INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

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

and

HASHEMITE KINGDOM OF JORDAN
(Respondent)

(ICSID Case No. ARB/13/38)

AWARD

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

Secretary of the Tribunal
Ms Aïssatou Diop

Assistant to the Tribunal
Mr Jack Wass

Date of dispatch to the Parties: 14 December 2017

REPRESENTATION OF THE PARTIES

Representing Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr Fouad Mohammed Thunyan Alghanim:

Mr Raid Abu-Manneh
Ms Rachael O'Grady
Mayer Brown International LLP
London, United Kingdom

and

Mr Dany Khayat
Dr Jose Caicedo
Mayer Brown International LLP
Paris, French Republic

and

Dr Salaheddin M. Al-Bashir
International Business Legal Associates
Amman, Hashemite Kingdom of Jordan

and

Dr Tarek Elzayat
In-house counsel for FASGTC
Sharq, State of Kuwait

Representing the Hashemite Kingdom of Jordan:

Dr. Awad Abo Jarad Almashagbeh
Minister of Justice
Amman, Hashemite Kingdom of Jordan

and

Mr Sam Wordsworth, QC
Mr Lucas Bastin
Mr Andrew Legg
Essex Court Chambers
London, United Kingdom

and

Mr Sean Aughey
11KBW
London, United Kingdom

and

Mr Aiman Y Odeh
Mr Firas I Bakr
Bakr & Odeh
Amman, Hashemite Kingdom of Jordan

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GLOSSARY OF DEFINED TERMS

1964 Companies Law	1964 Companies Law (Ex R-198)
1985 Tax Law	Income Tax Law No 57 of 1985 (Ex C-6)
1989 Temporary Companies Law	1989 Temporary Companies Law (Ex AM1, App 2, No 13)
1995 Amending Tax Law	The 1995 Amending Tax Law (Ex AM1, App 2, No 5)
1997 Companies Law	The 1997 Companies Law (Ex C-153)
2002 Amending Companies Law	2002 Amending Companies Law (Ex NR1, App 6, No 13)
2006 Committee	Internal ISTD Committee formed by Mr Kudah, Director-General of the ISTD, in June 2006
2006 Transaction	The sale on 24 June 2006 by UTT and Global to Batelco of 96% of the issued shares in UMC for a total price of US$415 million
2008 Assessment Committee	Three-person assessment committee appointed within ITSD to establish whether UTT was liable for tax formed on 15 April 2008
Arab Public Shareholding	*Arab Public Shareholding Company* (Decision) Court of Cassation Case No 1566/1999 (2000) (Ex AM1, App 3, No 15)
ARSIWA	ILC Draft Articles on the Responsibilities of States for Internationally Wrongful Acts (Ex CL-41)
Batelco	Bahrain Telecommunications Company
BIT	Agreement between the Hashemite Kingdom of Jordan and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments (Ex C-1)
CCD	Companies Control Department
Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction
Daoud Al-Issa	*inter alia Daoud Al-Issa* (Decision) Court of Cassation Case No 611/1981 (1982) (Ex C-11 / Ex R-85)
Distinguished Food Company	*Distinguished Food Company v Income Tax Assessor* (Decision) Court of Cassation Case No 4025/2004 (2005) (Ex AM1, App 3, No 25)
FASGTC	Fouad Alghanim & Sons Co for General Trading & Contracting WLL (First Claimant)
First Claimant	Fouad Alghanim & Sons Co for General Trading & Contracting WLL
Ghassan Dhamen	*Ghassan Dhamen* (Decision) Court of Cassation Case No 1956/2003 (2003) (Ex R-87)
Global	Global Investment House Company
GSM	Global System for Mobile Communications
Hamdan	*Hamdan* (Decision) Court of Cassation Case No 727/1992 (1992) (Ex C-12, Ex R-86)

ICSID	International Centre for the Settlement of Investment Disputes
ISTD	Income and Sales Tax Department of Jordan
Jordan	Hashemite Kingdom of Jordan
Jordanian Enforcement Proceedings	Proceedings commenced in 2013 to enforce the Tax Measure against (*inter alia*) the Claimants
LTPD	Large Taxpayers Department
Memorial	Claimants' Memorial on the Merits (described as Statement of Claim)
Mr Alghanim	Mr Fouad Mohammed Thunyan Alghanim (the Second Claimant)
Mr Dagher	Mr Michael Dagher, a director of UTT
MTC	Mobile Telecommunications Company
PO No 1	Procedural Order No 1 issued on 16 October 2014
PO No 2	Procedural Order No 2 concerning provisional measures, issued on 24 November 2014
PO No 3	Procedural Order No 3 concerning the Parties' requests for document production, issued on 1 September 2015
PO No 4	Procedural Order No 4 concerning the Respondent's request for the production of documents from third parties, issued on 17 December 2015
PO No 5	Procedural Order No 5 concerning procedural matters, issued on 3 March 2016
PO No 6	Procedural Order No 6 concerning the Claimants' application to file rebuttal evidence, issued on 21 March 2016
PO No 7	Procedural Order No 7 concerning the Claimants' request for the production of a document from third parties, issued on 22 March 2016
PO No 8	Procedural Order No 8 concerning the Respondent's application for production of documents, issued on 1 April 2016
PO No 9	Procedural Order No 9 concerning the Claimants' request for an order for the production of a document, issued on 7 April 2016
PO No 10	Procedural Order No 10 concerning the Respondent's application to exclude documents, issued on 12 April 2016
Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction
Rejoinder on Jurisdiction	Claimants' Rejoinder on Jurisdiction
Reply	Claimants' Reply on the Merits and Defence on Jurisdiction
Request	Request for Arbitration dated 4 December 2013
Second Claimant	Mr Fouad Mohammed Thunyan Alghanim
Tax Measure	ITSD's assessment of UTT as liable for income tax on the sale of the shares in UMC of JD 47,170,584 plus additional tax and penalties (Ex C-109)
TRC	Telecommunication Regulatory Commission

UMC	Umniah Mobile Company, PSC
Unified Agreement	Unified Agreement for the Investment of Arab Capital in the Arab States
UTT	Umniah Telecommunications and Technology LLC

I. INTRODUCTION

1. The present dispute is submitted to the International Centre for Settlement of Investment Disputes (**ICSID**) pursuant to the Agreement 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 (**the BIT**).[1]

2. The First Claimant is Fouad Alghanim & Sons Co for General Trading & Contracting WLL (**FASGTC**), a company registered in Kuwait and carrying on business as part of a diversified conglomerate. The Second Claimant is Mr Fouad Mohammed Thunyan Alghanim (**Mr Alghanim**), a Kuwaiti national and the majority shareholder in and Chairman of FASGTC. **FASGTC** and **Mr Alghanim** are jointly referred to herein as Claimants.

3. The Respondent is the Hashemite Kingdom of Jordan (**Jordan**).

4. The present arbitration concerns the Claimants' interest in Umniah Telecommunications and Technology LLC (**UTT**), a limited liability company registered in Jordan, in which the Claimants have an interest (along with others who are not parties to the present arbitration). UTT was used as a vehicle to hold a 66% interest in Umniah Mobile Company, PSC (**UMC**), a company registered in Jordan. In 2004, UMC was awarded a licence to operate the third public mobile telecommunications network in Jordan. In 2006, UTT sold its majority stake in UMC to a Bahraini company, Bahrain Telecommunications Company (**Batelco**) for approximately US$292 million and distributed its gain on the sale to its shareholders. In 2008, the directors and shareholders of UTT resolved to place it into voluntary liquidation.

5. In the same year, the Income and Sales Tax Department of Jordan (**ISTD**) assessed UTT as liable for income tax on the sale of the shares in UMC of approximately US$81 million (**the Tax Measure**). UTT challenged that assessment through the Jordanian courts but was not successful, with its final appeal being rejected by the Court of Cassation on 25 April 2012.

6. The Claimants allege that the Taxation Measure has no basis in Jordanian law and was imposed in response to public disquiet at the quantum of UTT's profit on the sale of its interest in UMC. They have brought the present arbitration alleging that the Tax Measure was arbitrary and breached a number of the substantive guarantees given by Jordan in the BIT.

7. The Respondent contests the Tribunal's jurisdiction over the dispute. On the merits, it maintains that the tax was lawfully imposed and that the Claimants' allegations that the Taxation Measure was arbitrary and politically motivated are unfounded. In those circumstances, the Respondent maintains that it committed no breaches of the BIT, and the Claimants' claims on the merits must be dismissed.

[1] Agreement 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, entered into force 19 March 2004) (Ex C-1).

II. PROCEDURAL HISTORY

A. Request for arbitration and constitution of the Tribunal

8. On 11 December 2013, ICSID received a request for arbitration dated 4 December 2013, together with Appendix 1 through Appendix 9 from the Claimants against the Respondent (the **Request**).

9. On 24 December 2013, the Secretary-General registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of the Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

10. On 13 March 2014, the Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, with one arbitrator appointed by each Party, and the third, presiding arbitrator appointed by agreement of the Parties. In the event that the Parties could not agree on a presiding arbitrator, the appointment would be made by the two party-appointed arbitrators in consultation with the Parties, failing which, ICSID would be asked to make the appointment.

11. The Tribunal is composed of Professor Campbell McLachlan, QC, a national of New Zealand, as president, appointed by agreement of the party-appointed arbitrators in consultation with the parties; the Honourable L. Yves Fortier PC CC OQ QC, a national of Canada, appointed by the Claimants; and Professor Marcelo Kohen, a national of Argentina, appointed by the Respondent.

12. On 27 June 2014, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the **Arbitration Rules**), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Aïssatou Diop, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

13. On 15 October 2015, by agreement with the Parties, Mr Jack L W Wass was appointed Assistant to the Tribunal on Terms of Appointment executed by the Tribunal, the Parties and Mr Wass on that date.

B. First Session and application for provisional measures

14. Following the constitution of the Tribunal, the Claimants on 15 September 2014 filed a request for the grant of provisional measures in accordance with Article 47 of the ICSID Convention. The Claimants sought an order restraining certain proceedings taken in Jordan against the Claimants and other parties. Those proceedings concerned the enforcement of the Tax Measure underlying the present proceedings. The Claimants submitted that provisional measures were necessary to protect the exclusivity of the present arbitral proceedings guaranteed by Article 26 of the Convention. The Respondent filed observations on that request on 28 September 2014.

15. On 2 October 2014, the Tribunal held its first session at the International Dispute Resolution Centre, immediately followed by a hearing on the Claimants' request for provisional measures.

16. Those present at the First Session and the hearing on the Claimants' request for provisional measures were:

Tribunal	
Professor Campbell McLachlan QC	President
The Honourable L. Yves Fortier	Co-Arbitrator
Professor Marcelo G. Kohen	Co-Arbitrator
ICSID Secretariat	
Ms. Aïssatou Diop	Secretary of the Tribunal
Claimants	
Counsel	
Mr Raid Abu-Manneh	Mayer Brown (London)
Mr Dany Khayat	Mayer Brown (Paris)
Respondent	
Counsel	
Mr Aiman Odeh	Bakr & Odeh
Mr Firas Bakr	Bakr & Odeh
Mr Luis Gonzalez Garcia	Matrix Chambers
Ms Alison Macdonald	Matrix Chambers
Parties	
Miss Rulan Samara	Embassy of Jordan, London
Court Reporter	
Mrs Claire Hill	The Court Reporter Limited

17. On 16 October 2014, the Tribunal issued Procedural Order No 1 (**PO No 1**). Annexed to the Order was, *inter alia*, a timetable for the number and sequence of pleadings. The timetable allowed for the possibility of the Respondent applying for bifurcation of the proceedings into separate jurisdiction and merits phases. In the result, the Respondent did not apply for bifurcation and accordingly this arbitration has proceeded in a single phase.

18. On 24 November 2014, the Tribunal issued Procedural Order No 2 concerning provisional measures (**PO No 2**). In that Order, the Tribunal by majority[2] recommended that until the Tribunal's jurisdiction in the present matter was finally determined:

(a) The Respondent refrain from prosecuting the Jordanian proceedings relating to the enforcement of the Tax Measure against the First and Second Claimants and, jointly

[2] Professor Kohen appended a dissenting opinion.

with the Claimants, request that the Jordanian courts suspend those proceedings against the Claimants; and

(b) The Respondent otherwise desist from enforcing the Taxation Measures against the Claimants.

C. Exchange of pleadings and subsequent Procedural Orders

19. The parties exchanged the following pleadings:

(a) On 21 January 2015, the Claimants filed a Memorial on the Merits (**Memorial**), together with Exhibits C-1 through C-184, Legal Authorities CL-1 through CL-196, and the following witness statements and expert reports: Witness Statement of Mr Nasser Al-Marri dated 24 July 2014; Witness Statement of Mr Eyad Abouzeid dated 21 January 2015; Witness Statement of Mr Fouad Mohammed Thunyan Alghanim dated 21 January 2015; Witness Statement of Mr Michael Suheil Dagher dated 21 January 2015; Expert Report of Dr Ahmad Masa'deh dated 21 January 2015, together with Appendices 1 through 5; and Expert Report of Ms Pam Jackson dated 21 January 2015, together with Exhibits PWC-1 through PWC-37.

(b) On 22 June 2015, the Respondent filed a Counter-Memorial on the Merits and Memorial on Jurisdiction (**Counter-Memorial**), together with Exhibits R-1 through R-134, Legal Authorities RL-1 through RL-36, and the following witness statements and expert reports: Witness Statement of Mr Eyad Jamal Ahmad Al Kudah dated 21 June 2015; Witness Statement of Mr Ali Muhammed Barakat Almusned dated 21 June 2015; Witness Statement of Mr Ali Muhammed Barakat Almusned dated 21 June 2015; Witness Statement of Mr Ibrahim Khateeb dated 22 June 2015; Expert Report of Mr Rafiq Dweik dated 10 June 2015, together with Appendix 1 and Appendix 2; Expert Report of Mr Nabil Yacoub Rabah dated 18 June 2015, together with its accompanying Appendices; and Expert Report of Ms Kate Alexander dated 22 June 2015, together with Appendices A through G.

(c) On 11 November 2015, the Claimants filed a Reply on the Merits and Counter-Memorial on Jurisdiction (**Reply**), together with Exhibits C-185 through C-223, Legal Authorities CL-197 through CL-334, and the following witness statements and expert reports: Second Witness Statement of Mr Fouad Mohammed Thunyan Alghanim dated 11 November 2015; Second Witness Statement of Mr Michael Suheil Dagher dated 11 November 2015; Expert Report of Mr Mohammed Al-Akhras dated 11 November 2015; Second Expert Report of Ms Pam Jackson dated 11 November 2015; and Second Expert Report of Dr Ahmad Masa'deh dated 11 November 2015, together with Appendix 1 through Appendix 4.

(d) On 15 February 2016, the Respondent filed a Rejoinder on the Merits and Reply on Jurisdiction (**Rejoinder**), together with Exhibits R-135 through R-194, Legal Authorities RL-37 through RL-54, together with the following witness statements and Expert Reports: Second Witness Statement of Mr Ali Muhammed Barakat Almusned dated

15 February 2016; Second Witness Statement of Mr Eyad Jamal Ahmad Al Kudah dated 15 February 2016; Second Witness Statement of Mr Ibrahim Khateeb dated 15 February 2016; Witness Statement of Mr Aktham Batarseh dated 15 February 2016; Second Expert Report of Mr Rafiq Dweik dated 14 February 2016; Second Expert Report of Ms Kate Alexander dated 15 February 2016, together with Appendix A and Appendix B; and Second Expert Report of Mr Nabil Yacoub Rabah dated 15 February 2016, together with its accompanying Appendices.

(e) On 30 March 2016, the Claimants filed a Rejoinder on Jurisdiction (**Rejoinder on Jurisdiction**), together with Legal Authorities CL-335 through CL-366, and the following expert reports: Second Expert Report of Mr Mohammed Al-Akhras, dated 31 March 2016; and Third Expert Report of Dr Ahmad K Masa'deh, together with Appendix 1 through Appendix 5.

20. The following Procedural Orders have been issued by the Tribunal in relation to the production of documents, the exchange of evidence and other matters:

(a) On 1 September 2015, the Tribunal issued Procedural Order No 3 on the Parties' requests for document production (**PO No 3**).

(b) On 17 December 2015, the Tribunal issued Procedural Order No 4 on the Respondent's request for the production of documents from third parties (**PO No 4**).

(c) On 3 March 2016, the Tribunal issued Procedural Order No 5 on procedural matters (**PO No 5**).

(d) On 21 March 2016, the Tribunal issued Procedural Order No 6 concerning the Claimants' application to file rebuttal evidence (**PO No 6**).

(e) On 22 March 2016, the Tribunal issued Procedural Order No 7 concerning the Claimants' request for the production of a document from third parties (**PO No 7**).

(i) On 1 April 2016, the Tribunal issued Procedural Order No 8 concerning the Respondent's application for production of documents (**PO No 8**).

(ii) On 7 April 2016, the Tribunal issued Procedural Order No 9 concerning the Claimants' request for an order for the production of a document (**PO No 9**).

(iii) On 12 April 2016, the Tribunal issued Procedural Order No 10 concerning the Respondent's application to exclude documents (**PO No 10**).

21. On 5 April 2016, the President held (by the consent of the full Tribunal) a pre-hearing organizational meeting by telephone with counsel for the Parties. Following the conclusion of that meeting and deliberation by the Tribunal, the President issued a Minute on 11 April 2016 making arrangements for the hearing.

D. Hearing on Jurisdiction, Merits and Quantum

22. The Hearing on Jurisdiction, Merits and Quantum was held from Monday 25 April to Friday 29 April 2016 at the premises of the International Dispute Resolution Centre in London, United Kingdom (the **Hearing**).

23. The Parties filed skeleton arguments, and the Hearing proceeded by way of opening statements and the hearing and testing of fact and expert testimony.

24. Those present at the Hearing were:

Tribunal	
Professor Campbell McLachlan QC	President
The Honourable L. Yves Fortier	Co-Arbitrator
Professor Marcelo G. Kohen	Co-Arbitrator
ICSID Secretariat	
Ms Martina Polasek	Acting Secretary of the Tribunal
Assistant to the Tribunal	
Mr Jack Wass	Assistant to the Tribunal
Claimants	
Counsel	
Mr Raid Abu-Manneh	Mayer Brown
Mr Dany Khayat	Mayer Brown
Dr Salaheddin Al-Bashir	International Business Legal Associates
Dr Jose Caicedo	Mayer Brown
Ms Rachael O'Grady	Mayer Brown
Mr Wisam Sirhan	Mayer Brown
Mr Mark McMahon	Mayer Brown
Mr William Ahern	Mayer Brown
Mr Mohammed Al-Bashir	Barghouti Bashir & Khirfan
Ms Charlotte Sperrink	Mayer Brown
Mr Karim El-Borhami	Mayer Brown
Parties	
Mr Fouad Mohammed Thunyan Alghanim	Claimant
Mr Mohammed Alghanim	Fouad Alghanim & Sons Co. for General Trading and Contracting, W.L.L
Mr Tarek Elzayat	Fouad Alghanim & Sons Co. for General Trading and Contracting, W.L.L
Witnesses	
Mr Michael Dagher (accompanied Ola El Shareef, in-house lawyer to Mr Dagher)	Dama Ventures
Mr Eyad Abouzeid	Dama Ventures

Experts

Dr Ahmad Masa'deh	Khalaf Masa'deh & Partners
Mr Mohammed Al-Akhras	PricewaterhouseCoopers, Jordan
Ms Pam Jackson	PricewaterhouseCoopers, London
Mr Christian Butter (assistant to Ms Jackson)	PricewaterhouseCoopers, London

Respondent

Counsel

Mr Aiman Odeh	Bakr & Odeh
Mr Firas Bakr	Bakr & Odeh
Mr Sam Wordsworth QC	Barrister
Mr Lucas Bastin	Barrister
Dr Andrew Legg	Barrister
Mr Sean Aughey	Barrister
Ms Aseel Barghuthi	Bakr & Odeh

Party Representative

Mr Daifallah Alfayez	Embassy of Jordan, London

Witnesses

Mr Eyad Al Kudah	Anti-Corruption Authority, Jordan
Mr Musa Mawazreh	Private Tax Consultant, Jordan
Mr Ibrahim Khateeb	Certified Auditors, Jordan
Mr Aktham Batarseh	Income and Sales Tax Department, Jordan
Mr Ali Almusned	Tax Attorney, Jordan

Experts

Mr Nabil Rabah	Rabah & Sharaiha
Mr Rafiq Dweik	Dweik and Co
Ms Kate Alexander	EY

Court Reporter

Mrs Claire Hill	The Court Reporter Limited

Interpreters

Ms Hanifa Dobson	English/ Arabic Interpreter
Ms Amal Watt	English/ Arabic Interpreter
Ms Huboob Al Mudhaffer	English/ Arabic Interpreter

25. The witnesses heard at the Hearing were:

(a) For the Claimants:[3]

[3] The Claimants also submitted a witness statement of Mr Nasser Al-Marri, but the Respondent did not require Mr Al-Marri's presence for cross-examination (without accepting the contents of his witness statement).

(i) Mr Fouad Alghanim, the Chairman and majority shareholder in the First Claimant, and the Second Claimant in his own right;

(ii) Mr Michael Dagher, a director of and shareholder in UTT;

(iii) Mr Eyad Abouzeid, an employee of UTT who was involved in its bid and ultimate sale to Batelco;

(iv) Dr Ahmad Masa'deh, an expert of Jordanian law;

(v) Mr Mohammed Al-Akhras, an expert of Jordanian tax; and

(vi) Ms Pam Jackson, an international tax expert.

(b) For the Respondents:

(i) Mr Eyad Al Kudah, the Director-General of the ISTD between 2004 and 2008;

(ii) Mr Mussa Mawazreh, the Director of the Large Taxpayers Department of the ISTD between 2006 and 2008 and Director-General of the ISTD from 2008 to 2012;

(iii) Mr Ibrahim Khateeb, an auditor and member of KPMG Jordan who advised Batelco on the sale transaction;

(iv) Mr Aktham Batarseh, an assessor in the Large Taxpayers Department who was a member of the 2008 assessment committee which decided that tax was payable on the sale;

(v) Mr Ali Almusned, a former employee of ISTD and member of the 2006 committee formed to examine the extent to which the sale of UMC was subject to tax;

(vi) Mr Nabil Rabah, an expert of Jordanian law;

(vii) Mr Rafiq Dweik, an expert of Jordanian tax; and

(viii) Ms Kate Alexander, an international tax expert.

26. At the conclusion of the hearing of expert testimony on 29 April 2016, the Tribunal declared the evidentiary phase of the proceeding complete, and ordered that no more evidence was to be adduced by either party except at the Tribunal's request.[4] With the Parties' agreement, the Tribunal then adjourned the Hearing until 22 June 2016, for the delivery of oral closing arguments.[5] On 10 June 2016, the Parties exchanged written closing skeletons.[6] Where

[4] Tr Day 5, 251:6-17.

[5] Tr Day 5, 252:24–253:4.

[6] Described as **Claimants' Skeleton** and **Respondent's Skeleton** respectively; see also Claimants' Closing Slides (**CCsl**).

questions of translation remained outstanding and were not otherwise agreed between the Parties, pursuant to directions given by the President and with the agreement of the Parties, independent translations were prepared on the Tribunal's instructions which were agreed to be entered into the record and on which the Tribunal has relied.[7] The transcript of the evidentiary hearing was also amended to account for interpretation and translation corrections.[8] The Tribunal held a one-day Hearing for oral closings in London on 22 June 2016 following which it declared the proceedings adjourned (the **Hearing on Closing Arguments**). Both Parties confirmed they had no concerns with the procedure that had been adopted.[9]

27. Those present at the Hearing on Closing Arguments were:

Tribunal	
Professor Campbell McLachlan QC	President
The Honourable L. Yves Fortier	Co-arbitrator
Professor Marcelo G. Kohen	Co-arbitrator
ICSID Secretariat	
Ms Martina Polasek	Acting Secretary of the Tribunal
Claimants	
Counsel	
Mr Raid Abu-Manneh	Mayer Brown
Mr Dany Khayat	Mayer Brown
Dr Salaheddin Al-Bashir	International Business Legal Associates
Dr Jose Caicedo	Mayer Brown
Ms Rachael O'Grady	Mayer Brown
Mr Wisam Sirhan	Mayer Brown
Mr Mark McMahon	Mayer Brown
Mr William Ahern	Mayer Brown
Mr Mohammed Al-Bashir	Barghouti Bashir & Khirfan
Parties	
Mr Tarek Elzayet	Fouad Alghanim & Sons Co. for General Trading and Contracting, W.I.L
Respondent	
Counsel	
Mr Aiman Odeh	Bakr & Odeh
Mr Firas Bakr	Bakr & Odeh
Mr Sam Wordsworth QC	Barrister
Mr Lucas Bastin	Barrister
Dr Andrew Legg	Barrister
Mr Sean Aughey	Barrister
Ms Aseel Barghuthi	Bakr & Odeh
Party Representative	
Mr Daifallah Alfayez	Embassy of Jordan, London

[7] Tr Day 5, 253:6–256:11.

