENTATION OF THE PARTIES

Representing Lao Holdings N.V.:

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Representing The Lao People's Democratic Republic:

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ICSID-AF Rules	Arbitration Rules (Additional Facility) of the International Centre for Settlement of Investment Disputes
BIT or Treaty	*Agreement on Encouragement and Reciprocal Protection of Investments* between the Lao People's Democratic Republic (PDR) and the Kingdom of the Netherlands
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the *Agreement on Encouragement and Reciprocal Protection of Investments* between the Lao People's Democratic Republic (PDR) and the Kingdom of the Netherlands (the "BIT" or the "Treaty"), which entered into force on 1 May 2005, and the Arbitration Rules (Additional Facility) of the International Centre for Settlement of Investment Disputes, which entered into force on 10 April 2006 (the "ICSID-AF Rules"). The dispute relates to actions by the Respondent the Lao People's Democratic Republic, hereinafter referred to as the "Lao Government", "Laos" or the "Respondent," that allegedly deprived Claimant of part or all of its investment in the gaming and tourism industry in Lao PDR.

2. The Claimant, Lao Holdings N.V., is a company incorporated under the laws of Aruba, The Netherlands Antilles, and is hereinafter referred to as "Lao Holdings" or the "Claimant." It is important to emphasize at the outset that the Claimant did not become an investor in Laos until 17 January 2012 ("the critical date") at which time it took over ownership of Sanum Investments Ltd., a Macao company, whose principals are John Baldwin and Sean Scott, and which had been investing in Laos since 2007.

3. The present ruling concerns an objection by the Respondent to the jurisdiction of the Tribunal *ratione temporis* to hear and determine the Claimant's assertion that by reason of the protection of the Treaty it is not subject to a New Tax Code enacted on 11 December 2011.

4. The Claimant and the Respondent are hereinafter collectively referred to as the "Parties." Their respective representatives and addresses are listed on page (2).

II. ICSID PROCEDURAL HISTORY

5. On 15 August 2012, ICSID received a Request for Arbitration dated 14 August 2012 from the Claimant against the Respondent, the Lao Government.

6. On 12 September 2012, the Secretary-General of ICSID registered the Request in accordance with Articles 4 and 5 of the ICSID-AF Rules and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible, in accordance with Article 5(e) of the ICSID-AF Rules.

7. In accordance with Chapter III of the ICSID-AF Rules, the Parties agreed that the Arbitral Tribunal would be composed of three arbitrators, one to be appointed by each Party and the third presiding arbitrator to be appointed by agreement of the Parties. Professor Bernard Hanotiau, a national of Belgium, was appointed by the Claimant; and Professor Brigitte Stern, a national of France, was appointed by the Respondent.[1] On 22 March 2013, the Parties agreed to the appointment of The Honourable Ian Binnie, a national of Canada, as President of the Tribunal, who accepted the appointment on 23 March 2013. On 26 March 2013, the Secretary-General, in accordance with Article 13(1) of the ICSID-AF Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date.

8. Mrs. Anneliese Fleckenstein, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

9. The Tribunal held a first session with the Parties on 8 May 2013, in London. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed inter alia that the applicable ICSID-AF Arbitration Rules would be those in effect from 10 April 2006, and that the procedural language would be English. The Tribunal decided, on the application of the Parties, that the place of the proceedings would be Singapore. The Parties agreed on a schedule for the proceedings, including

[1] On 27 February 2013, the Centre sought acceptance from Claimant and Respondent's appointees Professor Bernard Hanotiau and Professor Brigitte Stern as arbitrators. Prof. Stern accepted her appointment on 27 February 2013. Prof. Hanotiau accepted his appointed on 4 March 2013.

production of documents, and the terms were embodied in Procedural Order No. 1 signed by the President of the Tribunal and circulated to the Parties on 18 June 2013.[2]

10. On 12 July 2013, the Respondent informed the Tribunal that it would seek bifurcation of the proceeding. On 2 August 2013, the Claimant objected to the Respondent's request.

11. A hearing on the Claimant's amended request for provisional measures and the Respondent's request for bifurcation took place in London on 2 September 2013. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For the Claimant:

Mr. David W. Rivkin	Debevoise & Plimpton LLP
Mr. Chrispoher Tahbaz	Debevoise & Plimpton LLP
Ms. Natalie L. Reid	Debevoise & Plimpton LLP
Ms. Leigh E. Sylvan	Debevoise & Plimpton LLP
Mr. Andrew Esterday	Debevoise & Plimpton LLP
Mr. Todd Weiler	Barrister & Solicitor

Witnesses

Mr. John K. Baldwin	Lao Holdings N.V.
Mr. Shawn Scott	Vice Chairman Sanum Investments
Mr. Richard A. Pipes	Limited Sanum Investments Limited
Mr. Clay Crawford	Savan Vegas and Casino Co., Ltd.

For the Respondent:

Mr. David Branson	King Branson LLP
Dr. Bountiem Phissamay	Government of The Lao People's Democratic Republic
Ambassador Ouan Phommachack	Government of The Lao People's

[2] As agreed at the first session and subsequent modifications, the procedural schedule for the Claimant's provisional measures application was as follows: the Claimant filed an amendment to its request for arbitration including the request for provisional measures on 28 May 2013; the Respondent filed its response on 12 July 2013; the Claimant filed its reply on 2 August 2013; the Respondent filed its rejoinder on 23 August 2013. The procedural schedule for the jurisdiction and merits phase was agreed as follows: the Claimant shall file its memorial on the merits on 22 July 2013; the Respondent shall file its counter-memorial on the merits and its objections to jurisdiction on 22 October 2013; the Claimant shall file its reply on the merits and counter-memorial on the objections to jurisdiction on 22 January 2014; the Respondent shall file its rejoinder on the merits and reply on jurisdiction on 22 April 2014.

	Democratic Republic
Mr. Sith Siripraphanh	Government of The Lao People's Democratic Republic
Mr. Werner Tsu	LS Horizon, Singapore
Mr. K.P. Santivong	LS Horizon, Vientiane, Lao PDR

12. The following person was examined:

On behalf of the Claimant:

Mr. Clay Crawford	Savan Vegas and Casino Co., Ltd.

13. On 9 September 2013, the Tribunal informed the Parties of its decision to bifurcate the proceedings pursuant to Article 45(5) of the ICSID-AF Rules.

14. A hearing on the Respondent's objection to jurisdiction took place in Paris on 6 January 2014. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For the Claimant:

Mr. David W. Rivkin	Debevoise & Plimpton LLP
Mr. Chrispoher Tahbaz	Debevoise & Plimpton LLP
Ms. Catherine M. Amirfar	Debevoise & Plimpton LLP
Mr. Corey Whiting	Debevoise & Plimpton LLP
Ms. Sonia R. Farber	Debevoise & Plimpton LLP
Ms. Nadège Jean-Pierre	Debevoise & Plimpton LLP
Mr. Todd Weiler	Barrister & Solicitor
Parties	
Mr. John K. Baldwin	Lao Holdings N.V.
Mr. Shawn Scott	Bridge Capital LLC
Mr. Tucker Baldwin	Bridge Capital LLC

For the Respondent:

Mr. David Branson	King Branson LLP
Dr. Jane Willems	
Mr. Werner Tsu	LS Horizon, Singapore
Mr. K.P. Santivong	LS Horizon, Vientiane, Lao PDR

Parties	
Dr. Bountiem Phissamay	Government of The Lao People's Democratic Republic
Mr. Sith Siripraphanh	Government of The Lao People's Democratic Republic
Dr. Ovan Phommasak	Government of The Lao People's Democratic Republic
Dr. Ket Kiettisak	Government of The Lao People's Democratic Republic
Mr. Khouanta Phalivong	Government of The Lao People's Democratic Republic
Dr. Bounthoury Sisouphanthong	Government of The Lao People's Democratic Republic
Mr. Khampheth Viraphondet	Government of The Lao People's Democratic Republic

A. The Factual Background to the Dispute

15. Sanum was incorporated in Macau in 2005 to invest in gambling operations in Asia. In 2007, as a result of investigations and inquiries by Mr. John Baldwin, Sanum entered into agreements with ST Corporation, a Laotian company with numerous commercial interests in that country, including potentially valuable government concessions for hotel and casino projects. According to Mr. Baldwin, one of the attractions of ST as a business partner was that it was reputed to be well connected to the Lao Government. The attraction for ST was that Sanum had access to ample foreign funds to invest.

16. Sanum agreed to establish a joint venture with ST in a series of Laotian hotel and gambling facilities. Sanum contends that its contribution was more than US$85 million.

17. Relations between Sanum and ST were governed by a Master Agreement dated 30 May 2007 which resulted in three major projects, The Savan Vegas Hotel and Casino ("Savan Vegas"), The Paksong Vegas Hotel and Casino ("Paksong Vegas") and a third enterprise that invested in slot machine clubs in at least three locations in Lao, namely Thanaleng, Lao Bao and the Ferry Terminal.

18. Sanum and ST each owned 40% of Savan Vegas and Paksong Vegas, with the Lao Government owning the remaining 20%.

19. A separate dispute involving Paksong Vegas is being determined by another arbitral tribunal. It is not before this Tribunal.

20. The ownership structure of the slot clubs was more complicated and contested, but the details are not germane to the present Jurisdictional Objection.

21. The Sanum investments did not acquire Dutch nationality for purposes of the Treaty until 17 January 2012, when the Claimant was incorporated in Aruba, in The Netherlands Antilles.

