

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/13/38

**FOUAD ALGHANIM & SONS CO. FOR GENERAL TRADING & CONTRACTING,
W.L.L. AND MR. FOUAD MOHAMMED THUNYAN ALGHANIM**

Claimants

–and–

HASHEMITE KINGDOM OF JORDAN

Respondent

**ORDER ON APPLICATION FOR THE GRANT OF PROVISIONAL MEASURES
Dated 24 November 2014**

The Tribunal

The Honourable L. Yves Fortier, QC
Professor Marcelo G. Kohen
Professor Campbell McLachlan, QC (President)

Secretary to the Tribunal
Ms. Aïssatou Diop

Representing Claimants	Representing Respondent
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I. INTRODUCTION

1. This arbitration concerns a claim by two Kuwaiti nationals against the Hashemite Kingdom of Jordan (**the Respondent** or **Jordan**) pursuant to the Jordan–Kuwait Bilateral Investment Treaty (**the BIT**).¹ The Secretary-General of the International Centre for Settlement of Investment Disputes (**ICSID**) registered the Request for Arbitration on 24 December 2013. Both Kuwait and Jordan are States parties to the ICSID Convention.²
2. The First Claimant is Fouad Alghanim & Sons Co. for General Trading & Constructing, W.L.L. (**FASGTC**) and the Second Claimant is the chairman and majority shareholder of that company, Mr. Fouad Mohammed Thunyan Alghanim (**Mr. Alghanim**).
3. The dispute arises out of the Claimants’ former investment in a mobile telecommunications enterprise in Jordan.
4. The Tribunal was constituted on 27 June 2014. On 15 September 2014, the Claimants requested that the Tribunal make an order for Provisional Measures pursuant to Article 47 of the ICSID Convention (**Application**). The Respondent submitted observations on that Request on 28 September 2014 (**Observations**).
5. The Tribunal held its First Session in London, United Kingdom, on 2 October 2014. Immediately following the conclusion of the First Session, the Tribunal held a hearing on the Claimants’ Application for Provisional Measures. It heard submissions from, and posed questions to, both parties.
6. At the hearing, the Tribunal requested Respondent to provide complete English translations of three exhibits to its Observations.³ Respondent filed these translations on 6 October 2014.
7. On 16 October 2014 both parties informed the Tribunal of a judgment of the Amman Court of Appeals in related Jordanian proceedings, rendered on 14 October 2014. On 20 October 2014, the Tribunal directed the parties to file a copy of the judgment (together with an English translation) by 23 October 2014. Respondent was further requested to indicate by the same date whether it intends to appeal such judgment as

¹ The full title of the BIT is the Bilateral Investment Treaty between the Government of the Hashemite Kingdom of Jordan and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments (signed 21 May 2001 and entered into force 19 March 2004), Request for Arbitration (RfA)[2] and Annexes 3 & 4. The official text of the BIT is in Arabic (Annex 3). Claimants have submitted an unofficial English translation, which is cited in this Decision (Annex 4).

² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966). The Convention entered into force with respect to Kuwait on 4 March 1979 and with respect to Jordan on 29 November 1972: List of Contracting States and Other Signatories of the Convention (as of April 11, 2014), maintained by the International Bank for Reconstruction and Development as depositary of the Convention.

³ Exhibits R-22, R-48 and R-49.

against the Claimants in these arbitral proceedings. The Tribunal afforded the parties liberty to file any submissions limited to the effect and consequences of any such judgment upon the Application by Thursday 30 October 2014.

8. On 23 October 2014, Respondent filed a copy of the judgment of the Amman Court of Appeals, together with a translation, and confirmed that it did not intend to appeal the judgment as against the Claimants in these arbitral proceedings.
9. On 30 October 2014, both parties filed submissions on the effect and consequences of the judgment upon the Application.
10. The Tribunal deliberated in person in London on 3 October 2014 and subsequently by various means. This is the Tribunal's Order on the Application.

II. FACTUAL BACKGROUND

A. Preliminary

11. Before describing the content of the Claimants' request for provisional measures, it is necessary to describe some of the factual background to the dispute. The following summary is based on the limited material currently in the record before the Tribunal. Given the very early stage of these proceedings – before the Respondent has been required to formally notify any objections it may have to the jurisdiction of the Tribunal and before the parties have had the opportunity to fully plead as to the jurisdiction of the Tribunal or the merits of the dispute – this summary is necessarily brief and preliminary. Nothing in this Decision should be taken to prejudge the Tribunal's considered view on any questions of jurisdiction or merits that may arise.
12. The narrative of events relevant to the present application was largely undisputed between the parties, although they differed significantly on the relevance of particular events and the inferences to be drawn from them.⁴
13. Many of the documents relevant to this case are in the Arabic language. The parties having agreed that the language of the arbitration is English, the parties are required to submit translations of relevant exhibits. In some cases only partial translations were originally provided, and in respect of certain documents the Tribunal sought additional translations, which the parties duly provided. The Tribunal records that both parties accepted, for the purpose of this Application, the accuracy of the translations proffered by the other side.⁵

⁴ The Respondent's Observations included a detailed summary of the steps taken by the Government in connection with the Jordanian proceedings (at [5]–[48]). The Claimants confirmed during the hearing that they did not dispute the accuracy of that summary (T15/7-14) (save that it may not have been complete as to the consultation period) and they wished to add the Claimants' appeal against the attachment order, a copy of which was filed with the Tribunal during the hearing as Exhibit CPM-36.

⁵ T15/4-5 (Claimants); Respondent did not challenge the accuracy of the Claimants' translation of Exhibits CPM-34 and CPM-35, which are discussed below.

B. Factual background

14. FASGTC is a diversified conglomerate with its principal place of business in Kuwait City, Kuwait. FASGTC owns 35% of Umniah Telecommunications and Technology, L.L.C. (UTT), a Jordanian company now in voluntary liquidation. The remaining shares in UTT are held by different shareholders, including companies managed by Mr. Michael Dagher. The directors were Mr. Alghanim, Mr. Dagher and Mr. Rami Hadidi.
15. UTT formerly held 66% of the shares in Umniah Mobile Company P.S.C. (UMC), also a Jordanian company. The remaining shares in UMC were originally held by Global Investment House (as to 30%) and the Jordanian Student Fund (as to 4%, granted by UTT and FASGTC as a benefit to Jordan).
16. In August 2004, after a competitive bidding process, UMC was granted the third Public Mobile Telecommunications Licence in Jordan. It developed the licence and attracted around 550,000 subscribers.
17. In June 2006, UTT sold its shares in UMC to Bahrain Telecommunications Company (**Batelco**) for approximately US\$292 million. At the same time, Global Investment House also sold its shares. The shares in UMC are now owned by Batelco (as to 96%) and the Student Fund (as to 4%). UTT distributed all the gains from the sale of its shares to its shareholders, including FASGTC.
18. The dispute underlying this arbitration concerns the taxability of UTT's disposition of its shares in UMC. UTT did not file any income tax returns for the financial years 2003 to 2006, when it ceased operation. It did, however, file returns with the Controller of Companies as required by Jordanian law that recorded the distributions of profits.⁶ The shareholders resolved to place UTT into liquidation on 8 March 2008.⁷ In July 2008, the Jordanian Income and Sales Tax Department (**ISTD**) assessed UTT as liable for income tax in the sum of JD 47,170,584 (plus additional tax and penalties) in respect of the disposition of the shares in UMC. UTT challenged that assessment. The Court of Cassation ultimately upheld UTT's tax liability on 25 April 2012.⁸ The Claimants say that no such tax was properly payable and that the tax assessment and court order to pay gives rise to breaches of the BIT on which they rely in their claim on the merits.
19. Later that year, ISTD took steps to enforce the tax against UTT, and made a request for an attachment order on 13 November 2012.⁹ Only JD 24,727 was attached.
20. On 20 December 2012, ISTD gave notice to the directors of UTT alleging that they were liable for permitting the shareholders to withdraw the proceeds of the sale from UTT without maintaining sufficient reserves for the payment of taxes.¹⁰

⁶ T112/15-25.

⁷ Ex R-2.

⁸ Ex R-8.

⁹ Ex R-11.

21. On 8 April 2013, the Claimants gave notice to the Respondent (pursuant to Art 9(2) of the BIT) seeking amicable resolution of the dispute, failing which it signified its intention to resort to arbitration under the auspices of ICSID.
22. On 4 December 2013, the Claimants filed their Request for Arbitration. The Claimants allege that the Respondent's imposition of the tax (as ratified by the Court of Cassation) gives rise to a breach of a number of provisions of the BIT, including Art 3(1) (full protection and security and prohibition of arbitrary or discriminatory measures); Art 4(1) (fair and equitable treatment); and Art 4(2) (national and most-favoured nation treatment).
23. Meanwhile the Respondent had investigated the possibility of commencing criminal and/or civil proceedings against the directors and shareholders of UTT in respect of the failure to make sufficient reserves for the payment of the tax.¹¹
24. On 31 August 2014, the Civil Public Attorney filed Civil Lawsuit No. 2536/2014 (**the Jordanian Proceedings**).¹² The Civil Public Attorney is a representative of the Kingdom of Jordan, who has responsibility for appearing on its behalf in civil actions.¹³ The Respondent confirmed that although proceedings were brought in the name of the Civil Public Attorney, he embodied the Kingdom of Jordan for that purpose.¹⁴
25. The defendants to the Jordanian Proceedings are:
 - (1) UTT;
 - (2) Mr. Dagher in his personal capacity and in his capacities as the manager of UTT, former chairman of the UTT board; shareholder (up to the limit of the profits gained by him), debtor and representative of the sixth and eighth defendants;
 - (3) Mr. Alghanim, in his personal capacity and in his capacities as former vice-chairman of the UTT board and general manager and chairman of FASGTC;
 - (4) Mr. Hadidi, in his personal capacity as in his capacity as a former director of UTT;
 - (5) Mizoni Ltd. (a British company), in its personal capacity and in its capacities as shareholder in UTT (up to the limit of the profits collected according to the 2006 balance sheet), and as debtor of UTT;
 - (6) Cellnet Ltd. (a British company), in the same capacities;

¹⁰ Ex R-12.

¹¹ See Observations, especially [25] ff, and Ex R-22 (legal advice to Prime Minister of 10 March 2013).

¹² CPM-34.

¹³ T57/15-25.

¹⁴ T58/10-18.