[8] Tr Day 5, 257:5–259:9.

[9] Tr Day 6, 256:9-15.

Court Reporters

Ms Ailsa Williams	European Deposition Services
Ms Pamela Henley	European Deposition Services

28. In accordance with the Tribunal's directions, the Parties filed simultaneous submissions on costs on 4 August 2016, after which the Respondent filed an additional submission on 1 September 2016, followed by the Parties' simultaneous reply submissions on costs from both parties on 8 September 2016.

III. FACTUAL BACKGROUND

29. This section briefly summarises the background to the Claimants' investment in Jordan, the operation of UMC, the sale of their interest, the imposition of the Tax Measure and UTT's attempts to overturn it. Certain aspects of the factual record were in dispute between the Parties. The Tribunal identifies these matters in this Part, but defers any findings on these aspects that it is necessary to make until Part VI of the Award, following its exposition of the Parties' arguments in Part V.

A. The background to the establishment of UTT

30. FASGTC is a member of a diversified conglomerate based in Kuwait but with operations throughout the Middle East and worldwide.[10] Mr Alghanim is the Chairman and majority shareholder in FASGTC and a Kuwaiti citizen.[11]

31. Mr Alghanim's experience of the telecommunications industry included the establishment of Mobile Telecommunications Company (**MTC**) in Kuwait in 1983,[12] which he subsequently sold. He said in evidence that he was an extremely successful and well-connected businessman, and that both he and his company enjoyed a high credit rating.[13]

32. Mr Alghanim had known Mr Michael Dagher (**Mr Dagher**), a Jordanian and Lebanese national, since 1991.[14] Mr Dagher had extensive experience in the telecommunications industry in the Middle East. In particular, he organised a joint venture in Jordan in 1994 that established the first Global System for Mobile Communications (**GSM**) operator in Jordan, known as Fastlink.[15]

33. In 2003, Mr Dagher informed Mr Alghanim of an investment opportunity in Jordan, where the Government had announced a plan to seek bids for a third GSM mobile telecommunications licence.[16]

34. The privatisation of the Jordanian telecommunications market had begun in 1995, when the existing Jordanian Telecommunications Group was transformed into a public shareholding company (**JTC**), which was privatised in 2000.[17] In 1999 the 'REACH' initiative was developed by the Jordan Computer Society in response to a request from King Abdullah to promote the development of information and communication technology.[18] In 2000, Jordan became a

[10] Witness Statement of Mr Fouad Alghanim, [6].

[11] Witness Statement of Mr Fouad Alghanim, [3].

[12] Witness Statement of Mr Fouad Alghanim, [11].

[13] Tr Day 2, 5:20–6:4.

[14] Witness Statement of Mr Michael Dagher, [11].

[15] Witness Statement of Mr Michael Dagher, [4]-[10].

[16] Witness Statement of Mr Fouad Alghanim, [13]; Witness Statement of Mr Michael Dagher, [20].

[17] Witness Statement of Mr Michael Dagher, [13]-[14].

[18] *The REACH Initiative: Launching Jordan's Software and IT Industry*, March 2000 (Ex C-5); Tr Day 2, 21:16–24:13.

member of the WTO.[19] According to the Claimants, this led to the need to license a third mobile operator as part of opening up the telecommunications market.[20]

35. Mr Alghanim told the Tribunal that in 2003 he met the King of Jordan, King Abdullah II, and His Majesty assured Mr Alghanim that Jordan was a favourable place to invest.[21]

36. Originally, the project was conducted jointly by FASGTC, Mr Alghanim's company, and UTT, Mr Dagher's company.

37. The Claimants maintained that the opportunity to bid for a third mobile telecommunications licence in Jordan was exciting but risky.[22] At the time, the Jordanian market was characterised by a well-established duopoly. The Claimants maintain that the two incumbents (MobileCom and Fastlink) actively tried to persuade the Government not to grant a third licence.[23] The Claimants allege that the duopoly offered the Government the sum of JD 88 million in exchange for the Government not offering a new licence for a certain period[24] and to extend their licences for another 15 years.[25]

B. The bid process conducted by the Telecommunication Regulatory Commission

38. The bid process was conducted by the Telecommunication Regulatory Commission (**TRC**), which issued a Notice Requesting Public Comment on 12 October 2003,[26] and held a conference on 23 October 2003 accompanied by a public presentation which set out a four- to five-month timeframe for the bid process.[27] Mr Dagher participated in these processes.[28]

39. On 23 November 2003, the TRC issued its formal pre-qualification requirements for applicants.[29] Pre-qualification submissions were due (after an extension) by 15 January 2004.[30] In a meeting on 30 November 2003, Mr Dagher explained to Mr Alghanim the financing requirements of the project, which involved US$10 million in capital, around US$15 million in operating capital, and a licence fee. A Chinese company, Huawei Technologies Co. Ltd., would supply the technology.[31]

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[19] Witness Statement of Mr Michael Dagher, [16].

[20] Tr Day 1, 18:19–19:3.

[21] Witness Statement of Mr Fouad Alghanim, [14]; Mr Nasser Al-Marri also testifies to the existence of this meeting.

[22] Witness Statement of Mr Fouad Alghanim, [13]; see also Tr Day 2, 8:21-23.

[23] Witness Statement of Mr Fouad Alghanim, [17].

[24] Witness Statement of Mr Fouad Alghanim, [17]; Witness Statement of Mr Michael Dagher, [21].

[25] Tr Day 2, 90:6-24 (cross-examination of Mr Michael Dagher)

[26] Ex C-16.

[27] Telecommunications Regulatory Commission, 'The Telecommunications Regulatory Commission presents: The Public Forum on Licensing an Additional Mobile Operator in the Kingdom', presentation dated 23 October 2003 (Ex C-18).

[28] Witness Statement of Mr Michael Dagher, [21]-[26].

[29] Ex C-19.

[30] Witness Statement of Mr Fouad Alghanim, [21].

[31] Witness Statement of Mr Fouad Alghanim, [22]; Witness Statement of Mr Michael Dagher, [28].

40. UTT and FASGTC submitted their Pre-Qualification Submission on 15 January 2004.[32] Five other parties submitted pre-qualification applications, including Batelco and other international investors.[33] On 29 January 2004, TRC announced that two applicants had been disqualified, and the remaining four were invited to proceed.[34] Shortly afterwards, Batelco and one other applicant withdrew, leaving two applicants. The Claimants' evidence is that those applicants withdrew because they no longer regarded the investment as financially feasible.[35]

41. UTT and FASGTC established UMC as a vehicle to proceed with the bidding process on 21 March 2004.[36] UMC was set up as a private shareholding company in accordance with a Shareholders' Agreement dated 16 March 2004.[37] The authorised capital was initially JD 350,000, increasing JD 14 million in the event that UMC obtained the licence to. UTT would hold 65% of UMC's shares, and FASGTC 35%.[38] At this stage, the estimated cost of financing UMC was US$65 million.[39]

42. On 28 March 2004, UMC submitted its bid, which had been prepared with the assistance of international consultants.[40] The Claimants' evidence is that during the extensive bid preparation process, no question of capital gains tax on disposal arose,[41] although their evidence is that the investors had no plans to sell the company soon and accordingly exit costs were not specifically assessed.[42] Bridge Consulting was not engaged to assess exit costs.[43]

43. Mr Alghanim testified that the Claimants relied on UMC to obtain legal advice, and did not recall receiving advice on the tax implications of the sale but assumed that 'my people' had 'probably' done so.[44] His evidence was to the same effect as regards advice sought after the acceptance of the bid, which may have been written or verbal.[45] Mr Dagher said that advice

[32] UMNIAH Pre-Qualification Submission for an Additional Public Telecommunications License dated 15 January 2004 (Ex C-20).

[33] Witness Statement of Mr Fouad Alghanim, [24].

[34] Email from Mr Bob McDonald, of the Telecommunications Regulatory Commission dated 29 January 2004, with press release announcing pre-qualified applicants (Ex C-22).

[35] Witness Statement of Mr Fouad Alghanim, [26]; Witness Statement of Mr Michael Dagher, [34]-[35]; Witness Statement of Mr Eyad Abouzeid, [61].

[36] Witness Statement of Mr Fouad Alghanim, [31]; UMC's Certificate of Incorporation (Ex C-25).

[37] Witness Statement of Mr Fouad Alghanim, [28]; Shareholders' Agreement between UTT and FASGTC dated 16 March 2004 (Ex C-23).

[38] Witness Statement of Mr Fouad Alghanim, [29]; Witness Statement of Mr Michael Dagher, [36]; Ex. C-23.

[39] Witness Statement of Mr Fouad Alghanim, [30].

[40] UMC's License Application to Build, Own and Manage a Public Mobile Telecommunications Network dated 28 March 2004 (Ex C-37).

[41] Witness Statement of Mr Fouad Alghanim, [33].

[42] Witness Statement of Mr Eyad Abouzeid, [42]; Witness Statement of Mr Michael Dagher, [84]; Tr Day 2, 74:23–75:16 (Tribunal questions to Mr Fouad Alghanim); Tr Day 2, 84:2-9; but see Tr Day 2, 92:22–96:25 (cross-examination of Mr Michael Dagher), which is more equivocal.

[43] Tr Day 2, 162:19-22.

[44] Tr Day 2, 11:2-22; Tr Day 2, 14:11-14; Tr Day 2, 16:1-10; Tr Day 2:17-1–18:1.

[45] Tr Day 2, 18:2-13; Tr Day 2, 20:8–21:15; Tr Day 2, 29:1-12.

about tax implications was obtained from Mr Hadidi (director and in-house counsel) in August 2004.[46]

44. Mr Dagher incurred upfront costs, which were reimbursed by the shareholders of UMC.[47] The initial capital expenditure of the project was estimated at JD 25 million, and as part of the financing, both Mr Alghanim and Mr Dagher gave personal guarantees for several million Jordanian Dinars.[48] Mr Alghanim also wrote to the TRC on 23 May 2004 undertaking that he and FASGTC would finance the balance of UTT's shares in UMC's capital if the bid was successful.[49]

45. Mr Alghanim and Mr Dagher met the King, the Prime Minister and the Minister of Telecommunications on 11 April 2004.[50] Mr Alghanim testified that the King assured him that the Kingdom would not accept the duopoly's offers to pay cash in exchange for the postponement of the licence process, and Mr Alghanim offered in response to the Prime Minister's request to donate 4% of the shares in UMC to the Jordanian Student Fund as a benefit to Jordan.[51]

46. On 20 May 2004, TRC sought various clarifications from UTT, including in relation to the benefits UMC would provide to Jordan.[52] Mr Dagher provided a commitment letter on behalf of UMC on 21 July 2004.[53]

47. The TRC formally advised UMC that it would be awarded the Licence on 24 July 2004.[54]

C. The operation of the Licence

48. The 15-year Licence was entered into on 9 August 2004, despite what the Claimants describe as further attempts by the existing licensees to prevent it.[55] The Claimants' evidence is that the Minister of Finance had recommended that the King accept the duopoly's JD 88 million offer, and that nearly 70 Members of Parliament had petitioned the Government not to go ahead with the new licence.[56]

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[46] Tr Day 2, 97:11–98:8.

[47] Witness Statement of Mr Michael Dagher, [41].

[48] Witness Statement of Mr Fouad Alghanim, [34]; Witness Statement of Mr Michael Dagher, [42]; and see Claimants' Memorial, [72]-[73].

[49] Letter from Mr Fouad Alghanim to the Telecommunications Regulatory Commission, dated 23 May 2004 (Ex C-39).

[50] Witness Statement of Mr Michael Dagher, [47].

[51] Witness Statement of Mr Fouad Alghanim, [36]; Witness Statement of Mr Michael Dagher, [49]; Letter from Mr Fouad Alghanim to Minister of Planning dated 21 July 2004 (Ex C-40).

[52] Witness Statement of Mr Michael Dagher, [50]; Telecommunications Regulatory Commission License Application Submission Clarifications, dated 20 May 2006 (Ex C-38).

[53] Appendix 9 of Public Mobile Telecommunications License Agreement, between the Telecommunications Regulatory Commission and UMC dated 9 August 2004 (Ex C-45).

[54] Letter from Telecommunications Regulatory Commission to UMC, dated 24 July 2004 (Ex C-42).

[55] Witness Statement of Mr Fouad Alghanim, [40]-[41]; (Ex C-45).

[56] Witness Statement of Mr Michael Dagher, [51]-[54]; 'A Parliamentary Memorandum Requests Government to Cease Granting Any Cellular License', press report (Ex C-170) and '69 PMs Request Government to Prevent Granting a Third Cellular License', press report (Ex C-172).

49. The upfront cost of the Licence included an acquisition fee of JD 4 million, an additional fee of JD 2 million, a signal frequency fee and an operating licence fee.[57] UMC would also be required to pay 10% of its gross revenue to Jordan and subscribers' sales tax of 16%.[58] It also provided other financial benefits to Jordan.[59]

50. The Claimants' evidence is that UMC was successful beyond their expectations, achieving significant market penetration and introducing a number of innovative services and pricing structures.[60] They say that they risked 'about $100 million' on the project.[61]

51. The investors conducted a valuation of the company in August 2004,[62] and in 2005, they decided to refinance UMC. On 31 July 2005, UMC entered into a shareholders' agreement with Global Investment House Company (**Global**) pursuant to which Global injected US$27.5 million into UMC and took a 30% shareholding.[63] Shortly afterwards, FASGTC exchanged its 35% interest in UMC for a stake in UTT.

52. As a consequence, UTT held 66% of UMC, the remaining 34% being held by Global and the Jordanian Student Fund.[64] By then, the directors of UTT were Mr Alghanim, Mr Dagher and Mr Rami Hadidi.[65]

D. The sale of UMC

53. In 2006, UTT entered into discussions with Batelco for the sale of its interest in UMC. The Jordanian Student Fund wished to keep its share.[66] Mr Dagher, who led negotiations for UTT, testified at the Hearing that goodwill 'was discussed in broader terms with respect to capital gains and potential other taxes as regards sale of shares' but the parties did not make a provision for it because the law was very clear.[67]

54. Batelco conducted due diligence on the transaction. Mr Khateeb was involved in this process and testified that his firm told Batelco at a meeting in June 2006 that, although the transaction would not be taxable for UMC, it could be taxable for the seller depending on whether it included goodwill, and that the goodwill would be the difference between the fair value of the acquired assets and the sale price.[68] The Claimants vigorously challenge this testimony,[69]

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[57] Witness Statement of Mr Fouad Alghanim, [42].

[58] Witness Statement of Mr Fouad Alghanim, [43].

[59] Witness Statement of Mr Fouad Alghanim, [45].

[60] Witness Statement of Mr Fouad Alghanim, [47]-[51]; Witness Statement of Mr Michael Dagher, [65]-[67].

[61] Tr Day 1, 19:21–20:1.

[62] Email from Mr Eyad Abouzeid to FASGTC dated 16 August 2004 (Ex C-147).

[63] Witness Statement of Mr Fouad Alghanim, [53]; Ex C-48.

[64] Witness Statement of Mr Michael Dagher, [64]. Although the Claimants described Mr Fouad Alghanim as a shareholder in UTT (see Claimants' Memorial, [5]), the record does not demonstrate that he owned any shares in his personal name (distinct from FASGTC's shareholding): see Share Register of UTT Prior to Liquidation dated 5 September 2005, p 3 (Ex C-142).

[65] Request for Arbitration, [3].

[66] Witness Statement of Mr Fouad Alghanim, [55]-[56].

[67] Tr Day 2, 137:13-19; Tr Day 2, 152:14–154:3; correcting Second Witness Statement of Mr Michael Dagher, [31].

[68] Witness Statement of Mr Ibrahim Khateeb, [19]-[20]; Second Witness Statement of Mr Ibrahim Khateeb, [3].

[69] Claimants' Reply, [73]-[75].

but the Respondent says the Claimants have not presented any witness testimony to contradict it.[70] Mr Khateeb confirmed under examination that his firm was instructed to advise on the outstanding tax liabilities of UMC,[71] and that in the course of discussing the report, Batelco's representatives asked whether the transaction would have any tax consequences for Batelco. The response was that it might have tax consequences for the seller if it included goodwill, but not the buyer.[72] Mr Dagher's evidence is that such possible taxation was never raised by Batelco, and he would have expected it to have been if such advice had been given.[73] Mr Khateeb suggests that Batelco would have had no reason to disclose it.[74]

55. After Batelco confirmed its intention to buy UMC, the shareholders convened an extraordinary meeting on 22 June 2006 approving the sale.[75] They decided to distribute the sale proceeds on their receipt and reduce the share capital accordingly.[76] Mr Dagher's interests were due to receive approximately US$80 million.[77] Mr Alghanim confirmed that he was present in his capacity as deputy chairman and director of the company,[78] but does not recall whether there was a discussion of whether UTT was entitled to distribute the profits prior to the end of the accounting year. He deposed that the decision would have been taken on the basis of legal and accounting advice.[79] Mr Dagher agreed that that was a key issue, but says that tax was not discussed.[80] He maintained that the company was advised that Article 35 of its Articles permitted a distribution other than a dividend and that the company's advisers may have preferred that option.[81] He recalled specific but verbal advice during the meeting.[82]

56. UMC wrote to TRC in May/June 2006 to seek authorisation for the transfer of ownership and waiver of the requirement that Mr Dagher remain as general manager for a fixed term.[83] The TRC gave its approval on 15 June 2006.[84]

57. On 24 June 2006, UTT, Global and Batelco entered into an agreement whereby Batelco purchased 96% of the issued shares in UMC for a total price of US$415 million, of which UTT's share was US$292.5 million (**the 2006 Transaction**).[85] Mr Dagher stated under cross-examination that UTT received verbal advice from Mr Hadidi and Mr Mones Al-Madani (Chief

[70] Respondent's Rejoinder, [80]-[85].

[71] Tr Day 3, 77:3-10.

[72] Tr Day 3, 77:11–78:21.

[73] Second Witness Statement of Mr Michael Dagher, [30]-[31].

[74] Second Witness Statement of Mr Ibrahim Khateeb, [8].

[75] Ex R-11 / Ex C-53.

[76] Witness Statement of Mr Michael Dagher, [69].

[77] Tr Day 2, 103:16-23.

[78] Tr Day 2, 34:25–35:2.

[79] Tr Day 2, 37:5–39:9.

[80] Tr Day 2, 106:8-12; Tr Day 2, 107:1-11.

[81] Tr Day 2, 121:18-22; Tr Day 2, 123:20-25.

[82] Tr Day 2, 124:1-20.

[83] Witness Statement of Mr Michael Dagher, [70]-[71].

[84] Ex C-52.

[85] Witness Statement of Mr Fouad Alghanim, [57]; Share Purchase Agreement dated 24 June 2006 (Ex C-54 / Ex R-199).

Financial Officer) on the tax consequences of the sale.[86] His own view was that goodwill tax would usually be paid by the buyer, not the seller.[87]

58. The Claimants maintain that the sale of UMC was met by significant public hostility. Allegations were made in the media that the difference between the licence fee of JD 4 million and the sale price indicated some form of wrongdoing and that the Government should have benefitted from a higher licence fee or a tax on the sale profits.[88]

59. On 29 June 2006, the Director-General of ISTD, Mr Kudah, was reported as an 'informed source' as saying that the 2006 Transaction would likely be taxable on the basis that it involved the sale of goodwill.[89] Mr Kudah deposed that he said it was taxable 'in principle'; that any assessment could only be done once ISTD had received the relevant documents; and that it would be done in accordance with the law[90] (although he declined in oral evidence to express a view on the correct tax position.)[91] He maintained that he does not review ISTD decisions, and would rely on the relevant administrative officials to apply the law in accordance with the Constitution.[92] So too Mr Mawazreh, a subsequent Director-General, testified that in that capacity he would not be involved in assessments or have direct supervision over assessors, and had an exclusively administrative role.[93]

60. On 2 July 2006, the Ministry of Finance demanded payment of an additional 0.3% in stamp duties together with penalties. Mr Dagher's evidence is that the Minister told him that there was so much political pressure and the investors had made so much money that the stamp duty should be the least of their worries. Mr Dagher paid the duty under protest.[94]

61. According to Mr Kudah, his attention was drawn to the transaction by the ISTD Communication and Media Directorate (although he had also seen newspaper reports before giving the report described above[95]), and he formed an internal committee to examine the transaction (**the 2006 Committee**).[96] On 5 July 2006, it produced a memorandum directed to the legal department concluding that the profits of the sale were taxable in principle, but that UTT needed to file its tax return before any further action could be taken.[97]

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[86] Tr Day 2, 110:10-14; Tr Day 2, 113:1-19.

[87] Tr Day 2, 107:21–108:4; Tr Day 2, 142:1-16.

[88] Witness Statement of Mr Fouad Alghanim, [60]; Witness Statement of Mr Michael Dagher, [73]; Second Witness Statement of Mr Michael Dagher, [5].

[89] 'Umniah Deal…Association of Ideas', press report dated 30 June 2006 (Ex C-159), cited in Claimants' Reply, [11] & [303].

[90] Second Witness Statement of Mr Eyad Al Kudah, [8].

[91] Tr Day 2, 198:16-18. Mr Kudah testifies that he has never worked as an assessor at ISTD: Tr Day 2, 201:1-5.

[92] Tr Day 2, 181:18-20; Tr Day 2, 182:21–183:5.

[93] Tr Day 3. 111:19–112:7.

[94] Witness Statement of Mr Michael Dagher, [74]; Letter from Ministry of Finance to UTT dated 2 July 2006 (Ex C-63) and Letter from UTT to Minister of Finance dated 2 July 2006 (Ex C-66).

[95] Tr Day 3, 53:11-18.

[96] Witness Statement of Mr Eyad Al Kudah, [19]-[20]; Witness Statement of Mr Musa Mawazreh, [16]; Tr Day 3, 21:12-14; see also Tr Day 4, 80:25–81:5.

[97] Witness Statement of Mr Eyad Al Kudah, [20]; Ex R-5.

62. The Respondent's witnesses rejected any suggestion that the Director-General interfered with the Committee's assessment.[98] Mr Musned maintained that the Committee was unaware of the Director-General's 'in principle' statement, and was not influenced by the public campaign against the sale.[99]

63. On 3 July 2006, the Speaker of the Parliament forwarded an official enquiry from Member of Parliament Mamdouh Al-Abbadi to the Prime Minister (**Al-Abbadi Enquiry**).[100] On 5 July 2006, 34 Members of Parliament sent a petition to the Speaker of the Parliament seeking to halt the sale and for other relief (the **Parliamentary Petition**).[101] On 13 July 2006, Member of Parliament Khalil Atiyeh forwarded an official enquiry to the Prime Minister (**Atiyeh Enquiry**).[102]

64. On 5 July 2006, Members of Parliament (including members of the Financial and Economics Committee who had initially opposed the grant of the licence) requested the formation of an inquiry to investigate the sale.[103] That request was considered and approved at a session of Cabinet.[104] The Prime Minister's Committee of September 2006, in which Mr Kudah participated, investigated the appropriateness of the procedures which led to the award of the Licence.[105] Mr Kudah could not recall whether such a Committee had been formed to investigate other taxpayers in the past.[106] In early 2007, the Committee found that there had been no wrongdoing. It noted that any tax claim on the transfer of goodwill would be directed at the seller and that ISTD would follow up in accordance with the Income Tax Law.[107]

65. Further, a Council of Ministers' Committee was formed on 11 July 2006 and reported in February 2007 recommending the file be referred to the Prosecutor-General.[108] On 18 March 2007 the Speaker of the Jordanian Parliament referred the matter to the District Attorney (the District Attorney's Enquiry), who formally investigated the award of the licence and found no grounds for prosecution.[109] The Transaction was also referred to the Third Investigatory Representative Committee concerning the TRC.[110]

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[98] Second Witness Statement of Mr Eyad Al Kudah, [8c]; Witness Statement of Mr Musa Mawazreh, [20].

[99] Second Witness Statement of Mr Ali Almusned, [2]-[3]; Tr Day 4, 80:14-16; Tr Day 4, 89:15-20.

[100] Claimants' Reply, [119]-[124]; Ex C-68.

[101] Claimants' Reply, [117]-[118]; Ex C-203.

[102] Claimants' Reply, [125]-[126]; Ex C-208.

[103] Claimants' Reply, [104]-[116]; 'Government Confirms Appropriateness of 'Umniah Deal', Requests Briefing from Telecommunications Regulatory Commission about Sector Licensing', press release dated 5 July 2006 (Ex C-69); Memorandum from the Financial and Economics Committee to the Speaker of the Parliament dated 6 July 2006 (Ex C-185).

[104] Ex C-189.

[105] Witness Statement of Mr Eyad Al Kudah, [22]; Witness Statement of Mr Michael Dagher, [75]; Ex C-191.

[106] Tr Day 3, 52:23–53:7.

[107] Witness Statement of Mr Eyad Al Kudah, [22]; Letter from Minister of Telecommunications to the Prime Minister dated 15 January 2007 (Ex R-4).

[108] Claimants' Reply, [127]-[131]; Ex C-193.