B. The Five Year Flat Tax Agreement

22. As part of the Lao Government's investment incentive program, and in recognition of its limited capacity to engage in tax audits of a complex cash based business, the Lao Government granted Savan Vegas a five year Flat Tax Agreement ("FTA") dated 1 September 2009, that required it to pay $745,000 per year in taxes each year through 31 December 2013. The Claimant says that it was promised that when the FTA expired on 31 December 2013, it would be replaced by another flat tax agreement, ideally for the remainder of the 50-year concession. The terms (and in particular the tax rate) were to depend on negotiations arising out of the experience of the initial five year period. As set out below in greater detail, Sanum initiated negotiations for a new flat tax arrangement in March 2011 (which it said was necessary to attract further foreign long term financing for investments). However, for reasons and in circumstances that are contested in this proceeding, the Lao Government declined to enter into a renewal of the FTA.

23. According to the Claimant, responsible Laotian government officials induced Savan Vegas to believe (and the Savan Vegas management says it did believe so up until March 2012 and beyond) that the FTA in some form would be renewed. The New Tax Code was, it says, not a matter of "legal dispute" within the terms of Article 9 of the Treaty until at least March 2012, when negotiations broke down more than two months after the critical date [17 January 2012] of the acquisition of the investment by the investor of Dutch nationality.

24. The Lao Government says the failure of the Flat Tax negotiations was complete, and must have been obvious to Savan Vegas to be a complete failure no later than November 2011, when the Flat Tax negotiations had clearly been rejected (and the rejection confirmed) by the Laotian Finance Minister. If Savan Vegas or its investors thought the Lao Government breached any *contractual* right to a renewal, any such contract dispute "crystallized" no later than December 2011 when Sanum received notice of the Finance Minister's decision. (The Claimant disavows any contractual claim as relevant to the present jurisdictional objection.)

25. The Lao Government's position is that the FTA extension negotiations and any "legal dispute" over the application of the New Tax Code are inextricably linked. At whatever point the negotiations for a new flat tax agreement failed (which is a major point of disagreement), the New Tax Code would apply as a matter of law to Savan Vegas. Any "legal dispute" in respect of the New Tax Code therefore crystallized concurrently with the end of the Flat Tax negotiations which occurred, in the Lao Government's view, well before the critical date of 17 January 2012. The Claimant therefore has no claim to Treaty protection in respect of the New Tax Code, and this Tribunal has no jurisdiction *ratione temporis* to hear such a dispute.

C. The New Tax Code

26. On 20 December 2011, the Laotian legislature enacted a casino tax of 80% of casino revenues (not profits). The Claimant contends, and the Lao Government denies, that Sanum was repeatedly assured by high Lao Government officials that this Act was never intended to apply to Savan Vegas. The purpose of the casino tax, the Claimant says it was assured by high ranking Laotian officials, was to discourage new entrants into the Laotian gambling industry, not to penalize established businesses, such as Savan Vegas.

27. The Lao Government, for its part, points out that the New Tax Code makes no exception for Savan Vegas. The New Tax Code, as an exercise of its sovereign power, applies to Savan Vegas according to its terms. Its potential application was known (and disputed) by Sanum and its principals before the Treaty became applicable to the

Parties. That is why Sanum was anxious to obtain the FTA extension. The "legal dispute" therefore predated the entry into force of the Treaty between the Parties.

28. The Claimant responds that as the Flat Tax negotiations were continuing up to and including March 2012, neither Savan Vegas nor its investors, Sanum and the Claimant, had any reason to believe that there was any prospect of the application of the "confiscatory" casino tax of 80%, plus 10% VAT, to them. They had been assured otherwise. There was therefore no legal dispute capable of giving rise to a Treaty claim prior to the acquisition of Dutch nationality in Aruba on 17 January 2012 by the investor.

D. Relations Deteriorate Between Sanum and ST (its Laotian Co-venturer)

29. In the fall of 2011, relations between Sanum and ST deteriorated sharply. It is the Claimant's position in this arbitration that the Respondent, the Lao Government, took active steps to advance ST's interest at Sanum's expense, including complicity in the closure of the Thanaleng Slot Club and the sequestration of Sanum's slot machines. The position taken by the Claimant in its Notice of Arbitration dated 14 August 2012 was as follows:

> 42. Here ST has played the role of favored local, while members of the Respondent's justice, culture and revenue ministries, along with its courts and even the Prime Minister's Office, have shared the role of abettor and expropriator. Indeed, Sanum's story may have been worse, given its discovery of how the President of ST, Sithat Xaysoulivong and the Vice President of the Republic, Bounnhang Vorachith, are in-laws. [Its] officials are actually related as family to one and possibly more of the very Government officials who have been orchestrating the steady erosion of Sanum's rights and assets within the Lao PDR.

In this context, the Claimant alleges an array of measures initiated by the Lao Government beginning in April 2012, including what the Claimant regards as unfair and oppressive audits of Savan Vegas, resulting in tax claims which the Claimant says are invalid but, being unpaid, led to the freezing of Sanum's bank accounts in Laos. The series of Lao Government measures, the Claimant says, was calculated to deprive Sanum of its investment in Laos. The application of the New Tax Code rate of 80% on

revenue is part and parcel of the Lao Government's continuing policy of discrimination and oppression, the Claimant says.

30. The Respondent, for its part, says that Sanum had for years been operating its gambling operations using impenetrable accounting procedures, and in some respects, illegally, making it impossible for the Lao Government to assess their real profitability (and thus, perhaps, to settle on a realistic rate of "Flat Tax" for the future). As counsel for the Lao Government put it at the 6 January 2014 hearing:

> [The Claimants] decided, for their own reasons, that they would put all their money into Thailand; well, they had been putting their money in Thailand for the last five years. And it is illegal, it is against the law in Laos for any Lao corporation to have a bank account outside the country, and they had seven bank accounts outside the country for the last five years. We can tell from some of the documents we received from Ernst & Young that in one of those bank accounts in 2011, a year before the "freezing order", they put $11 million into a Thai bank account. That's against the law. (Transcript, pages 19-20).

31. These extracts provide the flavour of the broader dispute, and the facts will have to be decided in due course, but, for the purposes of the Lao Government's objection to jurisdiction, the only facts that have to be determined are those that relate to the existence and timing of the legal dispute in relation to the application of the New Tax Code to the Claimant's investments.

E. Public Meetings and Discussion about Amendments to the Tax Code

32. The Lao Government insists, but the Claimant denies, that by the spring of 2011 Sanum must have been aware of proposed amendments to the Tax Code that would increase the tax rate applicable to casinos not covered by an FTA.

33. In April 2011, the Tax Department sent invitations to the largest businesses in Laos to attend a seminar/public meeting to discuss potential changes to the Tax Code.[3] The seminar/public meeting actually took place on 11 May 2011 and was attended by approximately 300 people. The handouts included a list of proposed new rates – the excise rate for gaming revenues was proposed to be raised to 25%.

[3] Exhibit RE-01, ¶ 6.

34. Ms. Manivone Insisiengmai, Director of the Laotian Tax Department, was the keynote speaker. Time was made available for questions and public comment.

35. The Lao Government says that Sanum and Savan Vegas were invited to the meeting, but cannot state for a fact whether they attended the meeting.[4]

36. On 20 June 2011, DFDL, a regional law firm with an office in Vientiane, held a seminar to provide information to about 100 clients and potential clients about the proposed New Tax Code, and about investment treaties more generally. The Claimant says that Sanum was not a DFDL client at the time, had no notice of the meeting and did not attend it.

37. In June 2011, at its semi-annual meeting, the Laotian National Assembly proposed to amend the excise tax to increase the rate on gambling revenue to 60%. The amendment was not adopted into law. However, the existence of this proposal was publicly known. The next session of the Laotian National Assembly was to be held in December 2011.[5]

38. The Claimant says any public discussion of changes to the tax code was not of interest to Sanum or Savan Vegas, which expected to sign a new Flat Tax Agreement.

F. Negotiations for a Renewal of the Sanum FTA

39. As stated earlier, the FTA between "the Tax Department" and Sanum covers the 5 year period beginning, January 2009 and provides in Article 5 as follows:

> The duration of this contract is for the period of 5 (five) years and valid starting from 01 January 2009 up to 31 December 2013. The lump sum payment of tax is considered as a trial for the first 5 year period, in case of business growth and income has been increased on the basis of certified existing data, the two Parties will discuss for further improvement of the contract as to comply with the real income of the business and the amount of tax payment will be reconsidered. (Emphasis added)

[4] Exhibit RE-04.

[5] Exhibit RE-01, ¶ 9.

40. The Claimant says the FTA was not envisaged as a one-time arrangement, but as a 5-year "trial" contemplating "further *improvement* [not termination] of the contract" when "the amount of tax payment will be reconsidered."

G. Government Notice 1121

41. On 10 June 2011, the Lao Government Secretariat in the Prime Minister's office issued what the Respondent calls a "decision," No. 1121 ("Notice 1121"),[6] which refers to the Sanum FTA and the "trial period" and then states the following:

> … After the end of the trial period, the Parties shall comply with principle as prescribed in the main agreement and the laws." (Emphasis added)

42. The Lao Government says Notice 1121 manifested a decision that Savan Vegas's FTA would not be extended after the trial period of five years. It says that "most" of the subsequent documents passing between the Parties and within the Lao Government dealt with Sanum's unsuccessful efforts to have this 10 June 2011 decision reversed.[7] The Claimant says document 1121 is not, and does not pretend to be, a "decision." The operative part of document 1121 (at least in the English translation) is ambiguous. The reference to "the principle as prescribed in the main agreement" could be taken as referring to the renewal negotiations explicitly contemplated in Article 5 of the FTA. Moreover, it seems to misstate the content of Sanum's then current FTA.

