INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom of Jordan (ICSID Case No. ARB/13/38)

PROCEDURAL ORDER NO 6 ON CLAIMANTS' APPLICATION TO FILE REBUTTAL EVIDENCE

21 March 2016

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

Secretary to the Tribunal
Ms. Aïssatou Diop

Assistant to the Tribunal
Mr. Jack Wass

The Application

1. On 15 February 2016, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction (**Rejoinder**), together with witness statements and expert reports, as contemplated by Procedural Order No. 1 dated 16 October 2014 (**PO No. 1**).

2. Following the submission of those documents, the parties exchanged the following correspondence:

    (a) By email of Wednesday 17 February 2016, the Claimants expressed the view that the Respondent had changed its case in its Rejoinder and had introduced "new arguments and factual allegations" which should have been advanced as part of the Respondent's Counter-Memorial. The Claimants indicated that they would revert to the Tribunal "early next week" with an application for leave to file submissions in reply and/or evidence in rebuttal;

    (b) By letter dated Monday 29 February 2016, the Claimants sought leave to file rebuttal evidence (but not reply submissions) in relation to three particular topics (**the Application**);[1]

    (c) By letter dated 2 March 2016, the Respondent objected to the Claimants' application but declined to comment in detail until the Claimants had particularised their request;

    (d) By further letters dated 2 and 3 March 2016, the Claimants responded and the Respondent replied;

    (e) By paragraph 1 of Procedural Order No. 5 dated 3 March 2016 (**PO No. 5**), the Tribunal ordered as follows:

        (a) The Claimants are to file, by close of business on Monday 7 March 2016 (London time), a reasoned request for leave to file any further evidence by way of rebuttal. That request shall particularise (i) what material in the Respondent's Rejoinder (or accompanying evidence) is new, such that it is necessary for the Claimants to be given an opportunity to respond to it by the submission of further evidence; and (ii) what evidence the Claimants propose to file in response, including the identity of the witnesses and the topics on which those witnesses would give evidence.

        (b) The Respondent is to file any response to that request by close of business on Thursday 10 March 2016, following which the Tribunal will determine the application forthwith.

    (f) By letter dated 7 March 2016, the Claimants provided a schedule identifying the issues which they considered had been newly raised by the Respondent and the evidence which they wished to file in response (**Claimants' Schedule**);

    (g) By email dated 9 March 2016, the Respondent sought orders from the Tribunal that (a) the Claimants identify with greater particularity the evidence that they

[1] By that letter, the Claimants also sought a number of other procedural directions which were addressed by the Tribunal in Procedural Order No. 5 dated 3 March 2016 and are no longer in issue.

requested permission to file, and (b) that the Respondent have an extension to file its response until close of business on Monday 14 March 2016;

(h) By letter dated 9 March 2016, the Tribunal denied the Respondent's request (a) (whilst accepting that Respondent was entitled to rely upon any alleged lack of particularity in its response) but granted the Respondent an extension until 9am (London time) on Monday 14 March 2016 to file its response;[2]

(i) In accordance with that order, the Respondent filed its responses to the Claimants' application on 14 March 2016 (**Respondent's Response**), objecting to each of the Claimants' requests;

(j) By letters of 14 and 17 March 2016, the Claimants and the Respondent respectively exchanged final further observations on the Application.

3. The Respondent objects to each of the Claimants' requests. While it addresses each request separately, it identifies in particular four General Objections: (1) that the Claimants have not identified any "new" evidence; (2) that the Claimants have not established that it is "necessary" to respond to any new evidence by the submission of rebuttal evidence; (3) that the Claimants have failed to particularise the evidence they propose to file in response; and (4) that any applications other than to file rebuttal evidence fall outside the permission granted in PO No. 5.

4. The Claimants seek leave to submit written evidence both from witnesses who have already submitted statements or reports in the present arbitration, and additional witnesses who have not yet submitted a statement or report.

5. The Tribunal also notes:

(a) The Claimants seek the opportunity to both (1) submit further witness statements and expert reports, and (2) submit documents already in the Claimants' possession. Although the Application only suggested that the Claimants intended to seek leave to submit rebuttal evidence (rather than existing documents), the Tribunal is prepared to consider the Claimants' requests to submit further documents, in circumstances where the Respondent has made submissions on the merits of those requests.

