INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

KLESCH GROUP HOLDINGS LIMITED & RAFFINERIE HEIDE GMBH

Claimants

and

THE FEDERAL REPUBLIC OF GERMANY

Respondent

ICSID Case No. ARB/23/49

DECISION ON PROVISIONAL MEASURES

Members of the Tribunal
Mr. Cavinder Bull SC, President
Judge O. Thomas Johnson, Jr., Arbitrator
Professor Jorge E. Viñuales, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti

23 July 2024

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I. INTRODUCTION

1. The 1st and 2nd Claimants are Klesch Group Holdings Limited and Raffinerie Heide GmbH respectively. The 1st Claimant is a private limited liability company incorporated in and existing under the laws of the Bailiwick of Jersey.[1] The 2nd Claimant is a private limited liability company incorporated in and existing under the laws of the Federal Republic of Germany.[2]

2. The Respondent is the Federal Republic of Germany.

3. This arbitration concerns the Claimants' allegation that the Respondent has violated the Energy Charter Treaty of 17 December 1994 ("**ECT**") by enacting the Annual Tax Act ("**German Annual Tax Act 2022**"), which through Article 40 supplements and implements European Union Council Regulation 2022/1854 ("**EU Regulation 2022/1854**"). EU Regulation 2022/1854 requires companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors (such as the Claimants) to pay a "solidarity contribution".[3]

4. Under the German Annual Tax Act 2022, companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors that generate at least 75% of their revenue with activities in the crude petroleum, natural gas, coal, and refinery sectors in Germany, must pay a solidarity contribution of "*33%*

[1] Claimants' Request for Arbitration dated 30 September 2023 ("**RFA**") at para. 7.

[2] RFA at para. 8.

[3] RFA at paras. 18, 21, 28-29, 32.

of the positive difference between (1) a company's profits in 2022 or 2023 and (2) the company's average profits in 2018-2021 (four years) with addition of 20%".[4]

5. The Claimants allege that the solidarity contribution is "*manifestly ultra vires*", "*premised on the wrong factual assumptions*" such as that an oil refinery business such as the Claimants made (and would make) a "windfall" profit in 2022-2023, and is arbitrary, discriminatory and punitive.[5] The Claimants claim that as a result of the Respondent's actions, the 2nd Claimant is subject to an estimated aggregate payment obligation of at least EUR 38 million as the "solidarity contribution", which is "*substantial economic loss*", and will be placed into a "*substantially weaker competitive market position relative to unaffected companies*".[6]

6. Amongst other things, the Claimants seek a declaration that the German Annual Tax Act 2022 violates the Respondent's obligations under Articles 10(1), 10(3), 10(7), 10(12) and/or 13 of the ECT and an order that, to the extent that the Respondent enforces payment from the 2nd Claimant under the German Annual Tax Act 2022, including any accrued interest, the Respondent shall pay damages to the 2nd Claimant in an equal amount.[7]

7. On 6 June 2024, the Claimants filed an application for Provisional Measures and Immediate Temporary Restraining Order ("**Request**"), asserting that the Respondent had informed the Claimants that they must comply with the Respondent's solidarity

[4] RFA at paras. 33-34.

[5] RFA at paras. 4-6.

[6] RFA at para. 3.

[7] RFA at para. 96.

contribution regime by 31 July 2024.[8] The Respondent filed responsive submissions on 21 June 2024. The Claimants filed reply submissions on 28 June 2024 and the Respondent filed rejoinder submissions on 5 July 2024.

8. This Decision addresses and rules upon the Claimants' Request.

II. BACKGROUND TO THE CLAIMANTS' REQUEST

9. The Claimants argue that the very subject matter of this arbitration is whether the Respondent is entitled under international law to impose a payment obligation – the solidarity contribution – upon the Claimants.[9] They claim that their rights will be "*seriously harmed*" if they are required to comply with the Respondent's solidarity contribution regime by 31 July 2024, as they will be "*in breach of German law and become exposed to various criminal and financial penalties*" otherwise, and will "*lose [their] substantive right of control over around EUR 47.2 million of its returns within two months from [6 June 2024]*" for its returns for the financial year 2022.[10]

10. In the circumstances, the Claimants sought the following relief in their Request filed on 6 June 2024:

    (a) Option A,[11] which is to, amongst other things, recommend the Respondent or authorities under its control to suspend at the outset any attempt to collect or enforce the solidarity contribution.

[8] Request at para. 3.

[9] Request at para. 2.

[10] Request at para. 3.

[11] Request at para. 115.

(b) In the alternative, Option B,[12] which is to, amongst other things, recommend the Respondent or any authorities under its control to, as soon as practicable following the submission of the 2nd Claimant's Self-Assessment, exercise the discretion prescribed by Section 361(2) sentence 1 of the German Fiscal Code to suspend the enforcement or application of the German Annual Tax Act 2022 upon the 2nd Claimant.

(c) Pending the Tribunal's decision on the Claimants' application for provisional measures ("**Provisional Measures Application**"), a temporary restraining order ("**TRO**") against the Respondent with immediate effect, for the Respondent or any authorities under its control to temporarily refrain from:[13]

(i) collecting any amounts allegedly due from the 2nd Claimant pursuant to the German Annual Tax Act 2022; and/or

(ii) instituting or pursuing any action, judicial or otherwise, to collect or compel any payments purportedly owed by the 2nd Claimant pursuant to the German Annual Tax Act 2022; and/or

(iii) otherwise taking any steps that would aggravate the dispute in line with items (i)-(ii) described above.