43. When Sanum received a copy of document 1121 on 16 July 2011, the Claimant says it did not understand it to be a "decision." Discussions with the Lao Government continued in respect of the proposed renewal of the FTA.

H. The Sequel to Notice 1121

44. On 20 June and 22 June 2011, the Ministry of Planning and Investment invited several Ministries and Departments, including the Tax Department of the Ministry of Finance,

[6] Exhibit RE-05.

[7] Respondent's Objection, ¶ 29.

to a meeting with Sanum. The meeting was called "in light of the Notice No. 1121 of June 10, 2011."

45. On 26 July 2011, Sanum itself asked for a meeting with the Tax Department of the Ministry of Finance to discuss the FTA, "following the Notification from the Government's Secretariat No. 1121, dated 10 June 2011."[8]

46. On 4 August 2011, Ms. Manivone addressed a memo to the Minister of Finance recommending that the Minister seek guidance from the Prime Minister's office on extending the Sanum FTA. Referring to Notice 1121, she stated the Tax Department's position that the FTA should be extended because the Tax Department lacked the capacity to audit a gambling casino and because two other casinos in Laos had FTAs.[9] Ms. Manivone's 4 August 2011 memorandum to the Minister of Finance states in part in the English translation as follows:

> In response to the request from Savan Vegas and Casino Ltd., the Tax Department is of the view that:
>
> 1. For Casino and slot machine businesses, the company shall pay Lump Sum Tax as we lack experience in the management and control of this kind of business. If the company is requested to pay taxes according to its accounting holding, the collection of the revenue might be less than lump sum. Like LaoYuan Ltd., as mentioned above, casino business is a form of gambling business that uses cash and does not provide receipts as evidence for accounting controls and it is easy for tax evasion.
>
>   For other businesses (besides casino) the taxes shall be paid according to the accounting holding…
>
> 2. With regard to the request from Savan Vegas for Lump Sum Tax, **we agree with the request but we are of the view that the period for Lump Sum is too long and we cannot make precise predictions for the future.**
>
> 3. This request is made in a context of business extension with the investment in hotel construction which has reached an advanced stage and will continue to move ahead. For that reason, the

[8] Exhibit RE-09.

[9] Exhibit RE-10.

> Company is requesting to pay more taxes than it used to do in the past but we are of the view that the taxes are still not high enough. Therefore, **the Tax Department suggests that, every 5 years, we should ask for 5% more of what the company is proposing** but the amount should be close to the amount of taxes paid by other companies to the Government with the following breakdown:
>
> *[breakdown set out in Exhibit RE-05 omitted]*
>
> With respect to the request from the company, an **advice from the Prime Minister should be sought** for his further consideration and actions based on the attached report.

This report has been prepared for your information and further guidance.

Director General of Tax Department

Ms. Manivone Insisiengmai (Emphasis added)

47. On 5 August 2011, Mr. Baldwin, Mr. Jordahl (then a Sanum VP, and a lawyer) and others from Sanum met with Ms. Manivone and her staff. Ms. Manivone reported that she and the Tax Department found Notice 1121 to have misconceived at least in part the arrangements with Sanum. The Tax Department supported the extension of Sanum's FTA on adjusted terms. Mr. Baldwin was given a copy of the 4 August 2011 memo (supra). The FTA recommendation is recorded on 16 August 2011 in the minutes prepared by Ms. Manivone of the meeting of 5 August 2011.[10]

48. On 23 August 2011, Ms. Manivone wrote to the Minister of Finance to "report on the meeting with Savan Vegas to discuss about the directive of the Government Secretariat pursuant to the Notification No. 1121." After reciting the tax arrangements with other casinos in Laos, Ms. Manivone states:

> The tax officers do not have experience in the audit and cannot identify the source of revenue and expenses of this particular type of business. [T]o ensure uniformity throughout the country all casinos are subject to

[10] Exhibit RE-11.

> FTA because we have no experience. **Therefore we propose that the FTA be extended.** (Emphasis added) [11]

I. Incorporation of the Claimant in Aruba, The Netherlands Antilles

49. On 17 July 2011, Mr. Richard Pipes, Vice President of Sanum, recommended to John Baldwin, the CEO, that Sanum undertake a corporate restructuring under a Dutch entity to take advantage of the Dutch/Lao Bilateral Investment Treaty ("BIT") (Pipes II, para. 7). The Aruba company would become the new owner of Sanum and acquire 100% of Sanum's Lao investment.

50. The reorganization proceeded at a leisurely pace. On 29 December 2011, the Sanum organization sent to IMC in Aruba a payment of $5,995 to establish Lao Holdings.[12]

51. On 17 January 2012, IMC used an off the rack company named Mula Blou Holdings N.V., to form Lao Holdings N.V. in Aruba.[13]

52. The Respondent says that Sanum did not inform the Lao Government Ministry of Finance or the Prime Minister's office that it had created a Netherlands company to acquire Sanum's investments.

J. The Minister of Finance Rejects Renewal of the Savan Vegas FTA in Document 0772

53. On 24 August 2011, the Minister of Finance informed Ms. Manivone that the Tax Department should hire an expert to advise it on how to audit and tax a casino operation.[14]

54. On 14 September 2011, the Tax Department published a new draft of the proposed revision of the Tax Code based upon the proposal of the Laotian National Assembly in its June session to raise the excise tax for casinos to 60% of revenue.[15]

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[11] Exhibit RE-12.

[12] Exhibit RE-16.

[13] Exhibit RE-18.

[14] Exhibits RE-01, ¶ 18; RE-12, notes.

[15] Exhibit RE-13.

55. **On 28 November 2011, Ms. Manivone sent Sanum a one page letter stating that the Minister of Finance would not approve the extension of the FTA, but that when the present agreement expired on 31 December 2013, "Savan Vegas and Casino Co. Ltd. are to pay tax duties according to the regulated law on tax."**[16] However, the Lao Government acknowledged that any disposition of the Sanum application would be subject to the approval of the Prime Minister's office.[17]

56. On 20 December 2011, the Laotian National Assembly passed the New Tax Code, raising the excise tax on casino revenue to 80% of revenue.

57. On 28 December 2011, Mr. Pipes wrote a letter to the Prime Minister requesting an extension of the FTA. He says his proposal was based on what he understood from Ms. Manivone would be an acceptable schedule of tax payments.[18] Mr. Pipes was in attendance at the hearing but, by arrangement between counsel, he did not provide oral testimony.

58. On 11 January 2012, the Prime Minister's office directed the Minister of Finance to deal with the 28 December 2011 request from Mr. Pipes.

59. On 9 February 2012, the Deputy Minister of Finance was briefed on the latest Savan Vegas FTA proposals:

> Tax Department respectfully request you to review the report draft on the Flat Tax payment requested by Savan Vegas and Casino Co., Ltd. from 2014-2054 **to be reported to Prime Minister for consideration.** Tax

[16] Exhibit RE-14. The Ministry of Finance stated as follows:

> Department of Tax hereby informs you regarding the Flat Tax Payment of Savan Vegas and Casino Co., Ltd. As follows:
>
> 1. Authorize Savan Vegas and Casino Co., Ltd. to act according to Agreement on Flat Tax Payment until expiration (until 31/12/2013)
> 2. After the expiration of Agreement on Flat Tax Payment (after 2013) on, the **Savan Vegas and Casino Co., Ltd. to pay tax duties according to the regulated law on tax**.
>
> Therefore, issues this notification for your acknowledgement and to undertake.
>
> Tax Department, Director
>
> Manivone Insisiengmai (Emphasis added).

[17] Mr. Bounnam's First Witness Statement, ¶ 11.

[18] Exhibit RE-15.

> Department has completely amended to such report draft as you instructed on 8/2/2012 including the annexes showing the figures of tax obligation to be paid from 2014-2054 made by Savan Vegas and Casino Co., Ltd. attached herewith. [19] (Emphasis added).

Nothing in the 9 February 2012 document indicates that the Lao Government officials considered the door to be closed to a renewal of the FTA on terms to be agreed to.

60. On 21 March 2012, there was a high level meeting attended by both the Prime Minister and the Deputy Prime Minister as well as representatives from other Lao Government departments. The Minutes of the meeting were filed with this Tribunal on 6 January 2014 as Exhibit C-332. There is no reference in the Minutes to any earlier Lao Government "decision" taken in document 1121 of 10 June 2011 from the Prime Minister's office, or document 0772 of 28 November 2011 from the Minister of Finance. It appears that there was a discussion in the Prime Minister's office meeting of the merits of the Claimant's proposal, which **according to the Minutes of the 21 March 2012 meeting** was rejected in the following terms:

> Regarding the proposal by Savan Vegas and Casino Company, Ltd. to pay a flat tax during the years 2014 to 2054, the meeting agrees as follows: 3.1. Continue to carry out the provisions of the contract between the Government of the Lao PDR and Sanum Investments Company, Ltd. (Savan Vegas and Casino Company, Ltd.) dated August 10, 2007. **When the period specified in the contract for payment of flat tax ends, the contract is to be revised to conform to the Tax Laws of the Lao PDR.**
>
> Regarding payment of dividends from casino income, they are to be divided by the formula of 30% for the state and 70% for the investors. The 70% is to be divided according to the proportion of shares held.[20]

61. This appears from the file to be the end of the written record of negotiations between the Parties concerning the renewal of the FTA.

[19] Exhibit C-319.

[20] Exhibit C-332.