(b) However the Claimants' Schedule intimates other applications, including relating to the production of documents in the hands of third parties and the appearance of third party witnesses. As the Respondent points out, such applications were not raised in the Application or provided for in PO No. 5, and the Respondent has not particularised them.

(c) The Tribunal does not regard the Application or the Claimants' Schedule as a request for orders other than to file further evidence and documents. The Claimants have made a separate application by letter of 10 March 2016 for the production of a single document (**KPMG Application**). This Order only addresses the applications to file further evidence, and is without prejudice to the KPMG Application.

6. The Tribunal has now considered the Application, and orders as follows.

[2] On 10 March 2016, the Secretary re-issued the letter of the previous day to correct a typographical error.

Context of the Application

7. In accordance with Rule 31 of the ICSID Arbitration Rules, it was agreed that the written procedure in the present arbitration should consist of two rounds of pleadings. That procedure is reflected in Annex A to PO No. 1, which provides for the exchange of the Memorial and Counter-Memorial on the Merits, followed by a Reply and Rejoinder.[3]

8. By paragraph 24 of PO No. 1, the parties agreed that the IBA Rules on the Taking of Evidence in International Arbitration 2010 (**IBA Rules**) shall provide general guidance for the parties and the Tribunal in these proceedings. Of particular relevance are the following provisions of Article 4 of the IBA Rules:

> 1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
>
> ...
>
> 4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely….
>
> ...
>
> 6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

9. Equivalent rules apply to the submission of evidence by Party-Appointed Experts in Article 5.

10. Those general rules are reflected in paragraph 17.1 of PO No. 1, which requires the parties to file the witness statements and expert reports on which they rely together with their pleadings.

11. This two-phase written procedure for the submission of pleadings, witness statements and expert reports is well established in the practice of ICSID tribunals. It requires each party to put its full case in its primary pleading (the Claimants' Memorial and the Respondent's Counter-Memorial respectively), with the purpose of the second phase being to permit each party to raise arguments and produce evidence in reply to the case made by the opposing party.

12. The consequence of such a structure is that the Respondent has the final opportunity to put its case on the merits in the written phase. This is by design. It reflects the requirement in Article 31 of the ICSID Arbitration Rules for the "requesting party" to put its case and for the "other party" to respond to it.[4] In this manner, both parties have an equal opportunity to put their case, with the right of defence being also respected. Nevertheless, the *quid pro quo* of such a structure is that each party may only introduce

[3] For the purpose of Rule 31, the Claimants are treated as the requesting party with respect to their claim on the merits, and the Respondent the requesting party with respect to its objections to the Tribunal's jurisdiction. For this reason, the Claimants are still entitled to file a final Rejoinder on Jurisdiction (addressing the Respondent's objections to jurisdiction only).

[4] The Tribunal's observations are entirely without prejudice to the standard and burden of proof.

arguments and evidence in the second phase in response to the case presented in the preceding submissions.

13. The Tribunal has an overriding duty to maintain procedural fairness and equality of treatment of the parties. In *MINE v Guinea*, the *ad hoc* Committee cited with approval as an example of a fundamental rule of procedure the rule found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration that "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case."[5]

14. Commenting on the application of the *audi alteram partem* principle to the exchange of written material before international tribunals, Cheng observes that "whenever there is…new evidence, alteration of the legal basis of the claim, or amendment of the original submission, the other party is always assured of an opportunity to reply thereto, or comment thereon."[6]

15. This means, of course, that the Tribunal must consider equally the rights of the Claimants and of the Respondent, and weigh the consequences both of refusing leave to the Claimants to submit further evidence and of granting leave. Its decision, whether it is to admit or deny such a request, necessarily has effects on the right to be heard of both the applicant and the respondent to the request.

16. In the present case, the Tribunal must also consider, in determining the overall fairness of the procedure, the effect on the parties' preparation for the hearing long scheduled for 25–29 April 2016, a date which is now only five weeks away.

17. Finally, the Tribunal must assess the Claimants' application in light of the fact that there remains to be completed the oral phase of the proceeding. In particular:

    (a) The Tribunal has already ordered the parties to arrange conferencing between their respective experts, following which each set of experts is to produce a joint report. The Tribunal is conscious that that process will afford the experts an opportunity to engage with, consider and express views upon each other's evidence.