- (7) FASGTC, in its personal capacity, and in its capacities as shareholder in UTT (up to the limit of the profits collected by it according to the 2006 balance sheet) and debtor (up to the limit of the debt owed by UTT before liquidation);
- (8) Amani for Telecommunications, as to the same capacities.
26. The address for service given for all of the defendants is the office of the liquidator. The statement of claim alleges that the defendants are liable for withdrawing (or permitting the withdrawal of) the profits from of the sale of UMC without making provision for the tax debt, and that the defendants are liable to the Treasury in negligence for damages or restitution for the loss said to be occasioned by the Treasury's inability to recover the debt against UTT.¹⁵ The claim is made against UTT itself on the basis that the liquidator should have commenced proceedings against the shareholders to require them to repay the tax debt.¹⁶ The statement of claim alleges that (all) the defendants are jointly liable for the amounts claimed.¹⁷
27. On the same day, the Respondent applied for an order pursuant to Art 141 of the Civil Procedure Code ordering a 'provisional freezing of all the moveable and immovable assets, as permitted under the law, of the [named] defendants to cover the entire amount claimed' (the **Freezing Order**).¹⁸ The Order was granted on 4 September 2014. In respect of each of the shareholders (or each defendant sued in that capacity), the Freezing Order was stated to apply up to the limit of the profits earned by the shareholder. No such limit was stated in respect of those defendants who were sued in their capacity as former directors, including Mr. Alghanim.
28. The present Application was filed on 15 September 2014.
29. On 25 September 2014, the 3rd and 7th defendants (being the Claimants in the present arbitral proceedings) lodged an appeal against the Freezing Order.¹⁹
30. On 14 October 2014, the Amman Court of Appeals delivered judgment reversing the Freezing Order.²⁰ Respondent has confirmed in the present arbitral proceedings that it does not intend to appeal the Court of Appeal's judgment against the Claimants in these arbitral proceedings.²¹

¹⁵ CPM-34, 'Facts of the claim', [8], [11]-[13].

¹⁶ CPM-34, 'Facts of the claim', [14].

¹⁷ CPM-34, 'Facts of the claim', [15].

¹⁸ CPM-35.

¹⁹ CPM-36. Claimants' first ground of appeal was that the Jordanian Court lacks jurisdiction to hear the dispute since it is subject to arbitration under the ICSID Convention.

²⁰ The Court of Appeals recorded Claimants' argument as to objection to jurisdiction under the ICSID Convention, but did not determine the appeal on this basis or render any decision as to this ground of appeal. Accordingly, on the basis of the record before this Tribunal, Claimants' challenge to the jurisdiction of the Jordanian courts on the basis of the submission of the dispute to arbitration under the ICSID Convention remains outstanding and has not been decided by the Jordanian courts.

²¹ Respondent's letter dated 23 October 2014, p. 2.

III. SCOPE OF THE APPLICATION AND LEGAL PRINCIPLES

A. Application

31. The Claimants seek the suspension of the Jordanian Proceedings.
32. The Application originally sought the following relief:²²
 - (1) A Temporary Restraining Order requiring Jordan to suspend the measures in question pending the Tribunal's decision on the substantive Application for provisional measures.
 - (2) An order that the Respondent withdraw the Jordanian Proceedings against the assets or investments of the Claimants, UTT or the directors and shareholders of UTT, pending the Tribunal's decision on the merits.
 - (3) An order that the Respondent refrain from enforcing and withdraw any freezing orders against those parties.
 - (4) An order that the Respondent desist from any efforts to enforce the Taxation Measures pending the Tribunal's final award.
 - (5) Any other order that the Tribunal deems fit.
33. In the course of the hearing, the Claimants modified their request in two ways:
 - (1) The Claimants accepted that their application for a Temporary Restraining Order would be moot if the Tribunal were able to render a decision on the substantive application promptly.²³ It has accordingly been unnecessary for the Tribunal to determine the application for a Temporary Restraining Order.
 - (2) The Claimants confirmed that they no longer seek the withdrawal of the Jordanian proceedings. Rather, they seek the suspension of those proceedings pending the Tribunal's decision on the merits.²⁴
34. In the light of the judgment of the Amman Court of Appeals of 14 October 2014 and Respondent's confirmation that it does not intend to pursue an appeal from that judgment as against Claimants, the Tribunal considers Claimants' third head of relief to be moot.
35. Consequently, the Tribunal is seised with an application for orders that Jordan:
 - (1) suspend the Jordanian Proceedings (request (2) under para 33 above); and
 - (2) desist with other enforcement of the Taxation Measures (request (4) under para 32 above) pending the Tribunal's final Award.

²² Application, [90].

²³ T3/1-12.

²⁴ T37/19-21; T38/8-11.

B. Legal Principles

1. Basis of the Tribunal's jurisdiction

36. The Tribunal's power to grant provisional measures derives from Art 47 of the Convention, which provides:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

37. Art 47 of the Convention was modelled on Art 41 of the Statute of the International Court of Justice.²⁵

38. Article 47 is supplemented by Rule 39 of the Arbitration Rules, paragraph 1 of which provides:

(1) At any time after the institution of proceedings, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

39. There is no provision in the BIT that restricts the Tribunal's power to recommend provisional measures.

2. The requirement of a prima facie case

40. It is common ground between the parties that, in order to advance an application for provisional measures, the Claimants must establish:

(1) a *prima facie* case that the Tribunal has jurisdiction over the substance of the claim; and

(2) a *prima facie* case on the merits of the claim.²⁶

41. The Tribunal 'need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants'.²⁷ As the Tribunal put it in *Paushok v Mongolia*, the Tribunal 'needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal'.²⁸ This approach is

²⁵ Schreuer et al *The ICSID Convention: A Commentary* (2 ed, 2009) ('Schreuer'), 759, citing *History*, Vol II, 668, 813.

²⁶ Application, [29]-[37].

²⁷ *Paushok v Mongolia* UNCITRAL, Order on Interim Measures (2 September 2008), [55].

²⁸ *Ibid.*

also supported by the jurisprudence of the International Court of Justice.²⁹

42. The Claimants allege that the existence of a *prima facie* case on the merits is sufficiently established by the Request for Arbitration and its supporting documents.³⁰ They point out that the Secretary General of the Centre has registered the Request, finding that the dispute was not manifestly outside the jurisdiction of the Centre for the purposes of Article 36(3) of the Convention; and that the Respondent has not challenged the request as manifestly without legal merit within the time limit specified for such a challenge under Article 41(5) of the Arbitration Rules.
43. The Claimants further allege that the Request for Arbitration itself states the basis for the jurisdiction of the Tribunal.³¹ The Request for Arbitration invokes Article 9 of the BIT, which provides for the arbitration of '[d]isputes arising between a Contracting State and the investor of the other Contracting State, regarding an investment of the latter in the territory of the State.'³² They submit that both Claimants are Kuwaiti nationals and that the dispute is in regard to an investment made by them in the territory of Jordan. As such the dispute is within the *prima facie* jurisdiction of the Tribunal.
44. The Respondent has not, in its Observations, sought to challenge the application on the ground that these requirements are not made out.³³ At the hearing, the Respondent pointed out (correctly) that it retains the right to bring preliminary objections to the jurisdiction of the Tribunal and that, until such a preliminary objection has been raised and determined by the Tribunal, the jurisdiction of the Tribunal has not been definitively established. For these reasons, Respondent submits that the Tribunal must be slow to act.³⁴
45. The Tribunal accepts that its jurisdiction has not been finally determined. The Respondent retains the right, in accordance with Article 41 of the Convention and Article 41 of the Arbitration Rules, to object to its jurisdiction. A timetable within which such an objection must be raised has been established in Annex A of PO No1. Pursuant to this timetable, Respondent may, if so advised, file a notice on 21 January 2015 requesting the Tribunal to bifurcate its proceedings, so as to consider first any

²⁹ See, for example, the decision of the Court in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* Order on Request Presented by Nicaragua for the Indication of Provisional Measures (13 December 2013), [15]-[16].

³⁰ Application, [29]-[33].

³¹ Application, [34]-[37].

³² RfA, [77].

³³ See Observations, [2]. During the hearing (T102/13-17), counsel for the Respondent questioned whether the two sets of proceedings shared the same subject-matter, a submission addressed in Part IV B 2 below.

³⁴ T95/2-7; Respondent's letter dated 30 October 2014, p. 2. In the context of that post-hearing submission the Respondent provided examples of, but did not develop, the grounds on which it may yet challenge the jurisdiction of the Tribunal (*ibid*, p. 2). Respondent's counsel also advanced a submission at the hearing that the jurisdiction *ratione materiae* of the Tribunal to grant provisional measures was limited to assets that formed the investment covered by the BIT, but, following a question by the President, this submission was withdrawn: T97/2 - 100/2.

preliminary objections to jurisdiction or admissibility. If it does so, Respondent must file its Memorial on Preliminary Objections by 23 February 2015. Having received submissions on bifurcation from Claimants as well, the Tribunal will rule on bifurcation by 22 April 2015.

46. Nevertheless, Respondent does not submit that this state of affairs was such as to preclude the Tribunal from granting provisional measures at this stage in the proceedings in an appropriate case. This it could not have submitted in light of the clear terms of Arbitration Rule 39. Rule 39(1) enables provisional measures to be granted '[a]t any time after the institution of proceedings' and Rule 39(2) requires the Tribunal to 'give priority to the consideration of a request.' This rule fulfils a sound practical purpose, since, as will be discussed below, provisional measures are granted in cases of urgency to avoid irreparable harm. Thus, it may well be necessary to receive and rule upon an application for provisional measures before the time limited for a challenge to the jurisdiction of a Tribunal or any determination thereon.
47. For this reason it is sufficient, as the jurisprudence cited earlier confirms, for the Tribunal to be satisfied *prima facie* that it has jurisdiction over the dispute. On the basis of its examination of the Request for Arbitration and the BIT, the Tribunal considers that the Claimants have discharged this burden—a point not challenged by Respondent.
48. Accordingly the Tribunal proceeds on the basis that it has *prima facie* jurisdiction and that the substantive rights asserted by the Claimants are sufficiently plausible to justify the Tribunal considering whether the grounds for an order of provisional measures are satisfied. As mentioned earlier, in proceeding in this manner, the Tribunal does not limit or prejudge Respondent's ability subsequently to challenge the jurisdiction of the Centre or of the Tribunal or to contest the merits.

3. *Grounds for the recommendation of provisional measures*

49. It is common ground between the parties that once the Tribunal is satisfied that the Claimants have established a *prima facie* case, the Claimants must make out the following grounds:³⁵
- (1) The possession by the Claimants of rights requiring protection;³⁶
 - (2) That the provisional measures are urgent;³⁷
 - (3) That the provisional measures are necessary to avoid irreparable harm,³⁸ and

³⁵ Application, [28], citing in particular *Perenco Ecuador Ltd v Ecuador* ICSID Case No. ARB/08/6 (*Perenco*), Decision on Provisional Measures (8 May 2009), [43], [45], [55]. Observations, [54]–[56] (focusing on urgency and the need for irreparable harm).

³⁶ Application, [38]–[59]; Respondent's Oral Submissions (T98/1-15).

³⁷ Application, [60]–[63]; Observations, [58]–[65].

³⁸ Application, [64]–[74]; Observations, [66]–[70].

(4) That the provisional measures are proportionate.³⁹

50. In their Application, the Claimants submitted that it was not necessary, in the ICSID context, for the Tribunal to be satisfied that irreparable harm would be suffered if the provisional measures were not granted, and that ‘significant harm’ would suffice.⁴⁰ Nevertheless, the Claimants made their case at the hearing on the basis that the test of irreparable harm was satisfied.⁴¹ As the subsequent analysis will demonstrate, it has proved unnecessary for the Tribunal to express a view on whether a showing of significant harm would suffice, since Claimants have proceeded on the basis that they can satisfy the test of irreparable harm, and the Tribunal is satisfied that this higher standard is met in this case.