III. A GENERAL APPROACH TO THE TRIBUNAL'S JURISDICTION

A. Prerequisites for the Tribunal's Jurisdiction

62. As was noted above, the Claimant is a company incorporated under the laws of Aruba, The Netherlands. Article 13 of the BIT provides that in the case of The Netherlands the term "national" under BIT Article 1(b)(ii) shall apply to enterprises incorporated in Aruba. Hence, Lao Holdings N.V. is a national of The Netherlands, which has been an ICSID Contracting State since October 14, 1966. Laos is not an ICSID Contracting State. As such, this dispute was brought under ICSID's Additional Facility Rules. The Additional Facility establishes that the ICSID Secretariat may administer a proceeding between a State and a national of another State in the following instances, among others:

a. "conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment 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; …"[21]

63. Article 4 of the ICSID-AF Rules establishes, in relevant part:

"(1) Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.

(2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the

[21] Article 2(a) of the ICSID-AF Rules.

event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted…"

64. In the present case the Tribunal must examine its jurisdiction in light of the above Articles of the ICSID-AF Rules and the BIT. Under this analysis, for the Tribunal to have jurisdiction four conditions must be satisfied:

- first, a condition *ratione personae*: one of the parties to the dispute must be a Contracting State or a national of a Contracting State, while the other must not be a Contracting State or a national of a Contracting State ;
- second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
- third, a condition *ratione voluntatis*: the parties must consent in writing that the dispute be settled through ICSID-AF arbitration;
- fourth, a condition *ratione temporis*: the ICSID-AF Rules and the instrument including the arbitration clause must be applicable at the relevant time.

65. No objection is taken to the Tribunal's jurisdiction over the Parties or the subject matter of the claim. Nor is the existence of the consent to arbitration of both Parties contested. The Lao Government's objection is taken solely to jurisdiction *ratione temporis.* According to the Lao Government, the investor was not a national of The Netherlands when the dispute over the New Tax Code arose. In its view, the "legal dispute" over the application to Savan Vegas of the New Tax Code arose no later than 16 December 2011 when the Claimant received formal notice from the Prime Minister's office that the FTA would not be renewed. It followed, the Lao Government contends, that the ordinary law governing taxes would apply from and after the expiry of the five year FTA on 31 December 2013. The "legal dispute" can and did arise before any taxes became due or payable. It arose more than a month before the Claimant was incorporated in Aruba as an opportunistic device to provide Sanum with access to the rights and remedies afforded by The Netherlands/Laos Treaty.

B. Burden of Proof

66. The Respondent acknowledges that, while "the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled and that the facts on which its jurisdiction can be based are proven",[22] in terms of the present jurisdictional objection, the Respondent accepts the burden of proving that the "legal dispute" arose before the critical date.[23]

67. In particular, the Respondent accepts the onus of establishing (i) that a legal dispute existed and (ii) did so before 17 January 2012 and that the event(s) giving rise to the dispute were (iii) neither continuous nor (iv) composite.

C. Abuse of process distinguished from objection to jurisdiction *ratione temporis*

68. While the Lao Government contends that Sanum's "forum shopping" was an abuse of proper Treaty procedure, it does **not** make the argument that the investor's acquisition of Dutch nationality was an abuse of process that entitles the Lao Government to a dismissal of this entire arbitration. The Lao Government's objection to the tax element of the claim relies entirely on the general principle of non-retroactivity in the application of international treaties. The sole asserted basis of denial of the jurisdiction of the Tribunal over the New Tax Code issue is the principle of *ratione temporis.*

69. The Tribunal wishes to underline the distinction between these two quite different forms of objections. The *rationale* for the doctrine of abuse of process was succinctly set out in *Phoenix Action Ltd. v. Czech Republic,* ICSID Case No. ARB/06/5 as follows:

> The evidence indeed shows that the Claimant made an "investment" not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic

[22] Legal Authority RA-01, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (hereinafter "*Phoenix*"), ¶ 64.

[23] The Respondent cites *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012 (hereinafter "*Pac Rim*"), ¶ 2.13: "The Tribunal agrees that the burden lies on a claimant who asserts a positive right **and on a respondent who asserts a positive answer to the claimant**." (Emphasis added)

> activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.
>
> (…)
>
> … It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. It is indeed the Tribunal's view that to accept jurisdiction in this case would go against the basic objectives underlying the ICSID Convention as well as those of bilateral investment treaties. The Tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect …[24]

70. The Tribunal considers that it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the "legal dispute," as submitted by the Respondent.

71. The Respondent the Lao Government says the award in *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 (2010)[25] is dispositive in its favour due to the factual similarity with the case at hand, although in point of law, the Tribunal's decision in that case turned explicitly on an allegation of abuse of right. In fact, the tribunal in that case essentially ruled that it is an abuse to change nationality after a dispute has arise, but that no such abuse exists when the change of nationality has occurred after the dispute has arisen, in which case the rules of *ratione temporis* application of the Treaty aloow the claim to be heard by the arbitral tribunal.

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[24] *Phoenix* ¶¶ 142 and 144.

[25] Legal Authority RA-04, *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela* (formerly *Mobil Corporation and others v. Venezuela*), ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.

72. It was shown in that case that Mobil had made substantial investments in Venezuela from 1999 to 2005. In 2004, Venezuela raised the royalty tax rate from 1% to 16.66 %. Mobil said it was "surprised" at that development. In February and in May 2005, Mobil wrote to the Government complaining of the rise in tax rates. Then in June 2005, Venezuela raised the rate to 30% by Ministerial decree and introduced a bill into the legislature to raise it further to 50%. Mobil wrote on 20 June 2005 that the recent raise "has broadened the investment dispute." It requested negotiations to "reach an amicable resolution of this matter." The Tribunal concluded that: "It results from those letters that in June 2005 there were already pending disputes between the Parties relating to the increase of royalties and income taxes decided by Venezuela." Thereafter, "on 27 October 2005, Mobil created a new entity under the laws of the Netherlands ..." That entity then acquired the Mobil companies that had been engaged in Venezuela and "the Dutch Holding Company was thus inserted into the corporate chain for the Cerro Negro and La Ceibo projects."

73. On these facts, the *Mobil* Tribunal observed:

> 203. As recalled above, the restructuring of Mobil's investments through Dutch entity occurred from October 2005 to November 2006. At that time, there were already pending disputes relating to royalties and income tax. However, nationalisation measures were taken by the Venezuelan authorities only from January 2007 on. Thus, the dispute over such nationalisation measures can only be deemed to have arisen after the measures were taken.
>
> 204. As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal **as far as it concerned future disputes.** (Emphasis added)

74. The Tribunal then flagged the important distinction between the abuse of process doctrine and an objection to jurisdiction *ratione temporis.* As to abuse of process, the Tribunal stated:

> 205. With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in

> order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs… (Emphasis added).

75. However, as to an objection to jurisdiction *ratione temporis*, the *Mobil* Tribunal continued:

> … the Claimants seem indeed to be conscious of this, when they state that they "invoke ICSID jurisdiction on the basis of the consent expressed in the Treaty only for disputes arising under the Treaty for action that the Respondent took or continued to take after the restructuring was completed. (Emphasis added)

76. The Tribunal in *Pac Rim Cayman LLC v. Republic of El Savador*, ICSID Case No. ARB/09/12, explained clearly that the time frame corresponding to a finding of abuse of process is not the same as the time frame corresponding to an objection *ratione temporis*. **More precisely, if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process, but for an objection based on *ratione temporis* to be upheld, the dispute has to have actually arisen before the critical date to conform to the general principle of non-retroactivity in the interpretation and application of international treaties.**

77. As far as abuse of process is concerned, the *Pac Rim* tribunal explained:

> 2.99 … In the Tribunal's view, the dividing-line occurs when the relevant party **can see an actual dispute or can foresee a specific future dispute as a very high probability** and not merely as a possible controversy. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances, as in this case. As already indicated above, the Tribunal is here more concerned with substance than semantics; and it recognises that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant **grey area**. (Emphasis added)

78. The solution is different when the issue is based on an objection to jurisdiction *ratione temporis*:

> 2.101. **Ratione Temporis**: The Tribunal considers that this approach as regards the Abuse of Process issue is materially different from the approach applicable to the Ratione Temporis issue, where both Parties relied on the general principle of non-retroactivity for the interpretation and application of international treaties.
>
> …
>
> 2.104. Where there is an alleged practice characterised as a continuous act … which began before 13 December 2007 and continued thereafter, this Tribunal would have jurisdiction ratione temporis over that portion of the continuous act that lasted after that date, regardless of events or knowledge by the Claimant before 13 December 2007. The Tribunal concludes that this solution is different from that reached in its analysis of the Abuse of Process issue, as here explained.
>
> …
>
> 2.107. In the Tribunal's view, the relevant date for deciding upon the Abuse of Process issue must necessarily be earlier in time than the date for deciding the Ratione Temporis issue.

79. In the present case, as in *Phoenix*, it is difficult to discern any fresh economic investment arising out of the restructuring that would advance the purposes of the Treaty which, according to its preamble, exists "to extend and intensify the economic relations between th[e Parties], particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party."[26]

80. Article 31(1) of the *Vienna Convention on the Law of Treaties*, provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context **and in the light of its object and purpose**." The Lao Government says the Claimant has simply taken over the existing investment of Sanum, the Macaon company, and its insertion into the ownership structure was for the purpose of legal tactics, not investment.