11. On 8 June 2024, after considering the Parties' comments on an initial timetable proposed on 7 June 2024, the Tribunal issued the following directions:

[12] Request at para. 116.

[13] Request at paras. 121-126.

(a) the Respondent was to provide its response to the Claimants' application for a temporary restraining order ("**TRO Application**") by 14 June 2024;

(b) the Respondent was to provide its response to the Provisional Measures Application by 21 June 2024 ("**Response**");

(c) the Claimants' reply to the Respondent's response was due on 28 June 2024 ("**Reply**"); and

(d) the Respondent's rejoinder to the Claimants' reply was due on 5 July 2024 ("**Rejoinder**").

12. On 14 June 2024, the Respondent filed its response to the TRO Application in accordance with the timetable set out above. On 15 June 2024, the Tribunal made no order on the TRO Application as the Tribunal did not consider that the Claimants had established sufficient urgency to warrant the issuance of a TRO at that time. The Tribunal considered that the briefing schedule established by the Tribunal (at paragraph 11 above) would likely enable it to make a decision on the Claimants' Provisional Measures Application before 31 July 2024, which is the Claimants' deadline to file a Self-Assessment under the solidarity contribution regime.

13. On 14 June 2024, the Respondent also submitted a Request on Tax Waiver ("**Tax Waiver Application**"), requesting that the Tribunal order the Claimants (and in particular, the 2nd Claimant) to furnish to the Respondent a declaration whereby they waive the confidentiality of tax procedures and tax files for the duration of the arbitration. On 21 June 2024, the Claimants responded to the Tax Waiver Application

in accordance with the Tribunal's directions. On 24 June 2024, the Tribunal dismissed the Respondent's Tax Waiver Application.

14. The Parties consequently filed their submissions for the Claimants' Provisional Measures Application in accordance with the timetable set out at paragraph 11 above. The Tribunal also notes the additional comments on the Claimants' Provisional Measures Application by the Parties' respective emails of 8 July 2024, which were not provided for in the timetable directed by the Tribunal set out at paragraph 11 above.

III. APPLICABLE LEGAL PRINCIPLES

15. The Tribunal's power to recommend provisional measures is governed by Article 47 of the ICSID Convention (the "**Convention**"), which provides:[14]

> "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."

16. Rule 47 of the 2022 ICSID Arbitration Rules (the "**Arbitration Rules**") also states:[15]

> "(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:
> (a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;
> (b) maintain or restore the status quo pending determination of the dispute; or
> (c) preserve evidence that may be relevant to the resolution of the dispute.
>
> […]
>
> (3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances, including:
> (a) whether the measures are urgent and necessary; and
> (b) the effect that the measures may have on each party.

[14] Request at para. 40; Exhibit CL-10.

[15] Exhibit CL-13.

> (4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party. […]
>
> (6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request."

17. As the Claimants accept, while the language of Rule 47 is silent on the need for a claimant to prove a *prima facie* case or that the Tribunal has *prima facie* jurisdiction before it can rule on a request for provisional measures, "*arbitral jurisprudence suggests that [the Claimants] should also demonstrate these two points*".[16]

18. Therefore, while the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of this case, it should not order provisional measures unless it is satisfied that it has a *prima facie* basis upon which its jurisdiction might be founded.[17] Additionally, the Claimants must have a *prima facie* case on the merits in that the claims made by the Claimants "*are not, on their face, frivolous or obviously outside the competence of the Tribunal.*"[18]

19. The Tribunal must then consider whether the provisional measures requested would preserve the Claimants' rights, and are urgent and necessary. The requirements of necessity and urgency are usually considered together.[19] Provisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them.[20] The Tribunal also agrees that

[16] Request at para. 92.

[17] Request at para. 98; Rejoinder at para. 24.

[18] *Alghanim v Jordan* (Exhibit CL-11) at para. 41; *Paushok v Mongolia* (Exhibit CL-33) at para. 55.

[19] *Schreuer* (Exhibit RL-10) at para. 84.

[20] *Perenco v Ecuador* (Exhibit CL-29) at para. 43.

provisional measures are extraordinary measures which ought not to be granted lightly.[21]

IV. TRIBUNAL'S ANALYSIS

A. *PRIMA FACIE* JURISDICTION

20. The Claimants' case is that the Tribunal has *prima facie* jurisdiction *ratione personae, ratione materiae, ratione temporis* and *ratione voluntatis* as articulated in their RFA, and further, it is significant "*as a sign of confirming this Tribunal's prima facie jurisdiction*" that the Secretary-General had registered this arbitration after seeking and considering the Parties' views on the admissibility of the Claimants' claims.[22]

21. The Respondent's position is that the Tribunal has no jurisdiction, even on a *prima facie* basis, because Article 40 of the German Annual Tax Act 2022 is a "*Taxation Measure of a Contracting Party*" within the meaning of Article 21 of the ECT, which provides that "*nothing in [the ECT] shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*".[23] The Respondent also highlights that it intends to raise a preliminary jurisdictional objection based on Article 21 of the ECT in accordance with the procedural timetable issued by the Tribunal.[24]

22. Having considered the Parties' submissions, the Tribunal is satisfied that it has *prima facie* jurisdiction over the dispute. The threshold for a finding of *prima facie* jurisdiction

[21] Response at paras. 45-46; *Rizzani v Kuwait* (Exhibit CL-31) at para. 99.