IV. TRIBUNAL’S ANALYSIS

A. Matters not essential to decision on provisional measures

51. Before proceeding to consider whether the grounds for the Claimants application have been made out, the Tribunal records certain matters that it is *not* required to determine for the purpose of determining the Claimants’ Application.
52. The Tribunal is not required for the purpose of this Application to determine the merits of the parties’ respective positions on the legality of the tax measure underlying the dispute. That is a matter that the Tribunal will be required to determine, within the context of the guarantees provided in the applicable BIT, at the merits stage (provided that the Claimants reach the merits). Nor does the relief sought in this Application have the potential to prejudge the merits of the substantive dispute.⁴² The Claimants do not seek, by way of provisional measures, a determination as to whether the alleged tax debt was properly imposed. Rather, they request that the enforcement of that debt be stayed until the question of whether it was properly imposed can be determined.
53. Second, the parties exchanged submissions on the relevance of the timing of various steps in the dispute. The Claimants allege that the Jordanian Proceedings were instituted as a retaliatory response to this arbitration, in order to circumvent or frustrate it.⁴³ The Respondent says that the Jordanian Proceedings are simply the continuation of a legitimate and lawful process of enforcement of the tax debt that predates the

³⁹ Application, [75]-[80]; Observations, [74]-[76].

⁴⁰ Application, [64], citing *Perenco*, [43] and *Burlington Resources Inc v Ecuador* ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), [30].

⁴¹ T45/18 – T47/4 and Claimant’s Presentation, Slide 11.

⁴² The International Court has recognised this as a ground for refusing an application for the grant of provisional measures: see *Nicaragua v Costa Rica*, [20]-[21].

⁴³ Application, [18]; T3/14 – T4/23.

commencement of the arbitration.⁴⁴ It has not proved necessary for the Tribunal to resolve these competing allegations in order to determine the present Application.

54. Third, the parties dispute how long the Jordanian Proceedings would take. The Claimants argue that because they were designated as ‘summary judgment’ proceedings in terms of Art 60 of the Civil Procedure Code, and because service is deemed effected as a consequence of the defendants’ appeal against the attachment order, a final decision could be expected within months.⁴⁵ The Respondent says that the Jordanian Proceedings will take the form of a full ‘speedy’ trial, rather than summary judgment, which simply means that certain deadlines are shortened, and that a final decision will take at least four years (including allowing for appeals).⁴⁶ The Tribunal is not in a position to determine this issue. The Tribunal also observes that any assessment of the likely duration of the Jordanian Proceedings could only be meaningfully assessed relative to the likely duration of this arbitration. That, in turn, will depend to a significant extent on whether the Respondent files objections to the Tribunal’s jurisdiction and whether the proceedings are bifurcated (in the event that an application for bifurcation is made). For the reasons given below, it has not proved necessary for the Tribunal to reach a view on the likely relative duration of the two proceedings.

B. Rights to be protected: application of Art 26 ICSID Convention

1. The nature of Article 26 of the Convention

55. The Claimants assert that the requested provisional measures are necessary to protect two rights:⁴⁷
- (1) Their right to the exclusivity of the present proceedings in accordance with Art 26 of the ICSID Convention; and
 - (2) Their right to the preservation of the status quo that existed between the parties at the outset of the arbitration, and to the non-aggravation of the dispute.
56. Article 26 provides:

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

⁴⁴ Observations, [53].

⁴⁵ T20/3-22; Claimants’ Slide 8.

⁴⁶ T113/15-17 & T114/15-20; Observations, [47], relying on the expert opinion of Dr. Abdul Rahman Tawfic (dated 24 September 2014) (Ex R-54).

⁴⁷ Application, [42].

57. Article 26 is a provision of central importance in the scheme of the Convention. In their Report on ICSID Convention, the Executive Directors of the World Bank explain its purpose under the heading 'Arbitration as Exclusive Remedy':

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not preserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26.

58. The leading commentary on the Convention states the matter in this way:⁴⁸

Art. 26 is the clearest expression of the self-contained and autonomous nature of the arbitration procedure provided for by the Convention. Unlike Art. 25, it only applies to arbitration but not to conciliation.

The first sentence of Art. 26 has two main features. The first is that, once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID. This principle operates from the moment of valid consent. This exclusive remedy rule of Art. 26 is subject to modification by the parties. The phrase "unless otherwise stated" in the first sentence gives the parties the option to deviate from it by agreement.

The second feature of Art. 26, first sentence, is that of non-interference with the ICSID arbitration process once it has been instituted. The principle of non-interference is a consequence of the self-contained nature of proceedings under the Convention. The Convention provides for an elaborate process designed to make arbitration independent of domestic courts.

59. The plain words of Art 26 require consideration of the *remedy* sought in the arbitration and the comparison of that remedy with any other remedies sought in other proceedings, since Art 26 operates to exclude those other remedies.
60. The Respondent confirms that it has not made any reservations in terms of the second sentence of Art 26 in acceding to the Convention.⁴⁹
61. The provision in the rider to the first sentence of Art 26 ('unless otherwise stated') calls for an examination of the instrument by which the parties have given their consent to arbitration under the Convention, in this case Art 9 of the BIT. Art 9(2) provides, in cases that cannot be settled amicably, for reference of the dispute by the investor for settlement by one of three methods:

(a) any appropriate procedures previously agreed upon;

⁴⁸ Schreuer, 351.

⁴⁹ T101/5-8.

(b) in accordance with the dispute settlement chapter of the Unified Agreement for the Investment of Arab Capital in Arab Countries; or

(c) 'by means of international arbitration in accordance with the following provisions of this article.'

62. Para (3) provides that, where the investor chooses international arbitration, he must provide his written approval for the submission of the dispute (a) to ICSID; (b) under the UNCITRAL Rules; or (c) to an ad hoc tribunal pursuant to any other arbitral institution agreed upon by the parties.

63. Paras (4) and (5) then provide as follows:

(4) Even though the investor has submitted the dispute to mandatory arbitration pursuant to paragraph (2) above, he may, before the start of the arbitration proceedings or during these proceedings, request the local courts of the Contracting State that is party to the dispute to issue a temporary injunction for the preservation of his rights and interests, provided that this request does not include compensation for damages.

(5) The Contracting States give their unconditional consent to submit the investment dispute for the purpose of settlement through obligatory arbitration as per the choice of the investor pursuant to paragraphs (3)(a) and (b) or their mutual agreement under the terms of paragraph (3)(c).

64. The following relevant points arise from this instrument of consent:

(a) The Contracting States have conferred on the investor the right to elect his choice of dispute settlement methods between those listed in para (2). Where international arbitration is chosen, the Contracting States have also conferred upon the investor the choice between three forms of arbitration, including ICSID—a choice that he must exercise 'upon providing his written approval for the submission of the dispute.'

(b) By para (4), the Contracting States confer upon the investor, but not the Contracting States, the additional right to resort to local courts for the preservation of his rights and interests, before or during the arbitration. Article 9 states no other reference to local courts.

(c) Para (5) confirms that the consent of the Contracting States to international arbitration is 'unconditional'; that arbitration is 'obligatory' and that the choice of arbitration is that of the investor.

65. Thus, save for the limited option vouchsafed solely to the investor under para (4), the instrument of consent, so far from qualifying the exclusive character of the parties' consent to arbitration, strongly reinforces that such consent is intended by the Contracting State to be 'to the exclusion of any other remedy'.

66. What are the consequences of such exclusion? As one Tribunal put it, ‘once the parties have consented to ICSID arbitration, they must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID’ and ‘the parties must withdraw or stay any and all judicial proceedings commenced before national jurisdictions ... in connection with the dispute before the ICSID tribunal.’⁵⁰
67. The question is whether on the facts the domestic proceedings might ‘jeopardize the principle of exclusivity’.⁵¹ This in turn requires consideration of whether there is a ‘relevant relationship or nexus’ between the two proceedings and the issues raised in them.⁵²
68. It is well accepted that ICSID tribunals may exercise their power to grant provisional measures in order to enforce the exclusive remedy of ICSID proceedings.⁵³ So, for example, in *Millicom v Senegal*,⁵⁴ the Tribunal issued a provisional measure under Art 47 inviting the parties to send joint letter seeking the suspension of proceedings in Senegal pending the Tribunal's own decision on jurisdiction. It accepted on principle the Application for provisional measures.⁵⁵ It held:⁵⁶

Pursuing both sets of proceedings in parallel would necessarily involve complications, misunderstandings or even serious resistance at the stage of enforcing the decision, if the Arbitral Tribunal were to find in favour of the Claimants.

69. Art 47 empowers the Tribunal to issue provisional measures ‘to preserve the respective rights of either party.’ The Tribunal agrees with the decision in *Plama v Bulgaria* that:⁵⁷

The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by

⁵⁰ *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 Claimant’s Request for Provisional Measures, 1 July 2003, [1]-[2], cited in Application, [46].

⁵¹ *Ibid*, [3].

⁵² *Government of New Zealand v Mobil Oil New Zealand Ltd* (1988) XIII Ybk Comm Arb 638, 643, 4 ICSID Rep 117, 118 ILR 620 (NZ HC), CPM-13. Although the Court also relied upon domestic legislation for its decision, Schreuer states at 393 that ‘[t]he outcome of this case is undoubtedly in full accord with the requirements of Art. 26.’

⁵³ *Plama Consortium Ltd. (Cyprus) v Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures (6 September 2005) (*Plama*), [38]; *Tokios Tokelés*, [7]; Schreuer, Art 47, [99]-[134] (pp 784-793), and the numerous authorities there cited.

⁵⁴ *Millicom International Operations BV v Senegal*, ICSID Case No. ARB/08/20, Decision on Claimants' Request for Provisional Measures (9 December 2009), CPM-24.

⁵⁵ *Id.* at [49].

⁵⁶ *Id.* at [47(a)].

⁵⁷ *Plama*, [40].

provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in the arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.

70. It is therefore important to analyse the extent to which such measures are necessary to protect the exclusive remedy of arbitration for this dispute on basis that, *prima facie*, both parties have consented to submit this dispute to this Tribunal.

2. *Application to the facts*

71. The Respondent accepts that the state measure that is the subject of the Claimants' claim in this arbitration, namely the imposition of the tax liability, is the measure that underlies the Jordanian Proceedings, and that accordingly there is a nexus between the two sets of proceedings.⁵⁸ However, the Respondent submits that Art 26 is not engaged because this Tribunal does not have 'exclusive jurisdiction ... over the enforcement actions in the Jordanian Proceedings.'⁵⁹ In other words, the Respondent says that the subject matter of the Jordanian Proceedings and this arbitration are not the same because the former is concerned with the enforcement of the underlying tax debt while this arbitration concerns the Claimants' allegation that the tax was not lawfully imposed.
72. The Tribunal does not accept that submission. There is identity of parties in the two proceedings; there is a very substantial overlap in the subject matter; and the remedies sought in each proceedings are in essence the mirror image of each other.⁶⁰
73. The Jordanian Proceedings are brought by Respondent, through its Civil Public Attorney.⁶¹ Respondent does not seek solely to enforce the underlying alleged tax debt against the company held liable to pay the tax, UTT. Rather, it pursues for the first time a civil damages claim by which it seeks to establish the liability of the shareholders and directors of UTT, including the Claimants in this arbitration: Mr. Alghanim and FASGTC.
74. Such liability is claimed to arise from the failure of the directors to ensure that UTT paid the tax before distributing its profits to its shareholders and the obligation of the

⁵⁸ T103/15-23.