    (b) The parties will have an opportunity at the hearing to both examine witnesses and to make legal submissions on the case advanced by the other side.

    (c) Whilst it has been necessary for the Tribunal to review the existing evidence in order to reach a view on Claimants' Application, the Tribunal makes no findings of fact or law herein on the basis of the evidence in the arbitration record adduced by either party until it has heard that evidence tested at the hearing. Nothing in the present Order is to be taken as prejudging any of the issues raised in the proceedings or the evidence adduced in support.

Analysis

18. The Claimants' present application falls to be determined in accordance with paragraph 17.2 of PO No. 1, which provides that:

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[5] *Maritime International Nominees Establishment v Guinea* (Decision on Annulment, 22 December 1989) 4 ICSID Rep 79, 87, [5.06].

[6] Cheng *General Principles of Law as applied by International Courts and Tribunals* (1953), 295, citing *inter alia Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Rep, Ser A/B No 53, 25-6; *Chorzow Factory (Germany v Poland)* (1928) PCIJ Rep Ser A No 17, 7.

> 17.2 The Tribunal shall not admit any testimony that has not been filed with the written submissions without leave.

19. To the extent that the Claimant seek leave to submit further documents, paragraph 16.3 provides that:

> 16.3 Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, save at the discretion of the Tribunal upon a reasoned written request followed by observations from the other party.

20. The parties have not suggested that the Tribunal ought to apply a different standard to the assessment of the Claimants' requests to submit further statements or reports and its requests for leave to submit further documents.

21. Taking into account the matters traversed above, the Tribunal considers that the Claimants must establish:

    (a) Specific new and distinct legal arguments or factual allegations introduced by the Respondent (whether in its Rejoinder or accompanying witness statements and expert reports) that are not merely the further response, elaboration or explanation of issues of fact or law already in issue on the prior pleadings; and

    (b) That it is necessary, in the interests of procedural equality and affording the parties adequate opportunity to present their cases, to give the Claimants the opportunity to file written evidence in response.

22. In light of those observations, the Tribunal now proceeds to assess each of the matters on which the Claimants seek leave to file rebuttal evidence.

23. The Claimants present their eight requests in the form of a table. In most cases, the Claimants propose to file more than one piece of rebuttal evidence in relation to each request. The Respondent treats each proposed piece of rebuttal evidence as a separate request, submitting as a consequence that the Claimants have actually made 21 separate requests (recording its response to each request separately).

24. The Tribunal nevertheless considers that the first question in each case is whether the material presented by the Respondent in its Rejoinder (or accompanying evidence) constitutes a new legal argument or factual allegation, such that it is appropriate to grant leave for the Claimants to file evidence in response. Where the Tribunal is satisfied that that is so, then it is appropriate to consider the particular evidence that the Claimants propose to file by way of rebuttal.

25. Applying that approach, the Tribunal has considered each of the Claimants' eight numbered requests as a category. Its analysis of each of those categories is presented in this Order, with its decisions on each of the particular requests recorded in the parties' table (as reformatted by Respondent) annexed as **Appendix A**.

26. The material to which the Claimants seek an opportunity to respond falls into a number of categories:

    (a) Certain evidence of Mr Khateeb [**Request 1**];

    (b) The inferences to be drawn from a letter written by the Claimants to the Prime Minister of Jordan in 2013 [**Request 2**];

(c) The argument that ISTD quantified the entirety of the gains as goodwill because UTT did not file tax returns and that it is for the taxpayer to prove the correct characterization of the income [**Requests 3 and 8**];

(d) Matters relating to the interpretation of the 2014 Tax Law [**Request 4]**;

(e) An allegedly new interpretation of the capital gains exemption on which the Claimants rely, whereby the Respondent alleges that this provision (Article 7.a.15 of the 1985 Law) only extends to shares which the taxpayer has bought *and* sold [**Request 5**];

(f) Other evidence given by the Respondent's legal expert, Mr Rabah [**Requests 6 and 7**].