[22] Request at paras. 98-103.

[23] Response at paras. 70-82.

[24] Response at paras. 55, 87.

is not high. The Tribunal need only satisfy itself that it has jurisdiction at a "*first sight*" level.[25]

23. The Tribunal also agrees with the Respondent that the Tribunal has an independent duty to assess whether its jurisdiction exists.[26] Therefore, while the Secretary-General's registration of the dispute is a relevant factor towards the Tribunal's finding of *prima facie* jurisdiction, the Tribunal does not consider it determinative of the Tribunal's *prima facie* jurisdiction[27] or "*deserv[ing] [of] higher weight than usual*".[28]

24. Further, as the Respondent accepts, its position on jurisdiction and its announcement of its intended jurisdictional challenge "*cannot, in and of themselves, prevent the Tribunal from ruling on the request for provisional measures*".[29] While the Respondent claims that it is not asking the Tribunal to decide its forthcoming jurisdictional challenge in its favour, and the Tribunal is not precluded from reaching a different conclusion in its final award on jurisdiction,[30] this is in effect what the Respondent's submissions invite the Tribunal to do. This cannot be correct.

25. The *prima facie* test for jurisdiction does not require the Tribunal to decide whether the solidarity contribution is a tax, and whether Article 21 of the ECT applies, in order for the Tribunal to satisfy itself that it has *prima facie* jurisdiction to decide the Provisional Measures Application. The Respondent's arguments on the applicability of Article 21

[25] Request at para. 99.

[26] Response at para. 85.

[27] Response at para. 85; *PNG v Papua New Guinea* (Exhibit CL-32) at para. 119; *Alghanim v Jordan* (Exhibit CL-11) at paras. 42-43.

[28] Reply at paras. 131; Rejoinder at paras. 50-56.

[29] Response at para. 56.

[30] Rejoinder at para. 44.

of the ECT as a "*carve-out from the Tribunal's jurisdiction for Article 10 ECT claims*"[31] are to be properly determined in a jurisdictional challenge if and when one has been brought by the Respondent, and after hearing full arguments on the matter.

26. Accordingly, the Respondent's criticism that the Claimants have "*fail[ed] to engage with the Respondent's demonstration that Article 40 of Germany's Annual Tax Act 2022 is a "Taxation Measure of a Contracting Party" within the meaning of Article 21 ECT*" is unjustified.[32] The Tribunal disagrees that the Respondent's claims in relation to the applicability of Article 21 of the ECT should compel the Tribunal to find that it does not have *prima facie* jurisdiction.[33]

B. *PRIMA FACIE* CASE ON THE MERITS

27. The Claimants argue that they have a *prima facie* case on the merits because their "*detailed RFA confirms that [their] claims are not, on their face, frivolous or obviously outside the Tribunal's competence. If the facts alleged therein are proven, it is possible that the Tribunal may render an award in favour of [the Claimants]*".[34]

28. The Respondent asserts that the Claimants fail to specify any rights which require preservation by the grant of provisional measures and that the Claimants do not have any such rights which are threatened.[35] Therefore, the Claimants do not have any rights

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[31] Rejoinder at para. 6.

[32] Rejoinder at para. 33.

[33] Rejoinder at para. 6.

[34] Request at para. 95.

[35] Response at paras. 62-64, 88-99.

which require preservation by the grant of provisional measures and have no *prima facie* case.[36]

29. As the tribunal in *PNG v Papua New Guinea*[37] noted at para. 125, the requirements for a *prima facie* case to be made out are "*relatively undemanding*". The Tribunal need not go beyond deciding 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 favour of Claimants.[38]

30. The Tribunal is satisfied, based on the Parties' submissions, that the Claimants have a *prima facie* case on the merits. The Tribunal does not consider itself limited to considering only the Claimants' Request for Provisional Measures; it is clear from arbitral jurisprudence that the Tribunal is entitled to consider the claims raised in the RFA for the purposes of finding that the Claimants have a *prima facie* case.[39]

31. For completeness, the Tribunal does not consider particularly helpful the Parties' arguments on whether the test for a *prima facie* case on the merits is akin to the test for an application for summary dismissal under Rule 41 of the Arbitration Rules.[40] The Tribunal preferred to focus on the reasoning in ICSID cases concerning requests for provisional measures under Rule 47 and its predecessors (of which there are many), instead of considering the application of a different Rule.

[36] Request at paras. 62-64.

[37] Exhibit CL-32.

[38] *Alghanim v Jordan* (Exhibit CL-11) at para. 41; *Paushok v Mongolia* (Exhibit CL-33) at para. 55.

[39] Response at paras. 95-97; Reply at paras. 120, 125.

[40] Request at paras. 94-96; Response at paras. 66-69; Reply at paras. 121-123; Rejoinder at paras. 72-81.

32. The Tribunal also notes the Respondent's arguments on the standard of "*plausibility of rights*" in the International Court of Justice's jurisprudence,[41] but does not consider it necessary to examine these cases given the wealth of ICSID jurisprudence.

C. NECESSITY

33. The relevant test for necessity is that of harm. As the commentators in *Schreuer's Commentary on the ICSID Convention, 3rd Edition, Article 47* ("***Schreuer***") note at para. 84, tribunals only grant provisional measures if they are found to be necessary in the sense that they are required to preserve a party's rights from irreparable harm.[42] That may be either in the sense that the harm is not "adequately reparable by an award of damages" or that there is a "material risk of serious or grave damage to the requesting party".[43]

34. The Tribunal notes the Parties' disagreement on the applicable standard for "harm". The Claimants' position is that there need only be a risk of "serious harm",[44] whereas the Respondent's position is that the appropriate legal standard is one of "irreparable harm".[45] Ultimately though, the Parties are not that far apart. The Respondent accepts that harm need not be technically or literally irreparable as long as the harm is of "*a very serious nature*".[46]

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[41] Rejoinder at paras. 82-94.