⁵⁹ T102/13-17.

⁶⁰ In this context, the Tribunal confines itself to an assessment of the claims in the two proceedings as between the Claimants and the Respondent in this arbitration. In private international law, identity of parties is determined by reference to the specific parties that are before both courts; such identity between those parties not being lost by the presence of other parties in respect of whom there is no such identity: *The Tatry Case* C-351/96, [1998] ECR I-3075. A claim of non-liability has the same subject-matter as a claim for damages if the same question of liability lies at the heart of both actions, since one claim is the mirror image of the other: *Gubisch Maschinenfabrik KG v Palumbo* C-144/86, [1987] ECR 4861.

⁶¹ *Supra* [24].

shareholders to return such funds. The Respondent's case in the Jordanian Proceedings necessarily depends on the validity of the underlying tax debt and seeks to enforce that debt against Mr. Alghanim and FASGTC personally.⁶² In this arbitration, the Claimants seek a declaration that the same tax was imposed 'in contravention of Jordanian law and/or international law';⁶³ and an order that Jordan refrain from taking any measure against Claimants' investment in Jordan, including any measure against the shareholders or directors of UTT.⁶⁴

75. This case is therefore quite different from *Plama*, where the Tribunal declined to recommend provisional measures. In that case, the Tribunal found that claimants who were not parties to the arbitration had brought the Bulgarian bankruptcy proceedings. It held that it should not deny those parties their judicial remedies. Moreover the company that was the subject of the Bulgarian proceedings was the locally incorporated subsidiary, not the claimant.⁶⁵ The proceedings involved different claims, such that the Tribunal found that it was 'unable to see how any of the proceedings underway in Bulgaria could affect the issues involved in this arbitration or the outcome of this arbitration.'⁶⁶
76. In the present case, the parties have put squarely in issue in both the Jordanian proceedings and the arbitration the liability of the Claimants to pay to Respondent the underlying tax. In the Jordanian proceedings, Respondent seeks to establish against Claimants their alleged personal liability to pay the tax debt. In this arbitration, Claimants seek against Respondent a declaration of non-liability on the basis that the tax is invalid, whether under Jordanian law or international law. The respective remedies sought in these proceedings are therefore two sides of the same coin.
77. Art 26 precludes the parties from pursuing other proceedings that necessarily concern the same remedy as sought in the present arbitration.
78. At the hearing, the Tribunal repeatedly invited Respondent to explain what consideration it had given to the impact of Art 26 upon being notified of the Request for Arbitration and to advance submissions on the implications of Art 26 in light of the application for provisional measures.⁶⁷ Despite a number of assurances that this matter would be addressed, the only point that Respondent made was that cited at [71] above, which the Tribunal has just analysed. Although it has waived privilege over its internal legal advice relating to the institution of the Jordanian proceedings, Respondent did not

⁶² CPM-34, 'Facts of the claim', [7].

⁶³ RfA, *Dispositif* (c)

⁶⁴ *Id.*, (e).

⁶⁵ *Plama*, [42]-[43].

⁶⁶ *Id.*

⁶⁷ T49/16-21 (President); T59/10-20, T60/4-8 (Fortier); T100/4-9 (Kohen).

enlighten the Tribunal as to what consideration, if any, was given in that context to the implications of the commencement of the present arbitration.

79. The Claimants have thus established that they possess a right that is capable of protection by means of provisional measures. The Tribunal now turns to determine whether provisional measures are justified, and if so in what terms.

C. Irreparable harm and proportionality

80. The Tribunal first considers whether the Claimants have established that they will suffer irreparable harm if provisional measures are not granted, before turning to consider whether the measures sought are sufficiently urgent.
81. As noted above, the Claimants were prepared for the purpose of the hearing before the Tribunal to adopt the standard of irreparable harm. However, they submit that the fact that monetary compensation could be awarded (in the event that they were successful on the merits) does not preclude the grant of provisional measures.⁶⁸ Rather, they submit that provisional measures are justified to prevent '[a]ny measure capable of exercising a prejudicial effect in regard to the execution of the decision'.⁶⁹ They submit that any breach of the exclusivity guaranteed by Art 26 is deemed to be irreparable.⁷⁰
82. The Respondent distinguishes cases such as *Burlington*⁷¹ and *Perenco*⁷² on the basis that the claimants in those cases had ongoing businesses in the host state the viability of which would be threatened by the measures in question, and *City Oriente*⁷³ on the basis that the criminal proceedings had been commenced to coerce the claimants.⁷⁴ They submit that because the Jordanian Proceedings only have the potential to cause financial harm, the Claimants are not exposed to the risk of irreparable harm.⁷⁵
83. The Tribunal considers that the Claimants have discharged the burden of establishing a risk of irreparable harm, as regards the on-going prosecution of the Jordanian Proceedings against the Claimants.
84. In the first place, the obligation to afford exclusivity under Art 26, which is confirmed without material qualification by the express terms of the Contracting States' instrument

⁶⁸ Claimants' Presentation, Slide 11, citing *Paushok*, [68]-[69] and *Anglo-Iranian Oil Co Case*, Request for the Indication of Interim Measures of Protection [1951] ICJ Rep 89, 94.

⁶⁹ Claimants' Presentation, Slide 11, citing *Electricity Company of Sofia and Bulgaria*, Order (1939) PCIJ Ser A/B, No. 79, 199.

⁷⁰ The Claimants also relied at the hearing on the effects of the Freezing Order on their reputation and creditworthiness: Application, [74]. In view of the judgment of the Amman Court of Appeals, the Tribunal does not base its evaluation on this ground.

⁷¹ *Burlington*.

⁷² *Perenco*.

⁷³ *City Oriente v Ecuador* ICSID Case No ARB/06/21, Decision on Provisional Measures, 19 November 2007.

⁷⁴ Observations, [68]-[70]; T108/6-18.

⁷⁵ T107/1-5.

of consent in Art 9 of the BIT, would be irreparably breached by continued prosecution of the Jordanian Proceedings. They are brought between the same parties and concern the same subject matter, namely the liability for tax upon the disposal of UTT's interest in UMC. The object of the Jordanian Proceedings (the imposition of a liability upon the Claimants for tax alleged to be owed by UTT and unpaid) is in substance the mirror image of the object of the present arbitration (a declaration that the imposition of such a tax upon the Claimants' investments is unlawful).

85. The consequence of leaving both sets of proceedings to go forward as between the Claimants and the Respondent would be that evidence as to substantially the same underlying events would have to be adduced and tested as between the same parties in two parallel sets of proceedings. Without some scheduling of priority as between the two sets of proceedings, this is a state of affairs that is, in the view of the Tribunal, inherently likely to prejudice the Claimants. It would also hamper the work of this Tribunal in its consideration of the claims that the parties have charged it to decide.
86. Further, if the Jordanian Proceedings were to result in a final judgment against the Claimants upon which process of execution could be levied, whether in Jordan or in any other country in which such judgment could be enforced, it might result in the payment of sums by the Claimants. In the event that this Tribunal were to decide in its Award that the imposition of the tax was a breach of the Respondent's obligations under the BIT, these would be sums that ought not to have been paid. Although the Tribunal put the question a number of times, Respondent's counsel were unable to give an unequivocal confirmation to the Tribunal as to the position of the Government in that event.⁷⁶
87. In reaching this decision, the Tribunal has also considered the proportionality of recommending provisional measures. This requires the Tribunal to balance the potential harm to the Claimants (in the event that the provisional measures are not granted and the Claimants succeed on the merits in this arbitration) against the prejudice to the Respondent (if the provisional measures are granted but the Claimants fail on jurisdiction or the merits in this arbitration).
88. The only prejudice identified by the Respondent was the delay consequent on having to wait for this arbitration to conclude before prosecuting the Jordanian Proceedings.⁷⁷ However some substantial time had already elapsed prior to the commencement of the Jordanian Proceedings. The tax assessment itself, which is for the financial year 2006, was first raised on 30 April 2008.⁷⁸ The assessment was the subject of protracted proceedings in the Jordanian courts, culminating in the final decision of the Court of

⁷⁶ T71/1-9, T85/17-T89/21.

⁷⁷ T82/18 – T83/16.

⁷⁸ Ex R-3.

Cassation on 25 April 2012.⁷⁹ Some two and a half years then elapsed while the Government first sought recovery against UTT, an insolvent company, and then took advice and deliberated as to the proposed proceedings against the directors and shareholders, before the Jordanian Proceedings were finally commenced on 31 August 2014.⁸⁰ Counsel for the Respondent suggested that a suspension of the proceedings would expose the Government to blame for the delay. But no criticism can attach if such a suspension is implemented pursuant an order of this Tribunal.

89. If the rights claimed by Jordan in the Jordanian Proceedings are well-founded as a matter of Jordanian law and were in existence at the date of institution of those Proceedings, it is not suggested by Respondent that they will be lost as a result of the suspension of those Proceedings as against the Claimants while this Tribunal determines the international claim brought before it. Respondent itself alleges that, to its knowledge, the Claimants have no assets of any value in Jordan.⁸¹ There can therefore be no prejudice in a suspension of the Jordanian Proceedings as against the Claimants that cannot be compensated by additional interest.⁸²
90. Claimants expressly accepted before us that they were not seeking to prejudice the Government's position, but merely to give precedence to the present arbitration.⁸³ If the Claimants' claim in these arbitral proceedings were to fail, either for want of jurisdiction or on the merits, the Respondent would remain at liberty to pursue the Claimants for the full amount claimed in the Jordanian Proceedings.
91. For these reasons, the Tribunal concludes that the harm that would be occasioned to Claimants in the event that the order were not granted outweighs the delay that will be occasioned to Respondent in the prosecution of its claim against them in the event that Claimants were to fail before us.

D. Urgency

92. The Claimants update their case on urgency in their letter of 30 October 2014 following the judgment of the Amman Court of Appeals. They state that they have been required, by a procedural order of the Amman Court of First Instance dated 29 October 2014, to file their Statement of Defence by 5 November 2014. They state that the ground on which the Court relied in imposing such a deadline is that, as shareholders and managers of a Jordanian company, they should be treated as Jordanian. Therefore only the shorter time limit of 30 days was allowed rather than the 60 days. As a result, they

⁷⁹ Ex R-8.

⁸⁰ CPM-34.

⁸¹ Observations, [50].

⁸² Interest is claimed in prayer to the Statement of Claim, together with penalties and additional tax to date of judgment: CPM-34, [4].

⁸³ T38/11-13.

will, prior to the filing of their Memorial on the Merits in this arbitration (set for 22 December 2014) be required to plead and address the same issues at once in the two proceedings.

93. Respondent does not seek to contest this. It accepted at the hearing that Claimants' appeal from the Freezing Order would remove the need for service through diplomatic channels⁸⁴—a key element of the likely delay in the Jordanian proceedings relied upon in its expert evidence.⁸⁵ Rather its position is that both proceedings should continue in parallel. It submits that 'Claimants will be able to defend any action and challenge any decision against them in Jordan.'⁸⁶
94. In the Tribunal's view, the continued active progress of the Jordanian proceedings against Claimants, which is *prima facie* inconsistent with the international obligation assumed by Jordan under Art 26 of the ICSID Convention, does meet the requirement of urgency.