Request 1: Evidence of Mr Khateeb

27. The Respondent calls Mr Khateeb as a witness of fact, and has submitted statements from him dated 22 June 2015 (Khateeb 1, filed with its Counter-Memorial) and 15 February 2016 (Khateeb 2, filed with its Rejoinder). Mr Khateeb is stated to be a Certified Public Accountant. From 2005 to 2009 he was a partner in the Certified Auditors Firm, a firm based in Jordan that Mr Khateeb describes as 'correspondents' to KPMG.[7] From 2010 to 2013, Mr Khateeb was an auditing partner in KPMG once his firm became a full member of the KPMG group.

28. The Claimants seek leave to respond to the evidence at paragraph 3(a) to 3(f) of Khateeb 2, and in particular:

(a) Mr Khateeb's evidence of a meeting that he states he attended with the representatives of Batelco (the purchaser from UTT of the shares in UMC) in 2006, at which Mr Khateeb alleges he or his superior expressed the view that the sale of the shares would be taxable to UTT; and

(b) Mr Khateeb's evidence that the Rowwad[8] case was well-known in relevant circles in Jordan, and in particular that he told an auditor of Fastlink (either Karim Al Nabulsi or Khalil Nasr, but in either case a representative of Saba/Deloitte, who were subsequently the auditors of UTT) that the profit on the sale of "husas" shares would be taxable to the extent that it represented goodwill.

29. The Claimants seek to file a statement from Mr Karim Al Nabulsi; "[d]ocumentary evidence concerning Mr Khalil Nasr at the purported time of the supposed discussion"; and further evidence from Messrs Dagher, Alghanim and Al-Akhras. They also foreshadow applications for production of documents and the calling of third party witnesses.

30. The Tribunal finds that Khateeb 2 responds to the Claimants' criticism in their Reply of Mr Khateeb's evidence on these issues in Khateeb 1.

31. On the question of the Batelco meeting, in their Reply, the Claimants submit that Mr Khateeb's evidence is too vague for the Claimants to identify the Batelco representative who is alleged to have attended the meeting, further suggesting that his evidence is

[7] Khateeb 1, [7].

[8] Also referred to as the Ruwad or Fastlink case.

inaccurate, implausible and not credible, and his overall behavior "surprising".[9] In Khateeb 2, Mr Khateeb responds to a number of these criticisms. He gives further evidence about the meeting (including the name of Batelco's representative, the date, location and detail of the meeting, and the context of the alleged advice).[10]

32. In relation to the alleged discussion between Mr Khateeb and the auditors:

    (a) At paragraph 13 of Khateeb 1, Mr Khateeb states that after the sale of Fastlink, he had had a discussion with "one of the auditors of Saba (Deloitte) in relation to the tax imposed on income arising from goodwill." Mr Khateeb states that it was "possible" that the auditor was Mr Al Nabulsi or Mr Nasr. Although the auditor did not ask about the Fastlink sale transaction specifically, he asked whether it was possible to impose income tax on profits derived from the sale of shares if this profit was attributable to goodwill, and Mr Khateeb states that he replied that it would be subject to tax.

    (b) The Claimants' criticisms of Mr Khateeb's evidence in their Reply are focused on his recollection of the Batelco meeting, but impugn the accuracy and credibility of his evidence generally in a manner to which he was entitled to respond.

    (c) In Khateeb 2, Mr Khateeb revisits the Rowwad/Fastlink case, testifying that it was "well known" such that he would expect advisers to have at least highlighted the risk of tax liability. At paragraph 3(f) of his second statement, Mr Khateeb confirms his evidence that he "expressly told Mr Karim Nabilisi or his colleague Mr Khalil Nassr, both of Saba/Deloitte that the profit generated from the sale of 'husas' shares would be taxable if such profit was in exchange for goodwill."

33. The Tribunal does not consider that the testimony given by Mr Khateeb at paragraphs 3(a) to 3(f) of his second witness statement justifies granting leave for the Claimants to file the further evidence sought. The essential elements of Mr Khateeb's evidence on both points were identified in Khateeb 1. After having his credibility and recollection put in issue, Mr Khateeb has provided further testimony about the alleged meeting with Batelco. Although Mr Khateeb has refined his testimony of the meeting with Saba/Deloitte, he nevertheless identified in his first statement both the identity of the auditor/s with whom he may have had the discussion and the essential subject matter of that discussion. In both cases, had Claimants wished to adduce evidence from other participants in those discussions, they could have done so in support of their Reply,[11] in which their criticisms of Mr Khateeb's evidence were made. They did not do so and are not entitled to revisit that decision now when the written phase is closing and the hearing is imminent.