[42] Exhibit RL-10.

[43] *Schreuer* (Exhibit RL-10) at para. 89.

[44] Request at paras. 52-53; Reply at paras. 48-66.

[45] Response at paras. 115-134.

[46] Response at paras. 120, 132; Reply at para. 59; Rejoinder at para. 101.

35. The Tribunal agrees with the tribunal in *Perenco v Ecuador* at para. 43 where it said of the applicable standard of harm:[47]

> "Where action by one party may cause loss to the other which may not be capable of being made good by an eventual award of damages, the test in the Article is likely to be met. But the Article does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction …"

36. The Claimants argue that the requested provisional measures are necessary to prevent serious harm to:

(a) its substantive right of control over its protected returns under Article 10 of the ECT to "*manage its investment as it alone deems fit*"[48] because the enforcement of any award against the Respondent is not guaranteed.[49] The Claimants note that the Respondent has already disputed its consent to this arbitration on the basis of what it asserts to be the necessary proper application of EU law and will logically maintain this position even if it suffers an adverse award, resulting in challenges against enforcement;[50]

(b) its procedural right to maintain the *status quo* and not have this dispute aggravated. The Claimants highlight that provisional measures are authorised to "*prohibit[] any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of a future award or involves a party taking justice into its own hands*".[51] Amongst other things, the Claimants argue that the

[47] Exhibit CL-29, cited in the Request at footnote 65 and the Response at para. 128.

[48] Request at para. 23.

[49] Request at para. 24.

[50] Request at paras. 23-24, 61-66; Reply at paras. 84-94.

[51] Request at para. 67.

collection of the solidarity payment would be an "*attempt to enforce a law which creates a disputed liability*" which violates the *status quo*,[52] and would modify the Tribunal's current mandate since the Claimants primarily seek declaratory relief in the first instance and damages only if the Respondent forcibly extracts monies from it;[53] and

(c) its procedural right to maintain the procedural integrity of this arbitration, because if the Claimants do not pay the solidarity contribution, the 2nd Claimant's employees are "*liable to be prosecuted ... as permitted under German law*" which would result in the "*intimidation of sources of information*" and a "*usurpation of resources*" as its employees would have to attend to enforcement issues rather than this arbitration.[54]

37. The Respondent argues that the payment of the solidarity contribution is not a "harm" as understood for the purposes of provisional measures, and in any event not the kind of "serious harm" which would justify provisional measures.[55] It argues that the Claimants have not established which of its rights under the ECT would be violated,[56] or that payment of the solidarity contribution would "*in any way prevent [the Claimants] from normally pursuing its business opportunities*".[57] Even if the payment of the solidarity contribution amounted to "harm", the Respondent submits that it is a

[52] Request at para. 70.

[53] Request at paras. 77-80.

[54] Request at para. 83.

[55] Response at paras. 144, 152.

[56] Response at para. 153.

[57] Response at paras. 156-161.

financial matter which can be easily and completely undone by the repayment (with interest, if necessary) of the sums in question.[58]

38. The Respondent also disputes that the provisional measures are necessary to maintain the *status quo* and prevent aggravation of the dispute because, amongst other things, the "*various significant consequences*" which would follow the non-payment of the solidarity contribution "*would not be caused by the German State, but by [the 2nd Claimant's] own choice*".[59] The Respondent also alleges that any risk that an eventual award against it could not be enforced is "*pure speculation*"[60] and its use of "*legitimate procedural possibilities at its disposal in the context of this arbitration*" cannot be grounds for speculating that enforcement of an award against it could be difficult.[61]

39. The Tribunal does not consider it necessary to finally determine, at this juncture, whether the Claimants have a substantive right under Article 10 of the ECT. For the purposes of the Provisional Measures Application, it suffices for the Tribunal to find that the requested measures are necessary to protect the Claimants' right of exclusivity under Article 26 of the Convention and the Claimants' right to maintain the *status quo* of this arbitration.

40. **First**, Article 26 of the Convention provides that the consent of the parties to arbitration under the Convention "*shall, unless otherwise stated, be deemed consent to such arbitration* ***to the exclusion of any other remedy*** …" (emphasis added). This provision

[58] Response at para. 148; Rejoinder at 159.

[59] Response at paras. 186-187.

[60] Rejoinder at para. 207.

[61] Response at para. 151.

ensures that an ICSID Tribunal, duly constituted, has exclusive jurisdiction over any dispute of which it is seized.[62]

41. The Claimants referred to the case of *Perenco v Ecuador*,[63] in which the tribunal considered it necessary to recommend provisional measures to ensure the exclusivity of the arbitration.

42. In that case, the tribunal disagreed with Ecuador's argument that Perenco could resolve its difficulties by simply making the required deposit and challenging the relevant notices in the Ecuadorian courts, because the claims which Ecuador was invoking the legal process of the domestic courts to enforce were the claims which Perenco brought the arbitration to challenge. It was thus "*inescapable*" that resort to that process by Ecuador would violate Article 26 of the Convention. It was also "*inescapable*" that Perenco would violate Article 26 of the Convention if it were to advance the arguments which it will rely on in the arbitration to challenge the recoverability of payments demanded under the Ecuadorian law, in the Ecuadorian courts. The tribunal emphasised that "*none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration*" (at para. 61).