81. However, in this present case, the Lao Government does **not** advance the argument that, as was the case in *Phoenix*, the abuse of process ought to result in a dismissal of the entire arbitration. Its jurisdictional concern is solely with jurisdiction *ratione*

[26] Legal Authority CA-19.

temporis, i.e. the attempt to give retroactive effect to the Treaty at the instance of a party not entitled to its protection. At paragraph 20 of its Objection dated 15 October 2013, the Lao Government states as follows:

> Subsidiarily, Respondent argues that Claimant has proceeded in bad faith in prosecuting its claim in the fashion it has done, and asks the Tribunal to find as a fact that the proceeding with respect to the tax dispute constitutes an abuse of process. **Respondent notes that it does not argue**, as did Respondent in *Pac Rim Cayman LLC v The Republic of El Salvador*,[27] **that "abuse of process" is an independent ground for a finding of a lack of jurisdiction. Rather Respondent urges the Tribunal to make a finding on abuse of process solely for the purpose of allocating fees and costs at the end of the arbitration**, following the guidance of the Tribunal in *Phoenix Action Ltd. v. The Czech Republic*, which awarded all fees and costs to the Respondent in that case based upon a finding of claimant's abuse of the international investment arbitration system. (Emphasis added)

82. The Lao Government's position was reaffirmed on 6 January 2014 at the hearing on the jurisdictional objection. The Lao Government seeks only that the Claimant's alleged "forum shopping" be taken into account in the disposition of arbitral costs.

83. In other words, in the present case, the question could have been discussed whether a dispute was foreseeable before the change of nationality, if an objection had been raised on the basis of an abuse of process. However, as the only objection to jurisdiction was based on *ratione temporis* issues, the only task of the Tribunal is to determine the moment when the dispute arose. If that moment – "the critical date" – is before the change of nationality, then the Tribunal enjoys no jurisdiction; if, to the contrary, the critical date is after the change of nationality, then the Tribunal can assert jurisdiction.

IV. THE TRIBUNAL'S ANALYSIS OF THE OBJECTION TO JURISDICTION *RATIONE TEMPORIS*

A. The Applicable Texts

84. Article 9 of the Lao/Netherlands Treaty deals with "legal disputes" and provides as follows:

[27] *Pac Rim, supra* note 23.

> **Article 9** [legal dispute]
>
> Each Contracting Party hereby consents to submit any ***legal dispute*** arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States. (Emphasis added)

85. While there is no explicit temporal limit written into Article 9, such a time limit does appear in relation to the making of a "claim" under Article 10:

> **Article 10** [claim]
>
> The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments, which have been made before that date, but they shall not apply to **any *claim*** *concerning an investment, which arose before its entry into force.* (Emphasis added)

86. The articles relevant to the determination of the present jurisdictional objection draw a distinction between a "legal dispute" and a "claim." This is not necessarily relevant, as pointed out by the tribunal in *Emilio Agustin Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, 16 *ICSID Review – F.I.L.J.* 1, 33, para. 97 (2001):

> While a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim. The critical date will in fact separate, not the dispute from the claim, but the dispute from prior events that do not entail a conflict of legal views and interests.

B. The Lao Government's Position on its Jurisdictional Objection

87. The Lao Government's objection to the inclusion of the New Tax Code claim in this arbitration may be summarized as follows:

(a) on 18 March 2011, Sanum made a request to extend its FTA;

(b) on 10 June 2011, the Prime Minister's office rejected that request [by Notice 1121], thus requiring Savan Vegas casino to pay taxes after the expiry of the FTA at the rates in the tax code (that is when the tax dispute became a "fact");

(c) Sanum tried through five months of subsequent negotiations to have that decision reversed;

(d) Sanum was aware from 5 August 2011 that two other casinos in Laos had FTAs;

(e) Sanum's negotiations attempting to reverse the Prime Minister's office's decision of 10 June 2011 ended, in any case, on 28 November 2011 when the Finance Department notified Sanum [by Document 0772] that Sanum's investments would be subject to the tax code upon expiry of the current FTA;

(f) the New Tax Code was enacted on 20 December 2011, establishing that the new rate for the excise tax on casino revenue would be 80%, thus fixing the "injury" alleged in these proceedings; and

(g) the "legal dispute" thus predated the Claimant's acquisition of Dutch nationality;

(h) the Claimant thus has no recourse under the Treaty.

88. In response to the Claimant's contention that the dispute had not crystallized before the change of nationality, counsel for the Lao Government contends that there were no "negotiations" with anyone in a position of authority in 2012. Sanum's letter of 28 December 2011 to the Prime Minister's office, it says, was merely a unilateral offer to negotiate. It is obvious, counsel for the Lao Government concludes, that a claimant cannot delay the formation of a "legal dispute" by writing unilateral letters of "proposals" that are meaningless.

89. Be that as it may, the Lao Government contends that, when Lao Holdings was incorporated in Aruba on 17 January 2012, the "legal dispute" over the application of the New Tax Code had plainly been disposed of adversely to Sanum by the Lao Government, and the Treaty therefore has no application. Counsel for the Lao Government put the point as follows:

> The negotiations to attempt to reverse the Prime Minister's Office's June 10, 2011 decision ended on November 28, 2011 when the Tax Department notified Sanum it would be subject to the tax code; and… the new Tax Code was enacted on December 20, 2011, establishing that the new rate for the excise tax on casino revenue would be 80%, thus fixing the "injury" alleged in these proceedings. The operative "*disagreements on points of law and facts, conflict of legal views or of interests"* all arose before the "crucial date" of January 12 [*sic*, should say 17], 2012.[28]

90. Hence, the Lao Government says the tax issue not only crystallized prior to the critical date, but was resolved against the Claimant (at that time unprotected by the Treaty) by the Lao Government prior to the critical date.

C. The Claimant's Response to the Jurisdictional Objection

91. The Tribunal notes that the Claimant disavows any *contractual* claim arising out of the Lao Government's refusal to extend the FTA or what the Claimant says are the Lao Government's failures to live up to its alleged promises to renegotiate the FTA.

92. Equally, the Claimant does not contest the enactment of the New Tax Code, as such. At the enactment stage there was no "legal dispute." [29]

93. Having said that, the Claimant offers a "cascade" of responses, both legal and factual, to the Lao Government's objection.

94. **Firstly,** the Claimant says that under the Treaty there is no time limit on when an investor can take a "legal dispute" to arbitration. Accordingly, it does not matter if the "legal dispute" over the application of the New Tax Code arose in 2011 or 2012.

95. The Claimant argues that the difference between the wording of Article 9 and 10 shows that the framers of the Treaty put their minds to "temporal" issues, and the absence in Article 9 of an explicit time limit comparable to Article 10 must be given effect.

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[28] . (Respondent's Objection, ¶ 22)

[29] *ConocoPhillips Petrozuata B.V.,ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013 and citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Award, 8 May 2008.

96. The Claimant insists that it does not place any reliance on Article 10. The Claimant invokes only the "legal dispute" provisions of Article 9.

97. **Secondly,** and in the alternative, if the Treaty is interpreted as containing an applicable temporal limitation, the "legal dispute" over the *application* of the tax law did not arise until after the negotiations for the renewal of the FTA collapsed (at the earliest) in March 2012, well after the critical date. The Claimant cites the *Micula* tribunal for the proposition that "… the critical date is when the dispute arose rather than the date when events and actions that may have given rise to the dispute took place."[30]

98. In his Fourth Witness Statement, sworn on 25 November 2013, Mr. Baldwin acknowledges receipt on 16 December 2011 of the Ministry of Finance rejection, but testifies that the rejection at the Ministerial level was understood by Sanum to be simply a prelude to a review by the Prime Minister. He testified to the following conversation with Ms. Manivone after receipt of Notice 0772, which, in his view, simply confirmed that the locus of negotiations had now shifted from the Ministry of Finance to the Prime Minister's office:

> Notice No. 0772 informed us that the Government had rejected our FTA extension proposal. Although this notice was dated 28 November 2011, we did not receive it until 16 December 2011 – this again is typical of how the Lao Government operates. When we received this Notice, I was surprised. I spoke with **Madame Manivone** about it, and she explained that she was instructed by the Minister of Finance to issue it. **She assured me, however, that the FTA would nonetheless be extended, and that she would help guide us through the process.** She explained that **we would now have to go through the Prime Minister's Office** to obtain approval for the FTA extension, and that we should resubmit our proposal directly to the Prime Minister. So, later that month, we submitted a new proposal to extend the FTA – containing the same proposed flat tax payments as those recommended by Madame Manivone in her 4 August 2011 report to the Minister of Finance – to the Prime Minister. (para. 20, Emphasis added)

99. The inevitable question, of course, is whether Mr. Baldwin correctly recorded his conversation with Ms. Manivone, and if so her intent in providing what he took to be

[30] *Ioan Micula , Viorel Micula and others v. Romania,* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶ 155.

assurances. The Lao Government did not adduce any evidence from Ms. Manivone to dispute Mr. Baldwin's evidence. Mr. Baldwin was present at the 6 January 2014 hearing in respect of the jurisdictional objection but by agreement of counsel (as will be explained) Mr. Baldwin did not testify and was not cross-examined. His evidence was taken as read.

100. The Fourth Baldwin Statement continued:

> Throughout early 2012, we believed that our latest proposal for extension of the FTA was under active consideration by the Government. Indeed, I discussed the extension of Savan Vegas's FTA on multiple occasions during this time period with **Dr. Sinlavong, the Minister to the Prime Minister's Office.** (Emphasis added)

101. The Lao Government filed an affidavit by Dr. Sinlavong dated 9 December 2013 stating that "Mr. Baldwin has contacted me many times to discuss his investments in Laos" (para. 4). His redacted statement does not disclose the content or timing of those discussions.[31] The Claimant requested that Dr. Sinlavong be produced at the hearing of 6 January 2014 for cross-examination, but Dr. Sinlavong did not appear. Counsel for the Lao Government advised the Tribunal that Dr. Sinlavong had failed to make a timely visa application to the French Embassy.