E. Scope of the provisional measures

95. It remains to consider the scope of the Tribunal's Order *ratione personae* and *ratione temporis*. The first issue is whether the Tribunal has jurisdiction to recommend the suspension of the proceedings against all the defendants in the Jordanian Proceedings, or only the proceedings against the Claimants in this arbitration.
96. The Claimants submit that the Tribunal has jurisdiction to order the suspension of proceedings against defendants who are not parties to this arbitration. In their submission, it is sufficient that Jordan itself is a party to this arbitration and therefore subject to the jurisdiction of the Tribunal.⁸⁷
97. The Claimants submit that it is necessary for the Tribunal to restrain the proceedings against all the defendants in order to properly protect the Claimants' interests. The defendants are sued in the Jordanian Proceedings on the basis of joint and several liability. If the proceedings are not stayed against all of the defendants, then Jordan may succeed in attaching the assets of other defendants (including Mr. Dagher). The Claimants may then be met with a claim for contribution from those other defendants.⁸⁸
98. The Respondent submits that it is entitled to continue the Jordanian Proceedings, and to maintain the Freezing Order, against the other defendants, who are of Jordanian and other nationalities and cannot therefore benefit from the present ICSID arbitration.⁸⁹ In

⁸⁴ T81/7-14.

⁸⁵ Legal Opinion of Dr Abdul Rahman Tawfic dated 24 September 2014, Ex R-54, [5]-[10].

⁸⁶ Respondent's letter dated 30 October 2014, p. 2.

⁸⁷ T42/15-20.

⁸⁸ T5/1-16; T40/20 – T41/6.

⁸⁹ T89/22 – T90/3.

any event, Respondent regards Claimants' alleged concerns as to the effect of joint and several liability to be implausible.⁹⁰

99. The Tribunal does not consider that it should award provisional measures in relation to the claims by Respondent against third parties. The only authority cited by Claimants in support of their proposition that a Tribunal may extend its provisional measure to cover actions against third parties is *Quiborax v Bolivia*.⁹¹ But that decision is distinguishable from the facts of this case. In *Quiborax* the Tribunal found that the criminal proceedings brought by Bolivia did *not* threaten the exclusivity of the arbitration proceedings in terms of Art 26 of the Convention, and would not have ordered their suspension on that basis.⁹² Rather, the Tribunal restrained the criminal proceedings because it was satisfied that they threatened the procedural integrity of the arbitration, in particular by preventing witnesses from giving evidence in support of the claimants in the arbitration.⁹³ It was thus necessary on the particular facts of that case that the criminal proceedings be suspended in their entirety.
100. The Tribunal assumes for the purpose of analysis, but does not decide, that the Claimants are correct in asserting that the defendants' alleged joint liability may entitle the other defendants to maintain contribution actions against the Claimants. But even if that were so, the Claimants' position could not be placed in jeopardy at least until a final judgment is rendered against the other defendants. This possibility is not sufficiently imminent to give rise to the necessary urgency to justify the grant of provisional measures.
101. The Tribunal has accordingly decided that it is not appropriate to recommend provisional measures in respect of the Jordanian Proceedings save in relation to claims brought by the Respondent directly against the Third and Seventh Defendants in those Proceedings, who are the Claimants in this arbitration.
102. The second issue is the duration of the present Order. As the Tribunal has observed on a number of occasions in the course of its Decision, at present it proceeds, as it must necessarily given the early stage of these proceedings, on the basis of a *prima facie* showing of jurisdiction only. This it is entitled to do. But the final determination of whether Art 26 is engaged can only be made once the Tribunal has decided definitively whether it has jurisdiction, and, if so, the scope of its jurisdiction. Respondent has indicated that it reserves the right to challenge jurisdiction and admissibility, mentioning a number of issues that it may wish to raise for the Tribunal's consideration in this regard. The Tribunal has established a timetable within which any such issues

⁹⁰ T69/3-22.

⁹¹ T47/16 – T48/8, citing *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010).

⁹² *Id.* at [130].

⁹³ *Id.* at [148].

may be addressed. The Tribunal has therefore decided that it should follow the same approach on this aspect as that adopted by the Tribunal in *Millicom*. Accordingly, the present Order will be limited in time until the Tribunal's decision on any challenge to its jurisdiction or the admissibility of the claim, if such a preliminary objection is made. The Tribunal will revisit the question of the continuation of the present Order at that time.

V. DECISION

103. For the above reasons, the Tribunal by majority (Professor Kohen dissenting) hereby recommends that until the Tribunal's jurisdiction in the present proceedings is finally determined:

(1) The Respondent refrain from prosecuting the Jordanian Proceedings against the First and Second Claimants and, jointly with Claimants, request the Jordanian Court to suspend the Jordanian Proceedings against Claimants;

(2) The Respondent otherwise desist from enforcing the Taxation Measures against the First and Second Claimants.

104. If and to the extent that the Tribunal confirms its jurisdiction, it will afford the parties another opportunity to be heard on whether the present Order ought to be continued, varied or set aside.

105. Costs of and incidental to the Application are reserved.

Dated this 24th day of November 2014

For and on behalf of the Tribunal

SIGNED

Professor Campbell McLachlan, QC
President

IN THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/13/38

**FOUAD ALGHANIM & SONS CO. FOR GENERAL TRADING & CONTRACTING, W.L.L. AND MR. FOUAD
MOHAMMED THUNYAN ALGHANIM**

Claimants

-and-

HASHEMITE KINGDOM OF JORDAN

Respondent

ORDER ON APPLICATION FOR THE GRANT OF PROVISIONAL MEASURES

Dated 24 November 2014

Statement of Dissent

Professor Marcelo G. Kohen

I. Introduction

1. To my great regret, I cannot concur with the Order adopted by the majority of the Tribunal. As stated by several ICSID Tribunals, 'provisional measures are extraordinary measures which should not be recommended lightly'.¹ Provisional measures are of an exceptional nature and should only be granted when there is urgency, to prevent irreparable prejudice. Without prejudice to my position with regard to the other conditions, I can say at the outset that this is not at all the case here. Arbitral Tribunals should be particularly cautious in recommending measures implying intervention in domestic proceedings when their own jurisdiction has not yet been established. This is all the more necessary in this particular case, when instead of a situation of aggravation of the dispute pending the decision on provisional measures, the main circumstance for which the Claimants made their request had disappeared before the rendering of this Order, i.e. the provisional freezing of assets of the Claimants ordered by the First Instance Court of Amman of 4 September 2014. This freezing provisional order was reversed by the Amman Court of Appeals on 14 October 2014.

2. The extremely low standard employed by the majority in order to evaluate each of the conditions required for the recommendation of provisional measures is also a matter of concern. It is paradoxical that individuals or corporations may find it easier to obtain provisional measures in investment arbitration against a State, than a State itself would against its peers in any other tribunal or Court. I am aware that the present Order is not the first one to apply such low standards in ICSID practice.² ICSID case law presents significantly divergent criteria in this regard.³ It is my belief that the

¹ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Order of 28 October 1999; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order of 6 September 2005, para.38; *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Order of 6 April 2007, para.33; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Order of 17 August 2007; *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v Venezuela*, Decision on Provisional Measures, (ICSID Case No ARB/08/15), Decision on the Claimant's Request for Provisional Measures of 3 March 2010, para.41.

² *Víctor Pey Casado, President Allende Foundation v. Republic of Chile*, (ICSID Case No. ARB/98/2), ICC 185 (2001), Decision on Provisional Measures, September 25, 2001, para.8; *Paushok v. Mongolia UNCITRAL*, Order on Interim Measures (2 September 2008), para.55; *City Orient Limited v. Ecuador and Empresa Estatal Petróleos del Ecuador*, (ICSID Case No. ARB/06/21), Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, paras.72 and 86; *Burlington Resources Inc. v. Republic of Ecuador*, (ICSID Case No. ARB/08/5), Procedural Order No. 1, 29 June 2009, paras. 76-82; *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, (ICSID Case No. ARB/08/6), Decision on Provisional Measures, 8 May 2009, para.43; *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, (ICSID Case No. ARB/08/20), Decision on the Application of Provisional Measures, 9 December 2009, paras.39 and 48.

³ Compare the cases cited in the previous footnote with: *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/08/15), Decision on the Claimant's Request for Provisional Measures, 3 March 2010, paras.41-43; *Phoenix Action, Ltd. v. Czech*

(cont'd)

criteria employed by the International Court of Justice should be followed as standards, particularly when the provisional measures are exclusively addressed – as is generally the case in investment arbitration, and also the case here – to States.

3. At the end of the day, the only alleged right that the majority of the Tribunal found to be protected is that which would arise from Article 26 of the ICSID Convention, called ‘arbitration as exclusive remedy’. Whether this alleged right exists is open to question. If it does, then the question arises as to whether it would be a substantive or a procedural right. The Order, while considering that Article 26 ‘is a provision of central importance in the scheme of the Convention’,⁴ did not analyse this distinction and its impact in determining the existence of a risk of irreparable prejudice.

4. Yet another matter of concern is how the majority has dealt with the burden of proof. In provisional measures, it is for the requesting party to demonstrate urgency because of the risk of an irreparable prejudice to its rights that are at stake.

II. The extremely low standard employed for the determination of the conditions required to recommend provisional measures

5. The majority seems to have dispensed with the *prima facie* analysis of the Tribunal’s jurisdiction altogether, on the assumption that the Respondent has not challenged it.⁵ With respect, this is an inaccurate account of the views expressed by the Respondent during the hearing where, even after a long exchange with members of the Tribunal, which is referred to in footnote 33 of the Order, it contested in clear terms the *prima facie* existence of the jurisdiction of the Tribunal.⁶ Furthermore, in its last letter responding to a request of the Tribunal before the adoption of this Order, the Respondent clearly stated:

‘The Respondent makes this point to remind the Tribunal that it should act with caution in exercising its powers to grant provisional measures when it has not established jurisdiction over the claim. It is submitted that the claimants have not established a *prima facie* case. For example, it is unclear from the Request for Arbitration what the investment under the Treaty actually is. It is not yet clear whether UTT is an

(cont'd from previous page)

Republic, (ICSID Case No. ARB/06/5), Decision on Provisional Measures, 6 April 2007, para.32 ; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, (ICSID Case No. ARB/06/2), Decision on Provisional Measures, 26 February 2010, paras. 150 and 156.

⁴ Order, para.57.

⁵ *Ibid.*, paras. 44, 46 and 47.

⁶ Counsel for the Respondent stated: ‘Well, we said under Article 26 the Tribunal doesn’t have *prima facie* jurisdiction because we do not think that the ICSID Tribunal has the exclusive jurisdiction to hear over the enforcement actions in the Jordanian proceedings’ (T 102, 13-17).