43. The tribunal's considerations in *Perenco v Ecuador* apply to the present Request. The Tribunal disagrees with the Respondent's suggestion that the Claimants could preserve the *status quo* by simply paying the solidarity contribution and that it should just "*fully*

[62] *Perenco v Ecuador* (Exhibit CL-29) at para. 61.

[63] Response at para. 48.

comply with its obligation to pay its taxes".[64] The legality of the Claimants' obligation to pay the solidarity contribution under the German Annual Tax Act 2022 is the very issue at hand in this arbitration. It would be contrary to the Claimants' right under Article 26 of the Convention to have disputes resolved in arbitration if the Claimants were required to dispute their obligation to pay the solidarity contribution in German legal proceedings, after having commenced this arbitration and challenged the legality of the German Annual Tax Act 2022 on the basis of international law.

44. Indeed, ICSID tribunals have found a breach of a claimant's rights under Article 26 of the Convention by the continued prosecution of domestic proceedings to be sufficient "irreparable harm" warranting the recommendation of provisional measures. This was the case in *Alghanim v Jordan*,[65] where the domestic proceedings were brought between the same parties and concerned the same subject matter as the arbitration. See para. 84:

> "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)."

45. The tribunal in *Plama v Bulgaria* at para. 38[66] also considered that provisional measures would be "*appropriate to preserve the exclusivity of ICSID arbitration to the exclusion of local administrative or judicial remedies as prescribed in Article 26 of the Convention*", and "*appropriate to prevent parties from taking measures capable of*

[64] Response at para. 187; Rejoinder at para. 132.

[65] Exhibit CL-11 at para. 84.

[66] Exhibit RL-8.

having a prejudicial effect on the rendering or implementation of an eventual award or which might aggravate or extend the dispute or render its resolution more difficult".

46. Therefore, provisional measures ought to be recommended to preserve the Claimants' rights under Article 26 of the Convention and to maintain the exclusivity of this arbitration.

47. **Secondly**, Rule 47(1)(b) expressly empowers the Tribunal to recommend provisional measures to "*maintain ... the status quo pending determination of the dispute*". This is based on the principle that once a dispute has been submitted to arbitration, the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award.[67]

48. The Claimants refer to the case of *City Oriente v Ecuador*[68] for support. In that case, City Oriente alleged that Ecuador tried to unilaterally modify the contract between them (with Ecuador acting through Petroecuador) to require the payment of extra revenue to Ecuador, by the implementation of "Law 2006-42". City Oriente sought provisional measures to prevent Ecuador and Petroecuador from *inter alia* collecting payment of such revenue. The tribunal held as follows (at para. 57):

> "In the opinion of this Tribunal, the provisional measures requested by Claimant are necessary to preserve Claimant's rights and the claims it has asserted in this arbitration. Indeed, City Oriente is seeking to have the Contract performed pursuant to its original terms and conditions. Ecuador and Petroecuador consider that the rights and obligations arising from the Contract have not been affected or modified as a result of the application of Law No. 2006-42, which is to be fully enforced. ***Respondents may or may not be right –an issue for the merits of the case on which the Tribunal cannot and should not rule at this stage in the proceedings. However, pending a decision on this dispute, the***

[67] ICSID Explanatory Notes (Exhibit CL-51) at p.104; *Schreuer* (Exhibit RL-10) at para. 191; *Burlington v Ecuador* (Exhibit RL-13) at para. 60.

[68] Exhibit CL-27.

> ***principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails***. Consequently, Ecuador and Petroecuador are required to continue to comply with the obligations voluntarily undertaken through the Contract, as it was executed, and they are required to refrain from declaring its termination or otherwise modifying its content."
>
> [Emphasis added.]

49. In particular, the tribunal in that case held that Ecuador and Petroecuador were to refrain from demanding settlement of their demand for payment of the extra revenue or any other amount based on Law No. 2006-42. Ecuador and Petroecuador could file a counterclaim and the tribunal could render an award ordering City Oriente to make payment of all such amounts if they succeeded, but in the meantime, "*the status quo must be maintained and the principles that the dispute is not to be aggravated and of pacta sunt servanda must prevail*" (at para. 59).

50. The Respondent attempts to distinguish *City Oriente v Ecuador* as being "*not sufficiently analogous*" to this arbitration, because: (a) "*this is not a situation in which a contractual relationship between the Respondent and the Claimants has been modified by the enactment of legislation*"; and (b) the necessity to preserve the principle of *pacta sunt servanda* played a key role in the tribunal's decision to order provisional measures.[69]

51. The Tribunal disagrees. The tribunal in *City Oriente v Ecuador* was primarily concerned with maintaining the *status quo*, not upholding the principle of *pacta sunt servanda*.[70] In any event, the principle of *pacta sunt servanda* is relevant to this arbitration and the

[69] Response at para. 177-182.

[70] *City Oriente v Ecuador* (Exhibit CL-27) at paras. 42, 57-58 and 69.