34. To the extent that the Claimants seek leave to file evidence in response to legal submissions made by the Respondent in its Rejoinder, they will have the opportunity to respond to those with their own submissions in the oral phase. The essential case advanced by the Respondent under this head – that the Rowwad case was a precedent for the imposition of the tax measure at issue in the present case, and that the goodwill component of share sales had consistently been taxed in the past – was squarely raised in the Respondent's Counter-Memorial in response to the Claimants' case that the tax measure was unprecedented.[12] While the Respondent and Mr Khateeb now place more

[9] Reply, [72]-[75].

[10] Khateeb 2, [3(a)]-[3(f)].

[11] The Tribunal notes that the participants from whom the Claimants now wish to submit rebuttal evidence were all named in Khateeb 1.

[12] See *e.g.* Counter-Memorial, [277]-[287].

emphasis on the argument that the Rowwad case and the taxability of goodwill were well known, the Tribunal does not consider that this represents a new argument, but rather the refinement of its existing position.

Request 2: letter of 15 January 2013 to Prime Minister

35. In a letter dated dated 15 January 2013, the First Claimant and Al-Amani Telecom Company, L.L.C. wrote to the Prime Minister of Jordan. A copy of that letter was annexed to the Claimants' Memorial as Exhibit C-135, and to the Respondent's Rejoinder as R-179. In its Rejoinder, the Respondent submits that this letter was the "first time" that the Claimants raised their current argument, suggesting a contradiction between the Claimants' description of it as a clear argument but nevertheless requiring "the consideration of the Jordanian Special Bureau for the Interpretation of Laws."[13]

36. The Claimants seek leave to file an additional witness statement from Mr Dagher explaining the context of the letter.

37. The Tribunal does not consider that leave is justified with respect to this request. It was the Claimants that first produced this letter with their Memorial. It has therefore been in evidence from the commencement of the written phase. Claimants could have explained the letter at that stage. The Claimants do not explain in detail which aspect of the Respondent's use of this letter is new, but apparently object to the implication that it suggests inconsistency in the Claimants' position.

38. The Claimants do not seek leave to rebut any new evidence filed by the Respondent, but only to respond to the legal submission made by the Respondent in reliance on the letter. The Tribunal considers that the parties' difference is principally a question of the appropriate inference to draw from the document, which is a matter of submission not evidence.

Requests 3 and 8: quantification of tax

39. Two of the Claimants' requests relate to the practice of ISTD in the characterization and quantification of income.

40. Request 3: The Claimants allege that the Respondent has introduced a "new theory" that where the taxpayer "does not provide documents, like UTT, ISTD will then apply the full difference as taxable income".[14] It seeks the opportunity to file further evidence from Mr Masa'deh (Claimants' Jordanian law expert), Mr Al-Akhras (Claimants' Jordanian tax expert) and Ms Jackson (Claimants' international tax expert) in response.

41. The Tribunal does not consider that this is a new argument to which the Claimants are entitled to respond by the submission of rebuttal evidence. To the contrary, the question of how the goodwill component is to be quantified, and how ISTD did in fact quantify the goodwill component of the UMC sale, was raised in the Respondent's Counter-Memorial and accompanying evidence.[15] The Claimants also addressed this contention in the context of addressing the Respondent's attempts to contact UTT.[16] In those

[13] Rejoinder, [23].

[14] Citing Rabah 2, [51] and Alexander 2, [3.5.2]. The Tribunal notes that Rabah 2, [51] does not concern this point.

[15] See, *e.g.*, Counter-Memorial, [82] citing Mawazreh 1, [30]-[32]; Alexander 1, [2.1.15], [3.1.59], [3.1.78].

[16] Reply, [172].

circumstances, the Tribunal does not consider that the Respondent has introduced a "new theory" as the Claimants allege.

42. Request 8: This request concerns Section III.5 of Rabah 2, in which the Claimants allege Mr Rabah opines that "the tax assessor need not to determine the source of the income, notably whether the profit was generated by a sale of assets or a sale of shares… and it is for the tax payer to prove the proper 'legal characterization of the income' at the stage of the administrative objection or before the courts."