[109] Claimants' Reply, [132]-[137]; Parliament's Request for Investigation to District Attorney dated 18 March 2007 (Ex C-83); Decision No 1578/2007 of the Amman District Attorney dated 30 October 2007 (Ex C-84). The Attorney General confirmed that decision.

[110] Claimants' Reply, [138]-[151].

66. In the context of completing its 2007 annual accounts, UTT commissioned a number of legal opinions in September 2007 from Jordanian law firms, whose advice was that the transaction fell within the exemption for capital gains and was accordingly not taxable.[111] These were provided to UTT's auditors, Saba/Deloitte.[112]

E. The imposition of the Tax Measure

67. On 27 January 2008, UTT filed minutes of its General Assembly Meeting of 29 October 2007 approving its 2005 financial statements.[113] On 17 February 2008 it filed another set of minutes approving financial statements of the same year.[114] The auditors' report in respect of the 2005 statements is dated 22 October 2007.[115]

68. On 4 March 2008, UTT obtained a tax clearance certificate from the local tax directorate. Mr Dagher said that his lawyers advised him that such a certificate would not be granted if an obligation to file a tax return was outstanding or there was any evidence of taxable income.[116] Mr Kudah deposed that such a certificate should not have been issued as UTT had not filed any tax returns.[117]

69. On 5 March 2008, UTT filed minutes recording the decision of 22 June 2006 to reduce its capital,[118] but the Companies Control Department (**CCD**) required further information,[119] and on 14 April 2008 refused to register the resolution until that was provided.[120]

70. On 8 March 2008, UTT approved in an extraordinary meeting to voluntarily liquidate UMC,[121] and filed minutes recording this on 20 April 2008.[122] The company remains in liquidation, but that process was suspended by the CCD in response to a request from the ISTD, and the Respondent maintains that it cannot be completed until financial statements for 2007 are filed and all requisite clearances are obtained.[123]

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[111] Witness Statement of Mr Michael Dagher, [77]; Ex C-91, Ex R-184, Ex C-92 and Ex C-93.

[112] Second Witness Statement of Mr Michael Dagher, [32]. Mr Ibrahim Khateeb's evidence is that at an earlier stage, he had discussed the question of whether it was possible to impose income tax on the sale of shares where the profit was in exchange for goodwill with an auditor from Saba/Deloitte, being either Mr Karim Al Nabulsi or Mr Khalil Nasr. Mr Khateeb recalled stating that it would be subject to tax in the case of *husas* shares: Witness Statement of Mr Ibrahim Khateeb, [13]; Second Witness Statement of Mr Ibrahim Khateeb, [3.f]; Tr Day 3, 82:13-15.

[113] Ex R-8.

[114] Ex R-9.

[115] Ex R-10. Respondent's Counter-Memorial, [39] notes that it is 'unclear' why there were two filings.

[116] Second Witness Statement of Mr Michael Dagher, [26]-[27]; Ex C-94.

[117] Second Witness Statement of Mr Eyad Al Kudah, [7].

[118] Ex R-11.

[119] Ex C-103.

[120] Ex C-104 / Ex R-17.

[121] Witness Statement of Mr Michael Dagher, [81].

[122] Ex C-95 ; Ex R-18.

[123] Ex C-110; Ex C-111; Respondent's Counter-Memorial, [69]. See also Ex R-21, an internal ISTD memorandum recommending that the liquidation resolution be approved, but that the company not be dissolved until *inter alia* the necessary tax clearances are obtained.

71. On 19 March 2008, UTT had filed the minutes of its meeting of 3 November 2007 approving the auditors' report of the same day in respect of the 2006 year.[124]

72. On 15 April 2008, a three-person assessment committee was appointed within ISTD at Mr Mawazreh's request to establish whether UTT was liable for tax (the **2008 Assessment Committee**).[125] UTT had not filed any tax returns from the time of its establishment. The Claimants' witnesses testified that they had been advised that UTT was not required to file tax returns, because it was a mere holding company, and did not generate any taxable returns.[126] Mr Alghanim did not recall who advised him of this, or when.[127] The Claimants say that to the extent that there was such an obligation, neither the ISTD nor the Government informed UTT of it.[128] Mr Dagher testified that he had not seen the Instructions (discussed in the next paragraph) on which the Respondent relies until the arbitration,[129] and also that he was advised verbally that UTT was not obliged to file an annual financial statement.[130]

73. The Respondent points out that in addition to the obligation for taxpayers to file returns under Article 26 of the Income Tax Law, public Instructions issued by ISTD under Article 27 require all companies to file returns irrespective of whether they have a taxable income (and says there is no exception for holding companies). If only taxpayers were caught by the Instructions, Article 27 would add nothing to Article 26.[131] Returns are required to be submitted within four months of the end of the financial year (the end of April), and ISTD has a further year from the submission of the tax return to complete its audit.[132] The Respondent states that a list is kept or generated of registered taxpayers (including companies) who have not yet filed returns within the time specified,[133] they are referred to the relevant directorate,[134] and that in such cases there is no fixed term for the ISTD's initial assessment.[135]

74. The Claimants invite the Tribunal to find that such a list never existed.[136] Asked why UTT's case was not flagged after it failed to file a return in April 2007, Mr Mawazreh suggested that the assessors were busy auditing self-assessments.[137]

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[124] Ex R-13; Ex R-14.

[125] Ex C-106 / Ex R-28.

[126] Second Witness Statement of Mr Fouad Alghanim, [5]; Second Witness Statement of Mr Michael Dagher, [22].

[127] Tr Day 2, 68:3-6.

[128] Second Witness Statement of Mr Michael Dagher, [23].

[129] Tr Day 2, 117:8-9; see Ex R-2.

[130] Tr Day 2, 127:23–128:12.

[131] Second Witness Statement of Mr Eyad Al Kudah, [2]; Second Witness Statement of Mr Ali Almusned, [7]; Ex R-2; Tr Day 4, 155:5–160:25.

[132] Witness Statement of Mr Eyad Al Kudah, [9]; Witness Statement of Mr Musa Mawazreh, [8].

[133] Witness Statement of Mr Eyad Al Kudah, [26]; Tr Day 3, 117:13-17 (cross-examination of Mr Musa Mawazreh).

[134] Witness Statement of Mr Musa Mawazreh, [9].

[135] Witness Statement of Mr Eyad Al Kudah, [28].

[136] Claimants' Closing Skeleton, [79].

[137] Tr Day 3, 140:23–141:14.

75. The evidence of Mr Kudah (then Director-General of ISTD) is that at the end of each financial year, a special committee is formed to distribute tax returns among the assessors.[138] In 2008, ISTD practice was to audit all large taxpayers' tax returns;[139] Mr Mawazreh's evidence is that at the time (but apparently not in 2006[140]) the threshold for the purview of the Large Tax Payers' Department (**LTPD**) was four to five million dinars.[141] In addition, the Director-General of the ISTD had a discretion to refer taxpayers to the LTPD.[142] Mr Mawazreh also suggested that where a subsidiary (in this case UMC) was within the LTPD's remit then so was the shareholder.[143] Consistent with this, Mr Batarseh testified that the 2008 Assessment Committee had been instructed to assess both UTT and UMC but does not recall the result of the latter assessment.[144]

76. Mr Kudah's evidence is that the assessor, in conjunction with the audit committee, assesses the tax return independently of the Director-General, except if there is a dispute which involves general principle or point of law which is referred to the Director-General and the Committee of Planning and Coordination.[145] The Respondent's evidence is that it was normal procedure to refer the UTT tax file to a committee rather than an individual assessor given the large income involved, and that the assessment committee was formed by Mr Mawazreh on his own initiative.[146]

77. Having obtained copies of UTT's financial statements from the CCD, the 2008 ISTD Committee attempted to contact UTT. The Parties' witnesses take a different view on the adequacy of the Committee's attempts:[147]

(a) It is common ground that the Committee rang Ms Huda Sabra, who was registered in the records of the CCD as UTT's representative, on her mobile telephone, and Mr Nabil Zaarour, its liquidator. Mr Zaarour was apparently overseas at the time. Mr Dagher's evidence is that the Committee did not wait for his return, while the Respondent says that he promised to contact the CCD when he returned but failed to do so.

(b) Mr Dagher's evidence is that UTT had submitted powers of attorney for both Ms Amani Al-Hawari and Mr Abdullah Ahmed Al-Daas whom it should have contacted, that it had records of UTT's registered address, and that the Committee could have done much more to contact UTT.

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[138] Witness Statement of Mr Eyad Al Kudah, [13].

[139] Witness Statement of Mr Eyad Al Kudah, [10]. Mr Mawazreh's evidence is that this policy applied to all self-assessments: Tr Day 3, 118:19-24.

[140] Tr Day 3, 124:3-8.

[141] Tr Day 3, 114:2-11.

[142] Tr Day 3, 125:18–127:7.

[143] Tr Day 3, 127:4-12.

[144] Tr Day 4, 21:20-25; Tr Day 4, 24:8-13; Tr Day 4, 27:10-12.

[145] Witness Statement of Mr Eyad Al Kudah, [16].

[146] Witness Statement of Mr Eyad Al Kudah, [30]-[31]; Witness Statement of Mr Musa Mawazreh, [23].

[147] Second Witness Statement of Mr Michael Dagher, [9]-[15]; Witness Statement of Mr Aktham Batarseh, [3]-[7]; Ex R-29.

(c) The Respondent's evidence is that it was usual practice to contact the person listed in the CCD's records, and that the committee may not have had notice of the powers of attorney because they were attached to the application for tax clearance certificates.[148]

78. The Parties also differ on the significance of the time taken by the Committee:

(a) Mr Dagher maintains that the Committee proceeded with undue haste, having been formed on 15 April 2008, met for the first time on 22 April 2008,[149] and imposed the tax 8 days later on 30 April 2008. Mr Batarseh confirmed that the Committee started work (or at least could have done so) on 15 April.[150]

(b) Mr Batarseh's evidence is that the Committee called Ms Sabra at 1.30pm, then drafted the first paragraph of their note dated 22 April 2008 (which all three signed), and on the same day one member of the Committee called the liquidator, and the Committee drafted and signed the second paragraph before the end of the working day. Mr Batarseh testified that there was nothing unusual in that.[151] In cross-examination, the Claimants put it to Mr Batarseh that the Committee had finished its work on 24 April 2008, relying on a document of that date. Mr Batarseh's evidence is that this was a draft which was discussed with the Committee responsible for approving decisions before the decision was audited on 28 April 2008 and issued on 30 April 2008.[152] The difference in figures between that document and the final decision was down to bank interest and additional income.[153]

(c) The Respondent's evidence is that it is not unusual to complete the assessment process within the period in this case.[154]

(d) Mr Mawazreh testifies that he had no involvement in the 2008 ISTD Committee's work after its formation, and that the audit committee approved its decision.[155] The Respondent also testifies that the assessment committee was required to make its decision on the basis of the information available, even if it is limited.[156]

79. On 21 April 2008, the ISTD wrote to inform the CCD that UTT had not filed its tax returns and to request that the Controller not approve the liquidation until it had obtained the ISTD's

[148] Witness Statement of Mr Aktham Batarseh, [7].

[149] Second Witness Statement of Mr Michael Dagher, [8]-[10].

[150] Tr Day 4, 25:15-24.

[151] Tr Day 4, 30:20–32:4.

[152] Tr Day 4, 39:4–43:6, citing Ex C-224.

[153] Tr Day 4, 43:7-18, contrasting Ex C-109; Ex R-30.

[154] Witness Statement of Mr Eyad Al Kudah, [32]; Second Witness Statement of Mr Eyad Al Kudah, [4]; Witness Statement of Mr Musa Mawazreh, [25], [33].

[155] Witness Statement of Mr Musa Mawazreh, [26]-[29].

[156] Witness Statement of Mr Musa Mawazreh, [32].

clearance; the letter was signed by Mr Mawazreh on Mr Kudah's behalf and copied to the Assessment Committee.[157]

80. On 29 April 2008, UTT received a demand from the Ministry of Finance for further stamp duties; the Government subsequently accepted that UTT had paid the applicable stamp duties.[158]

81. Mr Mawazreh's evidence is that the decision to impose tax on the difference between the book value and the sale price would have been based on UTT's lack of cooperation, and that the administrative objection phase allowed UTT to challenge this.[159]

82. On 30 April 2008, the ISTD wrote to UTT to inform it of a tax liability of JD 47,170,584, together with an additional tax of JD 10,377,528 (**the Tax Measure**).[160]

F. UTT's challenge to the Tax Measure and subsequent developments

83. After the Tax Measure was imposed, UTT challenged the tax in accordance with the procedures provided by Jordanian law:[161]

(a) On 29 May 2008 it filed its administrative objection,[162] a hearing was held,[163] and it was rejected on 24 June 2008.[164]

(b) It lodged an appeal with the Tax Court of Appeal on 11 August 2008,[165] which after hearings[166] was rejected on 21 November 2011.[167]

(c) It then appealed to the Court of Cassation on 20 December 2011,[168] which on 25 April 2012 dismissed the appeal and upheld the tax.[169]

84. The Claimants complain that the administrative objection was based on the wrong provision of the Tax Law;[170] and that it was surprising that the file was transferred to the Large

[157] Ex C-107; Tr Day 3, 35:10-18; Tr Day 3, 149:7–150:10.

[158] Ex. C-112 through Ex. C-117; Witness Statement of Mr Michael Dagher, [82].

[159] Witness Statement of Mr Musa Mawazreh, [30]-[32].

[160] Ex C-109.

[161] Witness Statement of Mr Fouad Alghanim, [64].

[162] Second Witness Statement of Mr Michael Dagher, [16]; Ex C-118.

[163] Ex R-35.

[164] Second Witness Statement of Mr Michael Dagher, [18]; Ex. C-119, followed by the formal taxation measure: Ex C-120.

[165] Ex C-121 / Ex R-38.

[166] Ex C-123 / Ex R-39 (transcript); Ex C-124 (pleading of Assistant Tax Attorney General); Ex C-108 (pleading of UTT).

[167] Ex C-125 / Ex R-41.

[168] Ex C-126 / Ex R-42; Ex C-127 / Ex R-43.

[169] Ex C-128 / Ex R-44.

[170] Claimants' Closing Skeleton, [43].

Taxpayers Department.[171] The Respondent says that the taxpayer's right to be heard is at the administrative objection stage, not the assessment stage.[172]

85. The Claimants' evidence is that their pleadings were competently prepared by experienced professionals, and they were sufficient. Mr Dagher recounts advice that arguments in the administrative objection phase are generally brief, and that phase is seldom fruitful.[173] Mr Dagher also notes that there were no factual disputes and the case revolved around a question of law.[174] Furthermore, UTT's lawyers explained to him that it was ISTD's responsibility to bring evidence that the 2006 Transaction involved the disposal of goodwill, and not for UTT to disprove that.[175]

86. The Respondent counters that the Claimants are now trying to reconstruct a case they failed to put during the Jordanian procedures.[176] The Respondent maintains that the pleadings and submissions filed and delivered on UTT's behalf in the domestic proceedings were unusually brief and inadequate, that it is surprising that no witnesses or experts were called, and that it fell below the usual standard of the work of UTT's advocate Mr Naeem Al Madani.[177] The Respondent contrasts this with the *Rowwad* case.[178] Mr Almusned notes in particular that a taxpayer is required to put forward in the administrative objection phase all objections that it wishes to raise before the Tax Court of Appeal or Court of Cassation,[179] and concludes that UTT did not seriously try to advance reasonable grounds in favour of UTT's position.[180] He also testifies that the administrative objection phase is not 'seldom fruitful', as Mr Dagher alleges.[181] The Respondent notes, for example, that UTT did not raise before the Court of Cassation the question of whether the capital gains exemption applies to private shareholding companies, the relevance of the Tax Clearance Certificate or the lawfulness of imposing Additional Tax for the failure to file a tax return.[182] Rather it focused on submitting that this case did not involve the transfer of the entirety of the company.[183]

87. On 20 December 2012, FASGTC and Mr Alghanim received a notice from the LTPD advising that a total of JD 109,435,754 (approximately $US160 million) was due and payable, consisting

[171] Second Witness Statement of Mr Michael Dagher, [19].

[172] Second Witness Statement of Mr Eyad Al Kudah, [6].

[173] Second Witness Statement of Mr Michael Dagher, [16]-[17].

[174] Second Witness Statement of Mr Michael Dagher, [16]-[17].

[175] Second Witness Statement of Mr Michael Dagher, [20].

[176] Respondent's Counter-Memorial, [11].

[177] Witness Statement of Mr Musa Mawazreh, [36]; Witness Statement of Mr Ali Almusned, [7]-[8]; Second Witness Statement of Mr Ali Almusned, [6c]; see Respondent's Rejoinder, [24]-[35].

[178] Tr Day 6, 198:4–199:8.

[179] Second Witness Statement of Mr Ali Almusned, [6a], citing Article 36(d) of the 1985 Tax Law and Court of Cassation Judgment 1879/1998 (Ex NR2, App 1, No 3).

[180] Second Witness Statement of Mr Ali Almusned, [6a].

[181] Second Witness Statement of Mr Ali Almusned, [6b].

[182] Respondent's Counter-Memorial, [112].

[183] Tr Day 6, 202:19–206:14.

of the original tax, JD 10,377,528 in added tax and JD 51,887,642 in fines. It warned that unless the amount was paid that Mr Alghanim and the other directors would face prosecution.[184]

88. On 2 January 2013, the liquidator of UTT wrote to ISTD informing that he had written to the company's shareholders seeking repayment of all the funds 'illegitimately withdrawn'.[185]

89. On 14 January 2013, Mr Alghanim and Mr Dagher wrote to the Prime Minister to raise their concerns.[186] A meeting was held that day between Mr Dagher, UTT's lawyer Mr Rami Hadidi, the Prime Minister and the Kuwaiti Ambassador to Jordan.[187] The following day, FASGTC and another shareholder in UTT wrote to the Prime Minister.[188]

90. On 14 February 2013, the Prime Minister wrote to confirm that the tax would be enforced.[189]

91. Mr Almusned, who was a member of the 2006 Committee, was also member of a committee formed by the Prime Minister in 2013 to consider legal procedures for recovering unpaid tax in the Rowwad and UTT cases. That Committee contained representatives of the judiciary, the CCD and the ISTD.[190]

92. Subsequently, the ISTD confiscated a sum from UTT's account at the Housing Bank for Trust and Finance in November 2013,[191] and Jordan initiated domestic proceedings against the Claimants and the other directors of and shareholders in UTT in order to enforce the Tax Measure (the **Jordanian Enforcement Proceedings**).[192] As described above, in PO No 2 the Tribunal ordered that Jordan desist from prosecuting those proceedings or otherwise enforcing the Tax Measure against the Claimants while the arbitration is pending.

[184] Witness Statement of Mr Fouad Alghanim, [65]; Ex C-131.

[185] Ex R-58; see Tr Day 2, 40:12–45:22.

[186] Ex C-134.

[187] Witness Statement of Mr Michael Dagher, [87].

[188] Ex C-135 / Ex R-179.

[189] Ex C-136.

[190] Ex R-64; Tr Day 4, 96:3–97:4.

[191] Witness Statement of Mr Fouad Alghanim, [69].

[192] Witness Statement of Mr Fouad Alghanim, [71]; Respondent's Counter-Memorial, [119]-[149].

IV. JURISDICTION

A. Introduction

93. The Claimants invoke the substantive protections of the Jordan–Kuwait BIT, and in particular the provisions of Article 3 (Protection of Investments), Article 4 (Treatment of Investments) and Article 12 (Most-Favoured Nation Treatment).

94. The Claimants addressed the question of the Tribunal's competence to hear the present case in their Memorial, submitting that the Tribunal possessed jurisdiction:

(a) *Ratione personae*, because both FASGTC and Mr Alghanim qualify as investors in terms of Article 1.2 of the BIT;[193]

(b) *Ratione temporis*, because they retain their shareholding in UTT, the dispute over the Tax Measure arose after the BIT's entry into force, there is no requirement that the investment remain at the time arbitration is commenced (so the fact that they have withdrawn their capital gains is irrelevant), and in any case the crystallised claim would survive the termination of the investment;[194] and

(c) *Ratione materiae*, because the Claimants meet the definitions of 'investment' in both Article 1 of the BIT and Article 25(1) of the ICSID Convention.[195]

95. Since the Respondent protested the Tribunal's jurisdiction but elected not to seek bifurcation of the proceedings, it pleaded to its objections for the first time in its Counter-Memorial. The Tribunal addresses each of the Respondent's objections in turn.

B. The Parties' submissions

96. The Respondent advances four objections to the jurisdiction of the Tribunal:[196]

(a) The Claimants no longer have an investment in respect of which they can assert the breach of substantive guarantees;

(b) The Claimants cannot bring a claim on behalf of UTT;

(c) The Tribunal's jurisdiction is precluded by the 'tax carve-out' in Article 4(3) of the BIT; and

(d) There has been no harm and thus no loss has materialized.

[193] Claimants' Memorial, [147]-[150].

[194] Claimants' Memorial, [151]-[159].

[195] Claimants' Memorial, [160]-[179].

[196] As noted above, the evidence does not demonstrate that Mr Fouad Alghanim owns shares in UTT in his personal name, but the Respondent does not raise this as a separate basis of objection.

97. The Respondent did not press the third objection in its Reply or in oral submissions.[197] Although the Claimants express the view in their Rejoinder on Jurisdiction that the Respondent has raised new objections in its Rejoinder that should be ruled inadmissible – in particular, that the Claimants cannot establish the necessary contribution (presented as part of the first objection) and that the dispute is theoretical (presented as part of its fourth objection),[198] the Tribunal will summarise them according to the rubric established in the first exchange of pleadings.

1. The Claimants no longer have an investment

(i) <u>The Respondent's submissions</u>

98. The Respondent submits that the Claimants may not rely on a 'former investment' in order to establish the jurisdiction of the Tribunal.[199] It asserts that the Claimants' investment in Jordan was terminated when UTT sold its shares in UMC, the existence of an investment must be assessed at the time of the Request for Arbitration, and accordingly they cannot rely on an investment in the form of 'shares'.[200]

99. Nor can the Claimants rely on an investment in the form of 'returns', submits the Respondent, because there were no returns in the territory of Jordan at the time the Tax Measure was imposed,[201] and 'returns' only qualify as an 'investment' if they are 'retained for the purposes of reinvestment' or are 'resulting from liquidation' and that the Claimants' profit on the sale is neither.[202] So far as the Claimants rely on their present shareholding in UTT, the Respondent says that this does not meet the objective requirements of 'investment' in the ICSID Convention because UTT was merely a holding company, and any such jurisdiction would be limited to determining whether the *shareholding* (as opposed to UTT itself) has been treated in a manner that violates the BIT.[203]

(ii) <u>The Claimants' submissions</u>

100. The Claimants say that this objection is based on the wilful disregard of the fact that FASGTC remains a shareholder in UTT.[204] Even so, the Claimants say that the Respondent confuses the Tribunal's *ratione temporis* jurisdiction with the application *ratione temporis* of the substantive provisions of the treaty, in the process failing to address Article 9 of the BIT;[205] the former question depends on when the dispute arose, and the dispute arose after the BIT entered into force. As a matter of interpretation, the BIT covers the 'entire life' of investments

[197] Respondent's Rejoinder, [226].

[198] Claimants' Rejoinder on Jurisdiction, [11]-[25].

[199] Respondent's Counter-Memorial, [152]. The Respondent accepts in its Counter-Memorial, [153] that the Claimants had an investment in the share capital of UTT.

[200] Respondent's Counter-Memorial, [153]-[154]; Respondent's Rejoinder, [153]-[158].

[201] Respondent's Counter-Memorial, [155]; Respondent's Rejoinder, [161].

[202] Respondent's Rejoinder, [162]-[163]; Tr Day 1, 112:15–116:9.

[203] Respondent's Rejoinder, [164]-[165]; Tr Day 1, 11611–118:7.

[204] Claimants' Reply, [708]-[712].

[205] Claimants' Rejoinder on Jurisdiction, [26]-[53].

from their entry and acceptance to their liquidation and subsequent disputes, and both the 'returns' of the Claimants and their 'shares' in UTT qualify.[206] There is no relevant limitation on the temporal application of the substantive protections, and the criteria necessary for the establishment of the Tribunal's jurisdiction were present at the date of the Request for Arbitration;[207] it is not necessary to still have an investment at the time (although they did).[208]

2. The Claimants cannot bring a claim on behalf of UTT

(i) The Respondent's submissions

101. The Respondent alleges that the alleged mistreatment on which the Claimants rely related only to the rights of UTT, not the Claimants, and the Claimants cannot sue for harm done to a separate corporation.[209] It says that the Claimants' claim is really for denial of justice, the ICSID Convention requires a 'direct link' between the acts relied upon and the investment, and Jordan's acts were directed to UTT. It goes so far as to suggest that the Claimants fail to establish any breach of the BIT that specifically relates to the Claimants' 35% interest in UTT.[210]

102. The Respondent rejects the Claimants' reliance on 'accessory' or 'incidental' jurisdiction, submitting that this cannot be invoked as a means of obtaining jurisdiction where there is otherwise none.[211]

(ii) The Claimants' submissions

103. The Claimants respond that they are suing to vindicate their own rights as shareholders, and seeking remedies to protect them in that capacity.[212] The shareholders' rights in issue are the rights to receive their dividends, and the right to decide to wind up the business of their corporation.[213] Jordan's conduct, the Claimants submit, impaired those rights as shareholders, by interfering with their ability to wind up the company and by taking enforcement measures against the Claimants in their capacity as shareholders in UTT and (in Mr Alghanim's case) an officer of UTT.[214]

104. But even if the measures were solely concerned with UTT, the Tribunal would still have incidental or ancillary jurisdiction because the question of whether Jordan is entitled to demand from the shareholders payment of the tax levied on UTT is indivisible from the question of the lawfulness of the Tax Measure.[215]

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[206] Claimants' Reply, [713]-[743]; Claimants' Rejoinder on Jurisdiction, [54]-[105].