Tribunal considers that, as regards provisional measures, the facts of *City Oriente v Ecuador* are similar enough to those of the present dispute.[71]

52. The Claimants also rely on *Perenco v Ecuador*,[72] where"*[t]he dispute at the heart of [the] arbitration concerns Perenco's rights under the Participation Contracts*" and the effect (if any) on those rights of an Ecuadorian law requiring monthly "extraordinary income" payments to the State.[73]

53. The Respondent asserts that the tribunal only considered the provisional measures urgent and necessary in *Perenco v Ecuador* because the imminent seizure of Perenco's assets in Ecuador to the extent of US$327 million "*would effectively bring Perenco's business in Ecuador to an end.*"[74] In contrast, the Claimants here have already expected and accounted for the solidarity contribution in the 2nd Claimant's 2022 annual accounts.[75] Therefore, the Respondent argues that the payment of the solidarity contribution would not alter the 2nd Claimant's capacity to pursue its business.

54. However, the Tribunal notes that the tribunal in *Perenco v Ecuador* had actually held that "*the seizure of Perenco's assets ... would seriously aggravate the dispute between the parties and jeopardise the ability of Perenco to explore for and produce oil ... pursuant to the Participation Contracts*", which was the "*dispute at the heart of [the] arbitration*".[76] It concluded that (at para. 60):

[71] Reply at paras. 97-99.

[72] Request at para. 48.

[73] *Perenco v Ecuador* (Exhibit CL-29) at paras. 8, 44.

[74] Response at paras. 183-184, citing *Perenco v Ecuador* (Exhibit CL-29) at para. 46.

[75] Response at paras. 185, 203; Rejoinder at paras. 150-152.

[76] *Perenco v Ecuador* (Exhibit CL-29) at paras. 44, 46.

> "Having initiated this arbitration to challenge the recoverability of enhanced payments not provided for in the Participation Contracts but demanded pursuant to Law 42, Perenco should not, pending a final decision, be required to choose between making the very payments they dispute and suffering extensive seizure of its oil production or other assets."

55. Therefore, the Tribunal finds that the tribunal in *Perenco v Ecuador* declined to allow the seizure of Perenco's assets not because this would cripple Perenco's business, but because it would not be consistent with the tribunal's objective of preserving the effectiveness and integrity of the proceedings and avoiding severe aggravation of the dispute.[77] In the same vein, the Parties' arguments on the *quantum* of the solidarity contribution are immaterial for this conclusion. The Tribunal also does not think that the mere fact that the Claimants have accounted for the solidarity contribution in the 2nd Claimant's 2022 annual accounts amounts to an acceptance by the Claimants of their obligation to pay.[78] Such accounting is commonplace when there is the possibility that a ruling may go against the company.

56. Instead, the provisional measures are necessary in this case because (similar to *City Oriente v Ecuador* and *Perenco v Ecuador*), the solidarity contribution is the very subject-matter of this arbitration, and the legality of the Claimants' obligation to pay the same under the German Annual Tax Act 2022 is a key issue in this arbitration (see paragraphs 5 and 6 above). The Respondent does not appear to dispute this. The Claimants ought not to be compelled to pay this solidarity contribution while the arbitration is pending and the Tribunal has not determined this issue.

[77] *Perenco v Ecuador* (Exhibit CL-29) at para. 43.

[78] Reply at para. 21.

57. The Respondent submits that provisional measures seeking to preserve the *status quo* should not be ordered where a party, if ultimately successful, would be adequately compensated by damages, citing *Plama v Bulgaria* (Exhibit RL-8) at para. 45.[79] Therefore, since the solidarity contribution is a financial matter, any payment by the Claimants now can subsequently be undone by an award of damages and the Claimants have no basis for asserting that the Respondent would not comply with such an award (see paragraphs 37 and 38 above).

58. However, in *Plama v Bulgaria,* the tribunal observed that "*[w]hatever the outcome of the bankruptcy proceedings or [other] proceedings in Bulgaria is, Claimant's right to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to decide these claims will not be affected*" (at para. 46). Further, the only remedy which the claimant sought in that case was monetary damages for breaches of the respondent's obligations under the ECT.

59. In this case, the Claimants seek declaratory relief in the first instance, and damages if they are compelled to pay the solidarity contribution during the arbitration (see paragraph 36(b) above). If they are required to pay now and seek relief by commencing domestic German proceedings, this could "*aggravate or extend [the parties'] dispute or prejudice the execution of the award"* (see paragraph 47 above). Even if the Claimants eventually succeed in obtaining an award of damages (instead of declaratory relief), this would fundamentally change the *status quo* of the arbitration.

60. Indeed, the Tribunal observes that the Respondent has not stated affirmatively that it will repay the solidarity contribution if a final award is rendered in the Claimants'

[79] Response at para. 111.

favour. The European Commission's letter dated 14 November 2023 and the European Union's confirmation that it shall be fully responsible vis-à-vis the Claimants for any financial liability that may arise from this arbitration[80] does not sufficiently reassure the Tribunal because, pending the determination of any jurisdictional challenge, the Respondent for the Provisional Measures Application remains the Federal Republic of Germany, not the European Union.

61. Further, the Respondent has taken the position that it is entitled to use the "*legitimate procedural possibilities at its disposal in the context of this arbitration*" (see paragraph 38 above). In the circumstances, while the Tribunal does not agree with the Claimants' suggestion that the Respondent will not comply with any award against it, there is a reasonable basis for the Tribunal's view that the enforcement of any award in the Claimants' favour may not be a straightforward matter and the satisfaction of such an award may be delayed.

62. Thus, the Tribunal finds that provisional measures are necessary to preserve the *status quo* of this arbitration, as envisioned by Rule 47(1)(b) of the Arbitration Rules.