43. Mr Rabah states in Rabah 2 that the ISTD "has the burden of proving the existence of a source of income" after which it is entitled to issue an assessment based on the information available to it, and "[i]n all cases, the burden of proving the source of income remains on the assessor."[17] Both Mr Rabah and Mr Masa'deh had earlier expressed this view.[18] Mr Masa'deh also testified that once the tax authorities had met their burden, it was for the taxpayer to prove that "the tax calculation is wrong".[19] Mr Rabah goes on to state in his Report that a dispute as to whether the whole or part of such income is consideration for goodwill or exempt capital gain would be a dispute as to the legal characterization of the income which falls outside the tax assessor's burden of establishing its source.[20] The Tribunal considers that that opinion is an elaboration of the opinion Mr Rabah expressed in Rabah 1, and a response to Mr Masa'deh's opinion that the ISTD "assumed the existence of an income, and provided no evidence to prove that the intangible asset goodwill 'Shuhra' and/or the license have been sold and consideration was paid in lieu."[21]

44. Since therefore this is not in substance a new point, the Tribunal declines to grant leave.

Request 4: matters relating to the interpretation of the 2014 Tax Law

45. In this request, the Claimants identify a number of opinions advanced by Mr Rabah and Mr Batarseh (a fact witness from ISTD) based on the 2014 Tax Law.

46. The Claimants submit that the Respondent's witnesses have introduced a "new theory" in relation to the 2014 Tax Law. They identify four particular arguments allegedly introduced by Mr Rabah and Mr Batarseh under this heading:[22]

    (a) Rabah: That Article 4(7) and 4(8) of the 2014 Tax Law would be redundant if profits generated from the sale of shares were capital gains *per se*;[23]

    (b) Rabah: That the legislature intended by Article 4(7) and 4(8) that income accrued from trading in 'husas' and 'ashom' shares may consist of a goodwill element;

[17] Rabah 2, [105]-[106].

[18] Rabah 1, [124]; Masa'deh 1, [4.9]; Masa'deh 2, [3.6].

[19] Masa'deh 1, [4.9].

[20] Rabah 2, [108].

[21] Masa'deh 2, [3.6].

[22] Citing Rabah 1, [26]-[27] and Section I.4 (which the Tribunal notes is that report's Executive Summary); and Batarseh, [9]-[11].

[23] The Claimants refer to Mr Rabah's discussion of paragraphs 7 and 8 of Article 4 of the 2014 Tax Law. However, Mr Rabah appears to discuss Article 4(a)(7)-(8) of the 2009 Tax Law, and Articles 4(a)(6)-(7) of the 2014 Tax Law. The appendices to Mr Rabah's report in the record (which are said to contain the 2009 and 2014 Tax Laws: Items 5 and 6 of Appendix 2) have not been translated.

(c) Batarseh: That the 1985 Tax Law allows for "partial exemption and partial taxation of shares", and the fact that "the deeming provision is absent in 2009 and 2014 tax laws leads to the conclusion that publically traded stocks after 2010 include capital gain which is exempt and goodwill which is taxable."[24]

(d) Rabah: That an underlying asset of a company such as goodwill can be transferred by the shareholder of that company by selling its shares.

47. Taking each of these points *seriatim*:

(a) The Tribunal expresses no view on whether Claimants correctly characterise Mr Rabah's evidence on Articles 4(7) and 4(8) or on the potential weight and relevance of the point. It finds, however, that, while the 2009 and 2014 Tax Laws were mentioned at the stage of the Counter-Memorial[25] this was only in passing. Dr Masa'deh's discussion of the laws concerned a different issue (the meaning of "ashom shares").[26] In those circumstances, the Tribunal considers that this is a new argument to the Claimants' witnesses ought to have an opportunity to respond. The Tribunal adds that it would be assisted by the views of at least Dr Masa'deh on this point as well as Mr Rabah, and that the fair and orderly conduct of the hearing would be facilitated if his views were set forth in a short supplemental report, so that Mr Rabah, the Parties and the Tribunal can have a proper opportunity to consider the point in advance of its consideration in the course of oral testimony.

(b) For the same reason, the Tribunal considers that the Claimants' witnesses ought to have an opportunity to respond to Mr Rabah's second argument.