[207] Claimants' Rejoinder on Jurisdiction, [107]-[126].

[208] Tr Day 1, 104:8-15.

[209] Respondent's Counter-Memorial, [158]-[162], citing *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v Spain*) [1970] ICJ Rep 3, p.35 (Ex RL-3); Respondent's Rejoinder, [166].

[210] Respondent's Counter-Memorial, [163]-[166].

[211] Respondent's Rejoinder, [167]-[168].

[212] Claimants' Reply, [752]-[753].

[213] Claimants' Reply, [755].

[214] Claimants' Reply, [758]-[776]; Tr Day 1, 102:23 – 103:3.

[215] Claimants' Reply, [780]-[786]; Claimants' Rejoinder on Jurisdiction, [138]-[144].

105. The Claimants say that the Respondent fails to respond to its other arguments under this heading, and has not contested that the Claimants bring personal claims.[216]

3. The tax carve-out

106. Article 4(3) of the BIT provides that the provisions of that Article 'shall not be construed as binding a Contracting State to extend to the investors of the other Contracting State special treatment or privilege resulting from…domestic legislation totally or mainly relating to taxation.' The Respondent submits in its Counter-Memorial that this excludes from the Tribunal's jurisdiction disputes over the imposition of tax, but does not pursue this objection in its Reply. The Claimants maintain that the 'carve-out' does not apply to the fair and equitable treatment guarantee, the Respondent's construction would lead to an absurd result, and even if the carve-out applied it would leave most of the Claimants' claims intact.[217]

4. There has been no harm

(i) <u>The Respondent's submissions</u>

107. The Respondent alleges that the Claimants have failed to establish the existence of an investment dispute in terms of Article 9 of the BIT, because they have not suffered harm or loss from the impugned measures.[218] It says that any harm or loss to the Claimants will not materialise until the ongoing judicial process in Jordan against the Claimants is concluded, that the Claimants may prevail in those proceedings, and that until then the dispute may be 'theoretical'.[219]

(ii) <u>The Claimants' submissions</u>

108. The Claimants characterise the Respondent's objection under this heading as constituting three separate assertions: that there is no investment dispute between the parties; that economic damage is a condition precedent to standing under the BIT; and that the Claimants' claims are premature.[220]

109. The Claimants reject each of these allegations, submitting that: there is a dispute because there is a clear difference on a point of law or fact;[221] there is no requirement in the BIT or general international law that damage is a condition precedent to international responsibility;[222] and that the Respondent mischaracterises the Claimants' case as a denial of justice claim. They say that the Respondent confuses a claim arising out of the decisions of the Jordanian Tax Court of Appeal and Court of Cassation with the effect of the subsequent

[216] Claimants' Rejoinder on Jurisdiction, [127]-[137].

[217] Claimants' Reply, [787]-[804]. The Claimants note in their Rejoinder on Jurisdiction, [6] that the Respondent had abandoned this theory.

[218] Respondent's Counter-Memorial, [182].

[219] Respondent's Counter-Memorial, [183]-[187]; Respondent's Rejoinder, [170]-[171].

[220] Claimants' Reply, [806].

[221] Claimants' Reply, [808].

[222] Claimants' Reply, [809]-[815]

proceedings (noting that the Claimants do not allege the pending Jordanian Enforcement Proceedings amount to a denial of justice, but that the Claimants will not have the opportunity in the pending proceedings to contest the validity of the Tax Measure or the decisions which upheld it), says that international law does not require that enforcement of an internationally wrongful act have been completed before a claim can be brought, and finally that even if economic damage were a necessary prerequisite it has been satisfied.[223]

110. So far as the Respondent has introduced a new argument that the dispute is 'hypothetical' or 'academic', the Claimants say that this appears to depend on the propositions that loss has not materialised, and that the domestic proceedings ought to be allowed to come to their conclusion.[224] The Claimants reject these suggestions, arguing that a favourable award would have practical consequences,[225] and that Jordan's objection is based on a hypothetical outcome of proceedings it initiated.[226]

C. The Tribunal's analysis of the jurisdictional objections

1. Objection 1: That the Claimants no longer have an investment

111. The BIT between Kuwait and Jordan came into force on 19 March 2004, before the Claimants began their investment in Jordan through the creation of UMC. It remains in force.

112. There is no dispute between the Parties that the guarantees given by Jordan to investors of Kuwait under the substantive provisions of the BIT were in force at the time the Claimants' investment was made and continued to be in force at the time the present dispute was notified to the Centre.

113. The Respondent does not contest that the Claimants originally made an investment when they acquired shares in UMC in 2004 and when they subsequently exchanged that interest for shares in UTT in 2005. Those shares constituted the legal materialisation of the Claimants' 'investment' within the express terms of Article 1(1)(b) of the BIT. It is not in dispute that the Claimants continue to own their shares in UTT today.

114. The Claimants' investment also had an economic materialisation in Jordan in the form of the sums that the Claimants paid to acquire their telecommunications licence and to establish their mobile telephone network.

115. The Respondent's objection under this head relates not to the establishment of the Claimants' investment, but rather to the alleged significance of the fact that, by the time that the Tax Measure, which is the subject of the Claimants' complaint, had been imposed on UTT in April 2008, UTT had sold its interest in UMC to Batelco some two years previously and the sale proceeds had left Jordan. So, the Respondent says, the Claimants had no continuing

[223] Claimants' Reply, [816]-[828].

[224] Claimants' Rejoinder on Jurisdiction, [147].

[225] Claimants' Rejoinder on Jurisdiction, [149]-[158].

[226] Claimants' Rejoinder on Jurisdiction, [159]-[166].

investment in Jordan at the time of the State measure of which they complain, still less at the time the present arbitration proceedings were instituted in December 2013.

116. The Respondent's argument must be rejected for the following reasons:

(a) Once the Claimants had 'made' their investment in Jordan through the acquisition of shares in UMC and subsequently UTT, they became entitled, according to the express terms of the BIT, to the ongoing treaty protections set forth, *inter alia*, in Articles 3 and 4. Article 4 confirms this, emphasizing that the Contracting State's guarantee applies 'at all times'. The Claimants continue to be shareholders in UTT and therefore entitled to these protections.

(b) In any event, Article 1(1) further provides that '[t]he term "investment" also applies to "returns" … resulting from "liquidation"', which is defined (in art 1(4)) as 'any action taken for the purpose of totally or partially terminating the investment.' The Claimants' sale of UTT's shares in UMC to Batelco, and the proceeds realized upon that sale, represent returns resulting from the partial termination of the Claimants' investment, pursuant to which they disposed of UTT's interest in UMC, but retained their shares in UTT.

(c) The Claimants' cause of action in these proceedings relates to the alleged effect upon them as shareholders of the imposition of the Tax Measure upon UTT. That Measure imposes a capital gains tax liability on UTT's returns from termination of the investment. As a result, the impugned Measure directly operates upon an element of what the BIT defines as an 'investment.'

(d) Further, the Respondent alleges that the Claimants are personally liable for the tax liability of UTT. It has brought proceedings in the Jordanian courts seeking to establish the Claimants' personal liability, which proceedings are currently stayed as a result of the Tribunal's PO No 2.

(e) 'Disputes, arising between a Contracting State and the investor of the other Contracting State, regarding an investment of the latter in the territory of the former' may, under Article 9, be referred for settlement by means of international arbitration at ICSID. There was, at the date of the institution of these proceedings, a dispute between Jordan and the Claimants regarding the investment that the latter made in Jordan, including as to the liability of both UTT, as the investment vehicle, and the Claimants personally, to pay tax on the sale of their interest.

117. Once an investor has made an investment in the territory of another Contracting State under an investment treaty, he obtains the benefit of the protections of that treaty in relation to measures taken by the State that adversely affect his investment (including for this purpose his returns upon liquidation of that investment in whole or in part). In the present case, the

investors in fact continue to hold their shares in UTT. But this is not necessary. As the tribunal held in *Jan de Nul*:[227]

> Providing an effective remedy is part of the duties of fair and equitable treatment and of continuous protection and security for investments. A violation of that duty after the investment has come to an end does not change its nature. The duty to provide redress for a violation of rights persists even if the rights as such have come to an end. …

2. Objection 2: That the Claimants cannot bring a claim on behalf of UTT

118. In the second place, the Respondent alleges that the entity subject to the Tax Measure is UTT, not the Claimants, and that the Claimants cannot bring a claim on UTT's behalf.

119. This objection suffers from the difficulty that the Respondent itself alleges in the Jordanian Enforcement Proceedings that the Claimants are themselves personally responsible for UTT's tax liability in the capacity of shareholder or director.

120. The Claimants submit that they sue in the present proceedings to vindicate their own rights as shareholders in UTT. The Tribunal agrees. It is those shares, and the returns on them, that constitute their 'investment' for the purpose of Article 1 of the BIT. It is precisely the purpose of investment treaties to enable the foreign shareholder to bring a claim for losses to his investment in a locally incorporated investment company. The availability of such a claim has been regarded as 'perfectly clear' from the earliest decisions under investment treaties.[228]

121. In the present case, the link between the effect of the state's measure upon the investment company and the claim of the investor is *a fortiori* as a result of the Respondent's pursuit of a direct claim to recover the sums that it claims UTT is liable to pay in tax from the Claimants.

3. Objection 3: The tax carve-out

122. Thirdly, the Respondent submitted that the present case is excluded from the jurisdiction of the Tribunal as a result of Article 4(3)(b) which confirms that the Contracting States are not bound to extend to investors any 'special treatment, preference or privilege resulting from…any domestic legislation totally or mainly relating to taxation'.

123. The Tribunal does not understand the gravamen of the Claimants' case to be that it insists on a 'special treatment, preference or privilege' in the field of taxation. On the contrary, the Claimants allege that the proper application of the ordinary rules of Jordanian tax law applicable to all taxpayers should have resulted in UTT's gain on the disposal of its shares in UMC not being liable to capital gains tax. They claim that the imposition of this tax in their case was an arbitrary and discriminatory measure that singled them out from the ordinary and proper application of the tax law in a manner that was unfair and inequitable.

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[227] *Jan de Nul N.V., Dredging International N.V. v Arab Republic of Egypt* (Decision on Jurisdiction) ICISD Case No ARB/04/13 (2006) (Ex RL-40), [135].

[228] *American Manufacturing & Trading, Inc. v Republic of Zaire* (Award) ICSID Case No ARB/93/1 (1997) (***American Manufacturing v Zaire***) (Ex CL-66), [5.15].

124. Article 4(3)(b) appears in a provision of the BIT that guarantees national and most-favoured nation treatment as well as fair and equitable treatment. In this context, it is understandable that the treaty drafters would have included an express clause providing that preferential tax treatments not afforded to investors could not give rise to an investment treaty claim. This provision in no way restricts the ability of an investor to claim that he has been subjected to an arbitrary measure contrary to the ordinary application of the law otherwise applicable to all.

4. Objection 4: That there has been no harm

125. Finally, the Respondent claims that the Claimants have suffered no harm since their own personal liability might yet not be established in the Jordanian Enforcement Proceedings, so their present claim is premature and speculative.

126. This objection is really the other side of the coin to Objection 2. In the Tribunal's view, it suffers from a similar infirmity. The Claimants are entitled by virtue of the BIT to pursue a claim for the Respondent's alleged breach of its obligations to them as a result of mistreatment of their investment in UTT. The Respondent's Tax Measure has already been imposed on UTT, and finally confirmed by the decision of the Court of Cassation.

127. The cause of action under the Treaty does not require damage as a constituent element. Nor *a fortiori* does it require the final establishment of direct damage to the Claimants. The Claimants are entitled to sue for the breach of the obligations owed to them under the BIT to protect their investment in UTT.

128. For these reasons, the Tribunal therefore concludes that each of the Respondent's objections to its jurisdiction fail. As a result, it is necessary to proceed to consider the Claimants' claims on their merits. This it will do by first setting forth a summary of the Parties' submissions and then turning to its own analysis.

V. MERITS: THE PARTIES' SUBMISSIONS

A. Introduction

129. This Part summarises the Parties' submissions on the merits of the Claimants' case. It begins with extracts of the most relevant legal texts.

130. The Parties adopted different structures for their submissions on the merits, consistently with the different way in which they characterised the dispute. Those submissions also evolved over the course of two rounds of written pleadings and oral argument:

(a) The Claimants focused on establishing that the relevant acts were attributable to the Respondent; that the Respondent's acts were internationally wrongful by reference to each of the substantive guarantees (submitting, that is, that Jordan's conduct was arbitrary, was a breach of full protection and security, was a breach of the guarantee of legal stability, violated legitimate expectations, was discriminatory, and impaired the liquidation of the Claimants' investment); and that Jordan's breaches of the BIT cannot be excused by its own judicial organs.

(b) The Respondent, to some extent, reversed the enquiry, submitting first that it had applied its taxation law to the transaction in a reasonable manner (submitting, in particular, that the Claimants were now attempting to raise arguments that should have been raised by UTT in the domestic proceedings, that the Respondent's interpretation of the tax legislation was open to it, and that the Tax Measure was not politically motivated) and addressing each of the substantive guarantees in the BIT against that background.

131. In either case, the question of whether the Tax Measure was imposed according to domestic law is centrally important to both parties' analysis – albeit not necessarily dispositive on either party's characterisation of the issues.[229] The Tribunal accordingly summarises the Parties' submissions in the following sequence:

(a) The key legal texts;

(b) The validity of the Tax Measure;

(c) The alleged political motivation of the Tax Measure;

(d) The legal framework for the assessment of the Claimants' claims, and in particular the standard to be applied where the case revolves around the allegedly unlawful application of domestic law; and

[229] The Claimants submit that even if it is wrong that the gain on a share sale cannot be bifurcated, the Respondent's conduct would still breach the obligation to accord legal predictability and stability: Tr Day 1, 15:3-17. The Respondent says that if the Tribunal were to find that there was no reasonable basis in Jordanian law for the imposition of the tax measure, the Tribunal would still have to be satisfied that its conduct fell below international standards (Tr Day 1, 129:15–131:5), although that international responsibility would flow if the Tribunal was satisfied that the courts' decisions were such that no competent judge could reasonably have reached them (Tr Day 1, 144:6-21).

(e) The substantive guarantees which the Claimants allege have been breached, including:

(i) Arbitrary treatment (Article 3(1) and Article 4);

(ii) Full protection and security (Article 3(1)) and legal stability and predictability (Article 12);

(iii) Legitimate expectations (Article 4);

(iv) Discrimination (Articles 3(1) and 4); and

(v) Impairment of rights to liquidate.

B. The key texts

1. The BIT

132. This section begins by extracting the most relevant provisions of the Jordan–Kuwait BIT invoked by the Claimants.

133. The key investment protection guarantees on which the Claimants rely are as follows:[230]

Article 3

Protection of Investments

1. Investments, made by investors of either Contracting State, enjoy full protection and security in the territory of the other Contracting State, in compliance with the recognized principles of international law and with the provisions of this Agreement. Neither Contracting State shall in any way impair by arbitrary or discriminatory measures such investments or associated activities including the use and enjoyment of the management, development, maintenance and expansion of these investments or related activities.

2. Each of the Contracting States shall declare all laws, regulations, rules and judgements related to or directly affecting investments or connected activities in its territory of the other Contracting State.

3. Each of the two Contracting States must work on providing effective means to confirm requests and implement rights with respect to investments. Each, Contracting State shall guarantee to investors of the other Contracting State the right to resort to courts, administrative agencies and all other authorities that exercise judicial authority, as well as the right to appoint any person of their choice qualified according to the applicable laws and regulations for the purposes of the confirmation of claims and execution of rights concerning their investments and connected activities.

4. The two Contracting States shall not impose on the investors of the other Contracting State any compulsory discriminatory measures against investments made by investors of the other Contracting State in favour of investments made by its own investors or investors of a third State, requiring or restricting the purchase of materials, energy, fuel or production facilities, transportation or processing of any

[230] Ex C-1. The Parties' submissions contain wording with slight differences that are not material.

kind or restricting the marketing of its products inside or outside the territory of the host Contracting State.

5. Moreover, investments in the host Contracting State shall not be subject to performance requirements which could be harmful, to its growth capabilities or could have adverse effects on its usage, enjoyment, management, maintenance, expansion or on other connected activities, unless such requirements were considered vital for public health considerations, public order or the environment and were applied in compliance with legal instruments of general application.

6. Investments made by investors of either Contracting State in the host Contracting State shall not be subject to sequestration, confiscation or any similar measures, except in accordance with legal procedures and in conformity with the mandatory principles of international law and the other specific provisions of this Agreement.

7. Each of the Contracting States shall observe any commitment or obligation to which it is a party to, in connection with investments or related activities in its territory made by investors of the other Contracting State.

Article 4

Treatment of Investments

1. Each Contracting State guarantees, at all times, fair and equitable treatment to investments made in its territory by investors of the other Contracting State. This treatment shall not be less favourable than the treatment granted in similar circumstances to its own investors or to investors of a third State whichever is more favourable.

2. Each Contracting State grants the investors of the other Contracting State, regarding connected activities related to their investments including the use, enjoyment, management, development, maintenance and expansion or disposal of these investments, a treatment that is not less favourable than the one granted to its own investors or to investors of a third State whichever is more favourable.

3. However, the provisions of this Article shall not be construed so as binding a Contracting State to extend to the investors of the other Contracting State special treatment, preference or privilege resulting from:

   a) Any customs or economic union, free trade zone, monetary union, any kind of regional economic arrangement or other similar international agreement concluded between the two Contracting States or to which either of them is or may later become a party;

   b) Any international, regional or bilateral agreement or any similar arrangement or any domestic legislation totally or mainly relating to taxation.

Article 12

Application of other Provisions

If the legislations of either Contracting State or obligations under international law currently existing at present or established hereafter between the Contracting States in addition to the present Agreement, contain rules, whether general or specific, entitling investments or connected activities by the investors of the other Contracting State to a treatment more favourable than as provided for by the present Agreement, such rules, to the extent that they are more favourable, prevail over the present Agreement.

2. Domestic legislation

134. As noted above, the application of Jordanian tax legislation is at the heart of the present dispute. It is helpful to extract key provisions from that legislation to set the context for the subsequent summary of the parties' submissions.

135. It is common ground that the applicable taxation legislation was Income Tax Law No 57 of 1985 (**1985 Tax Law**), as amended. Although the parties and their experts explained in detail the evolution of this law, it is accepted that at the time of the Transaction it read as follows:[231]

> Article (3)
>
> a. Income accrued or earned in the Kingdom from the following sources by any person shall be subject to tax-:
>
> 1. Profits or gains from any work, craft, business, profession or vocation…and from any separate transaction or deal which is considered as trade or business.
>
> …
>
> 7. Consideration for vacancy, key-money, and goodwill.
>
> …
>
> 12. Profits or gains from any other source not included in items (1-11) of this paragraph which have not been explicitly excluded from these items and which have not been granted an exemption under this law or any other law.
>
> Article (7)
>
> a. It shall be totally exempt from tax
>
> …
>
> 15. a. Capital gains, profits accrued from the buying and selling of lands, real estate, shares and bonds shall be considered part of these capital profits except for gains resulting from sale or transfer of ownership of assets included in the rules of depreciation stipulated in this law, provided that the losses arising from the sale or transfer of ownership of such assets included by the rules of depreciation are deducted if they are realized. For the purposes of this law, this loss shall be determined to be equal either to the depreciation deducted for the purposes of this law or the incurred loss whichever is less.
>
> b. 25% of the gains of purchasing and selling shares and bonds inside or outside the Amman Stock Exchange and from distributions of Joint Investment Funds accrued to banks and financial institutions provided that no amounts of expenses will be returned to the gains of such companies in return to exempting such a percentage of gains.
>
> …

136. The Parties disagree on the correct interpretation of this Article. The Claimants maintain that Article 7.A.15.a contains only one element (an exemption for capital gains and a list of examples of such capital gains), an interpretation which they say is confirmed by the official

[231] Originally annexed as Ex C-6 and subject to official translation

translation.[232] The Respondent says it contains two elements (an exemption for capital gains and a list of sources which are deemed to be capital gains).[233]

137. Prior to 2001, the exemption for capital gains was found – in similar terms – in Article 7.A.11.[234] The 2001 Amending Tax Law also introduced a specific reference to *shuhra*/goodwill in Article 3.[235]

138. The Parties also explained the evolution of the legislation applicable to the formation and constitution of corporations in Jordan. Since this is relevant to the proper interpretation of the tax law, it is helpful to recount briefly this history:[236]

(a) The first comprehensive Jordanian legislation applicable to the formation of companies was the **1964 Companies Law**. It provided for two kinds of companies – ordinary companies and shareholding companies. Shareholding companies, in turn, were defined in Article 8 as 'money/capital companies that include public shareholding limited companies and (private) shareholding limited companies.'[237] Article 39(2), meanwhile, provided that the share capital of a public shareholding limited company consisted of '*ashom* shares that are tradable and may be offered publicly', whereas the share capital of a private shareholding limited company consisted of '*ashom* shares which may not be publicly offered'.[238]

(b) The **1989 Temporary Companies Law** abolished the concept of private shareholding companies.[239] Instead, Article 6 relevantly provided for two kinds of 'money/capital companies' – public shareholding companies and limited liability companies:[240]

(i) Public shareholding companies were continued from the 1964 Law, and were still constituted by *ashom* shares; and

(ii) Private shareholding companies were replaced by limited liability companies. These were constituted, according to Article 54, by *husas* shares, while Article 56 provided that *husas* shares could not be offered publicly.[241]

(c) The **1997 Companies Law** maintained this structure, and continued to recognize public shareholding companies and limited liability companies.[242]

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[232] Claimants' Closing Skeleton, [5].

[233] Respondent's Rejoinder, [60].

[234] Second Expert Report of Mr Nabil Rabah, [31]; Respondent's Counter-Memorial, [17]. The Parties disagree on the correct characterisation of the changes made in 1995 and 2001, which is addressed below.

[235] Ex AM1, App 2, No 6, Art 3.

[236] See Claimants' Reply, [367]-[376].

[237] Expert Report of Mr Nabil Rabah, [42]; see Ex AM1, App 2, No 2.

[238] Expert Report of Mr Nabil Rabah, [43]; the translation at E4/4.14 is slightly different.

[239] Expert Report of Mr Nabil Rabah, [46]; see Second Expert Report of Dr Ahmad Masa'deh, [5.1] and Ex AM1, App 2, No 13.

[240] Expert Report of Mr Nabil Rabah, [45]. The law also provided for a 'Limited Partnership in Shares'.

[241] Expert Report of Mr Nabil Rabah, [47]-[48].

[242] Expert Report of Mr Nabil Rabah, [51]-[54]; Second Expert Report of Dr Ahmad Masa'deh, [5.7].

(d) The **2002 Amending Companies Law** came into force on 17 February 2002, and (re-) introduced a new form of 'money/capital company' known as private shareholding companies in Article 66(a)(*bis*). These companies were constituted by *ashom* shares; in Mr Rabah's opinion they are 'more akin' to limited liability companies although Dr Masa'deh disagrees.[243] Although Article 66(a)(bis)(C) of the 2002 Law permitted the listing and public trading of private shareholding companies, Jordan's Securities Commission has not issued the necessary directives to enable this and private shareholding companies are not traded on Jordan's stock exchange.[244]

139. Thus, it is common ground that by the time of the Transaction, the 1997 Companies Law as amended recognised:[245]

(a) Public shareholding companies and private shareholding companies constituted by *ashom* shares; and

(b) Limited liability companies and partnerships constituted by *husas* shares.

140. It is also common ground that:[246]

(a) UTT is a limited liability company;[247]

(b) UMC is a private shareholding company;[248] and

(c) The Transaction took the form of a sale of shares.[249]

C. The validity of the Tax Measure

1. Introduction

141. A central dispute between the parties is whether the Tax Measure was lawfully imposed; that is to say, whether UTT's sale of its shares in UMC was taxable in accordance with the taxation legislation in place in 2006.

142. The Claimants say that the Tax Measure was unlawful, because Article 7.A.15.a clearly exempted from taxation profit representing capital gains on the sale of shares. They say, in particular, that Article 7.A.15.a as officially translated confirms:[250]

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[243] Expert Report of Mr Nabil Rabah, [55]-[56]. See 2002 Amending Companies Law, Article 66(a)(*bis*) (Ex NR1, App 6, No 13); cf Second Expert Report of Dr Ahmad Masa'deh, [5.17].