102. The Lao Government points out the lack of any written communication from the Lao Government corroborating the version of ongoing "negotiations" testified to by Mr. Baldwin and Mr. Pipes, and it says that the documentation that does exist contradicts rather than confirms their testimony.

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[31] In the Claimant's Rejoinder on Jurisdiction dated 23 December 2013 it is said at ¶ 45:

> 45. In addition, a document produced by Respondent and recently translated by Claimant shows that Dr. Sinlavong – who now claims to "have never spoken to anyone on the issue related to the extension of the flat tax" – *actually issued an official notice calling for Savan Vegas's exemption from the New Tax Law* in March 2012. Notice No. 728/GO, dated 28 March 2012 and signed by Dr. Sinlavong, advised the Ministers of Finance and Planning and Investment: *"When the Flat Tax Agreement expires, the new Agreement must be amended* according to the Law on Tax of the Lao PDR (subject to the accounting entry system)." More specifically, the Notice states that "benefits sharing obtaining [sic] from Casino Income [should be]. . . divided according to the State formula namely 30% and the investor gets 70% of the total income," as an alternative to the 80% demand on revenues established under the New Tax Law.

103. The Lao Government says that the 28 December 2011 "proposal" was not even a good faith offer to negotiate. The yearly payments listed in Mr. Pipes' letter were lower than the 18 March 2011 proposal the Lao Government had previously rejected. In response, Mr. Baldwin testified that:

> Moreover, the terms of the December proposal, as was the case with every proposal, reflected what we were told at the time had the best chance of being accepted by the Lao Government. It makes no sense for us to have submitted a proposal we did not believe in good faith would be accepted by the Lao Government – our goal was to obtain an extension of the FTA. [Statement dated 25 November 2013, para. 22]

104. Moreover**, the Claimant contends that** whatever "legal dispute" existed prior to March 2012 related to the old tax law, which was at a much lower rate, and not to the New Tax Code enacted on 20 December 2011 but which did not come into effect until October 2012, and could not have been applied to the Claimant in any event until the expiry of Sanum's FTA on 31 December 2013, long after the critical date of 17 January 2012.

105. The Claimant argues that the "tax laws of the Lao PDR" mentioned in Exhibit C-332[32] must refer to something other than the New Tax Code because if an 80% tax were imposed on revenue (plus 10% VAT) the next paragraph makes no sense because there would be no dividends to divide.

106. The Claimant, in its 2 August 2013 submission, contends the following:

> In March 2012, after Sanum and Savan Vegas learned that members of the Government were opposed to their latest proposal for extension, they withdrew their proposal. Nevertheless, Government officials continued to state even after that point that agreement on the FTA could be reached before the expiry of Sanum's FTA and the new casino tax would not be applied to Savan Vegas.[33]

107. Also**, according to the Claimant,** the Lao Government did not threaten the Claimant with the new 80% tax on casino revenue until after the Claimant delivered its Notice to Arbitrate herein on 12 August 2012. Prior to that date, there had been "no

[32] Referred to in ¶ 55 of this Decision.

[33] Claimant's Provisional Measures Reply dated 2 August 2013, ¶ 26.

confrontation of the points of view of the Parties" on that legal issue. In its application for Provisional Measures dated 19 April 2013, the Claimant first identified the risk of the application to it of the "80% tax on gaming revenues." On 12 July 2013, the Lao Government affirmed its intention to impose the New Tax Code and stated:

> Absent any proof that a tax would be "confiscatory", claimant is not entitled to Provisional Measures blocking enforcement of a tax passed in a tax code. (para. 1)

108. The Claimant contends that the New Tax Code did not become a "legal dispute" between the Parties until it was raised in 2013 in the context of the Claimant's Request for Provisional Measures.

109. The Claimant says that in the Provisional Measures proceeding, the Respondent asserted for the first time (and the Claimant subsequently denied), that Savan Vegas would be subject to the New Tax Code. Thus, the Claimant argues, the "legal dispute" over the application of the New Tax Code did not in fact crystallize until July 2013. The Order for Provisional Measures dated 17 September 2013 granted a measure of protection to the Claimant from the New Tax Code by way of an escrow arrangement. The terms of the Provisional Measures decision are not otherwise at issue in the present application.[34]

[34] As to the Provisional Measures the Tribunal enjoined:

> *"the Lao Government from (a) demanding that Claimant pay any amounts allegedly due pursuant to the New Tax Law; and (b) instituting or further pursuing any action, judicial or otherwise, to collect any payments Respondent claims are owed by Claimant pursuant to the New Tax Law; (b) enjoins the Lao PDR from taking any enforcement action, judicial or otherwise, to seize or interfere in the operations of the Lao Bao and Ferry Terminal slot clubs based on any disputed tax amounts; (3) enjoins the Lao PDR from taking any action, judicial or otherwise, to freeze or seize funds that Claimant or its related entities place in accounts in the Lao banking system; and (4) these orders are under the condition that the Claimant deposits in an escrow account at a Singapore bank or other bank satisfactory to the parties under arrangements negotiated by the parties and approved by the Tribunal, the amount of US$429,330 on the first day of each month commencing 1 January 2014. (5) enjoins both parties from taking any steps that would alter the status quo ante, or aggravate the dispute."*

On 16 December 2013, the Claimant informed the Tribunal that both Parties had reached an agreement on the escrow arrangements to be established in accordance with the Tribunal's 17 September 2013 Decision on Claimant's Amended Application for Provisional Measures. The Tribunal confirmed this agreement on 23 December 2013.

110. Therefore, it was not until 12 July 2013, according to the Claimant, that the present "legal dispute" arose.

111. **Finally,** the application of the New Tax Code is a *continuing* measure that will affect the Claimant's investments from and after 1 January 2014, and each assessment will give rise to a new claim or legal dispute. It is therefore an issue that the Tribunal should deal with.

112. In any event, according to the Claimant, no "claim" has yet been made against Savan Vegas under the New Tax Code, which did not become law until October 2012, and which could not as a matter of law apply to Savan Vegas until the FTA expired on 31 December 2013 (four days before the hearing of this jurisdictional objection). If, and when a "claim" is made against the Claimant under the New Tax Code, by way of assessment, demand or otherwise, there will arise a "claim" capable of being referred to arbitration (if necessary) under Article 10, but, says the Claimant, no such "claim" is yet in existence.

D. The Tribunal's Analysis of the Claimant's First Response to the Objection *Ratione Temporis:* Namely that the Treaty Contains No *Ratione Temporis* Limitation

113. The Tribunal does not accept the argument that there is no temporal limit in relation to Article 9 and that any party may at any time refer to arbitration "legal disputes" that were dealt with before the investor's accession to the Treaty (leaving aside events that form elements of continuing or composite disputes).

114. The general principle of non-retroactivity is expressed in Article 28 of the *Vienna Convention on the Law of Treaties* as follows:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

115. It cannot be said that the silence of Article 9 with respect to a temporal limit "clearly" manifests a "different intention" apparent on the face of the Treaty.[35] The fact (as the Claimant points out) that Laos and The Netherlands used different language in different treaties does not alter the fact that nothing in *this* Treaty contemplates that investors such as the Claimant could change their nationalities at will by artful corporate restructurings to "forum shop" after a legal dispute has arisen with the same investor on the same issue and had therefore become, in the words of the *Paushok* tribunal,[36] a "discrete event in the course of relations [between the Parties]" that predated the Treaty."

116. The general presumption favours non-retroactivity and in this Treaty the presumption is not displaced by any different intention "apparent" on its face.

117. The Tribunal does not view the Treaty as intending to provide legal weapons to investors for the purpose of re-engaging in a pre-existing legal dispute with the Lao Government.

118. Accordingly, the Tribunal concludes that the Respondent is entitled to raise the objection *ratione temporis* to its assertion of a "legal dispute" under Article 9.

119. The question, therefore, is when did the tax dispute arise?

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[35] In its 1996 Commentaries to the *Draft Articles of the Law of Treaties*, the International Law Commission stated:

> There is nothing to prevent the Parties from giving a treaty, or some of its provisions, retroactive effect if they think fit. It is essentially a question of their intention. The general rule however is that a treaty is not to be treated as intended to have retroactive effects unless such an intention is expressed in the treaty or was clearly to be implied from its terms. (Emphasis added)

[36] *Sergei Paushok and others v. Republic of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 498.

E. The Tribunal's Analysis of the Claimant's Second Response to the Respondent's Objection, Namely that the "Legal Dispute" Over the New Tax Code Did Not Arise Between the Parties Until After the Critical Date of 17 January 2012

1. Definition of a "Legal Dispute"

120. Both Parties accept as appropriate the definition of "dispute" formulated by the Permanent Court of International Justice in the *Mavrommatis* case[37] at page 11:

> A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.

121. To which the tribunal in *Victor Pey Casado v. Chile,*[38] added:

> In order to establish the existence of such a dispute, "it must be shown that the claim of one of the Parties meets obvious opposition from the other." (para. 441)
>
> (;;;)
>
> It is only with the expression and the confrontation of the points of view of the Parties that the dispute is crystallized. (para. 443)

2. When did the dispute arise? The contentions of the Parties and the Tribunal's findings

122. The Claimant contests the Lao Government's position that the end of the FTA renewal negotiations (whatever date that might be) triggered a "legal dispute" about the application of the New Tax Code. The Claimant says the two disputes are distinct and separate. However, the Tribunal agrees with the Lao Government that the issues are linked. In the situation confronting the Parties in 2011 and 2012, Sanum clearly understood that it would be subject to the ordinary law of Laos, including the Tax Code, unless affirmatively exempted by the extension of its FTA. Sanum opposed the application to its investments of the ordinary tax laws on the basis of various alleged Lao Government representations and understandings regarding renewal of the FTA,

[37] Legal Authority RA-05, *The Mavrommatis Palestine Concessions*, PCIJ Ser A No 2, 11 (1924).