(c) The Tribunal takes a different view with respect to the evidence of Mr Batarseh. As the Respondent notes, Mr Batarseh does not discuss the 2009 or 2014 Tax Laws. Rather, the Claimants refer to Mr Batarseh's testimony that the ISTD understands the 1985 Tax Law as "allowing for partial exemption and partial taxation of shares". It is the Claimants that then comment on this theory in light of the different wording of the 2009 and 2014 Tax Laws. Mr Batarseh is called as a witness of fact, not an expert. In the Tribunal's view, his evidence does not involve the introduction of a new theory. Moreover, the Claimants will have the opportunity to cross-examine Mr Batarseh on his evidence at the hearing.

(d) Fourth, Claimants contend that Mr Rabah advances an argument that the sale by a shareholder of its shares can be effective to transfer an underlying asset of a company such as goodwill. The Tribunal does not consider that a fair reading of the paragraphs cited by the Claimants supports the proposition for which Claimants contend, and Mr Rabah does not deploy the 2009 and 2014 Tax Laws specifically in support of it. At most, that argument is a premise of Mr Rabah's opinion. To an extent it is also responsive to Mr Masa'deh's opinion.[27] In those circumstances, the Tribunal does not consider that leave is warranted.

48. As to the terms of leave, the Tribunal determines:

[24] Citing Batarseh, [9]-[11].

[25] Counter-Memorial, [17] and Rabah 1, [78].

[26] Masa'deh 2, [5.30].

[27] See *e.g.* Masa'deh 2, [4.17].

(a) The Claimants' experts should have the opportunity to respond to the first two points raised by Mr Rabah.

(b) The Claimants also seek leave to produce two sets of "documentary evidence", recording "closely held companies…which were wholly or substantially sold from 1977-2014" and "records of public shareholding companies whose substantial part of shares was sold between 2010-2015." The Claimants have not explained to which aspects of the new arguments these documents would relate. The Tribunal also recalls that the parties have submitted considerable documentary evidence already in support of their positions. The Claimants are permitted to submit only specific documents that are strictly necessary to support any opinions expressed by Dr Masa'deh and Mr Al-Akhras in accordance with the preceding paragraph. Claimants may not have leave to adduce these documents from these additional sets for any other purpose.

Request 5: Article 7.A.15 only applies to shares that are bought* and *sold

49. The Claimants seek leave to respond to what they describe as a "completely new legal theory" that the capital gains exemption in Article 7.A.15 only applies to shares in public shareholding companies which have been bought *and* sold. The Claimants refer in particular to Section II.4 of Mr Rabah's second report, but the Tribunal notes that evidence to this effect is also given by Mr Almusned[28] and Mr Batarseh,[29] witnesses of fact called by the Respondent, and adopted in the Rejoinder.[30]

50. The Tribunal considers that the Claimants are entitled to an opportunity to respond to this theory.

51. The Respondent objects on the basis that the "issue of the scope of the exemption…including the specific wording of that exemption, was discussed extensively" in the preceding submissions. The Tribunal has considered the Counter-Memorial, the Reply and the accompanying evidence, and does not consider that either Party squarely raised the present interpretation. While the scope of the exemption was extensively discussed, and there are references in those submissions to the trading and listing of shares, this was largely in the context of the distinction between public and private shareholding companies,[31] and the Respondent did not advance the present submission in terms before the Rejoinder stage.

52. Nor is it sufficient for the Respondent to cite the ISTD decision on the administrative objection in support of this theory, or Dr Masa'deh's discussion of that objection in his first report,[32] because the Respondent advances an explanation of the reasons for that decision that is new.[33]

53. The Tribunal has considered the applications made in relation to this request, and has determined:

(a) The Claimants should have the opportunity to file rebuttal evidence from Dr Masa'deh and Mr Al-Akhras in response to this argument.

[28] Almusned 2, [9].

[29] Batarseh, [10].

[30] See, *e.g.*, Rejoinder, [52]-[56].

[31] See, *e.g.*, Reply, [191], [399]; Jackson 2, [4.3.4].

[32] Masa'deh 1, [5.1.5].

[33] See, *e.g.*, Rejoinder, [56].