[244] This became Article 66(*bis*)(c) of the 1997 Companies Law (Ex. C-153). Expert Report of Mr Nabil Rabah, [56]; Second Expert Report of Dr Ahmad Masa'deh, [5.15]. Dr Masa'deh was questioned on the extent to which public shareholding companies are required to be traded on the stock exchange: Tr Day 4, 148–153.

[245] Claimants' Memorial, [237].

[246] Claimants' Reply, [65]-[67].

[247] Ex C-14.

[248] Ex C-25.

[249] See Claimants' Memorial, [94].

[250] Claimants' Closing Skeleton, [6].

(a) All capital gains are fully exempt, because what follow are examples;

(b) There is no distinction between public and private shareholding companies as all capital gains are exempt;

(c) There is nothing to support the bifurcation of profit into taxable and exempt elements; and

(d) There is no distinction between buying and selling (trading) of shares, on the one hand, and selling by founding partners.

143. The Claimants dispute the Respondent's argument that Article 7.A.15.a contains a deeming provision: their case is that capital gains are exempt, and the individual items are examples of that exemption.[251] They say that if the Tribunal accepts this interpretation, then the Respondent's case necessarily fails.[252]

144. The Respondent says that the ISTD interpreted Article 7.A.15.a correctly, or at least in a manner that was open to it.[253] As noted above, the Respondent sees Article 7.A.15.a as including two elements, so the Tribunal must answer two questions arising out of Article 7.A.15.a: was the entirety of the proceeds a capital gain (thus coming within the initial words of the article) in which case the exemption would apply? If not, do the proceeds nevertheless come within the 'deeming' provision?[254] In particular, it says that the exemption only applies where the taxpayer has bought *and* sold *ashom* shares in a public shareholding company, and because UMC was a private shareholding company, the exemption did not apply. Therefore, the gains earned by UTT – equivalent to the goodwill or *shuhra* representing the difference between the share cost of the company and the sale price – was taxable.[255]

2. The scope of the exemption

(i) <u>The Claimants' submissions</u>

145. On the question of statutory interpretation generally, Dr Masa'deh says that a provision will (generally) be interpreted at the time it is enacted,[256] that if the 'text is clear, you don't need to go into interpretation matters',[257] but that an evolutionary approach to interpretation may be consistent with the legislature's intention.[258]

[251] Tr Day 5, 3:8-11; and see cross-examination for Dr Ahmad Masa'deh's evidence on the correct translation of the Article.

[252] Tr Day 1, 25:4-9.

[253] Respondent's Rejoinder, [45].

[254] Tr Day 1, 146:18–147:5.

[255] Respondent's Rejoinder, [56].

[256] Tr Day 4, 175:15-16; for the parenthetical qualification see Tr Day 5, 13:23-25.

[257] Tr Day 4, 182:17-18.

[258] Tr Day 4, 183:5-15.

146. The Claimants dispute the Respondent's starting point that 'all income is, in principle, taxable'[259] as reversing the constitutional rule that no tax may be imposed except by law, and no exemption may be applied except by law.[260] The rule is accordingly that profit is not taxable unless the law so provides, and the burden of proving the generation of a taxable income lies with the ISTD.[261] According to Dr Masa'deh's evidence under cross-examination, this extends to proving the taxable element and the source of income,[262] and the source of this rule is Article 3 and Article 29.A of the Tax Law (albeit that these articles do not use the term 'burden of proof').[263] So far as the relationship between the general principle and the exemption is concerned, Dr Masa'deh agrees that an exemption should not be interpreted 'extensively', but says that one cannot read the general principle in isolation from the exemption.[264] He also notes the general principle of civil procedure that whoever asserts something must prove it.[265] So far as the interpretation of Article 3.A of the Income Tax Law is concerned, Dr Masa'deh does not accept that paragraph 12 catches 'profits or gains from any other source', since in his view it does not catch non-taxable sources of income: paragraph 12 must be read in the context of the preceding 11 paragraphs, which are mainly concerned with operational profits.[266] Mr Rabah accepts that when the legislator excluded land in paragraph 10 (it not being a depreciable asset), it was not recaptured by the general provision in paragraph 12;[267] on that basis, the Claimants argue that not all forms of income are subject to Article 3.[268]

147. The Claimants submit that the gains that UTT earned on the sale of its shares in UMC constitute 'capital gains' or 'capital profits' in terms of Article 7.A.15.a of the 1985 Tax Law, and accordingly should have been exempt from taxation.[269] It is irrelevant that 'capital gains' is not defined because the sale of *ashom* shares is expressly included.[270]

148. The Claimants reject the argument that a share sale may give rise to both an exempt capital gain and goodwill.[271] The Claimants also reject the Respondent's attempt to read down the meaning of 'capital gain' Article 7.A.15.a: the Article provides that capital gains are 'fully exempt'.[272]

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[259] Respondent's Counter-Memorial, [12]. As noted below, the Claimants also say that Article 3 historically only caught operational income, with an exception introduced for *depreciable* capital assets only: Tr Day 1, 45:15–46:1.

[260] Claimants' Reply, [34]-[36], citing Jordanian Constitution, Arts 111 & 118 (Ex C-151).

[261] Claimants' Reply, [37]-[40]; see also Claimants' Reply, [350]-[363], addressing the proper sequence of the analysis.

[262] Tr Day 4, 130:2-15.

[263] Tr Day 4, 134:10-15; Tr Day 4, 143:8-25; Tr Day 4, 146:21-24; see also Expert Report of Dr Ahmad Masa'deh, nn20, 22.

[264] Expert Report of Dr Ahmad Masa'deh, [4.28], citing *Distinguished Food Company v Income Tax Assessor* (Decision) Court of Cassation Case No 4025/2004 (2005) (***Distinguished Food Company***) (Ex AM1, App 3, No 25); Tr Day 4, 172:15–174:23.

[265] Tr Day 5, 90:14-16.

[266] Tr Day 4, 140:6-20.

[267] Tr Day 5, 153:10-19; Tr Day 5, 156:21–157:2.

[268] Tr Day 5, 154:25–155:2.

[269] Claimants' Memorial, [45]-[51], [210].

[270] Claimants' Reply, [46].

[271] Claimants' Reply, [345]-[349]; see also Tr Day 6, 238:23–242:16.

[272] Claimants' Reply, [333]-[344].

(ii) The Respondent's submissions

149. On the general principles of statutory interpretation, the Respondent says that statutes must be interpreted:[273]

(a) In accordance with their plain meaning;

(b) In context, as a whole;

(c) In such a way as to give effect to all terms therein;

(d) In the context of tax, restrictively without expansion by analogy; and

(e) As they stood at the time they were enacted.

150. The Respondent starts from the proposition that profits earned from the sale of goodwill is taxable, against the background of which the exemption in Article 7.A.15.a must be interpreted.[274] It maintains that the law does not contemplate 'construing the provision in order to make the exceptional provision flexible to include the originally not exempted from tax into the exceptional exemption.'[275]

151. The Respondent submits there is nothing in Article 3 that suggests 'a capital gain is not per se taxable'; proceeds from the sale of shares fall within the concept of 'profits or gains' in the catch-all paragraph 12.[276] The starting point is that all income, including from a sale of shares, is taxable.[277] The exemption in Article 7.A.15.a then applies to all 'capital profits' and any profits deemed to be capital gains.[278] In the Respondent's view, paragraph 12 is closely related to the exemption in Article 7, since capital gains will come within the broad definition in paragraph 12 to the extent they are not otherwise exempted.[279]

3. Different forms of company in Jordanian law and their relevance to the exemption

152. There is a debate between the parties as to the correct interpretation of the reference to *ashom* shares in Article 7.A.15.a, and in particular whether it is confined to *ashom* shares in public (as opposed to private) shareholding companies.[280] The Tribunal has already summarised above the evolution of the companies legislation. It now summarises the Parties' submissions on the relevance of that development for the interpretation of the exemption.

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[273] Respondent's Closing Skeleton, [41], citing in particular *Distinguished Food Company*.

[274] Respondent's Rejoinder, [48]-[52], citing Witness Statement of Mr Aktham Batarseh, [8]-[11] & Second Witness Statement of Mr Ali Almusned, [9].

[275] Respondent's Rejoinder, [61], citing Article 118 of the Jordanian Constitution and Second Expert Report of Mr Nabil Rabah, [22] & [56]; Tr Day 1, 147:6–149:14.

[276] Tr Day 1, 151:1–152:25.

[277] Respondent's Closing Skeleton, [61] citing *Distinguished Food Company*, Sec II.2.

[278] Respondent's Closing Skeleton, [62].

[279] Tr Day 1, 153:3-10.

[280] In the next section, the Tribunal summarises the Parties' submissions on the difference between companies constituted by *ashom* and by *husas* shares.

(i) The Claimants' submissions

153. The Claimants' case is that the exemption applied to the sale of *ashom* shares in either a public shareholding company or a private shareholding company. As UMC is a private shareholding company, the exemption applied. Mr Almusned's evidence is that no distinction was drawn at the relevant time by ISTD between the taxation treatment of companies constituted by *ashom* or *husas* as far as private shareholding companies were concerned.[281] Dr Masa'deh opined that the focus of the exemption is on capital-based companies, and therefore the reference to *ashom* shares should be read to include capital companies constituted by both *ashom* and *husas* shares.[282] He could not offer an explanation for why the legislator had used the term *husas* for a company constituted by capital as opposed by the interest of the named partners.[283]

154. The Claimants reject the Respondent's suggestion that the reference to *ashom* shares was intended to refer only to public shareholding companies, and Mr Rabah accepted that there was no precedent case for such a proposition.[284] The Claimants disagree that an investor should have been expected to know the history of how the companies legislation had evolved in order to work out what the legislature meant by the reference to *ashom* shares – any sale of *ashom* shares is exempt. Any other approach would be deceptive, breach legal stability, and could not be in good faith.[285] They also say that the Respondent has failed to identify a coherent reason for such a distinction.[286]

155. The exemption of capital gains arising on the sale of *ashom* shares has been in place since 1985, and applying the Respondent's interpretative methodology the meaning of this term should be interpreted by reference to the 1964 Companies Law – which recognized both private and public shareholding companies.[287] The Claimants also note that the Respondent relies on the terms of the 1989 Temporary Companies Law which had been repealed since 1997.[288]

156. Accordingly, the Claimants submit that it is immaterial whether private shareholding companies are (dis)similar to limited liability companies, since it is enough that they are constituted by *ashom* shares.[289] The flawed premise of the Respondent's theory, according to the Claimants, is that the exemption cannot be extended to 'new' companies which were

[281] Tr Day 4, 82:16–83:11. Mr Ali Almusned did not in that passage draw an explicit distinction between 'private and [public] shareholding companies' but between *ashom* and *husas* shares: cf Claimants' Closing Skeleton, [7(a)]; Tr Day 6, 13:9-14.

[282] Second Expert Report of Dr Ahmad Masa'deh, [5.21]; Tr Day 5, 18:14–21:3.

[283] Tr Day 5, 93:23–95:5.

[284] Tr Day 5, 174, 12-19.

[285] Tr Day 1, 29:1-24.

[286] Tr Day 1, 74:14-17.

[287] Claimants' Reply, [54]-[55].

[288] Claimants' Reply, [56]; see also Claimants' Reply, [387].

[289] Claimants' Reply, [83]. Dr Ahmad Masa'deh opined that there was no difference between *husas* and *ashom* companies so far as ownership is concerned, but there probably was a difference 'in terms of their selling and tradeability': Tr Day 5, 94:16–95:2.

created from 2002 onwards.[290] Applying an inter-temporal approach, only two moments could be relevant – either 1985 or 2006 – but in either case the reference to *ashom* shares would capture the shares in UMC.[291] Parliament introduced the 2002 amendments in the context of an existing exemption applicable to *ashom* shares, and Parliament could have enacted legislation (in 1995 or at any point before 2006) to constrain the exemption.[292]

157. The Claimants also say that the ISTD and the Tax Court of Appeal focused on the wrong company in determining whether the exemption applied; the enquiry should have been concerned with UMC, not UTT.[293] Thus the Claimants say that a central paragraph of the Tax Court of Appeal's judgment: wrongly refers to UMC's shares as *husas* instead of *ashom*; focused on the character of the shares in UTT instead of UMC in order to determine whether the exemption applied; and wrongly holds that the exemption did not apply because UMC was a private, not public, shareholding company.[294] They say that the Court of Cassation perpetuated these errors.[295] Indeed, the Respondent's acceptance in this arbitration that a 'partial exemption' is possible was not reflected in the Court of Appeal's analysis: 'It did not at all see the exemption.'[296]

158. The Claimants also say that the Respondent's interpretation is discriminatory. The Respondent implies that the seller of shares in public shareholding companies are not in 'like circumstances' to the sellers of shares in non-public shareholding companies;[297] that is inconsistent with Parliament's intention, and ignores the fact that private shareholding companies are 'in principle' tradable on the market.[298]

(ii) <u>The Respondent's submissions</u>

159. The Respondent's case, relying on Mr Rabah's evidence, is that Article 7 contains two elements: an exception for capital gains, and a deeming provision whereby gains arising from the sale of shares in a public shareholding company are treated as capital gains.[299] The Respondent submitted that Dr Masa'deh is not truly expert in Jordanian tax law.[300]

160. Although the official translation of Article 7.A.15.a does not use the verb 'deemed', the Respondent maintains that the effect of the clause is to treat profits that would not otherwise be exempt as exempt capital gains.[301] On the linguistic point, the Respondent also referred to a number of provisions of the Income Tax Law that supported its submission that the words

[290] Claimants' Reply, [365].

[291] Claimants' Reply, [378], citing Second Expert Report of Dr Ahmad Masa'deh.

[292] Claimants' Reply, [379]-[380].

[293] Claimants' Memorial, [235].

[294] Claimants' Memorial, [240].

[295] Claimants' Memorial, [243]-[247].

[296] Tr Day 6, 128:22–129:2.

[297] Claimants' Reply, [396].

[298] Claimants' Reply, [399].

[299] Tr Day 5, 2:2-7.

[300] Tr Day 6, 147:19-20.

[301] Tr Day 6, 207:22–208:8.

'shall be considered' had to be given meaning, otherwise the legislator would have used a phrase such as 'includes'.[302] The Claimants noted that these additional translations were not referred to official translation, and submitted they were being taken out of context.[303] The Tribunal reminded the Respondent that its analysis would have to consider Article 7.A.15.a in its official translation.[304]

161. The Respondent says that the exemption in Article 7.A.15.a is subject to two limitations which the Claimants do not recognise:[305]

(a) The exemption only applies where the taxpayer has bought *and* sold (i.e. traded) the shares; and

(b) The reference to *ashom* shares is understood to be limited to *ashom* shares of public shareholding companies.

162. So far as the first qualification is concerned, however, the Claimants say Mr Rabah confirmed in evidence that the tax treatment of a share sale did not depend on whether the sellers were founding partners.[306]

163. On the second argument, Mr Rabah opines that this is consistent with the legislative history of the exemption.[307] According to Mr Batarseh, ISTD officials have understood the exemption to be concerned only with the buying and selling of shares on the Amman Stock Exchange. Accordingly, even though the 2002 amendments introduced the concept of private shareholding companies constituted by *ashom* shares, 'this exemption is not understood by ISTD officials as applying to such companies as a matter of principle'.[308] Mr Kudah suggests that the policy behind this distinction is that the price of shares traded publicly is determined by the market, rather than between the parties, and the government wished to encourage investment in the market.[309]

164. The Respondent argues that this explanation is reflected in the decision rejecting the administrative objection: the fact that UMC was not a public shareholding company whose shares were traded, and the fact that UTT was a 'founding partner' (a reference, in the Respondent's submission, to the fact that UTT had not bought *and* sold the shares) took it outside the scope of the exemption.[310] It also notes that the Tax Court of Appeal and Court of Cassation both emphasised the exemption's limitation to public shareholding companies.[311]

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[302] Respondent's Closing Skeleton, [69(a)]; Tr Day 6, 208:25–219:22.

[303] Tr Day 6, 210:6-21.

[304] Tr Day 6, 211:25–212:16.

[305] Respondent's Rejoinder, [50], [59].

[306] Claimants' Closing Skeleton, [56]; Tr Day 5, 179:6-20.

[307] Second Expert Report of Mr Nabil Rabah, [37].

[308] Witness Statement of Mr Aktham Batarseh, [8]-[11]; see also Second Witness Statement of Mr Ali Almusned, [9].

[309] Tr Day 3, 50:24–51:25.

[310] Respondent's Rejoinder, [55]-[56]; see also [36]-[40].

[311] Respondent's Rejoinder, [57].

165. The Respondent relies on the evolution of the companies legislation in support of its interpretation of the reference to *ashom* shares. Mr Rabah says that the exemption in Article 7.A.15.a (as subsequently renumbered) was introduced in the 1995 amendments to the 1985 Tax Law (although an equivalent exemption had previously been found in Article 7.A.11). By that time, the concept of private shareholding companies had been abolished by the temporary law of 1989. Since the 1995 Amending Tax Law 'is the first law that incorporated the terms of the 1989 Temporary Companies Law within the provisions of the 1985 Tax Law', by introducing a new provision referring only to *ashom* shares Parliament must have intended that it should only apply to public shareholding companies – the only form of company constituted by *ashom* shares at the time: there was no such thing as a private shareholding company under the 1989 Temporary Companies Law.[312]

166. Dr Masa'deh's evidence for the Claimants is that this amendment only introduced the depreciable assets exemption, and should accordingly be treated as amending and not repealing and replacing Article 7.A.11.[313] The Respondent's case is that in 1995 the legislator made a 'positive decision to replace Article 7.A.11'; that the new provision refers to companies constituted by *ashom* shares, and therefore the legislator must have had in mind the companies constituted by *ashom* shares in 1995. The Respondent submits that the contrary theory advanced by Dr Masa'deh (that because the amendment only introduced the reference to depreciable assets it must be interpreted as it would have been when the original provision was promulgated in 1985[314]) is 'completely implausible'.[315] It would entail that the legislator did not in 1995 have in mind the forms of company that then existed but was looking back to *ashom* shares as they existed under the regime established in 1964.

167. The Respondent accepts that the original exemption for *ashom* shares could be construed as capturing both public and private shareholding companies (both of which existed in 1985), but submits that this is 'unlikely' because its predecessor, a provision of the 1982 Temporary Tax Law referred to 'subscription, purchase and sale', and because the reference to 'buying and selling' connotes trading on the stock exchange.[316] So the Respondent argues that Jordanian principles of constitutional law and statutory interpretation prevent an 'implied or automatic extension' to the new form of company – particularly in circumstances where private shareholding companies are akin to limited liability companies which do not benefit from the exemption.[317] If the legislator had intended to encompass all capital-based companies, it could have added a reference to 'company' as defined in Article 2.[318]

168. The Respondent also says that UTT never submitted during its administrative and judicial challenges to the Tax Measure that the ISTD was wrong to exclude from the exemption the

[312] Respondent's Rejoinder, [61]-[64], citing Second Expert Report of Mr Nabil Rabah, [9e-f]; Respondent's Closing Skeleton, [70].

[313] Tr Day 5, 24:25–29:17; Tr Day 5, 33:4-13.

[314] Tr Day 5, 33:23–36:4.

[315] Tr Day 5, 28:6–36:6.

[316] Respondent's Rejoinder, [90], citing Second Expert Report of Mr Nabil Rabah, [37].

[317] Respondent's Rejoinder, [90].

[318] Respondent's Closing Skeleton, [73(c)].

sale of shares in private shareholding companies.[319] UTT's submissions were 'preoccupied' with the distinction between public shareholding companies and limited liability companies and apart from one reference in passing, its submissions in the Court of Cassation do not refer to private shareholding companies at all.[320] It acknowledges a 'confusing reference to the appellant company being a limited liability company' in the judgment (which it ascribes partly to UTT's pleadings), but submits that the 'critical point' is the court's understanding that the reference to *ashom* shares only includes shares in public shareholding companies.[321] It disputes that withholding tax should have been applied to Batelco, because the requirement only applies to Jordanian companies.[322]

4. The distinction between companies constituted by ashom and husas shares, and the relationship between the sale of shares and the taxation of goodwill

(i) The Claimants' submissions

169. The Claimants emphasise that the 1985 Tax Law distinguished between the sale of depreciable assets, the sale of non-depreciable assets, and the sale of shares; goodwill is also recognised as a separate concept. The fundamental distinction between goodwill (an asset) and shares is the point of departure of the Claimants' analysis.[323]

170. So far as terminology is concerned, the Claimants emphasise the following points:[324]

(a) It is not disputed that goodwill/*shuhra* comes within the definition of 'gross income' pursuant to Article 3.A.7 of the 1985 Tax Law;

(b) It is also undisputed that the term 'goodwill' is not defined in the Tax Law;

(c) The Jordanian Law of Commerce, however, defines 'goodwill' as an intangible asset, and according to a precedent of the Court of Cassation 'taxation of profits generated by goodwill … occurs when ownership over assets is transferred';[325]

(d) The reference to 'goodwill' was introduced into the Tax Law in 2001, and should be interpreted as referring to a depreciable asset 'and not part of companies' share capital that cannot be separated or depreciated from such a share.'[326] Dr Masa'deh thus opines that assets which are not subject to depreciation are not caught by Article 3 at all, confirmed by the exemption in Article 7.[327]

[319] Respondent's Rejoinder, [93]-[95].

[320] Respondent's Rejoinder, [20]-[23].

[321] Tr Day 1, 184:9-16; Tr Day 1, 188:8-19.

[322] Respondent's Closing Skeleton, [76].

[323] Claimants' Reply, [324]-[334], citing Second Expert Report of Mr Mohammed Al-Akhras, [2.1.4].

[324] Claimants' Reply, [41]-[43].

[325] Claimants' Reply, [41], Citing Second Expert Report of Dr Ahmad Masa'deh, [6.8] ff.

[326] Claimants' Reply, [43].

[327] Tr Day 4, 140:21–141:2.

171. The Claimants submit that its transaction was clearly a sale of shares, not the sale of the underlying assets such as goodwill, and accordingly there was no basis on which to impose a tax on any goodwill element.[328] If Parliament had intended that, they would have provided for it;[329] Dr Masa'deh opines that the policy behind the distinction is to foster investment.[330]

172. The distinction between the sale of shares and the sale of assets is at the heart of the Claimants' case, since they say that the sale of shares cannot give rise to a taxable disposition of goodwill.[331] They say that the sale of partnerships or 'general ordinary companies' constituted by *husas* shares takes the form of the sale of assets, and in those circumstances it is necessary to make a distinction between taxable goodwill and exempt capital gain.[332] The Claimants accept that when a natural person sells a partnership interest, they are selling a portion of the underlying assets and the law will, if proof is satisfied, draw a distinction between taxable goodwill and capital gains.[333] However they say that any such case is distinguishable from a sale of shares.[334]

173. The proviso to the exemption provided in Article 7.A.15.a does not apply, because shares are non-depreciable.[335] They explain that the relevant provisions of the Tax Law (as they have been amended by Parliament and interpreted by the courts) are designed to achieve symmetry between taxable sources and deductible expenses: the sale of depreciable assets gives rise to taxable income under Article 3 and a deductible expense under Article 9.[336] The consequence is that the sale of capital assets is not taxable except for the sale of depreciable assets.[337]

174. As well as submitting that Jordanian law does not recognise the concept of bifurcating the sale of shares into capital gain and goodwill, the Claimants say that tax is only due on goodwill when the goodwill changes hands; if it stays in the company's accounts, then there is no taxable event.[338]

175. The Claimants thus distinguish the line of cases on which the Respondent relies on the basis that they all involved partnerships and the sale of assets, and submit that the Tax Measure was 'unprecedented'.[339] While they accept that a partnership has separate legal personality under Jordanian law,[340] the Claimants submit:

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[328] Claimants' Memorial, [216]-[221]; [253]-[257]; Claimants' Closing Skeleton, [38].

[329] Claimants' Memorial, [213].

[330] Tr Day 5, 95:13–96:17.

[331] Claimants' Closing Skeleton, [57]-[67].

[332] Tr Day 1, 31:24–32:22.

[333] Tr Day 1, 54:19–55:18.

[334] Tr Day 1, 33:18–34:20.

[335] Claimants' Reply, [47]-[51].

[336] Tr Day 1, 40:6-9; Tr Day 1, 45:15–46:17.

[337] Tr Day 1, 44:15-17.

[338] Tr Day 1, 45:3-10.

[339] Tr Day 1, 31:3-16; Tr Day 6, 20:19-22; Tr Day 6, 22:1-23.

[340] Tr Day 1, 35:22–36:3, and see below for a summary of Dr Ahmad Masa'deh's evidence under cross-examination.