[38] Legal Authority CA-12, *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on the Request for Provisional Measures, 25 September 2001.

and assurances from Lao Government officials that it was never their intention to apply the New Tax Code to existing investments such as Savan Vegas. In the Tribunal's view, the link between the FTA extension and the tax issue, while sequential, is clear, with the result that the treatment of the tax aspects of Sanum's business can be considered as a continuous behaviour.

123. Sanum's objective in the negotiations was to avoid the application of the ordinary tax laws. Whether or not at that time Sanum had formulated a detailed challenge to the application of the tax law to its investments and the implication of constantly increasing rates of tax being considered by the legislative power, does not detract from the direct link between a failure of the FTA negotiations and the consequent triggering of the tax dispute.

124. The Parties agree that the test for determining the critical date is objective and that the relevant question is not whether the Lao Government subjectively believed the legal dispute to have arisen, or whether the Claimant subjectively believed it had not, the question is whether the facts, objectively analysed, establish the existence of a dispute and if so at what time did it arise, and was it resolved (as the Lao Government argues) before the Treaty came into force as between the Lao Government and the Claimant?

125. In early 2011, the Ministry of Finance decided to undertake a revision of the Tax Code under the supervision of the Director General of the Tax Department, Ms. Manivone Insixiengmai, as related above.

126. Counsel for the Respondent emphasizes that flat tax agreements are also made to serve the Lao Government's interest, not only investor's. If the Lao Government's assessment of the benefit changes, the *rationale* for the Flat Tax, from its point of view, may disappear.

127. Certainly, Ms. Manivone consistently took the view in her memoranda that the Finance Tax Department had only 15 auditors to audit all the largest companies in Laos and she believed that her department lacked not only the human resources but the expertise to

audit a casino, a cash based business.[39] She pushed hard for a renewal of the Sanum FTA, and made no secret of the Tax Department's views in her dealings with the Claimant.

128. From the Claimant's perspective, it needed certainty about future tax treatment if it were to be able to arrange for long term financing to expand its gambling operations in Laos. The financial prospects of the company, and therefore its potential attraction as an investment, were linked, *inter alia,* to its exposure to an escalation of Laotian taxes over the life of the concession.

129. The evidence shows that, in the months following Sanum's request for a renewal of the FTA, there was disagreement within the Lao Government over the advantages and disadvantages of extending Sanum's FTA.

130. The Prime Minister's office was actively involved in the file at least by 10 June 2011 when it issued Notice 1121. The document, in the Tribunal's view, is ambiguous (as previously discussed). It cannot reasonably be interpreted, on the present state of the record, as a decision rejecting Sanum's request for a new FTA. But it establishes that the *locus* for the making of the final decision was at the Prime Ministerial level.

131. Ms. Manivone, who was a central figure in the Sanum negotiations, does not appear to have treated Notice 1121 as a rejection, and her conduct thereafter (as disclosed by the Lao Government documents) is not consistent with that view.

132. The Lao Government did file a witness statement from Mr. Bounnam Chounlaboudy, who in June 2011 was Director of the Legislative Division of the Tax Department, but it is apparent from his statement that he was only peripherally involved (if at all) in the Sanum negotiations.[40] Mr. Bounnam does describe Notice 1121 as a denial of Sanum's

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[39] Exhibit RE-01, ¶ 10.

[40] Mr. Bounnam's lack of knowledge of relevant events is evident from his witness statement, for example:

> *14. I was aware that Mrs. Manivone had discussions with her staff about the Savan Vegas' request for an extended Flat Tax Agreement during the summer 2011.*
>
> *15. I was aware that Mrs. Manivone directed her staff to write a report addressed to the Minister of Finance. It is dated August 4, 2011.*

request, but his conclusory statement is unsupported by any explanation or analysis of the text (neither the Laotian text nor the English text). In light of the unsatisfactory state of the evidentiary record, the Claimant requested Mr. Bounnam be produced at the 6 January 2014 hearing for cross-examination but he failed to appear.

133. The Lao Government explained that Mr. Bounnam was unable to obtain a French visa because of his last-minute application and the holiday schedule of the French Embassy in Laos.[41] However, in the Tribunal's view, there was no justification for leaving the visa application until the last minute. The hearing date for 6 January 2014 had been fixed more than 3 months earlier by the Tribunal's bifurcation order dated 23 September 2013. It was evident at the 23 September 2013 hearing that there were sharp differences between the Parties on some of the facts central to the Lao Government's own jurisdictional objection. In the absence of a waiver by the Claimant of its right to cross-examine the Lao Government's deponents, it was up to the Lao Government to have its witnesses available for cross-examination either at the hearing or at some prior occasion under arrangements satisfactory to the Parties.[42]

134. In light of Mr. Bounnam's failure to appear, and the lack of any evidence from Ms. Manivone, as well as the lack of clarity in the English text, **the Tribunal declines to treat Notice 1121 dated 10 June 2011 as a "decision" to reject the Sanum application, which could have triggered the dispute which is in front of the Tribunal.**

135. There is no doubt, in any event, that Ms. Manivone and the Tax Department continued to negotiate with Sanum on an open-ended basis.

> *16. I was informed that Mrs. Manivone held a meeting with her staff and Sanum staff on August 5, 2011.*
>
> *17. I was informed that Mrs. Manivone told Mr. Baldwin that she would submit the Tax Department's recommendation directly to the Minister of Finance.*

[41] Email to the Tribunal from Counsel for the Respondent dated Friday, 3 January 2014.

[42] Pursuant to Procedural Order No. 1, and as provided in the IBA Rules (applicable to these proceedings under Section 14.1 of Procedural Order No. 1), any witness whose statement is submitted as evidence is subject to cross-examination.

136. Document 0772 dated 28 November 2011 on the other hand, clearly documents a decision to reject Sanum's application, but only at the level of the Minister of Finance.

137. On the Lao Government's view, the Flat Tax issue was dead as of 28 November 2011 (or at least by 16 December 2011 when Sanum acknowledged receipt of a copy of document 0772). At that point, if not earlier, the Lao Government says, Sanum was exposed to the ordinary tax rate, and any "legal dispute" about the New Tax Code arose at that time – at least a month before the critical date of 17 January 2012.

138. The Tribunal agrees with the Lao Government that, if the Sanum Flat Tax issue were shown to have been concluded in or before December 2011, the "legal dispute" over the New Tax Code ought to be held to have arisen prior to the critical date of 17 January 2012, despite the Claimant's view that greater formality would ordinarily be required to turn a potential legal dispute into an actual legal dispute.

139. However, both Mr. Baldwin and Mr. Pipes have provided sworn testimony to demonstrate a reasonable expectation that the decision of the Minister of Finance was just a stepping stone in a longer process. In his Fourth Witness Statement dated 25 October 2013, Mr. Baldwin testifies:

> Notice No. 0772 informed us that the Government had rejected our FTA extension proposal. Although this notice was dated 28 November 2011, we did not receive it until 16 December 2011 – this again is typical of how the Lao Government operates. When we received this Notice, I was surprised. I spoke with **Madame Manivone about it, and she explained that she was instructed by the Minister of Finance to issue it. She assured me, however, that the FTA would nonetheless be extended, and that she would help guide us through the process. She explained that we would now have to go through the Prime Minister's Office to obtain approval for the FTA extension,** and that we should resubmit our proposal directly to the Prime Minister. So, later that month, we submitted a new proposal to extend the FTA – containing the same proposed flat tax payments as those recommended by Madame Manivone in her 4 August 2011 report to the Minister of Finance – to the Prime Minister. (para. 20, Emphasis added)

140. Mr. Baldwin was available for cross-examination at the 6 January 2014 hearing. Ms. Manivone was not.

141. Mr. Bounnam says in his first Sworn Statement that:

> 22. In January 2012, the Tax Department received a message from the Prime Minister's office, dated January 10, referring to another request from Sanum to extend the FTA. I have reviewed this document.

His redacted Statement sheds no light on what transpired in January 2012. In a further Sworn Statement dated 9 December 2013, Mr. Bounnam refers to work he did in relation to a letter from the Vice-Minister of Finance to the Prime Minister's office dated 10 February 2012 (*i.e. after* the critical date of 17 January 2012). However, if anything, his testimony simply indicates ongoing preparation for the meeting convened by the Prime Minister on 21 March 2012 to discuss Sanum's FTA proposal. Mr. Bounnam's statements raise more questions than they provide answers. This is not to say that Mr. Bounnam is to be disbelieved. However, his evidence is largely based on hearsay, is vague and uncertain in content, and (absent cross-examination) raises too many questions to be relied on by the Lao Government to establish that the FTA negotiations ended in December 2011.

142. Therefore, **the Tribunal does not consider the letter of 28 November 2012 as a "decision" to reject Sanum's application, which could have triggered the dispute which is in front of the Tribunal.**

143. Mr. Pipes' Second Witness Statement sworn 2 August 2013 states that, even after the meeting with the Prime Minister and Deputy Prime Minister on 21 March 2012, Sanum was led to believe that the FTA extension was still a live issue within the Lao Government.