D. URGENCY

63. The Claimants argue that the requested provisional measures are urgently required because if the 2nd Claimant does not submit a Self-Assessment by 31 July 2024 and transfer EUR 47.2 million within 10 days afterwards, it will breach German law and become exposed to various legal and financial enforcement measures.[81] However, if it

[80] Rejoinder at paras. 163-164.

[81] Request at para. 44a.

does make the demanded payment, the Claimants will be deprived of their substantive right of control over their returns under the ECT.[82]

64. The Claimants emphasise that they cannot wait for harm to occur first,[83] and provisional measures ought to be granted to "*prevent the attempted collection of a disputed financial liability*" (as was the case in *City Oriente v Ecuador*[84] and *Perenco v Ecuador*[85]) so that there is no risk to the *status quo* and impairment of the Claimants' protected rights.[86] The Claimants submit that the requirement of urgency is met when provisional measures are sought to protect against the aggravation of the dispute or to ensure the proper conduct of the proceeding.[87]

65. The Respondent does not dispute that the 2nd Claimant is required to file its Self-Assessment by 31 July 2024 under German law[88] and that the Claimants could be subject to enforcement action if they fail to pay in accordance with their obligations under German tax law "*once the tax debt has been determined*".[89] However, the Respondent does not appear to deal squarely with the "urgency" requirement. Instead, the Respondent argues that the provisional measures cannot be urgent and necessary because the Claimants will not suffer "irreparable harm" if the provisional measures are not granted.[90]

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[82] Request at para. 44b.

[83] Request at para. 46; *Biwater Gauff v Tanzania* (Exhibit CL-25) at para. 145.

[84] Exhibit CL-27.

[85] Exhibit CL-29.

[86] Request at para. 47.

[87] Request at para. 49; Reply at para. 38.

[88] Response at para. 206.

[89] Response at para. 207.

[90] Response at paras. 103-134; Rejoinder at paras. 100-125, 127.

66. The Tribunal has addressed the Parties' arguments on the appropriate standard of harm above. Insofar as the requirement of urgency is concerned, the Tribunal considers that the relevant test is whether there is a need for the Claimants to obtain the provisional measures requested before the issuance of the award.[91] Indeed, the Respondent accepts that to establish urgency, "*there must be "a real and imminent risk" of [serious] prejudice being incurred*" although that prejudice need not have materialised at the point in time when the application for interim relief is sought.[92]

67. In the present case, the Tribunal finds that the requirement of urgency has been met given the requirement for the 2nd Claimant to file its Self-Assessment by 31 July 2024 and pay the solidarity contribution thereafter, failing which it will be subject to enforcement action under German law. The case law is clear that the Claimants cannot wait for harm to occur first and are not required to prove actual harm.[93]

68. The Respondent raises an objection that the Claimants are seeking to restrain the Respondent prematurely, "*before the Claimants have submitted their Memorial, before the Respondent had any opportunity to reply to that Memorial and before the Tribunal has made any finding as to its jurisdiction, much less the merits of the case on substance*."[94] Insofar as the Respondent suggests that the requested provisional measures therefore cannot be "urgent and necessary",[95] the Tribunal disagrees. ICSID tribunals have routinely decided on applications for provisional measures before the

[91] *Schreuer* (Exhibit RL-10) at para. 98.

[92] Response at para. 112.

[93] *PNG v Papua New Guinea* (Exhibit CL-32); *Biwater Gauff v Tanzania* (Exhibit CL-25) at para. 145.

[94] Response at para. 50; Rejoinder at para. 45.

[95] Response at para. 111.

parties' memorials on the merits have been filed and before jurisdictional challenges have been filed.[96]

69. To be clear, the Tribunal's finding of urgency pertains only to the solidarity contribution of EUR 47.2 million to be paid for the 2nd Claimant's financial year 2022, and not the solidarity contribution of EUR 69.4 million to be paid for the 2nd Claimant's financial year 2023, which only falls due in 2025.[97]

E. PROPORTIONALITY

70. The Tribunal also considers it relevant to determine whether the granting of provisional measures would be proportionate, pursuant to Rule 47(3) of the Arbitration Rules which requires the Tribunal to consider all relevant circumstances, including the effect that the measures may have on each party .[98] The test is whether the threatened harm to the Claimants if the provisional measures sought are not granted would "*substantially outweigh*" the harm caused to the Respondent if the provisional measures were granted.[99]

71. The Parties predictably take diametrically opposed positions on this issue.

72. **First**, the Claimants argue that insofar as the Respondent claims to be deprived of its right to exercise local legislation against the Claimants, "*attempts to violate obligations under international law cannot simply be excused by characterising acts as being taken*

[96] *Alghanim v Jordan* (Exhibit CL-11) at paras. 4-5, 11; *Cemex v Venezuela* (Exhibit RL-15) at para. 10; *Schreuer* (Exhibit RL-10) at paras. 66-69.

[97] Response at para. 3; Rejoinder at para. 8.

[98] *Schreuer* (Exhibit RL-10) at para. 101; Request at para. 85; Response at para. 219.

[99] Request at para. 85; Response at para. 219.

in accordance with a State's own internal laws".[100] Even if the Respondent's collection of the solidarity contribution were a legitimate exercise of its sovereignty, the Claimants argue that it would not be harmed if such a right was temporarily suspended.