(a) *Daoud Al-Issa* establishes the proposition that the sale of a partnership interest (constituted by *husas*) involved the sale of a portion of the underlying assets, so might give rise to a taxable goodwill component.[341]

(b) *Hamdan* involved the same partnership, and establishes that capital gain on a sale of a partnership portion (measured by the appraised value of the assets at that date) is not taxable.[342]

(c) *Ghassan Dhamen* involved the sale of an interest in a private shareholding company (under the 1964 Law, equivalent to a limited liability company under the 1997 Law).[343] Although the transaction was titled a share sale, the Court found that it in substance (and as a matter of fact) it involved the sale of assets,[344] so that it gave rise to a corresponding deduction and taxable income.[345]

(d) *Arab Public Shareholding* stands for two propositions: that *shuhra* is only taxable when it changes hands, and that the ISTD could not rely on the new depreciable assets provision because it had been introduced after the transaction.[346] It does not support the notion that where the whole of the shares in the company are sold then there is a taxable event.[347]

176. The Claimants say that the consequence of defining *shuhra* as the difference between the nominal value of the shares and the sale price would be that all capital profits would be considered goodwill.[348] Mr Al-Akhras also maintains that the calculation of *shuhra* was not in accordance with accounting standards.[349] Mr Dweik notes that tax treatment is not the same as accounting treatment;[350] he opines that the assessor should have calculated goodwill as the difference between the 'fair value of the assets or shares' and the sale price, but instead had calculated it as the difference between the cost of the shares and the sale price.[351] The Claimants say that the ISTD ignored the legal structure of the Transaction.[352] The Claimants submit that ISTD's reliance on international accounting standards in support of the Tax Measure is misplaced;[353] it relies on Ms Jackson's opinion that no goodwill would have been accounted for in UTT's accounts, to tax UTT on goodwill derived from a third party's accounts

[341] Tr Day 1, 54:19–55:18 (submissions); Tr Day 5, 54:9-17 (cross-examination of Dr Ahmad Masa'deh).

[342] Tr Day 1, 56:25–57:8. The Claimants pointed out that the Court of Cassation remitted the case for the lower court to determine that (taxable) goodwill had passed.

[343] Tr Day 1, 58:5–59:6.

[344] Tr Day 1, 58:5–62:17. Indeed the Claimants submit that if the Respondent's theory were correct it should have been exempt: Tr Day 1, 62:23–63:2.

[345] Tr Day 1, 66:6-11.

[346] Tr Day 1, 68:3-24; Tr Day 5, 67:19–68:25.

[347] Tr Day 5, 76:4-11.

[348] Claimants' Memorial, [214].

[349] Tr Day 5, 194:23–195:4; Tr Day 5, 197:6-21.

[350] Tr Day 5, 210:15-16.

[351] Tr Day 5, 216:13–217:1.

[352] Claimants' Memorial, [223]-[233].

[353] Claimants' Memorial, [258]-[265].

is 'nonsense', and the Respondent's bifurcation theory would be unique internationally.[354] Mr Dweik accepted that goodwill cannot arise when one sells half a business, or when tangible assets are sold.[355]

177. An ordinary company constituted by *husas* shares–with separate legal personality–calculates its profits and losses and files its own tax return. However, the obligation to actually pay the tax rests on the individual partners according to their pro rata share in the ownership of the company. Accordingly, the company itself does not pay tax.[356]

(ii) The Respondent's submissions

178. The Respondent does not accept the rubric of the Claimants' analysis. Relying on the evidence of witnesses of fact with experience in the ISTD, it says that the goodwill element of a share sale may be taxable. It adopts the opinion of Mr Almusned:[357]

> In a sale transaction of 'husas' shares or 'ashom' shares involving, in effect, a sale of the business as an ongoing concern and at a price above the fair value of the business taking into account the cost of investment in the assets of the business, goodwill will be a part of the transaction. The part of the price that is capital gain is exempt from tax, and the part of the price that is goodwill is subject to tax pursuant to Article 3.A.7; although I note that, where the taxpayer provides no documents like UTT did in this instance, the full difference between the sale price and cost of investment will be treated as goodwill, which the taxpayer can then challenge by subsequent administrative objection.

179. It also says that the 'appropriateness' of taxing goodwill and the quantification of goodwill as the difference between the fair value and the sale price of the shares is reflected in the contemporaneous record.[358] The Respondent's expert, Mr Rabah, accepted that goodwill is an intangible asset of the company, and that the fair market price of a public shareholding company is determined by its traded price, but opined that in the case of a private shareholding company the agreed price is not always a fair price.[359] One calculates the value of the tangible and intangible assets in order to calculate the fair price, with the difference between this and the sale price constituting goodwill.[360]

180. Both capital-based and personal companies (including general partnership companies) enjoy separate legal personality and have capital divided into shares (either *ashom* or *husas*). The partners of a general partnership company do not have title to the company's assets, and the income of the company is calculated by reference to the partnership's accounts.[361]

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[354] Claimants' Memorial, [261]-[263], citing Expert Report of Ms Pam Jackson, [3.4.5], [3.4.23]-[3.4.24]; Claimants' Closing Skeleton, [64] citing Tr Day 5, 244:17 – 245:23 (although Ms Kate Alexander did not accept that proposition).

[355] Tr Day 5, 203:5–204:20.

[356] Tr Day 5, 57:4-18; Tr Day 5, 58:4–59:2 (Tribunal questions to Dr Ahmad Masa'deh), citing Article 3 of the Income Tax Law.

[357] Second Witness Statement of Mr Ali Almusned, [9].

[358] Respondent's Rejoinder, [57], citing *inter alia* the 2006 Committee report, the 2008 assessment decision, and the decisions of the Tax Court of Appeal and Court of Cassation.

[359] Tr Day 5, 175:3–177:6.

[360] Tr Day 5, 177:24–178:23.

[361] Respondent's Closing Skeleton, [49]-[52].

181. The Respondent put its interpretation of the relevant case law to Dr Masa'deh in cross-examination.[362] Dr Masa'deh accepts that a general ordinary company has separate legal personality; is divided in *husas* shares which are held by the partners, form the capital of the company and can be transferred; is capable of owning and selling assets in its own name; that the company and not the partners have title to the assets, and that this basic position has not changed through the 1964, 1989 and 1997 Companies Laws.[363] Dr Masa'deh could not point to any provision in the 1964 Companies Law which said that an individual partner can sell assets of the company.[364]

182. On the individual cases, the Respondent's interpretation starts from the proposition that the entities to which the transactions related had separate legal personality.[365] It submits that these authorities form a line of jurisprudence with which the UTT decisions are consistent:[366]

(a) There is nothing in *Daoud Al-Issa* (Case 611/1981, which is referred to in the ISTD Manual[367]) to suggest that the sale of *husas* in a general ordinary company or partnership is a sale of the underlying assets.[368] It was the sale of a share in a separate legal person (which share is registered in the Companies Register in the same manner as shares in any other company).[369]

(b) The same is true of *Hamdan*.[370]

(c) In *Arab Public Shareholding*, the Court found that goodwill had not actually changed hands. It follows from the judgment that if the shares in the limited company had been transferred to a third party for value, then a portion of the price reflecting goodwill would have been taxable.[371]

(d) In two further decisions, there was no finding that the transaction involved the sale of assets: 'the focus is on the consideration and what the sale price reflects'.[372]

(e) The appellant in *Rowwad* recognized that taxable goodwill could arise on a share sale; it focused on putting forward evidence to prove that the sale did not involve a goodwill element.[373] The Court noted that the assessed goodwill matched that

[362] See Tr Day 5, 38 and following, discussing *inter alia Daoud Al-Issa* (Decision) Court of Cassation Case No 611/1981 (1982) (***Daoud Al-Issa***) (Ex C-11 / R-85) and Tr Day 5, 65:24 and following, discussing *Arab Public Shareholding Company* (Decision) Court of Cassation Case No 1566/1999 (2000) (***Arab Public Shareholding***) (Ex AM1, App 3, No 15); see Tr Day 6, 220:6–2333.

[363] Tr Day 5, 44:3–45:25; Tr Day 5, 52:10-17; Tr Day 5, 53:2–54:8.

[364] Tr Day 5, 54:9-17.

[365] Tr Day 1, 176:25–177:12; the Respondent confirmed that its interpretation of the cases was predicated on the Tribunal's acceptance of that proposition.

[366] Respondent's Closing Skeleton, [63]-[67].

[367] Respondent's Closing Skeleton, [64] citing Ex R-197.

[368] Tr Day 1, 162:6-11.

[369] Tr Day 1, 156:17-21; Tr Day 1, 157:9-11; Tr Day 1, 158:1–160:4.

[370] Tr Day 1, 163:1–166:9.

[371] Tr Day 1, 173:11-21.

[372] Tr Day 1, 175:8–176:19, citing Ex R-87, Ex R-93; Ex R-91.

[373] Tr Day 1, 177:14–179:22, citing Ex R-169.

recorded in the buyer's consolidated financial statements.[374] The Respondent notes that Batelco's accounts record part of the share price as reflecting goodwill.[375] The Respondent says that since the Claimants accept *Rowwad* did not involve the transfer of assets, they are forced to contend it was wrongly decided.[376]

5. Precedent for the imposition of the tax

(i) The Claimants' submissions

183. The Claimants submit that the Respondent has not produced a single example where it taxed the profits arising from the sale of shares in limited liability and private shareholding companies before June 2006.[377] They say that the consistent understanding at the time was that such transactions were not taxable, and that the burden of establishing otherwise should rest on the Respondent.[378] They cite a list of private shareholding and other companies sold without the imposition of tax on goodwill,[379] and cite Dr Masa'deh's opinion that the Court of Cassation precedents identified by Mr Rabah are distinguishable.[380] They say that the Respondent's witnesses disproved the Respondent's assertion that the *Rowwad* case was well known at the time.[381]

(ii) The Respondent's submissions

184. The Respondent cites Mr Rabah's reference to the judgments delivered before UTT's investment in Jordan referred above which upheld the taxation of goodwill included in the sale of *husas* shares.[382] It cites in particular the 'Rowwad' or 'Fastlink' case, where Rowwad obtained a shareholding in a limited liability company (Bella Investment Company WLL), and Rowwad's auditors, Saba/Deloitte, recorded in Rowwad's financial statements goodwill/*shuhra* as an asset resulting from the purchase of the shares. According to the Respondent, when Rowwad sold its shares in Bella, the ISTD imposed a tax on the goodwill element which was upheld by the Tax Court of Appeal and Court of Cassation.[383] While it accepts that the Rowwad case concerned the sale of shares in a limited liability company (constituted by *husas* rather than *ashom* shares) it says that the 'factual parallels between the two cases were otherwise very close' and the basic principle of taxing the goodwill component was present. It submits that responsible tax advisers and auditors at the time of the Transaction would accordingly have advised of the potential tax liability on sales of companies

[374] Tr Day 1, 179:18-22.

[375] Tr Day 1, 180:4-21, citing Ex C-158.

[376] Respondent's Closing Skeleton, [65(e)].

[377] Claimants' Reply, [58].

[378] Claimants' Reply, [59]-[61].

[379] Claimants' Memorial, [139].

[380] Claimants' Reply, [62]-[63] & [388]-[394], citing Second Expert Report of Dr Ahmad Masa'deh, [6.4]; see also Tr Day 5, 78:5-15.

[381] Claimants' Closing Skeleton, [71]-[73], citing Tr Day 2, 190:11-25 and Tr Day 4, 73:18–74:2; Tr Day 4 74:16-17.

[382] Respondent's Counter-Memorial, [279]-[280], citing Expert Report of Mr Nabil Rabah, [105]-[108] & Ex R-85, Ex R-86, Ex R-87, Ex R-89, Ex R-91 & Ex R-93.

[383] Respondent's Counter-Memorial, [281]-[283], citing Ex R-96 through Ex R-105 & Ex R-45.

that were not public shareholding companies.[384] The Respondent submits that the Court of Cassation applied this line of cases.[385] Recent cases also demonstrate that goodwill in the sale of shares is taxable.[386]

185. The Respondent rejects the Claimants' reliance on a list of private shareholding companies which had been sold without the imposition of a goodwill tax, arguing that ISTD has consistently sought to impose tax where it is applicable and is prevented by law from commenting further on the cases of third party taxpayers.[387] Ms Alexander also says there are international precedents for bifurcating capital gain and goodwill on a share sale.[388]

186. The Tribunal asked Mr Kudah what internal procedures were in place to give policy guidance to assessors in individual cases. He testified that an 'assessment manual' and a base of knowledge for employees were available, and extracts from the former were produced in evidence.[389] The manual was updated from time to time.[390]

D. The alleged political motivation of the Tax Measure

187. The Claimants argue that the Tax Measure was politically motivated, and that this contributes to the breach of a number of the substantive guarantees in the BIT.

188. The parties take starkly different positions on this question. The Claimants allege that the Tax Measure was imposed as a politically expedient reaction to popular dissatisfaction with perceived failings in the process by which the Government had granted the Licence and the profits made by UTT. The Respondent says that the Tax Measure was imposed in good faith by public servants applying their genuine understanding of the relevant law, uninfluenced by the political context.

189. The facts are summarised in Section III above. To a significant extent this section summarises the different inferences which the Parties invite the Tribunal to draw from those primary facts.

1. The Claimants' submissions

190. The Claimants submit that a decision based on political motivation is the 'paragon' of an arbitrary decision under international law.[391]

191. It recounts the narrative of the political motivation behind the Tax Measure in the following way:

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[384] Respondent's Rejoinder, [86]-[87].

[385] Tr Day 6, 205:2–206:14; Respondent's Rejoinder, [88]-[89], citing Second Expert Report of Mr Nabil Rabah, Sec III/3 and Sec III/1.

[386] Respondent's Counter-Memorial, [285].

[387] Respondent's Counter-Memorial, [287].

[388] Tr Day 5, 244:14–247:20.

[389] Tr Day 3, 45:8-23; Ex R-203 and Ex C-227.

[390] Tr Day 4, 64:3-9.

[391] Claimants' Memorial, [266].

(a) The Claimants start with the process of granting the Licence in 2003, noting that the duopoly offered increasingly large sums for the Government to defer that process. They say that public concern was already developing about what was seen as a 'loss' to the Government, and it was this concern that reignited in 2006.[392]

(b) The Minister of Finance recommended that the King accept the duopoly's offer. But the King instructed the CEO of the Board of Commissioners of the TRC, Ms Muna Nijem, to tell the duopoly that the Government expected to receive long term revenues of JD 200 million from the third Licence, and that the duopoly should be required to pay this if they wished to prevent the grant of the third licence. When that offer was rejected, the King explained in a further meeting that the Government's priority should be the development of the economy rather than short-term returns to the Treasury.[393] At the same time, another member of the TRC, Ms Shuqair, expressed the view that the process was tailored in favour of Mr Dagher and dissented from the decision to grant the Licence.[394] Fastlink also challenged the grant of the Licence, a challenge the Supreme Court rejected.[395]

(c) Turning to the sale in 2006, although the Claimants never hid the sale price from the Respondent, Ms Shuqair demanded to see a copy of the SPA and again dissented from the TRC's approval of the transfer, referring to money being 'transferred unjustifiably' to Mr Dagher, noting public opinion and suggesting that 'legal means available to take necessary measures to return these amounts to the treasury should be studied.'[396] The sale itself was met by a 'media uproar' building on the existing impression that UTT had 'cheated' in obtaining the Licence for JD 4 million.[397]

(d) Along with the pressure on UTT to pay double the required stamp duty, there then began a lengthy campaign by Members of Parliament lasting into 2007, in an attempt to recoup the profit made by UTT.[398] This was followed, in 2013, by what the Claimants describe as political interference in the enforcement of the Tax Measure.[399]

192. The Claimants emphasise that they have brought this arbitration as a consequence of the events since the Tax Measure was confirmed by the Court of Cassation, and in particular the direct pursuit of the Claimants.[400]

[392] Claimants' Memorial, [269]-[270].

[393] Claimants' Memorial, [271]-[273].

[394] Claimants' Memorial, [274]-[276].

[395] Claimants' Memorial, [278]; Ex C-161.

[396] Claimants' Memorial, [280]-[284].

[397] Claimants' Memorial, [285]-[289].

[398] Claimants' Memorial, [290]-[297]

[399] Claimants' Memorial, [298]-[307].

[400] Claimants' Closing Skeleton, [81]-[84].

193. The Claimants rely in particular on the political and media focus on the transaction in 2006 and 2007, recounted above, to submit that the Tax Measure had been predetermined. They rely in particular on:[401]

(a) Mr Kudah's press statement on 30 June 2006 that the transaction was in principle subject to tax, which they claim was made without familiarizing himself with the law, unprofessionally and perhaps in breach of confidentiality;[402]

(b) The July 2006 Committee which they maintain was highly likely to have been politically steered and was created to find a justification;[403]

(c) The Prime Minister's Committee of September 2006, which they say was an 'extraordinary act of targeting' at the request of the Parliamentary group that had originally been opposed to the grant of the licence, noting that the Committee used the Arabic word for 'collect' not 'assess';[404] and

(d) The allegation that the 2008 assessment was 'wholly insufficient' and comprised 'a few hand scribbles' and was conducted hastily in violation of proper procedures.[405]

194. Responding to a number of points made by the Respondent, the Claimants say:

(a) The establishment of the Prime Minister's 2006 Committee was not itself arbitrary, but the decision of the Prime Minister to succumb to political pressure was. The Respondent misrepresents its outcome by deliberately confusing it with the Council of Ministers' Committee of June 2006. The questions submitted were not submitted by an MP but agreed on by all participants of the 5 July 2006 meeting.[406]

(b) The Claimants rely upon the Government's capitulation to Parliamentary and public pressure.[407] The Claimants' expert, Dr Masa'deh, does not maintain that the Jordanian courts acted in bad faith,[408] and does not contest the independent character of the Jordanian judiciary.[409] The Claimants nevertheless submit that Jordan is 'a country which is all susceptible to political pressure'[410] and that the courts 'were left with no option but to go ahead with the decision and the request from both Parliament and the Prime Minister'.[411]

[401] Claimants' Closing Skeleton, [11]-[32].

[402] Tr Day 6, 25:10-24.

[403] Tr Day 6, 26:1-2.

[404] Claimants' Closing Skeleton, [20]-[23].

[405] Claimants' Closing Skeleton, [28].

[406] Claimants' Reply, [283].

[407] Claimants' Reply, [284]-[288].

[408] Tr Day 4, 128:24–129:13.

[409] Tr Day 5, 89:6-12.

[410] Tr Day 1, 77:20-25.

[411] Tr Day 1, 82:9-17.

(c) The Claimants reject the evidence of the ISTD officials, Mr Kudah and Mr Mawazreh, that the case was handled the same way as any other, noting in particular Mr Kudah's role both on the Committee and within the ISTD.[412]

(d) The Claimants submit that the 2006 (ISTD) Committee decided that tax should be imposed on the Transaction regardless, consistent with the view publicly expressed by Mr Kudah.[413] Noting that the Respondent had either failed or refused document production requests in relation to the circumstances by which the Transaction came to the attention of ISTD, the Claimants invite the Tribunal to find that it did not come to ISTD in the ordinary way; rather, these developments were the product of a predetermined conviction that the Transaction should be taxed.[414]

(e) So too, the Claimants question the credibility of the Respondent's evidence as to how the taxability of the Transaction came before the ISTD in 2008. Instead of being drawn to the ISTD's attention by a list of taxpayers who had not filed a return, the Claimants submit that the 2008 Assessment Committee was established in response to UTT's intentions to reduce its capital and enter liquidation.[415]

195. The Claimants submit that the assessment process in 2008 was not adequate or conducted in accordance with legal requirements and ISTD practice. This is relevant both directly to the Claimants' allegations of Treaty breaches and also to the question of whether the Tax Measure was correct as a matter of Jordanian law:[416]

(a) After waiting a year, the Assessment Committee was formed just after the ISTD learned of the proposal to liquidate and was instructed to undertake the assessment 'as soon as possible'.

(b) The ISTD 'deliberately prevented any involvement of UTT' contrary to its usual process.[417]

(c) The ISTD failed to comply with the notification provisions of the Income Tax Law, and although it managed to contact UTT's liquidator it 'deliberately and knowingly took the decision not to wait for his return to the country before deciding to impose the

[412] Claimants' Reply, [291]-[295].

[413] Claimants' Reply, [297]-[298].

[414] Claimants' Reply, [299]-[309].

[415] Claimants' Reply, [310]-[320].

[416] Claimants' Closing Skeleton, [29]-[30]; [46]-[49]; Tr Day 6, 112:12–117:9.

[417] The Claimants submit that Mr Eyad Al Kudah's evidence in cross-examination confirmed that 'it was ISTD's practice to invite companies that had failed to submit their tax returns to do so, and to participate in the assessment process at the ISTD': Claimants' Closing Skeleton, [29(c)], citing Witness Statement of Mr Eyad Al Kudah, [28] and Tr Day 3, 43:17-25. What Mr Al Kudah said in that passage was 'As for those people who have not submitted their tax returns, the assessors will be instructed to make an initial assessment, and the purpose of this assessment, as globally accepted, is to oblige and direct the taxpayers towards submitting their tax returns so that the submitted tax return replaces the initial assessment; and thereafter if there is a tax return it will be reviewed and verified according to the principles'. In his Second Witness Statement, n1, Mr Kudah clarified the translation of his First Witness Statement, [28] to state that the taxpayer 'may' be invited to ISTD.

Tax' and the 2008 Assessment Committee 'intentionally chose to expedite its decision before UTT's liquidator and legal representative returned'.

(d) The Assessment Committee reached its conclusion 'just seven working days after its formation on 24 April 2008'.

(e) In this context, the Claimants say that the extracts from the Assessment Manual describing 'Phases for the assessment procedure in case of failure to provide a tax return' are 'hugely significant' because they demonstrate a failure to comply with establish procedures and thus arbitrariness and targeting.[418] Responding to the Respondent's arguments, they say that the 27 January 2008 Circular does not change the matter, and emphasise that the Assessment Manual is not expressed in optional terms.[419]

2. The Respondent's submissions

196. The Respondent begins by recalling the high standard of proof implied by allegations of bad faith,[420] which cannot be made out by inference in this case.[421]

197. The Respondent says that the Claimants have failed to identify the ulterior objective, in circumstances where a political motivation could only be wrongful if the motivation was to do something other than apply the law properly.[422] None of the classic forms of ulterior motive are present.[423] The Claimants have not established the link between what the Government is said to have been implicitly directing and how the assessment was actually made.[424]

198. The Respondent submits that the Claimants' political motivation theory 'petered out' in cross-examination. It says that there is no documentary or testimonial evidence from which to infer a wrongful political motivation, noting in particular:[425]

(a) The Claimants did not challenge Mr Batarseh's evidence that the assessment was not politically motivated,[426] or that the Committee considered Article 7.A.15.a;[427]

(b) The Claimants did not challenge evidence of other ISTD officials rebutting the allegation; and

[418] Tr Day 6, 28:22–33:1, citing Ex C-227.

[419] Tr Day 6, 250:10–253:4.

[420] Tr Day 1, 118:15-19; Tr Day 6, 226:10–228:7.

[421] Tr Day 6, 171:11–173:5.

[422] Respondent's Rejoinder, [98]; Tr Day 1, 121:11-13.

[423] Respondent's Rejoinder, [99].

[424] Tr Day 6, 156:6-10, Tr Day 6, 165:23–166:4.

[425] Respondent's Closing Skeleton, [18]-[20]; Tr Day 6, 133:1-8.

[426] Tr Day 6, 135:6-16; Tr Day 6, 175:6-9; Tr Day 6, 177:2-15.

[427] Tr Day 6, 197:16-20.

(c) The Claimants only raised the theory 'obliquely' with Mr Kudah and did not put to him that there was any pressure from the Minister of Finance.

199. The Respondent says that the Claimants' theory makes no temporal sense, since the ISTD reached its preliminary conclusion on the taxability of the Transaction too quickly to be influenced by political motivations or any media 'uproar' – noting that Mr Kudah expressed his view 4 days after the public announcement of the Transaction and the 2006 Committee reached their provisional view within a further 10 days – and the actual tax was imposed long after the public interest has subsided.[428]

200. The Respondent says the Claimants have constructed their political motivation theory so broadly that it lacks substantive credibility.[429] The Claimants' theory implicates an implausibly large number of Government organs and officials.[430] The evidence supports the conclusion that the ISTD reached its decision on the basis of its view of the merits. There is no basis for the suggestion that officials were following the direction of Mr Kudah or political organs.[431] Mr Kudah maintains that he does not recall political pressures and did not discuss the matter with the Minister of Finance or any member of the government[432] and did not act on instructions.[433]

201. The Claimants misrepresent the report of the Prime Ministerial Committee convened in September 2006.[434] The Committee made it clear that any tax would be imposed on the seller, not UMC, and the question of taxation would be followed up 'in accordance with the legal procedures set out in the applicable Income Tax Law.'[435]

202. The ISTD's conclusion on the taxability of the Transaction was consistent and repeated over a number of years – from the provisional view of the Director-General, Mr Kudah, on 29 June 2006, through the 2006 and 2008 Committees to the ultimate decision of the ISTD.[436] The consistency of this view should not be taken, says the Respondent, as a sign of predetermination or submission to political pressure, but rather the consistent application of an interpretation that was reasonable and open to ISTD – defeating any argument that the Respondent is guilty of acting arbitrarily or otherwise in breach of the BIT.[437]

203. So too the Respondent says the process adopted by the ISTD is also above criticism. The proper inference is that the ISTD learned of the intention to liquidate, and wanted to assess whether tax was payable before that became an academic issue.[438] The Respondent says that UTT was

[428] Respondent's Rejoinder, [101]-[106]; Tr Day 1, 124:3–127:16.