“investment”, or whether the “investment” was merely the shares in UTT which were sold in 2006 before the tax dispute. It is also not clear that the tax affair qualifies as an “investment dispute”; nor is it clear that the Jordanian Proceedings concern “same matters” as the present arbitration.⁷

6. Most of these arguments advanced before the Tribunal, if not all of them, remained without consideration.

7. While setting out the requirements to establish a *prima facie* case of the rights invoked by the applicant for provisional measures, the Order considered, following UNCITRAL *Paushok v. Mongolia*, that such a case would be established in the absence of either ‘frivolous’ claims or claims ‘obviously outside the competence of the tribunal’. Surprisingly, the majority of the Tribunal considered that ‘[t]his approach is also supported by the jurisprudence of the International Court of Justice.’⁸

8. The ICJ has affirmed that for the exercise of its power under Art. 41 of the Statute, it requires the rights asserted by the parties to be at least plausible.⁹ This is the requirement that is also called *fumus boni iuris*,¹⁰ and it is the approach followed by the ICJ in analysing the source and nature of such rights. The Order did make an attempt to follow this line of reasoning, although limitedly to the alleged right of Article 26 of the ICSID Convention. The repetition of *Paushok* as an authority instead of the clear formulation of the condition as set out by the ICJ, is to be regretted.

9. The Order affirms that the conditions of irreparable prejudice and urgency exist, but I strongly disagree with the cursory examination it makes. The same can be said about what the Order calls ‘proportionality’, *i.e.* the need to preserve the rights of *both parties* pending a final decision in the case. Since these conditions are closely related to the alleged right that the indication of provisional measures seeks to preserve, I will examine them separately after referring to Article 26 of the ICSID Convention.

III. Art. 26 of the ICSID Convention

⁷ Respondent’s letter dated 30 October 2014.

⁸ Order, para. 41.

⁹ *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p.537, para.33; Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013, p. 398, para. 15; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p.18, para.53; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 151, para.57.*

¹⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, Separate Opinion of Judge Abraham paras.9-10.*

a. *Objective and nature of the provision*

10. The only right requiring the recommendation of provisional measures retained by the Order is the so-called right to the exclusivity of ICSID arbitration that is said to emerge from Article 26 of the ICSID Convention. According to the Order, and admittedly several ICSID tribunals,¹¹ unless otherwise provided, Art. 26 grants the parties to an investment dispute a right to exclusive arbitration.¹²

11. A brief excursus to the documents relating to the discussion and drafting of this provision will shed light on its purpose. Article 26 was designed to operate as a rule of interpretation of the conditions of consent in the case that, as envisaged by its second part, the State did not specifically require foreign investors to exhaust local remedies. According to the commentary to this provision in its preliminary draft version by Aaron Broches, 'Section 16 states a rule of interpretation rather than of substance.'¹³

12. It is apparent that the alleged right that is sought to be preserved in the present case is a procedural one, and not at all one related to private international investment. There is also no doubt that the party that considers domestic proceedings to be in contradiction with Article 26 may raise the issue before the domestic tribunal by way of an exception of *lis pendens*. Even assuming, as several ICSID tribunals have done, that provisional measures are the way to raise the issue at the ICSID arbitration level, many other questions must still be examined.

¹¹ *CSOB v. Slovakia*, Procedural Order no 4 of 11 January 1999 quoted in the Decision on Jurisdiction of 24 May 1999; Procedural Order no 5, 1st March 2000; *Tokios Tokelés v. Ukraine*, ARB/02/18, Procedural Order No. 3, 18 January 2005, para.7; *Plama Consortium Limited v. Republic of Bulgaria*, (ICSID Case No. ARB/03/24), Order [on Provisional Measures], 06 September 2005, para.38; *Burlington Resources Inc. v. Republic of Ecuador*, (ICSID Case No. ARB/08/5), Procedural Order No. 1, 29 June 2009, para.57.

¹² Order, paras. 58-9.

¹³ Art. IV, Sect.16 of the 1963 Preliminary Draft of the Convention reads, 'Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings in lieu of any other remedy'. There was no specific reference to the exhaustion of local remedies, although according to Broches this was to be presumed from the proposed wording. This provision was later transformed into Art. 27, where such reference was still omitted, to finally become Art.26 of the ICSID Convention, where the delegates of the Contracting Parties' inclusion in part 2 of Art.26 that 'A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention' is understood to have clearly waived the requirement of local remedies for ICSID arbitration proceedings unless specifically required. A. Parra, *The History of ICSID*, Oxford University Press (2012) pp.83-84, 364-5 and 380. C. Schreuer *et al.* *The ICSID Convention: A Commentary*, Cambridge University Press (2nd ed. 2009) p.403, citing Aaron Broches: 'Mr. Broches repeatedly explained that the provision merely created a rule of interpretation, that is, a presumption that arbitration was intended to be the sole remedy, but that it left the parties entirely free to require the exhaustion of local remedies'.

13. *First*, until such time as the ICSID tribunal decides whether it has jurisdiction, it is impossible to determine whether the provision of Article 26 applies. In such a circumstance, to recommend to a State that its judicial organs should stop exercising their normal functions appears to be detrimental to its sovereign character. The only exception would be if the continuance of the domestic proceedings were to prevent the ICSID tribunal from fulfilling its function. In this case, a *prima facie* analysis of jurisdiction is required, even *proprio motu*.

14. *Second*, it is not absolutely clear, as the Order presupposes, that in all cases in which domestic proceedings were initiated *before* the institution of the ICSID arbitration, the former should be terminated or suspended. Resort to ICSID arbitration is a right when consent exists, but the parties are still free to follow other procedures. Fairness and good faith require that, if the parties have mutually followed another procedure without raising the issue of the exclusive character of ICSID arbitration, one of them cannot then invoke this exclusivity as a way of suspending the prior proceedings.

15. *Third*, even if the exclusive jurisdiction of ICSID arbitration and the existence of identical proceedings at the domestic level were established, this does not automatically amount to the conditions for recommending provisional measures being met. In *Cemex v. Venezuela*, having affirmed that '[t]he exclusive jurisdiction of ICSID Arbitral Tribunals under Article 26 is certainly susceptible of protection by way of provisional measures', the tribunal also went further, indicating that 'it remains to be seen whether Claimants establish that the continuation of the proceedings in the Venezuelan Administrative Court meets the requirements necessary for recommending such measures'.¹⁴

16. As mentioned in *Millicom and Sentel v. Senegal*, '[a]ccording to the Arbitral Tribunal, it is correct that, strictly speaking, there is nothing preventing both sets of proceedings from taking place more or less simultaneously, a situation that has already occurred in other cases submitted to ICSID. This situation is admittedly far from perfect and may cause a range of practical difficulties, depending on the speed adopted by the Court or the Tribunal.'¹⁵

17. It emerges from the above that the mere ascertainment that there exist parallel proceedings in domestic jurisdiction and in ICSID arbitration is not sufficient for the recommendation of provisional measures. Before analysing whether the other conditions for such a recommendation are met, it is essential to determine whether the Jordanian proceedings and these arbitration proceedings satisfy the test for a finding of parallelism.

b. The threshold for comparison of proceedings

¹⁴ *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on the Claimants' Request for Provisional Measures, 3 March 2010, para.69.

¹⁵ *Millicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal* (ICSID Case No. ARB/08/20), Decision on the Application for provisional measures submitted by the Claimants, 9 December 2009, para.47.

18. After having elaborated on the position of Article 26 in the ICSID system and the consequences to be derived from its application, my distinguished colleagues affirmed, quoting the case between the *Government of New Zealand v Mobil Oil New Zealand*, that for a proceeding to potentially jeopardize the principle of exclusivity, there needs to be a 'relevant relationship or nexus' between the two proceedings and the issues raised therein.¹⁶ The application of such a test to the case in hand did not seem to present any difficulties, as the Respondent acknowledged it in an answer to a question raised by the President.¹⁷ However, as shall be demonstrated, the 'relevant relationship or nexus' test used by the majority is neither grounded in previous practice nor appropriate if Art.26 were to operate as a tool for solving the problem of parallel proceedings.

c. *The Case of Government of New Zealand v Mobil Oil New Zealand Ltd*

19. It is disturbing that the only authority cited by the Order to justify the sole requirement of 'relevant relationship or nexus' is a domestic decision in the case between *The Government of New Zealand and Mobil Oil New Zealand Ltd. et al.*¹⁸ Furthermore, a close reading of the facts of this case shows that it is substantially different to the case in hand. In the *Government of New Zealand Case*, the High Court of Wellington had to decide on an application of stay in its proceedings on the basis of an arbitration clause in a Participation Agreement signed between the Government of New Zealand and Mobil Oil New Zealand Ltd et al. It was asked to do so in preservation of the jurisdiction of an ICSID tribunal seized by Mobil Oil New Zealand and another number of companies.

20. To reach its decision, the High Court compared different statutory provisions regarding a stay of court proceedings in favour of arbitration, and in particular Sect.8 of the 1979 Act. This piece of legislation, although implementing the Washington Convention, differed in its drafting and provided as follows:

'(i) If any party to proceedings pursuant to the Convention (or any person claiming through or under him) commences any legal proceedings in any court against any other party to the proceedings pursuant to the Convention (or any person claiming through or under him) *in respect of any matter to which the proceedings pursuant to the Convention relate*, any party to the legal proceedings may at any time apply to the court to stay the legal proceedings; and the court may, if satisfied that there is no sufficient reason why the matter should not be dealt with under the Convention, make an order staying the legal proceedings.'¹⁹ [emphasis in original]

¹⁶ Order, para.67.

¹⁷ T103, 15-23.

¹⁸ *Government of New Zealand v. Mobil Oil New Zealand Ltd* (1988) XIII Ybk Comm Arb 638, 643, 4 ICSID Rep 117, 118 ILR 620 (NZ HC), CPM-13.

¹⁹ *Ibid.*, p. 641, para. 1.

21. It is evident that *New Zealand Government v Mobil Oil New Zealand Ltd. et al.*, although dealing with parallel proceedings between domestic courts and ICSID arbitration, cannot be considered, as the majority would seem to imply, the leading case in the interpretation of Art. 26. This decision was clearly not grounded on the basis of this article (and in fact the High Court of Wellington makes no reference to the provision in its judgment), but exclusively revolves around the statutory interpretation of the 1979 Act implementing the ICSID Convention in domestic law.

d. *The Triple Identity Test*

22. It is my submission that if Article 26 were to be interpreted as a right to exclude parallel proceedings – a priority rule –, the comparison test for proceedings before other international tribunals or courts for such purposes should be the triple identity test proper to the *lis alibi pendens* principle (hereinafter *lis pendens*).

23. The *lis pendens* identity test is characterized by the requirement of the identity of parties (*personae*), cause or subject matter (*causa petendi*) and object of proceedings to be defined as the relief sought (the *petitum*),²⁰ and has served to conceptually distinguish truly parallel proceedings from related proceedings.²¹ The triple identity test is therefore the appropriate test to best define parallel proceedings between domestic courts and international tribunals.²²

24. Such a test has been either implicitly or explicitly applied by investment tribunals dealing with domestic proceedings within an application for provisional measures. This was the case of the *Plama* tribunal ('Nor are the causes of action and claims and requests for relief which are the subject matter of

²⁰ C. C. McLachlan, *Lis pendens in international litigation (volume 336)*. Collected Courses of the Hague Academy of International Law. The Hague Academy of International Law. Brill Online, 2014, ('C. C. McLachlan') 283. See also Art. 27 of the *Brussels Regulation on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* EC No 44/2001 of 22 December 2000: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay in proceedings until such time as the jurisdiction of the court first seised is established.'

²¹ C. C. McLachlan, p.344. See also, Brussels Regulation, Art.28, and Articles 100 and 101 of the French Code of Civil Procedure.