73. The Respondent claims that "*this argument presupposes the outcome of this dispute at its very beginning, namely that the Tribunal has in fact jurisdiction and that the Claimants' case is meritorious on substance*".[101] It also objects on the basis that the provisional measures requested would require the suspension of "*the regular, lawful implementation of its tax laws to [the 2nd Claimant], a corporation established under the laws of Germany*", which is "*a severe limitation of [the Respondent's] sovereignty*" and requirement to apply its laws in a uniform, non-discriminatory manner.[102]

74. The Tribunal agrees with the Claimants. When a State ratifies the Convention, the State must accept that an ICSID tribunal may order provisional measures which entail "*some interference with sovereign powers and enforcement duties*".[103] Non-discriminatory takings of property may also be compensable breaches of treaty obligations. The Tribunal's recommendation of provisional measures in this case does not "*presuppose*" the outcome of this arbitration, but simply preserves the exclusivity of the proceedings and maintains the *status quo*. If the Tribunal ultimately finds in the Respondent's favour, the Respondent can still enforce the Claimants' payment of the solidarity contribution.[104]

[100] Request at para. 89; Reply at para. 114a.

[101] Response at para. 228; Rejoinder at paras. 218-220.

[102] Response at para. 229; Rejoinder at paras. 223-224.

[103] Request at para. 89; Reply at para. 114b.

[104] Request at paras. 88, 90.

75. **Secondly**, the Claimants assert that the financial risk to the Respondent is *de minimis* as the collection of EUR 47.2 million is "*less than 0.009895% of its fiscal budget*".[105] If the Respondent receives a favourable award, it can enforce the German Annual Tax Act 2022 against the 2nd Claimant, which is in the Respondent's territory, and the Claimants have reiterated that they will continue to make necessary and legally appropriate payments.[106]

76. The Respondent disagrees because the 2nd Claimant "*is a limited liability company and there is therefore a significant risk that it may not be able to pay its tax liabilities in the future*" if the Claimants fail in this arbitration.[107]

77. However, the Respondent does not substantiate its assertion that, if provisional measures are granted and a final award is rendered in the Respondent's favour, there is a risk that the German tax authorities may not obtain payment of the sums owed by "*a private law company such as the Second Claimant*".[108] Indeed, the Tribunal finds the Respondent's arguments in this regard inconsistent with its reliance on the 2nd Claimant's provision of the solidarity contribution in its annual accounts for 2022 (see paragraphs 54 to 55 above). The 2022 annual accounts in fact suggest that the Claimants are readying themselves to pay the solidarity contribution if they lose in this arbitration.

78. The Tribunal also notes the Claimants' confirmation that it does not "*seek to relieve itself of any financial liability otherwise legitimately owed by [the 2nd Claimant] locally (e.g., standard corporate payments due to [the German Federal Tax Office])*" and they

[105] Reply at para. 115a.

[106] Request at para. 118; Reply at para. 115b.

[107] Response at para. 230; Rejoinder at para. 225.

[108] Rejoinder at para. 225.

only seek to temporarily enjoin the Respondent from enforcing measures which "*are the subject of dispute in this arbitration*" and "*stand to threaten its rights*".[109] This ought to be contrasted with the Respondent's position that it may utilise "*legitimate procedural possibilities at its disposal in the context of this arbitration*", which may delay the satisfaction of any award in the Claimants' favour, as discussed at paragraphs 60 to 61 above.

79. Thus, on the material before it, the Tribunal does not consider the Respondent would be disproportionately harmed by the purported financial risk of not collecting EUR 47.2 million now. The Respondent has not established any material risk that a delay in collecting, if provisional measures were granted, would not be compensable (for example, by repayment with interest) by the Claimants.

V. DECISION

80. On the basis of the reasons set forth above, the Tribunal hereby recommends that:

(a) the 2nd Claimant may file its Self-Assessment pursuant to the German Annual Tax Act 2022 within the statutorily prescribed time limits;

(b) the Respondent (including any authorities under its control) shall refrain from:

(i) demanding that the 2nd Claimant pay any amounts allegedly due pursuant to the German Annual Tax Act 2022 for its financial year 2022; and/or

[109] Request at para. 118; Reply at para. 115b.

(ii) instituting or pursuing any action to collect or compel any payments Germany asserts are owed by the 2nd Claimant for its Financial Year 2022 pursuant to the German Annual Tax Act 2022;

81. The costs of this application are reserved to be dealt with at a later stage.

82. The Tribunal makes a brief observation that the above recommendations would put this arbitration on the same footing as the parties in ICSID Case No. ARB/23/48 ("***Klesch v Denmark***"), which is being heard together with this arbitration and ICSID Case No. ARB(AF)/23/1. While the Tribunal accepts that the Kingdom of Denmark has decided to put the collection of the solidarity contribution on hold pursuant to its own laws, which are different from German laws,[110] the Tribunal finds the effect of the Kingdom of Denmark's decision – which preserves the exclusivity of these proceedings and maintains the *status quo* – equally desirable in this arbitration.

83. For the avoidance of doubt, the Tribunal's Decision is limited only to the matters canvassed in the Claimants' Provisional Measures Application and should not be considered as finally determining or pre-judging any issue of fact or law concerning jurisdiction or the merits of this case. The Parties have liberty to apply for the provisional measures to be modified or revoked pursuant to Rule 47(6) of the Arbitration Rules, depending on the Tribunal's decision on any jurisdictional challenge.

[110] Rejoinder at paras. 240-247.

On behalf of the Tribunal,

[signed]

Cavinder Bull S.C.
President of the Tribunal
Date: 23 July 2024