> In March of 2012, we learned that members of the Government were opposed to our most recent proposal to extend the Savan Vegas Flat Tax Agreement, and we withdrew our proposal. But even after March 2012, we continued to believe that we would succeed in coming to an acceptable agreement for extension of the Flat Tax Agreement based on clear statements by Government representatives to that effect. **Because of those statements, and also because of other reassurances we had received from various Government officials that the new casino tax would not be applied to Savan Vegas, we believed that we would eventually resolve the issue presented by the new casino tax before the current Flat Tax Agreement expired.** (para. 11, Emphasis added)

144. Mr. Pipes thus refers to discussions of some sort *after* March 2012. However, Mr. Pipes is not specific about his "sources", nor does he identify the "Government officials" referred to, and this substantially lessens the weight of his testimony. This being said, from a jurisdictional perspective, the question whether the FTA negotiations continued after March 2012 is of little relevance. The Tribunal's concern is with 17 January 2012. In any event, to the extent the evidence of Mr. Pipes on this point was considered by the Lao Government to be of significance, he was present and available for cross-examination at the 6 January 2014 hearing and could have been cross-examined on those issues. This eventuality was avoided by the agreement of counsel, as explained below.

145. However, for present purposes, the Tribunal puts no weight on whatever may subsequently have been said by the anonymous "Government officials" referred to but not identified by the Claimant.

146. **It results from this analysis that it appears to the Tribunal on the analysis of the Claimant's evidence that the dispute arose on 21 March 2012, when the final decision not to grant a new FTA to Sanum was adopted at the highest level, in other words, that the dispute arose after the critical date.** It remains to verify whether the Lao Government has adduced credible contrary evidence on when the dispute arose.

3. The Failure of the Lao Government to Produce Satisfactory Factual Evidence on When a "Legal Dispute" Arose with Respect to the New Tax Code

147. Ms. Manivone would have been able to provide crucial evidence with respect to the Sanum negotiations, and in particular their progress (or lack of it) within the Lao Government, but, despite the Lao Government's initial statement that it would provide a witness statement from Ms. Manivone, none was ever provided to the Tribunal. [43]

[43] Initially, the Tribunal was told no such statement was filed because "Ms. Manivone has left the country on holiday," (16 October 2013) and subsequently, on 11 December 2013, the Tribunal was advised that Ms. Manivone "had to accompany her husband, a Lao senior soldier, to Vietnam on official business."

148. The Respondent instead chose to file witness statements from more peripheral Lao Government officials, including Mr. Bounnam (who as mentioned was not involved in the Sanum negotiations at the relevant time), as well as Mr. Souralay and Minister Sinlavong, neither of whom could shed much light on the actual state of negotiations.

149. On Friday 3 January 2014, three days before the hearing called to consider its own objection to jurisdiction, which had been scheduled three months before, the Respondent Lao Government advised the Tribunal that none of Mr. Bounnam, Mr. Souralay or Minister Sinlavong would be available for cross-examination on their witness statements.

150. As stated, both Mr. Baldwin and Mr. Pipes for the Claimant were available on 6 January 2014 for cross-examination.

151. Eventually counsel for the Parties reached an agreement that the Claimant's witness statements would be taken as read, some of the Laotian witness statements would be redacted, but as redacted would remain in evidence, that the two Laotian witness statements in respect of which the Claimant had waived cross-examination would be entered in full, and that no cross-examination would take place of anybody.[44]

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[44] The arrangement was put on the record in the 6 January 2014 Hearing Transcript, pp. 1-3:

> MR BRANSON: I made a proposal; Mr Rivkin accepted it. I will let him explain it.
>
> MR RIVKIN: Yes, I will explain the proposal and let me explain our thinking about it a little bit as well. The agreement we reached was that because Mr Branson has not arranged for any of his witnesses to be here for cross-examination, he will not cross-examine Mr Baldwin. All of the witness statements may be taken into the record, but Mr Branson proposed that we be able to redact certain portions of the witness statements of the three witnesses who did not appear for cross-examination. We had some back and forth yesterday and agreed on which sections would or would not be redacted. So we can provide -
>
> PRESIDENT: Of the Respondent's witnesses?
>
> MR RIVKIN: Yes. Mr Baldwin's witness statements are in in full.
>
> PRESIDENT: Although he is not being cross-examined?
>
> MR RIVKIN: Although he is not being cross-examined. The two witnesses whom we had decided not to cross, their witness statements are in in full. And the four witness statements by the three witnesses who were not brought for cross-examination can be

152. Nevertheless, counsel agreed that:

> … neither side accepts the truth of what's in the witness statements, even the redacted witness statements, and we will have an opportunity to discuss that in our presentations, of course.

153. The Tribunal, of course, accepts the agreement of counsel with respect to the testimony. As a result of counsel's agreement, the Tribunal does not draw any adverse inferences regarding the witnesses on either side. **However, the Tribunal is still left with the problem of the onus of proof.** Has the Lao Government proven, as it set out to do, that the legal dispute regarding the application of the New Tax Code arose prior to the critical date of 17 January 2012? In the Tribunal's view, the Lao Government has not discharged its onus of proof of the facts.

154. In particular, the Tribunal is of the view that the Lao Government has failed to discharge its burden of proof to establish that the negotiations to renew the FTA had come to an end – and that therefore the application of the "New Tax Code" had become a "legal dispute" between the Parties as of the critical date – namely 17 January 2012. In fact, on the contrary, it would appear on the current record that the Sanum Flat Tax proposal was very much alive at the meeting in the Prime Minister's office on 21 March 2012.

155. A similar situation existed in the *Pac Rim* case, where negotiations continued after the date when the Claimant considered that a dispute had arisen because of a "final" refusal of a gold exploitation permit:

> admitted as redacted, and we will provide you with those redacted copies now.
>
> (…)
>
> PRESIDENT: Alright. Mr Branson, do you have anything to add to that?
>
> MR BRANSON: Yes, I think it was irrelevant. I made the proposal so that both Parties would have equal treatment at the hearing. If they can't cross-examine our witnesses, then I shouldn't cross-examine their witnesses, so we have equal treatment. I also proposed that they could redact sections if they believed they might have been able to impeach, so that it would be equal on both sides. And I trust that our agreement signifies that there is equal treatment, and that one party won't be able to allege later that there was not equal treatment. That was the purpose of the proposal and the purpose of the acceptance.

> 2.83. The Tribunal has taken particular note of the Claimant's belief that it received indications from the Salvadoran authorities, to the effect that the different permits and authorisations could yet be granted to its Enterprises. According to the Claimant, even if there were theoretical legal circumstances under which a government agency's failure to meet a statutory deadline could give rise to a dispute between an investor and **the Respondent, the conduct in this particular case of MARN, the Bureau of Mines and other government officials led the Claimant reasonably to understand that even though deadlines had been missed by these authorities, PRES´s applications for a permit and a concession remained under consideration by the Salvadoran authorities.** Therefore, so the Claimant contends, having induced it to understand that despite the missed deadlines in 2004 or 2007 there was no dispute between the Parties, the Respondent is now effectively precluded, as a matter of law, from here arguing that the missed deadlines triggered the present dispute between the Claimant and the Respondent before December 2007.
>
> 2.84. The Tribunal accepts the Claimant's submissions. It also notes that, even after March 2008, there were discussions between the Claimant and the Salvadoran authorities. In the Notice of Intent, it was specifically pleaded that: "(i)n 2008, President Elias Antonio Saca was reported as having publicly stated that he opposed the granting of any outstanding mining permits. In light of President Saca's comments and the Government's actions and inactions, the Enterprises engaged in several meetings with the Government in 2008 seeking approval of the necessary permits." Accordingly, the Tribunal concludes that **the alleged omission to grant a permit and concession was not completely finalised before 13 December 2007, because even at that time there still seemed to be a reasonable possibility, as understood by the Claimant, to receive such permit and concession notwithstanding the passage of time.** (Emphasis added)

156. In other words, the case at hand presents a similar situation, because (to track the language of the *Pac Rim* decision) the Lao Government has failed to demonstrate that the FTA negotiations had been finalized before 17 January 2012 and even at that time there still seemed a reasonable possibility as understood by the Claimant, basing itself on objective facts, that such negotiations would lead to a renewal of the FTA on mutually satisfactory terms. On the record before the Tribunal the negotiations continued until 21 March 2012.

157. It is unnecessary for the Tribunal to decide whether the FTA issue died as a result of the decision taken by the Prime Minister on that date.

V. DISPOSITION BY THE TRIBUNAL OF THE RESPONDENT'S OBJECTION TO JURISDICTION *RATIONE TEMPORIS*

158. The Tribunal rejects the jurisdictional challenge on the basis that the Lao Government has not met the burden of showing that a legal dispute with respect to the application of the New Tax Code had arisen on or before the critical date of 17 January 2012. The Tribunal concludes on the present record that the FTA negotiations continued after that date and, until those negotiations ended, the application of the New Tax Code was a mere possibility that was not yet ripe for a "legal dispute" to arise.

VI. DISPOSITION OF APPLICATION FOR COSTS

159. The Tribunal does not see fit to make any award of costs at this stage of the proceeding.

VII. ISSUES NOT DECIDED BY THE TRIBUNAL

160. In light of its disposition of the Flat Tax issue, it is unnecessary for the Tribunal to decide – and it does not decide – with regard to the Claimant's alternate arguments in opposition to the jurisdictional objection. The Tribunal also wishes to be clear that it makes no findings of fact in relation to the dispute other than those necessary to the consideration and disposal of the Respondent's objection to jurisdiction *ratione temporis.*

[Signed]

Professor Bernard Hanotiau
Arbitrator

[Signed]

Professor Brigitte Stern
Arbitrator

[Signed]

The Honourable Ian Binnie, C.C., Q.C.
President