²² The Permanent Court of International Justice had occasion to refer to *lis pendens* in the following way: 'There is no question of two identical actions: the action still pending before the Germano-Polish Mixed Arbitral Tribunal at Paris seeks the restitution to a private Company of the factory of which the latter claims to have been wrongfully deprived; on the other hand, the Permanent Court of International Justice is asked to give an interpretation of certain clauses of the Geneva Convention. The Parties are not the same, and, finally, the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character, and, a fortiori, the same might be said with regard to the Court and the Polish Civil Tribunal of Kattowitz' (*Certain German Interests in Polish Upper Silesia*, (1925) *PCIJ Rep.*, Ser. A, No. 6, pp. 19-20)

the present arbitration causes of action or claims and requests for relief in any of the proceedings in Bulgaria.²³) and the *Churchill Mining PLC* tribunal ('A breach of Article 26 of the ICSID Convention only occurs if a claim or right forming part of the subject matter of these proceedings is the object of parallel proceedings in another forum.'²⁴).

e. *Application to the facts*

25. The Respondent contests the application of Article 26 in respect of the Jordanian Proceedings against the Claimants and other shareholders and directors for allegedly withdrawing, or permitting the withdrawal of, the profits of the sale of UMC without making provision for the tax debt, and against UTT itself on the basis that the liquidator should have commenced proceedings against the shareholders to require them to pay the tax debt.²⁵ According to the Respondent, there is no identity of subject matter, since the ICSID Tribunal is requested to decide whether the tax was unlawfully imposed, while the Jordanian proceedings concern a claim against UTT and the three directors (the 2nd, 3rd and 4th defendants) for all damages suffered by the Public Treasury as a result of the non-payment of amounts due by UTT as a result of a final and binding Jordanian judgment, and a claim from the 5th and 8th Defendants to refund gains received from UTT in the second half of 2006 without deducting the income tax due by UTT.²⁶

26. The Order explains the majority position in the following way: 'There is identity of parties in the two proceedings; there is a very substantial overlap in the subject matter; and the remedies sought in each proceedings are in essence the mirror image of each other.'²⁷

27. In fact, there is no exact identity of parties in the two proceedings. The Tribunal is aware of this, and the majority has decided to recommend provisional measures with regard only to the Defendants of the Jordanian proceedings that are at the same time the Claimants in these proceedings.²⁸ In my view, the Tribunal has no jurisdiction at all to make any recommendation with regard to proceedings of a national Court involving individuals or corporations who are not parties to its own case.

28. With regard to the subject matter of both proceedings, the Order does not affirm the existence of *identity*, but of '*a very substantial overlap*'. Clearly, there is no identity of subject matter. The Jordanian proceedings discuss the liability of the owners and directors of UTT for allowing UTT to not

²³ *Plama Consortium Ltd. (Cyprus) v. Bulgaria* (ICSID Case No. ARB/03/24), Order on Provisional Measures (6 September 2005), para.42.

²⁴ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Procedural Order N. 9 of 8 July, 2014, para.86.

²⁵ Order, paras. 71 and 25 and 26.

²⁶ Respondent Observations, paras.42-43.

²⁷ Order, para.72. Para.85 of the same Order repeats the same reasoning, stating this time that the proceedings 'concern the same subject-matter'.

²⁸ Order, para.101.

pay tax before its liquidation (and all the damages occurring as a consequence), and the possibility of refunding the gains UTT shareholders received from UTT without deducing income tax. The question to be decided by this Tribunal if it reaches the merits stage – the legality of the taxation –, is a point the Jordanian judiciary seems to have already decided.

29. As a matter of course, States are responsible for the acts of their Judiciary, and this is the reason why the Claimants have instituted the present ICSID proceedings. Nevertheless, the pending Jordanian proceedings and these ICSID arbitral proceedings, although related, do not have the same object, and consequently the alleged ‘exclusive jurisdiction right’ stemming from Article 26 appears *prima facie* not to be at issue here.

30. This is confirmed through the comparison of the remedies sought in each proceeding. As discussed above, these are not the same. The remedies sought in the Jordanian proceedings no longer discuss the matter of legality, a point which *prima facie* appears to have already been decided within Jordanian law by the Jordanian judicial organs having decided this matter earlier. There is undoubtedly a relationship between the two proceedings, but each one has its own object. Consequently, there is no true parallelism for the purposes of Article 26 of the ICSID Convention, and hence it is my submission that the question of deciding whether provisional measures should be recommended in this respect does not even arise.

IV. The necessity to avoid irreparable prejudice

31. As explained by the *Cemex* Tribunal, the ICJ, while applying the test of irreparable prejudice, makes a distinction between actions for which, although capable of being finally compensated, an award in compensation would not remedy the damage suffered, and those actions ‘which may well prove to have infringed a right and caused harm, but in respect to which it will be sufficient to award damages, without taking provisional measures’.²⁹ The ICJ has considered in particular that those rights not capable of full remedy through monetary compensation would relate to the health or life of human beings,³⁰ rights that of course are not at issue in these proceedings.

32. Further, these ICJ criteria have been followed by investment treaty tribunals, and in the words of the *Plama v Bulgaria* Tribunal ‘[w]hat the Claimant is seeking in this arbitration are monetary damages for breaches of Respondent’s obligations under the Energy Charter Treaty. Whatever the outcome of the [...] proceedings in Bulgaria is, Claimant’s right to pursue its claims for damages in the arbitration and the Arbitral Tribunal’s ability to decide these claims will not be affected. The Tribunal

²⁹ *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on the Claimant's Request for Provisional Measures, 3 March 2010, para.49.

³⁰ *Ibid*, para. 47.

accepts Respondent's argument that harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover, is the only remedy Claimant seeks.³¹

33. Assuming that the right of exclusive ICSID arbitration to the exclusion of any domestic proceedings existed, it would constitute a procedural right, not a substantive one. In the *Pulp Mills* case, the International Court of Justice, analysing a request for provisional measures aiming at the protection of conventional procedural rights, considered that, even if their correct interpretation by the Applicant were later demonstrated, they would be capable of being remedied at the merits stage of the proceedings.³² The same could apply here. Any prejudice the Claimants might suffer from the exercise of domestic jurisdiction could be remedied at the merits stage by way of compensation or otherwise.

34. For the sake of completeness, I will now assume that there is a plausible right that could be protected by the recommendation of provisional measures. The majority decided that the Claimants have discharged the burden of establishing irreparable prejudice or damage ('harm' in the words of the majority) if provisional measures are not granted. According to the Order, 'the obligation to accord exclusivity under Art 26, which is confirmed without material qualification by the express terms of the Contracting States' instrument of consent in Art 9 of the BIT, would be irreparably breached by continued prosecution of the Jordanian Proceedings'.³³

35. The explanation of this alleged irreparable prejudice is twofold. The first is that 'evidence as to substantially the same underlying events would have to be adduced and tested as between the same parties in two parallel sets of proceedings. Without some scheduling of priority as between the two sets of proceedings, this is a state of affairs that is, in the view of the Tribunal, inherently likely to prejudice the Claimants. It would also hamper the work of this Tribunal in its consideration of the claims that the parties have charged it to decide'.³⁴

36. There is a general question whether the fact of producing the same evidence in two parallel proceedings causes irreparable prejudice. Assuming it does, something about which I have my serious doubts, it has not been demonstrated that this would be the case in the proceedings at stake. As mentioned, the subject matters are not the same. Furthermore, as the Order mentions, the parties do not disagree with the facts.³⁵ It seems rather that what is at stake in both proceedings is a pure matter of law interpretation. With regard to the impact of the Jordanian Proceedings on the work of the ICSID Tribunal, with all due respect, I do not see how it could hamper the Tribunal's work. Our Tribunal is completely independent. To use the words of the ICSID Tribunal in *Plama*, the continuation of the Jordanian proceedings in no way affects the issues involved in this arbitration or its outcome. Even an unfavourable outcome of the Jordanian Proceedings for the Claimants 'will have no foreseeable effect

³¹ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order [on Provisional Measures], 06 September 2005, para.46.

³² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p.131, para.70.

³³ Order, para.84.

³⁴ Order, para.85

³⁵ Order, para.12 and footnote 4.

on the Arbitral Tribunal's ability to make a determination of the issues in the arbitration'.³⁶ Furthermore, this Tribunal would have jurisdiction to determine that the decisions of domestic tribunals are in breach of the international obligations embodied in the BIT.

37. The second argument of the majority is related to what would happen if the final outcome of the Jordanian Proceedings resulted in a final judgment against the Claimants and later on execution if this judgment were pursued.³⁷ By no means can this be accepted as an argument to prove the existence of irreparable prejudice to the alleged exclusivity right stemming from Article 26. It might be that in such a hypothetical situation, pending the decision of this Tribunal, other, substantive, rights of the Claimants could be at stake. However, the task of the Tribunal is not to engage in such speculation, nor to envisage the possible provisional measures that could be necessary in the future. It is clear that we are not now faced with such a situation, and nothing prevents the Claimants from raising a request for provisional measures in the future if the circumstances so require. Furthermore, the consequence envisaged by the Order is that this 'might result in the payment of sums by the Claimant'.³⁸ With respect, I cannot imagine a better example of prejudice reparable by compensation at the merits stage.

V. Urgency

38. Paragraph 94 of the Order disposes of the condition of urgency without any further elaboration.³⁹ The majority seem to be of the view that since the Jordanian Proceedings are continuing, and the Claimants will 'be required to plead and address the same issues at once in the two proceedings' before 22 December 2014 (the deadline for filing their Memorial in these proceedings),⁴⁰ then the condition of urgency is met.

39. The ICJ has defined this condition in the following manner: 'the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision'.⁴¹

³⁶ *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Order of 6 September 2005, para.42.

³⁷ Order, para.85.

³⁸ Order, para.86.

³⁹ '[i]n the Tribunal's view, the continued active progress of the Jordanian proceedings against the Claimants, which is in prima facie inconsistent with the international obligation assumed by Jordan under Art 26 of the ICSID Convention, does meet the requirement of urgency'. Order, para.94.

⁴⁰ Order, para.92

⁴¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, p.6, para.64. Some investment treaty tribunals have followed the ICJ in this definition, *Occidental Petroleum Corporation and Occidental Exploration and* (cont'd)

40. In their Request, the Claimants explained their position with regard to the condition of urgency on the basis of the 'imminent risk' that the freezing order 'is likely to be enforced at any moment' and that 'the remainder of the Jordanian Proceedings be dealt with speedily via summary judgment.'⁴² After the decision of the Amman Court of Appeal of 14 October 2014 quashing the freezing order and the confirmation by the Respondent that it will not appeal this decision,⁴³ it becomes apparent that there is no urgency.

41. In their letter of 30 October 2014, responding to a request by the Tribunal, the Claimants maintain that, notwithstanding the annulment of the freezing order, 'nothing prevents the Respondent from seeking new attachment orders in the future, against the Claimants, on the basis of a change in circumstance.'⁴⁴ There is no way this hypothetical situation could constitute a real and imminent risk which would fulfill the condition of urgency.