[429] Respondent's Rejoinder, [107]; Tr Day 1, 127:17–128:22.

[430] Respondent's Rejoinder, [108]-[109].

[431] Respondent's Rejoinder, [110]-[118]; Tr Day 1, 119:22–120:14.

[432] Tr Day 2, 191:25–192:1; Tr Day 2, 194:2-4.

[433] Tr Day 3, 24:10-12.

[434] Ex R-4.

[435] Respondent's Rejoinder, [119]-[127], citing Ex R-4; see also Tr Day 1, 123:9–124:2.

[436] Respondent's Rejoinder, [65]-[79].

[437] Respondent's Rejoinder, [79].

[438] Tr Day 6, 178:18-23.

not intentionally deprived of an opportunity to participate, because the ISTD is only obliged to contact a taxpayer who has filed a return. It did attempt to contact UTT and a taxpayer's opportunity to participate is guaranteed by the administrative objection procedure, not the initial assessment procedure.[439] The 2008 Assessment Committee completed the assessment on the basis of the information available to it (UTT having failed to submit a return – which it was obliged to do).[440] Finally, there is no basis to the complaint that the 2008 Assessment Committee reached its decision too quickly for it to be legitimate.[441]

204. The Respondent refers to the Administrative Circular from the Ministry of Finance to the ISTD dated 27 January 2008 concerning Article 30 of the Income Tax Law which makes no mention of a duty to consult the taxpayer. It allows an assessment to be conducted on the basis of the available information.[442]

E. The standard of review and the relevance of the domestic decisions

1. Introduction

205. The Claimants allege that the imposition of a domestic taxation measure, and its confirmation by the domestic courts with jurisdiction to determine UTT's challenge to it, constitute a breach of Jordan's international obligations.[443] It is common ground that the Tribunal's role is to determine whether the conduct attributable to the Respondent constitutes a breach of the rules of public international law to which the Respondent is bound.[444] But the Parties advanced different frameworks for the analysis of the issues to which that allegation gives rise. In summary:

(a) The Claimants say that the Tax Measure simply has no basis in Jordanian law and the manner in which it was imposed gave rise to breaches of substantive guarantees in the BIT. It says that Jordan's liability for those breaches cannot be excused by its own judicial organs, since the Respondent's breaches are independent of the Jordanian courts and the characterization of these as unlawful under international law cannot be affected by domestic decisions holding them lawful under Jordanian law.[445]

(b) The Respondent says that the Tribunal does not sit as a supplementary court of appeal to review the decisions of the Jordanian courts. The imposition of the Tax Measure was open to the ISTD and the Jordanian courts. So in circumstances where there is no basis for the allegation of illegitimate political motivation, there cannot be a breach of Jordan's international obligations – even if its interpretation of the relevant tax may

[439] Respondent's Rejoinder, [132]-[137], citing Second Witness Statement of Mr Eyad Al Kudah, [6]; Witness Statement of Mr Aktham Batarseh, [5]-[6]

[440] Respondent's Rejoinder, [138]-[144]

[441] Respondent's Rejoinder, [145]-[149].

[442] Tr Day 6, 181:19–182:24, citing Ex R-200; see also Tr Day 6, 183:22–184:20, citing Ex R-201.

[443] This observation is, of course, without prejudice to the full set of allegations advanced by the Claimants.

[444] Claimants' Memorial, [414]-[415]; Respondent's Counter-Memorial, [189]-[191].

[445] Claimants' Closing Skeleton, [111].

have been actually wrong.[446] In any case, it says that the Claimants face a 'threshold difficulty', because UTT failed to raise before the Jordanian courts central arguments – in particular that ISTD was wrong to conclude that Article 7.A.15.a did not apply to the sale of shares in private shareholding companies, and arguments relating to UMC's status as a private shareholding company – on which it now relies.[447]

2. The Tribunal's approach to questions of domestic law decided by domestic courts

(i) The Claimants' submissions

206. The Claimants explain that the acts on which they rely as giving rise to internationally wrongful conduct are attributable to the Respondent.[448] They have not invoked the Respondent's international responsibility for the decisions of its courts. Rather they rely on breaches that were not corrected by the courts.[449] In particular, they refer to the decision of the CCD to refuse to register the decision to liquidate UTT; the imposition of the Tax Measure; ISTD's alleged interference with the completion of the liquidation; the decisions of the courts to uphold the Tax Measure; the confiscation of funds from UTT's bank account in 2013; the pressure exercised by politicians and the press; and the Jordanian Enforcement Proceedings.[450]

207. The Claimants then return to address the relevance of the decisions of the Jordanian judicial system to explain why the Respondent is not entitled to rely on those decisions to excuse its breaches.[451] In this respect the order of the Claimants' analysis is the inverse of that adopted by the Respondent.

208. The Claimants submit that the characterisation of an act of a State as internationally wrongful is governed by international law, and accordingly not affected by its characterisation as lawful according to internal law.[452] The Claimants submit that this leads to the conclusion that the judgments of the Tax Court of Appeal and Court of Cassation finding the Tax Measure to be valid under Jordanian law are 'immaterial'.[453] The Claimants do not ask the Tribunal to sit as an additional court of appeal on Jordanian law, or to find that Jordan is internationally responsible for the breach of domestic law. Rather, the Tribunal must make findings of domestic law in order to determine whether international responsibility is engaged.[454] Thus they distinguish *ELSI* and rely on the *Polish Nationals in Danzig* case as establishing that although the characterisation of an act as internationally wrongful is independent of its

[446] Respondent's Rejoinder, [4]-[16].

[447] Respondent's Rejoinder, [174].

[448] Claimants' Memorial, [180]-[192].

[449] Claimants' Closing Skeleton, [111]; Tr Day 6, 16:3-4.

[450] Claimants' Memorial, [182].

[451] Claimants' Memorial, [411]-[469].

[452] Claimants' Memorial, [414], citing ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Ex CL-41).

[453] Claimants' Memorial, [416].

[454] Claimants' Reply, [488]-[491].

characterisation under domestic law, this does not exclude the possibility of relying on the misapplication of domestic law for the purpose of establishing an international wrong.[455]

209. Therefore, the Claimants say that international tribunals have 'repeatedly ordered the restitution of local taxes wrongfully imposed on foreigners.'[456]

210. The Claimants submit that the proper approach in a case where an international tribunal is confronted by a domestic court's decision on the issues before it is established by the *Chorzów Factory* case, where the Permanent Court of International Justice held that whatever the effect of the Polish decision in municipal law, it could not displace the Court's earlier finding of a breach of the Geneva Convention.[457] The same principle applies where the international decision is second in time.[458]

211. The Claimants reject the proposition that an international tribunal 'will accept the findings of local courts.'[459] *Azinian* and like authorities are not on point because they 'refer to domestic decisions having previously considered the exact same issue … [while here] the Respondent's arbitrariness is based on elements which were not considered by the Jordanian Courts and based on evidence and facts discovered and revealed thereafter.'[460] *Azinian* does not, according to the Claimants, consider whether the characterisation of a sovereign act governed by the Treaty as arbitrary could be affected by the findings of a domestic court since that case concerned the existence of proprietary rights which was not an issue governed by international law.[461]

212. The Claimants argue that the Respondent's case is based on a *non sequitur:* if the characterisation of a measure as unlawful under domestic law by a domestic tribunal is not determinative of its characterisation as arbitrary under international law, it follows that Jordanian decisions that the Tax Measure was lawful cannot be determinative. Those decisions are 'incapable of producing a presumption of lawfulness' in circumstances where the Tribunal is precisely requested to find that such decisions are internationally wrongful.[462] The Tribunal should apply municipal law as it would be applied in Jordan, paying 'utmost regard' to the decisions of that country's courts and, weighing that jurisprudence, selecting the interpretation that it considers in conformity with the law.[463] Taking into account the

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[455] Claimants' Reply, [492]-[498], citing *inter alia Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* (Judgment) (1989) ICJ Rep 15 (***ELSI***) (Ex CL-58 / Ex RL-19); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) (1932) PCIJ Ser A/B, No 44 (Ex CL-123), pp 24-25.

[456] Claimants' Reply, [499].

[457] Claimants' Memorial, [417], citing *Case Concerning the Factory at Chorzów (Claim for Indemnity)* (Judgment) (1928) PCIJ Ser A No 13 (Ex CL-45), pp 33-34.

[458] Claimants' Memorial, [419]-[423], citing *Affaire des Chemins de fer Bužau-Nehoiaşi* (Award) (1939) 3 UNRIAA, pp 1827-1836 (Ex CL-46) & *Différend concernant l'interprétation de l'article 79, par. 6, lettre C, du Traité de Paix (Biens italiens en Tunisie)* Decision No 171 (1954) 13 UNRIAA (Ex CL-47), pp 404, 419.

[459] Tr Day 1, 87:19–90:14.

[460] Claimants' Closing Skeleton, [113].

[461] Tr Day 6, 87:19–91:4.

[462] Claimants' Reply, [500]-[503].

[463] Claimants' Reply, [504], citing *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (Judgment) (1929) PCIJ Ser A, Nos 21/21, p 124 (***Brazilian Loans***) (Ex CL-252); *ELSI* (Ex CL-58 / Ex RL-19), [62].

jurisprudence of the Court of Cassation, the Tribunal should 'conclude that the decisions from the Amman Tax Court of Appeal and Court of Cassation concerning the Taxation Measure are a clear departure from the well settled interpretation and application of Article 7/A/15'.[464] Rather than reflecting the law at the time, the Claimants say that these decisions should be put aside because they are 'not representative of the rules actually applied in Jordan'.[465]

213. The Claimants also rely on the fact they were not party to the Jordanian proceedings, and UTT's lawyers were instructed by the liquidator.[466] They accept that the first liquidator was appointed by the Claimants but say he was not acting at their direction. The Claimants accept that the proceedings were (and could only have been) taken by the Claimants' underlying investment vehicle. They nevertheless say that because they were not party to the court decisions those decisions cannot affect the Claimants' rights in this arbitration. In the alternative, they are entitled to attack the decisions because they affect their rights.[467] Moreover, the Claimants' claims in this arbitration involve issues that were not litigated in those proceedings, such as discrimination, predetermination, motivation, and failure to comply with procedures and rely on new material.[468]

214. The Claimants thus conclude that Jordan is not entitled to rely on the decisions of its own courts to contest the international wrongfulness of the Tax Measure, and the Tribunal is not bound by those findings.[469]

(ii) <u>The Respondent's submissions</u>

215. The Respondent argues that that the Jordanian courts reached a decision on the basis of the material presented, and one that was open to them. The Claimants cannot now relitigate those issues because a breach of domestic law does not *per se* give rise to a breach of the state's international obligations.[470]

216. The Respondent relies on the following propositions:

(a) Investment treaty tribunals 'are not appellate courts vis-à-vis decisions of the domestic law by the courts of the host State'.[471] An unlawful act at domestic law does not necessarily amount to arbitrariness under international law. There must be other elements present sufficient to elevate it to the level of an international wrong.[472] The Respondent does not dispute the principle reflected in Article 3 of the ILC Draft

[464] Claimants' Reply, [505].

[465] Claimants' Reply, [507]-[509].

[466] Tr Day 6, 70:22–74:14.

[467] Tr Day 6, 77:12–78:4.

[468] Tr Day 6, 79:1–82:22.

[469] Claimants' Memorial, [423].

[470] Respondent's Rejoinder, [175]-[176].

[471] Respondent's Counter-Memorial, [213]-[217]; Respondent's Rejoinder, [178]-[180], citing *inter alia Liman Caspian Oil BV and NCL Dutch Investment BV v Kazakhstan* (excerpts of Award) ICSID Case No ARB/07/14 (2010) (Ex RL-20), [274]; *Mondev International Ltd. v United States of America* (Award) ICSID Case No. ARB(AF)/99/2 (2002) (***Mondev v USA***) (Ex CL-134), [237].

[472] Respondent's Counter-Memorial, [218]-[221], citing *ELSI* (Ex CL-58 / Ex RL-19), [123]-[124].

Articles on State Responsibility, but says that this just confirms that the lawfulness of an act under domestic law does not establish its lawfulness under international law.[473]

(b) Once local remedies have been invoked, the focus is no longer exclusively on the initial acts but on the domestic courts' review of that measure. Thus, the analysis adopted by the Jordanian Courts is directly relevant to the present case. An appropriate domestic forum was available; UTT failed to properly put its case in that forum and the Claimants are now attempting to reargue it; and the challenge to the Tax Measure was considered and dismissed by the Jordanian Courts.[474] The Tribunal must take the decisions of the Jordanian courts as 'juridical facts' unless it disavows the acts of the judiciary itself.[475]

(c) Tribunals 'are not bound by the underlying decisions but they will give due deference to them.'[476] A tribunal will accept the findings of local courts unless they suffer from deficiencies of such a nature 'rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice',[477] or 'pretence of form to achieve an internationally unlawful end.'[478]

(d) Investment treaty tribunals will hesitate to disturb the imposition of a tax by a State pursuant to its own local law.[479] The investor must take the conditions of the host State as he finds them,[480] and the tribunal must have 'due deference to government decisions', which is particularly important in the context of taxation. The tribunal should not 'second-guess' the decisions of the ISTD and the Jordanian courts.[481]

(e) The conduct of a respondent State in cases involving alleged mistreatment of an investment (such as breach of fair and equitable treatment) must be analysed as a whole,[482] and the threshold for finding a denial of fair and equitable treatment is high.[483]

217. The Respondent says that the Claimants cannot rely on the fact that they were not party to the domestic proceedings, when the Tax Measure against UTT is the basis of their claim.[484]

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[473] Tr Day 1, 136:1-12.

[474] Respondent's Counter-Memorial, [210]-[212].

[475] Respondent's Counter-Memorial, [210]-[212] & [269], citing *Robert Azinian, Kenneth Davitian, and Ellen Baca v United Mexican States* (Award) ICSID Case No ARB(AF)/97/2 (1999) (***Azinian v Mexico***) (Ex RL-1), [96]-[97].

[476] Tr Day 1, 132:15-25, citing *Luigiterzo Bosca v Republic of Lithuania* (Award) PCA Case No 2011-05 (2013) (***Bosca v Lithuania***) (Ex RL-55).

[477] Tr Day 1, 133:1-25; Respondent's Closing Skeleton, [10]-[15]. It says that even if *Azinian* is distinguishable as involving the validity of an underlying contract, that does not affect the other cases relied on: Tr Day 6, 233:1-14.

[478] Respondent's Closing Skeleton, [16].

[479] Respondent's Rejoinder, [181]-[183].

[480] Respondent's Closing Skeleton, [17]

[481] Respondent's Counter-Memorial, [194]-[203], [208]-[209].

[482] Respondent's Rejoinder, [184]-[188].

[483] Respondent's Counter-Memorial, [204]-[207].

[484] Tr Day 6, 191:1-10, Tr Day 6, 224:16–226:9.

3. Denial of justice

(i) The Claimants' submissions

218. The Claimants argue that even if the Tribunal were to consider that the Respondent's own courts 'settled the existence of a taxable event' – i.e. if it concludes that 'the characterization of the Taxation Measure as a breach of the Treaty is affected by its characterization under Jordanian law by [Jordanian] courts' – it should nevertheless disregard those decisions because they amount to a denial of justice.[485] The Claimants say that the Jordanian courts' decisions give rise to both a procedural and a substantive denial of justice.[486]

219. In their Memorial, the Claimants allege that this denial of justice gave rise to both international responsibility for breach of Jordan's obligation to guarantee fair and equitable treatment, and as a basis for disregarding the decisions of the Jordanian courts in relation to the Tax Measure. In their Reply, they submit that they 'have not invoked Jordan's international responsibility for the denial of justice committed by its courts', but have argued that because the Jordanian Courts' decisions amount to a substantive denial of justice they cannot be invoked by the Respondent in its defence, and should be disregarded by the Tribunal for the purpose of determining whether Jordan breached its obligations under the BIT.[487] The Claimants rely on the distinction between responsibility for an internationally wrongful act and the non-opposability of a wrongful act; pursuant to the latter, a domestic rule, institution or regime not in accordance with international law cannot be relied upon to defeat an international claim.[488] In oral submissions, the Claimants confirm that their case is 'not based on a denial of justice' but that Jordan cannot rely on those decisions to excuse its liability.[489]

220. The Claimants reject the Respondent's argument that the Tribunal does not have jurisdiction to hear the denial of justice claim because it was UTT that was party to the domestic proceedings.[490] Indeed they rely on the fact that UTT was party to the tax proceedings (as opposed to the Claimants themselves) to say that they are 'suffering from a decision … which we never had the opportunity to participate in.'[491]

221. As to the applicable standard, the Claimants submit:

(a) International law recognises substantive denial of justice (misapplication of the law) as well as procedural denial of justice (breach of due process).[492] The review of the

[485] Claimants' Memorial, [424]; Claimants' Reply, [223].

[486] Claimants' Memorial, [425]-[427]; Claimants' Closing Skeleton, [114].

[487] Claimants' Memorial, [469]; Claimants' Reply, [220]-[223], [474]-[479].

[488] Claimants' Reply, [224]-[231].

[489] Tr Day 1, 83:13-15; Tr Day 1, 87:4-18.

[490] Claimants' Reply, [233]-[238].

[491] Tr Day 1, 98:12-14.

[492] Claimants' Memorial, [428].

decisions of domestic courts is a necessary corollary of the prohibition on committing a denial of justice.[493]

(b) A substantive denial of justice occurs where the state's courts directly breach an international obligation; there is a failure to satisfy a substantive minimum standard of treatment; and a 'manifestly unjust decision arising from the erroneous application of domestic law.'[494] The analysis of a substantive denial of justice involves examining as 'objective facts' the reasoning of the domestic court, and determining whether the decision is manifestly one that no reasonable judge properly instructed could have made.[495]

(c) Denial of justice is produced by any misapplication of the law that is 'inexcusable for any impartial, reasonable and competent judge'.[496] The test is objective such that a manifestly erroneous decision is itself evidence of a denial of justice without proof of bad faith.[497] A merely negligent decision is not sufficient to produce a substantive denial of justice; an 'inexcusable mistake' is necessary.[498]

222. On the facts, the Claimants say that the denial of justice arose from decisions that were not based on evidence, relied on an 'egregiously and manifestly wrong' interpretation that no impartial, reasonable and competent judge could have come to, and were unprecedented.[499] The Jordanian courts were faced with a straightforward question but avoided reaching the correct answer through a sequence of manipulations and egregious mistakes.[500] They do not criticise the Court of Cassation in general terms, but say that in this particular case the Court was wrong, and inexcusably so.[501]

223. In particular, the Claimants allege that the denial of justice arose in the following ways:

(a) The Jordanian court decisions were based on the 'egregious and inexcusable' error of examining UTT's status as a limited liability company, whereas the application of the exemption depended on the character of UMC, a shareholding company constituted by *ashom* shares.[502] The validation of the Tax Measure relies on an inexcusable disregard of the 'most basic factual elements of the case' sufficient to meet the threshold imposed by international law.[503] International law does not require that an

[493] Claimants' Reply, [522]-[530].

[494] Claimants' Memorial, [430].

[495] Claimants' Memorial, [436], citing *inter alia Mondev v USA* (Ex CL-134), [127].

[496] Claimants' Reply, [534]-[546]; Tr Day 6, 44:21.

[497] Claimants' Reply, [547]-[556].

[498] Tr Day 6, 46:13–47:13; Tr Day 6, 48:11-14.

[499] Claimants' Reply, [557]-[562].

[500] Claimants' Reply, [563]-[568].

[501] Tr Day 6, 51:17–52:2.

[502] Claimants' Memorial, [438]-[441], citing Ex C-125 / Ex R-41 (Court of Appeal) & Ex C-128. At [441], the Claimants observe that 'even admitting ad absurdum that the exemption provided by Article 7/A/15…only applied to capital gains arising from the sale of 'shares' (ashom … in Arabic), the fact that the seller UTT is a limited liability company composed of 'stocks' (houssa in Arabic) was totally immaterial and irrelevant'.

[503] Claimants' Memorial, [443]-[445]; Claimants' Reply, [591]-[613]; see also Tr Day 6, 128:5–130:6.

argument must first have been raised in the domestic proceedings, because it is sufficient to render a claim admissible that its essence was unsuccessfully taken before the domestic tribunals.[504] The decisions also depend on the (re-)characterization of capital gains arising from the sale of shares as profit arising from the transfer of an underlying asset.[505]

(b) The decisions breached 'a substantive minimum international standard of treatment' by disregarding the separate personality of UTT and UMC, and the fact that UTT did not own UMC's assets and could not sell them to Batelco.[506] These are basic principles respected by both Jordanian and international law.[507]

(c) ISTD bore the obligation of establishing the occurrence of a taxable source of income, and that the Jordanian courts without justification or evidence reversed that onus by presuming that the price difference corresponded to goodwill.[508] This was a wilful neglect of duty giving rise to a substantive denial of justice.[509]

(ii) <u>The Respondent's submissions</u>

224. The Respondent submits that there has been no denial of justice in any case – whether as a standalone breach or as a reason to exclude reference to the decisions of the Jordanian courts.[510]

225. The Respondent submits that the denial of justice concept does not encompass a substantive right arising out of a 'manifestly unjust' domestic judgment, but is limited to breach of due process, and that the threshold is not met in the present case:

(a) There is no place for substantive denial of justice in modern international law, but an egregious substantive error may be indicative of a due process error.[511] This standard is effectively equivalent to the *ELSI* standard of what constitutes arbitrary conduct.[512]

(b) Thus, the standard is high – only egregious conduct which is in bad faith, malicious, outrageous, shocking or manifestly unjust – will qualify, with a correspondingly onerous burden of proof.[513] There is a presumption that domestic court decisions

[504] Claimants' Reply, [613]-[629].

[505] Claimants' Reply, [569]-[579].

[506] Claimants' Memorial, [449]-[450].

[507] Claimants' Memorial, [451]-[455].

[508] Claimants' Reply, [580]-[590]. Dr Ahmad Masa'deh accepted in evidence that, contrary to the assumptions stated in his report, the assessor reviewed UTT's financial statements: Tr Day 4, 170:9-12.

[509] Claimants' Memorial, [463]-[469].

[510] Respondent's Rejoinder, [213]-[218].

[511] Respondent's Rejoinder, [220]-[222], citing J. Paulsson, *Denial of Justice in International Law* (CUP, 2005) (Ex RL-48) and *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyan Hizmetleri A.S. v Republic of Kazakhstan* (Award) ICSID Case No ARB/05/16 (2008) (Ex CL-91), [653]; Tr Day 6, 153:14–154:3.

[512] Tr Day 1, 144:6-21.

[513] Respondent's Counter-Memorial, [229]-[238]; Respondent's Rejoinder, [223]-[224].

have been fairly decided.[514] For that reason a merely incorrect application of host State law will not give rise to a denial of justice.[515]

(c) Applying this approach, the Respondent says there has been no denial of justice. There is no basis for doubting that UTT had full access to the Respondent's judicial system, there was no breach of due process, and it was UTT's choice not to engage more fully with the processes available to it.[516] To the extent that the substantive merits of the Jordanian judgments can be investigated, those decisions were reasonably open, and the Claimants' criticism is misconceived.[517]

226. The Respondent also rejects the Claimants' submission that the alleged denial of justice precludes the Respondent from relying on the decisions of its own courts to show that the Tax Measure did not give rise to a breach of the BIT.[518] The decisions of the Jordanian courts are part of the factual matrix by which to judge whether the approach of the ISTD was reasonably open to it and whether the procedures involved in the administrative objection and appeal phases were fair and equitable.[519]

F. The alleged treaty breaches

227. The Claimants allege that the Respondent's conduct breaches a number of the substantive guarantees in the BIT. This section summarises the parties' submissions in relation to each of the alleged breaches – namely:

(a) Arbitrary treatment and fair and equitable treatment (Article 3(1) and Article 4);

(b) Full protection and security (Article 3(1)) and legal stability and predictability (Article 12);

(c) Legitimate expectations (Article 4);

(d) Discrimination (Article 3(1) and Article 4); and

(e) Impairment of rights to liquidate.

1. Arbitrary treatment

(i) The Claimants' submissions

228. *The standard.* The BIT prohibits Jordan from employing arbitrary measures to impair the Claimants' investment (Article 3(1)) and arbitrary and discriminatory acts violate the fair and

[514] Respondent's Counter-Memorial, [228] citing *Ida Robinsom Smith Putnam (U.S.A.) v United Mexican States* (Award) 4 UNRIAA (1927) (Ex CL-128), 225.

[515] Respondent's Counter-Memorial, [258]-[263]; Respondent's Rejoinder, [225]-[228].

[516] Respondent's Counter-Memorial, [243]-[263]; Respondent's Rejoinder, [229].

[517] Respondent's Counter-Memorial, [247]-[257]; Respondent's Rejoinder, [230].

[518] Respondent's Rejoinder, [232].

