

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