42. The Claimants maintained their position on the basis that the Jordanian Proceedings are still ongoing, and the urgency was motivated by the fact that they had to submit their statement of defence on 5 November 2014. According to them, they will have to litigate and produce evidence on two fronts, and hence 'the Respondent would thereby have access to evidence outside the procedural opportunities carefully discussed and agreed within ICSID arbitration', affecting the equality of arms of the Parties and procedural fairness.⁴⁵ The deadline of 5 November 2014 has passed and cannot serve to demonstrate any urgency for the recommendation of provisional measures by this Tribunal. Provisional measures act for the future. Any prejudice that occurred from the filing of the statement of defence by the Claimants is beyond the realm of any recommendation of provisional measures.

43. For the reasons explained above, it is unconvincing that the need to produce evidence in domestic proceedings which may also be used in the ICSID proceedings could justify the urgent need to recommend provisional measures. All the more so when the present proceedings appear *prima facie* as being related to a pure question of law, i.e. the legality of the taxation. Moreover, equality of arms and procedural fairness do not seem to be prejudiced, since both parties may produce evidence in one and the other case.

44. It is for the party requesting provisional measures to prove the urgent need to recommend provisional measures. It is my view that the Claimants have not discharged this burden.

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Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Provisional Measures, 17 August 2007, para. 89.

⁴² Request, para.61.

⁴³ Order, paras.7-8, 30.

⁴⁴ Claimants' letter dated 30 October 2014.

⁴⁵ Claimants' letter dated 30 October 2014, 2(1).

VI. The “proportionality” test

45. Article 47 of the ICSID Convention envisages provisional measures ‘to preserve the respective rights of either party’. The Order envisages the potential harm to be caused to the Respondent’s rights if the provisional measures are recommended. It considers that the only prejudice would be having to wait for this arbitration to conclude before prosecuting the Jordanian Proceedings.⁴⁶ Unfortunately, instead of analysing the meaning of this situation, the majority simply engaged in an analysis of how long the Respondent took to initiate the Jordanian Proceedings.⁴⁷

46. The Order went on by stating that since it appears that the Claimants have no assets of any value in Jordan, then there can be no prejudice in the suspension of proceedings there.⁴⁸ I respectfully disagree with this assertion, which in any event addresses a situation that should play both ways. However, the central question in examining the rights of the Respondent that may be prejudiced by the suspension is a completely different one.

47. The Respondent is a sovereign State. Equality of the parties before the Tribunal does not transform a State into an individual or a commercial corporation. The examination of the consequences of the suspension of judicial proceedings within the State cannot be made in the same manner as the consequences for an individual. The judicial system in any State has its procedures and timing that must be respected. There must be compelling reasons to provoke a modification in the normal functioning of the judicial organs of a State. Not allowing the judicial system to act normally is a prejudice that must be assessed while examining ‘proportionality’.

48. In the instant case, the majority decided not to examine the argument developed by the Respondent according to which the Jordanian Proceedings are the normal continuation of the procedures that started in 2008.⁴⁹ However, this argument may have a role to play in analysing the condition of proportionality.

49. Furthermore, if the Claimants’ position is well founded, they will obtain an enforceable judgment from this Tribunal.⁵⁰ If the Respondent’s position is well founded, and the provisional measures are applied, it will have to restart the domestic proceedings in order to obtain what it has successfully invoked before this Tribunal. As another ICSID Tribunal stated in another context, ‘[i]t would be inequitable if, by reason of the invocation of ICSID jurisdiction, the Claimant could on the one hand elevate its side of the dispute to international adjudication and, on the other, preclude the Respondent from pursuing its own claim for damages by obtaining a stay of those proceedings for the pendency of

⁴⁶ Order, para.88.

⁴⁷ *Ibid.*

⁴⁸ Order, para.89.

⁴⁹ Order, para.53.

⁵⁰ Articles 53 and 54 of the ICSID Convention.

the international proceedings, if such international proceedings could not encompass the Respondent's claim'.⁵¹ In spite of the fact of the different context of both cases, the same words can be applied here.

50. Yet another situation would be whether a favourable decision for the Respondent in the Jordanian Proceedings could be enforced while the proceedings before this Tribunal are still pending. As a matter of fact, nothing would prevent the Claimants in such a situation from requesting provisional measures. However, this is not the situation the Tribunal has to address today.

51. In my view, on the basis of the above considerations, the Order has also failed to address the question of 'proportionality' in an adequate way.

VII. The Non-Binding Nature of Provisional Measures

52. Lastly, for the purposes of this Order, I consider it important to revisit the nature of the provisional measures capable of being ordered by arbitral tribunals under Article 47 of the ICSID Convention, which is the object of some controversy.

53. Some arbitral tribunals, while either discussing or affirming the binding nature of provisional measures ordered under Article 47 of the Convention, have contented themselves to state that although the above-cited provisions use the word 'recommend', arbitral tribunals are generally empowered under these provisions to prescribe provisional measures, and parties are consequently obliged to comply with such orders.⁵² One tribunal had simply replaced the word 'recommend' with the word 'order' in Article 47,⁵³ while in a recent case, the binding nature of the provisional measures ordered under Art.47 was grounded in the recent judgments of the International Court of Justice in the

⁵¹ *SGS Société Générale de Surveillance SA v. Pakistan*, (ICSID Case No ARB/01/13), Procedural Order No. 2, 16 October 2002, para.41.

⁵² *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, (ICSID Case No. ARB/06/11), Decision on Provisional Measures, 17 August 2007, para.58; *Tokios Tokelés v. Ukraine*, (ICSID Case No. ARB/02/18) Order No. 1 on Request for Provisional Measures, para.4; *City Oriente Limited v. Ecuador and Estatal de Petróleos del Ecuador* (ICSID Case No ARB/06/21) Decision on provisional measures, 19 November 2007, paras. 51- 53; *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, 8 May 2009, paras.67-76.

⁵³ *Emilio Agustín Maffezini v. Kingdom of Spain*, (ICSID Case No. ARB/97/7) Procedural Order No. 2, 28 October 1999, para.9.

interpretation of Article 41 of the ICJ Statute.⁵⁴ Fortunately, this cannot yet be considered to be an established line of jurisprudence⁵⁵ and has been contested in important doctrinal writings.⁵⁶

54. It is not contested that 'Art. 47 of the Convention was modeled on Art. 41 of the Statute of the International Court of Justice.'⁵⁷ Indeed, Art. 47 repeats almost every crucial word of Article 41, with a striking exception: instead of 'indicate', the Contracting Parties to the ICSID Convention employed 'recommend'. Until *LaGrand*⁵⁸, the verb 'to indicate' may have had a role in the discussions on the binding effect of ICJ provisional measures. However, the deliberate substitution of this verb with 'to recommend' in the ICSID Convention does not allow any doubt about its scope. This is a treaty concluded by States to which the general international law rules relating to interpretation of treaties, as embodied in Articles 31-32 of the Vienna Convention on the Law of Treaties,⁵⁹ apply. The term 'recommend' is explicit and cannot be interpreted in any other way than to suggest something without binding effect, *i.e.* that the addressee is not obliged to follow the recommendation.

55. It is clear from the *travaux préparatoires* and history of the drafting of Article 47 that provisional measures under the ICSID Convention were not intended to be of a binding nature.⁶⁰ The Contracting Parties' delegates animatedly and lengthily discussed the replacement of the word 'prescribe' with the word 'recommend' in Article 50(1) of the First Draft proposed for the discussion.⁶¹ They did so in full consciousness that this would be a departure from the drafting of Art. 41 of the Statute of the International Court of Justice, and partly based this change on the constitutional impediments that binding provisional measures would present in some jurisdictions.⁶²

⁵⁴ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Decision on Claimant Request for Provisional Measures, 13 December 2012, para.120.

⁵⁵ See against, *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, para.67.

⁵⁶ A. Pellet, 'The Case Law of the ICJ in Investment Arbitration' *ICSID Review* (Fall 2013) 28 (2), pp.223-240, at pp.238-9. Also, Kostantinos D. Kerameus, 'Anti-Suit Injunctions in ICSID Arbitration' in *Anti-Suit Injunctions in International Arbitration*, E. Gaillard (ed.), IAI Series on International Arbitration, pp.131-144 at p.132.

⁵⁷ Order, para. 37.

⁵⁸ *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p.466, paras.99-104.

⁵⁹ See *Territorial Dispute (Libyan Arab Jarnahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p.21, para.41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p.812, para.23; *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment, I.C.J. Reports 1999, p.1045, paras.18-20.

⁶⁰ C. H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, (2nd ed. 2009), p. 764.

⁶¹ See discussions in SID/LC/SR/16 (December 30, 1964), Summary Proceeding of the Legal Committee Meeting, December 8, published in *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, International Centre for Settlement of Investment Disputes, 1970, Volume II, p.678 and pp.813-15.

⁶² See statement by the delegate of Italy Mr. Guarino in this respect at *ibid* 814.

56. The explanation of the recommendatory effect of provisional measures in the field of ICSID arbitration, a clear departure from other international adjudicative systems, is simple. In this field, provisional measures are generally addressed to States. We are dealing here with disputes between States on the one hand, and individuals or private corporations engaged in investment on the other. This is a completely different relationship to a State-State one. The questions at issue here do not relate to the protection of fundamental human rights either. In the context of interests of a commercial nature, which by definition may be protected by way of compensation, a given conduct cannot be imposed on a State without having previously obtained a final determination in the specific case.

57. This is not tantamount to suggesting that, since States are in a position to disregard what is recommended, provisional measures do not possess any force and constitute a vain exercise. It is opportune to recall here what Sir Hersch Lauterpacht indicated while examining UN General Assembly recommendatory resolutions addressed to Administering States of territories under a special regime. His words are equally applicable in this context:

‘A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith.’⁶³

58. It is submitted that if the integrity and legitimacy of the ICSID system is to be preserved, such considerations should be borne in mind when the tribunals decide on applications for provisional measures. The above should not in any manner be read as a possibility to lessen the required standards for the recommendation of provisional measures. Provisional measures are a clear disturbance of the proceedings and should not be granted lightly. Even when constituting a recommendation, generally addressed to a State, they have to pass the requisite stringent conditions. The extremely low standard followed by the majority in this Order cannot be justified on the basis of its recommendatory effects.

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VIII. Conclusion

59. I deeply regret feeling obliged to depart so substantially from the reasoning and decision of my distinguished colleagues. I have in essence come to the conclusion that nearly every condition for the recommendation of provisional measures was not met or not sufficiently elaborated.

⁶³ *South-West Africa-Voting Procedure, Advisory Opinion of June 7th 1955, I.C.J. Reports 1955, p.67, Separate Opinion of Judge Lauterpacht, pp.118-9.*

60. To sum up, even assuming that the requirements of *prima facie* jurisdiction and *fumus boni iuris* are met; even assuming that Article 26 of the ICSID Convention establishes exclusivity of ICSID arbitration as a right; even assuming that this right is not merely procedural but substantive, or at any rate the kind of right that deserves protection through provisional measures; even assuming that the conditions for such exclusivity appear *prima facie* to be fulfilled, i.e. the triple identity test; even assuming that the so-called 'proportionality' criterion was also met, it is quite patent that in the instant case there is no risk of irreparable prejudice or any urgency requiring the recommendation of provisional measures at this time. For the reasons above, I am constrained to vote against the present Order.

SIGNED

Professor Marcelo G. Kohen