(b) The Claimants also seek leave to file testimony from an individual who has yet to give evidence in this arbitration, Mr. Karim Kawar, who is said to have been the chairman of the "Reach initiative". Mr Kawar's evidence would concern the "taxation of start-ups and the role and added-value of private shareholding companies for the telecommunications sector in Jordan". The Claimants discussed this initiative (albeit not mentioning Mr Kawar) in their Memorial.[34] The Tribunal does not consider that the circumstances justify the Claimants introducing a new witness to give evidence on such topics. The Respondent has advanced a legal argument as to the correct interpretation of a statutory provision. Such an argument does not justify the introduction of a wholly new witness of fact to comment on the role of start-up businesses in the telecommunications sector generally.

(c) The Claimants have also intimated applications for production of documents. As noted above, the Tribunal has not received applications for such production and does not consider those requests further.

Requests 6 and 7: further evidence of Mr Rabah

54. In these requests, the Claimants point to two further points in Rabah 2:

(a) His reference to clause 5.3(k) of the Share Sale Agreement, which refers to goodwill (Request 6); and

(b) A distinction between withdrawals of partners in a company and their rightful dividends from that company (Request 7).

55. Request 6: At Section III.4.1 of his second report, Mr Rabah quotes a number of provisions in the Share Sale Agreement between UTT and Batelco. Pursuant to clause 5.3(k), the Sellers undertook not to do or permit any steps that might jeopardise the goodwill of the Company. Commenting on the quoted clauses, Mr Rabah opines that "the sale agreement links between the value of the sold shares and the value of the tangible and intangible assets of [UMC], including the goodwill."[35]

56. The Respondent points out that both the Share Sale Agreement and the taxability of goodwill were discussed in previous pleadings; indeed they are central aspects of the parties' respective cases. Albeit that Mr Rabah's discussion of this particular provision of the Agreement may be new, the Tribunal agrees with the Respondent that his opinion is a development of his analysis of the kind that is to be expected in a second round of expert reports.

57. The Claimants' witnesses and experts will have the opportunity to comment on the relevance of that clause, and the inferences which Mr Rabah draws from it, in both conferencing (so far as experts are concerned) and in evidence. The Claimants will also have the opportunity to cross-examine Mr Rabah on his opinion. The Tribunal therefore does not consider that the circumstances justify the granting of leave to file three further expert reports on the question.

58. Request 7: At Section V.1 of his second report, Mr Rabah addresses the difference between the distribution of profits to shareholders (which become the absolute property of the shareholders) and withdrawals by shareholders (which are treated as loans which

[34] Memorial, [34]-[35] & [370]-[371].

[35] Rabah 2, [95].

remain on the company's balance sheet). He explains this distinction by reference to UTT's Articles of Association and the Companies Law.[36]

59. The Claimants submit that this is a "new line of argument" which is designed to "legitimize the demand for reimbursement made to UTT's shareholders."

60. The Respondent argues that the evidence is responsive to Dr Masa'deh's report, in which he discussed whether the distribution of the share sale income from UTT should be characterized as revenue (and if so, whether the General Assembly should have treated it as profits and distributed it among the shareholders accordingly).[37]

61. The Tribunal considers that Mr Rabah's evidence is properly in reply to the opinion expressed by Dr Masa'deh. The Claimants' expert discussed whether the income should have been characterized as profits and distributed as such to shareholders, by reference to the Articles of Association and in a section of his report that also discussed the Companies Law. Mr Rabah was entitled to comment on that evidence, and in the Tribunal's view his evidence does not introduce a new "line of argument" justifying the Claimants having an opportunity to file a further report from Dr Masa'deh on the issue.

Conclusion

62. The Tribunal's decisions on each request are recorded in Appendix A.

63. The Tribunal directs as follows:

    (a) If the Claimants wish to avail themselves of the opportunity to file further evidence permitted pursuant to this Order, they must do so by c.o.b London time on Thursday 31 March 2016;

    (b) The Respondent has leave to file sur-rebuttal evidence strictly limited to responding to any new points made in Claimants' additional evidence by c.o.b. London time on Thursday 14 April 2016.

For and on behalf of the Arbitral Tribunal

SIGNED

Professor Campbell McLachlan QC
President of the Tribunal
Date: 21 March 2016

[36] Rabah 2, [137]-[140].

[37] Masa'deh 2, [7.9].