[519] Respondent's Rejoinder, [233]-[234].

equitable treatment standard (Article 4). In the Claimants' submission, arbitrary conduct describes actions which are an unreasonable, improperly motivated, unpredictable or unduly unjust or oppressive use of governmental authority. Even acts which are normally entirely lawful may be arbitrary in context.[520] Arbitrariness is something contrary to the rule of law, wilful disregard of the law and facts, or capricious or unreasonable exercise of authority.[521] The prohibition has two purposes: to ensure that State conduct affecting investment is 'objectively based' and to prevent a State from making harmful decisions in wilful disregard of the law.[522]

229. Applying the canons of interpretation found in the Vienna Convention on the Law of Treaties (**VCLT**), the Claimants say that the meaning of 'arbitrary' cannot be equated with the few lines from *ELSI* quoted by the Respondent.[523] Adopting the language of UNCTAD, the Claimants say that arbitrariness 'has to do with the motivations and objectives behind the conduct concerned', and that a measure that 'inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias', is arbitrary.[524] In any event the '*ELSI* standard' has been breached in this case, since that standard is not confined to breaches of due process and asks whether the conduct in question violates the rule of law.[525] The Claimants emphasise that the arbitrariness standard is distinct from the 'specific international delict' of denial of justice, with a different standard.[526]

230. Asked whether the Tribunal is entitled to assess the whole course of the Respondent's conduct in determining the question of its international responsibility, the Claimants say that this depends on whether the Respondent's obligation is characterised as an obligation of conduct or result.[527] If arbitrariness is characterised as an obligation of conduct, then its breach occurs when a specific act is not in conformity with the obligation,[528] without reference to subsequent actions.[529] The proposal by Judge Ago to include a distinction between obligations of conduct and result in the ILC Draft Articles on State Responsibility did not survive to the Final Draft, but it is nevertheless a useful tool.[530]

231. The Claimants accept that there is a distinction between accepting that a cause of action may have come into existence at the date of the breach, and whether the Tribunal is obliged to consider the context of what happened thereafter, including the fact that 'remedies were used or were attempted by the claimants.'[531] Even considered as an obligation of result,

[520] Claimants' Memorial, [193]-[195].

[521] Tr Day 6, 102:24–103:3.

[522] Claimants' Memorial, [196]-[203].

[523] Claimants' Reply, [240]-[254]; Claimants' Closing Skeleton, [86].

[524] Claimants' Reply, [249], citing UNCTAD, *Series on International Investment Agreements II: Fair and equitable treatment, a sequel* (2012), p 78 (Ex CL-223).

[525] Claimants' Reply, [255]-[264], citing *ELSI* (Ex CL-58 / Ex RL-19), [128].

[526] Tr Day 6, 42:22–44:3; Tr Day 6, 55:9-13.

[527] Tr Day 1, 94:24–95:20.

[528] Tr Day 6, 56:13-16.

[529] Tr Day 6, 58:4-7.

[530] Tr Day 6, 57:2–61:11.

[531] Tr Day 6, 62:10 – 63:5.

arbitrariness results when the Respondent's subsequent conduct did not achieve the necessary result, then perfecting the breach.[532] The Claimants say that their approach is consistent with *ELSI*, where the arbitrariness of the requisition order was reviewed on its own as a first step, and its characterisation of arbitrariness was not affected by the determination of the Italian courts.[533]

232. *The Tax Measure was taken without legal basis and in wilful disregard of the law.* The Claimants submit that the Respondent breached the rule of law, a principle reflected in international law and the Jordanian Constitution.[534] There was no legal basis under Jordanian law for the taxation of profits in the present case[535] and the ISTD disregarded proper processes.[536] The Jordanian authorities 'ignored the legal structure of the 2006 Transaction', submitting that the decision to take the Transaction was made as early as June 2006, and that the 2008 Tax Measure was imposed with a *post hoc* attempt to explain and legitimise it.[537]

233. *The Tax Measure was not founded on reason or fact.* Jordan examined the nature of the shares in the wrong company, by focusing on the shareholding structure of UTT instead of UMC.[538] The characterisation of the Transaction as a transfer of goodwill was 'factually impossible'.[539] No policy reason was advanced to support the tax.[540]

234. *The Tax Measure was predetermined.* The Respondent decided as soon as the transaction took place to tax it, and the following events were an implementation of that intention.[541]

235. *The Tax Measure was politically motivated*. The Tax Measure was politically motivated, was not taken in accordance with the rule of law and is accordingly arbitrary in breach of the BIT.[542] Taking into account the Prime Minister's involvement, the Claimants submit that 'external elements were decisive.'[543]

236. *The tax assessment was carried out in violation of the ISTD's own procedures*. The Claimants also say that the ISTD failed to comply with its own procedures in imposing the tax.[544]

(ii) <u>The Respondent's submissions</u>

237. The BIT does not define arbitrariness. The Respondent relies on the definition in the *ELSI* case: something opposed to the rule of law, a 'wilful disregard of due process of law, an act which

[532] Tr Day 6, 65:14-23, Tr Day 6, 68:19–69:1.

[533] Tr Day 6, 85:6-20.

[534] Claimants' Memorial, [204]-[209].

[535] Claimants' Memorial, [210]-[221].

[536] Claimants' Closing Skeleton, [88(b)]; Tr Day 6, 112:12–117:9.

[537] Claimants' Memorial, [222]-[233].

[538] Claimants' Memorial, [234]-[249].

[539] Claimants' Memorial, [250]-[257]; Claimants' Reply, [324]-[349].

[540] Tr Day 6, 106:16–107:11.

[541] Claimants' Closing Skeleton, [88(a)]; Tr Day 6, 107:12–112:11.

[542] Claimants' Memorial, [266]-[307]; Claimants' Reply, [269]-[320].

[543] Claimants' Closing Skeleton, [88(d)-(e)].

[544] CCsl, 95-105.

shocks, or at least surprises, a sense of judicial impropriety.'[545] The Claimants must establish that an error was made by the Jordanian courts of a kind that no competent judge could reasonably have made.[546] Predetermination amounting to a wrongful political motivation could constitute arbitrary conduct (unless perhaps the courts got to the right answer for the wrong reasons).[547]

238. The Respondent says that standard has not been met.

239. *The Tax Measure was based on the law*. As noted above, the Respondent contends that the Tribunal must accept the decisions of the Jordanian courts unless it disavows the acts of the judiciary itself, and must apply a presumption in favour of the legality of the ISTD's decision.[548] It says that the ISTD interpreted Article 7.A.15.a in a way that was open to it. Its approach was consistent from the Director-General's first comments in the days following the transaction.[549]

240. UTT failed to file a tax return as it was obliged to;[550] it failed to cooperate with the ISTD; the LTPD assessed tax in accordance with the law; it neglected to advance the challenges the Claimants now rely on in the Jordanian procedures.

241. *The ISTD acted in a consistent manner*. The Respondent relies on its evidence that tax advisers (as well as officials at the ISTD and Saba/Deloitte) at the time of the Transaction were aware of the possibility that a transaction such as this would be taxable on the basis that part of the income represented goodwill, and were aware that a similar issue had arisen in the *Rowwad* case (arising out a transaction almost 2 years prior).[551] It refers to four Court of Cassation judgments upholding the taxation of transactions where goodwill was included in the sale of *husas* shares,[552] as well as the *Rowwad* case,[553] and more recent cases[554] to demonstrate the longstanding principle that transfer of the ownership of capital effects a transfer of goodwill, that goodwill was a taxable commercial gain, that that the sale of shares will be regarded as having two components – an exempt capital gain and taxable goodwill.[555] The history of the relevant provisions supports the limitation of the exemption to buying and selling public shareholding companies.[556]

242. *The CCD acted in lawful manner*. The Respondent says that the CCD did not refuse to permit UTT's liquidation, but sought further information in order to oversee the reduction of capital.

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[545] Respondent's Counter-Memorial, [264]-[266], citing *ELSI* (Ex CL-58 / Ex RL-19), [128]-[129]; Tr Day 1, 131:17–132:8.

[546] Respondent's Closing Skeleton, [6]; Tr Day 6, 152:6-19.

[547] Tr Day 6, 150:4–151:2.

[548] Respondent's Counter-Memorial, [269].

[549] Respondent's Rejoinder, [194].

[550] As noted above, the case put to the Claimants' legal expert was that the Instructions (Ex R-2) required all companies to file tax returns regardless of whether they had a taxable income (and thus qualified as a 'taxpayer'): Tr Day 4, 158:1–163:12.

[551] Respondent's Rejoinder, [194]. Though Mr Ali Almusned accepted that the *Rowwad* case may only have been known to those involved in the transaction (including assessors) in June 2006: Tr Day 4, 74:13–76:13.

[552] Respondent's Counter-Memorial, [277]-[280], citing Expert Report of Mr Nabil Rabah, [105]-[108].

[553] Respondent's Counter-Memorial, [281]-[283].

[554] Respondent's Counter-Memorial, [285]-[287].

[555] Respondent's Rejoinder, [194(e)].

[556] Respondent's Rejoinder, [194(f)].

Instead of providing that information, UTT submitted a resolution purporting to record a decision to liquidate the company. Notwithstanding the ISTD's request, the CCD decided on 1 July 2008 to proceed with UTT's liquidation. The liquidator appointed by UTT was able to exercise his duties, but the liquidation cannot be completed until all taxes are paid.[557]

243. *The Tax Measure had nothing to do with alleged public opposition*.[558] The Respondent rejects any attribution of the acts of the duopoly, the media, or individual statements of Members of Parliament to Jordan.[559] The Respondent does not dispute that the duopoly opposed the grant of the Licence, and that public concern greeted the Transaction given the circumstances.[560] The Prime Minister's decision to set up a ministerial committee was reasonable and a demonstration of good faith. But the question of whether tax was due was not a matter for Ministers or Parliament, but for the ISTD who assessed the Transaction in the ordinary fashion.[561] The Jordanian Enforcement Proceedings are nothing more than the exercise of the state's legitimate right to recover taxes.[562]

244. *The Claimants' conduct*. The Claimants' conduct is relevant, since either they were aware in June 2006 that the transaction might be taxed (which would contradict the alleged lack of foundation) or they were reckless in not taking advice.[563] The Respondent invites the Tribunal to infer that advice would have been taken, and points to other factors consistent with the Claimants having known of the risk that a tax would be imposed.[564] There is no justification for the Claimants' failures (such as to file a tax return); the Claimants' priority was to extract the proceeds of the sale as soon as possible.[565]

2. Full protection and security and legal stability

(i) <u>The Claimants' submissions</u>

245. *Full protection and security.* The Claimants say that the Respondent breached the guarantee of full protection and security by facilitating and capitulating to a hostile campaign against UTT's shareholders and ultimately capitulating to political and media pressure.[566] On this basis they claim moral damages.[567]

246. Submitting that the standard is not concerned only with physical harm but with 'due diligence' more generally,[568] the Claimants say that the Respondent failed to protect them from a

[557] Respondent's Counter-Memorial, [267]-[268].

[558] Respondent's Rejoinder, [194(h)].

[559] Respondent's Counter-Memorial, [289].

[560] Respondent's Counter-Memorial, [293].

[561] Respondent's Counter-Memorial, [296].

[562] Respondent's Counter-Memorial, [297].

[563] Respondent's Closing Skeleton, [21], [36].

[564] Respondent's Closing Skeleton, [22]-[29].

[565] Respondent's Closing Skeleton, [30]-[36].

[566] Claimants' Memorial, [310]; Claimants' Reply, [401].

[567] Tr Day 6, 126:6-8.

[568] Claimants' Reply, [407]-[420].

'concerted, lengthy and vicious campaign by Members of Parliament' during 2006 and 2007, in which it was the Members of Parliament themselves that suggested the imposition of a 'goodwill tax'. It was the political pressure and harassment of those Members of Parliament that 'pushed the Government into imposing the Taxation Measure as a way of fending off accusations that it was involved in the loss of public funds.'[569] The Respondent should have reminded journalists and politicians of the criminal nature of defamation and the presumption of innocence. Instead the Government facilitated the campaign by responding to questions, allowing officials to comment to the press and apologising to Parliament.[570]

247. *Legal stability.* The Claimants also say that the Jordanian tax authorities' departure from previous practice amounted to a *de facto* amendment of Jordanian tax legislation and the introduction of a new tax.[571] The Claimants rely on Article 12 of the BIT, which provides that 'obligations under international law' established between the Contracting Parties prevail over those provided by the BIT to the extent they are more favourable, to import the guarantee of legal stability in Article 2 of the Unified Agreement for the Investment of Arab Capital in the Arab States (**Unified Agreement**).[572] Even if Article 2 does not apply, the Claimants say that 'the most-favourable fair and equitable treatment provided by Article 4 of the [BIT] required Jordan to ensure a transparent and predictable framework for the investor's business activities'.[573] The Claimants say that the Respondent breached these obligations, because the Tax Measure was unprecedented and could not have been predicted,[574] and it amounted to a retroactive taxation.[575]

248. Legal certainty does not prevent the tax administration or courts from adopting new interpretations of legislation or amending it, but it prohibits surprising taxpayers years after a transaction with a new interpretation that was not made public; the Claimants maintain that the Tax Measure was unprecedented and unpredictable.[576]

(ii) <u>The Respondent's submissions</u>

249. The Respondent alleges that this theory is a makeweight, recycling arguments made in relation to arbitrariness.[577] The standard is the customary international minimum, which applies where the State has failed to provide reasonable police protection against physical

[569] Claimants' Memorial, [309]-[314]; Claimants' Reply, [422]-[443].

[570] Claimants' Closing Skeleton, [96]-[97].

[571] Claimants' Memorial, [315]-[316]; Claimants' Reply, [350]-[363].

[572] Claimants' Memorial, [317], citing Unified Agreement for the Investment of Arab Capital in the Arab States (signed 26 November 1980, entered into force 7 September 1981) (Ex CL-72).

[573] Claimants' Memorial, [327]-[331].

[574] Claimants' Memorial, [333]-[348].

[575] Claimants' Memorial, [349]-[359].

[576] Claimants' Reply, [388]-[394] (addressed in the context of the allegation of arbitrary treatment).

[577] Respondent's Counter-Memorial, [308]-[309].

invasions of the person or property of foreign investors.[578] The case does not even remotely resemble the precedents cited by the Claimants.[579]

250. The Respondent says that the Claimants have cited no authority for the proposition that failure by a State to exercise due diligence to prevent an alleged injury to an investor's credit, reputation or prestige amounts to a breach of this provision. Where the Claimants suffered no physical harm or threats, no relevant duty of the Respondent was engaged and it cannot be liable for a failure to curb discussions in the media or by politicians.[580]

251. As for legal stability, the Respondent notes that its legal taxation framework is complex, in constant development and subject to judicial interpretation. A taxpayer's subjective interpretation cannot be deemed to constitute the law, and in any case the ISTD performed its duties in accordance with the law.[581]

252. Article 12 is a savings clause, not a most-favoured nation provision. It does not operate to import into the BIT any protections in another instrument, but just confirms that a claimant may benefit from more favourable treatment to which it is otherwise entitled.[582] And even if it were a most-favoured nation provision, Article 2 could not be relied upon as establishing a new obligation under the BIT.[583]

3. Legitimate expectations

253. The Claimants say that the Article 4(1) standard of fair and equitable treatment includes respect for legitimate expectations,[584] which is also an element of the international law principle of good faith.[585] A specific representation is not necessarily required, and in the circumstances the Claimants were 'reasonable' in legitimately expecting that their capital gains would not be taxed:[586] the terms of Article 7.A.15 are clear and unequivocal; the exemption for capital gains was recalled in the 'REACH Initiative' of March 2000 (which the Claimants characterise as a 'formal Government document'[587]); the King explicitly gave guarantees of legal stability to the Claimants (among others); the capital gains exemption had been introduced to encourage investment; and the Respondent has identified no precedents

[578] Respondent's Counter-Memorial, [310].

[579] Respondent's Counter-Memorial, [311], citing *Asian Agricultural Products Ltd. v Republic of Sri Lanka* (Award) ICSID Case No ARB/87/3 (1990) (Ex CL-67), *American Manufacturing v Zaire* (Ex CL-66), *Wena Hotels Limited v Arab Republic of Egypt* (Award) ICSID Case No ARB/98/4 (2000) (Ex RL-33).

[580] Respondent's Rejoinder, [243]-[246].

[581] Respondent's Counter-Memorial, [312]-[314].

[582] Respondent's Rejoinder, [206]-[210].

[583] Respondent's Rejoinder, [211]-[212], citing *Hochtief AG v Argentine Republic* (Decision on Jurisdiction) ICSID Case No ARB/07/31 (2011) (Ex RL-47), [81].

[584] Claimants' Memorial, [360]-[363].

[585] Claimants' Reply, [456]-[462].

[586] Claimants' Memorial, [364]-[365].

[587] Tr Day 1, 17:1-19.

in the ISTD's practice or the Court of Cassation's jurisprudence to support the taxation of goodwill in this manner.[588]

254. The Respondent says that Article 4(1) of the Treaty reflects the customary international minimum standard of treatment, and State practice and *opinio juris* are insufficient to establish the protection of legitimate expectations as a rule of international law. Decisions to the contrary have been driven in particular by a reference to legal stability in the preamble of the treaty that is absent here.[589] It is particularly important in the context of taxation that a claimant is able to establish a specific assurance,[590] and the claimant must show it relied on its legitimate expectations when making the investment.[591]

255. The Respondent says that the Claimants have not identified a specific legal commitment, and any expectation the Claimants and UTT had at the time could not have been legitimate and reasonable.[592] In the absence of definitions of 'capital gains' and 'goodwill', Article 7.A.15.a could not amount to a clear, unambiguous and specific commitment to a shareholder that a share sale would under no circumstances be taxed.[593] The Claimants should have been aware of Court of Cassation and ISTD precedents imposing tax on goodwill arising from share sales,[594] and the REACH Initiative merely recounted the content of the law at the time.[595]

4. Discrimination

256. The Claimants say that the BIT prohibits discriminatory treatment.[596] A discriminatory measure is one that singles out a person or group without a reasonable basis, is not limited to discrimination on the basis of nationality, and can include taxation measures.[597] Applying the principle that discrimination may result from either intent or result, the Claimants say that 'the new tax policy concerning capital gains implemented by Jordan … has been applied selectively'. The exclusion of the capital gains exemption from the sale of private shareholding companies – even if it were valid as a matter of Jordanian law – was not reasonable or sensible and resulted in discriminatory treatment.[598] The discriminatory treatment arose from both the different treatment of non-public shareholding companies, and companies specifically in the telecommunications sector.[599] They say that the proper comparator should be companies generally, not specifically non-public or public shareholding companies.[600]

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[588] Claimants' Memorial, [366]-[376]; Claimants' Reply, [463]-[473]; Claimants' Closing Skeleton, [108].

[589] Respondent's Counter-Memorial, [299]; Respondent's Rejoinder, [196]-[198].

[590] Respondent's Rejoinder, [199], citing *Jan Oostergetel v Slovak Republic* (Award) UNCITRAL (2012) (Ex CL-93), [236].

[591] Respondent's Rejoinder, [200]-[203].

[592] Respondent's Counter-Memorial, [299]-[300]; Respondent's Rejoinder, [204]-[205].

[593] Respondent's Counter-Memorial, [301]-[303].

[594] Respondent's Counter-Memorial, [304]-[306].

[595] Respondent's Counter-Memorial, [307].

[596] Claimants' Memorial, [379].

[597] Claimants' Memorial, [380]-[388].

[598] Claimants' Memorial, [388]-[400]; Claimants' Closing Skeleton, [100]-[106].

[599] Claimants' Reply, [395]-[399] (addressed in the context of the allegation of arbitrary treatment).

[600] Tr Day 6, 123:5-14.

257. The Respondent notes that the Parties agree that discrimination occurs where there are like circumstances, a difference of treatment and absence of a reasonable ground for that differential treatment.[601]

258. It rejects the suggestion that the ISTD targeted the telecommunications sector or that the Court of Cassation acted in a discriminatory fashion by drawing a distinction between those companies that trade on the stock exchange and those which do not. The precedents before the cases of Rowwad and UTT did not involve the telecommunications sector; the 1995 Amending Tax Law clearly distinguished between companies listed on the stock exchange and those which are not permitted to do so. The appropriate comparison would be with a similar sale of shares of a non-public shareholding company. The evidence shows that other private companies have been treated in a similar manner to UTT and that the ISTD has not targeted only telecommunications companies.[602] There is no question of discrimination against foreign investors. Mr Alghanim declined to suggest that the Claimants had been targeted because of their nationality.[603]

5. Impairment of the rights to liquidate

259. The Claimants say that Article 4 of the Treaty promises most-favoured nation treatment, and in reliance on this guarantee, the Claimants invoke Article 3 of the Jordan–Algeria BIT and Article 3(2) of the Jordan–Austria BIT, which prohibit the impairment of the liquidation of investments.[604] They say that Jordan has breached this obligation by 'specifically and intentionally preventing the shareholders of UTT … from liquidating that company, on the premise of its arbitrarily and discriminatorily imposed Taxation Measure'.[605] The Claimants also maintain that the Respondent acted in an arbitrary manner when it blocked the liquidation, arguing that the imposition of the Taxation Measure was dictated by the decision to liquidate or an 'incredible coincidence'.[606] The Claimants say that the ISTD and CCD's conduct was characterised by 'complicity'.[607]

260. The Respondent notes that the Claimants only mention this argument in their Reply in passing and says that the evidence establishing the absence of any breach of the protections against arbitrariness and discrimination also defeats this claim.[608]

[601] Respondent's Rejoinder, [235]-[237].

[602] Respondent's Counter-Memorial, [315]-[319].

[603] Respondent's Counter-Memorial, [318]; Tr Day 2, 79:1-10 (Tribunal questions to Mr Fouad Alghanim).

[604] Claimants' Memorial, [401]-[404], citing Ex CL-39 and Ex CL-40.

[605] Claimants' Memorial, [405]-[410].

[606] Claimants' Closing Skeleton, [77]-[78].

[607] Claimants' Closing Skeleton, [80].

[608] Respondent's Rejoinder, [247].

G. Relief and quantum

1. Non-pecuniary remedies and injunction

(i) The Claimants' submissions

261. The Claimants submit that the Tribunal has jurisdiction to grant non-pecuniary remedies; those remedies flow from the application of substantive international law rules on State responsibility and are not a matter of the specific judicial powers of the Tribunal.[609] As long as the Tribunal has jurisdiction to hear the case, it has the power to grant appropriate remedies. Absent a specific limitation in the BIT, ICSID tribunals may grant the non-pecuniary remedies provided by international law including annulment or rescission of domestic juridical acts and cessation.[610]

262. The Tax Measure is still in force and the Jordanian Enforcement Proceedings are ongoing – giving rise to a 'lasting or continuous breach.'[611] They thus ask the Tribunal to (i) order the Respondent to refrain from prosecuting the Claimants for the non-payment of the tax; and (ii) desist from enforcing the Tax Measures against the Claimants.[612]

(ii) The Respondent's submissions

263. The Respondent says that the relief sought by the Claimants must be refused, because they have not suffered any damage as a consequence of the ISTD's decision to impose the Tax Measure.[613] The Claimants are not entitled to compensation for injury they have not suffered. The only remedy that would be available is a decision ordering Jordan to refrain from enforcing the tax against the Claimants, but the Jordanian Enforcement Proceedings are ongoing and it is possible that the defences to those proceedings will succeed, in which case the present claim would be moot.[614]

264. The Respondent contends that the Tribunal's power is limited to the claims brought by the two Claimants in these proceedings, and has no power to order relief in respect of UTT or other third parties.

2. Annulment of the Tax Measure or indemnity from the Respondent

(i) The Claimants' submissions

265. The Claimants maintain that they are entitled to the annulment of the Tax Measure as restitution.[615] Restitution requires the State to re-establish the situation which existed before

[609] Claimants' Memorial, [474].

[610] Claimants' Memorial, [475]-[480].

[611] Claimants' Memorial, [485]-[488].

[612] Claimants' Memorial, [489]-[495].

[613] Respondent's Counter-Memorial, [321].

[614] Respondent's Counter-Memorial, [323]-[327]; Respondent's Rejoinder, [251]-[253].

[615] Claimants' Memorial, [502].

the wrongful act. It is only by annulling the Tax Measure that the Claimants will be guaranteed to be protected against the consequences of the Respondent's wrongful act.[616] The Respondent cannot raise its domestic law as an obstacle to this relief.[617] If the Tribunal concludes that annulment of the Tax Measure is not appropriate because of the presence of third parties who are not entitled to the protection of the Treaty, the Claimants are entitled to an indemnity.[618]

266. The Claimants say that the fact they were not party to the original proceedings is irrelevant.[619] It is precisely because annulment would affect Jordan's right to pursue the tax against third parties that it is an adequate remedy,[620] and Jordan cannot rely on difficulties under its domestic law to avoid the granting of relief.[621]

(ii) The Respondent's submissions

267. The Respondent says that the Tribunal should reject the Claimants' request for annulment of the Tax Measure because it was imposed against UTT, a third party, and the Tribunal does not have jurisdiction over third parties (including Global, Mr Dagher, and UTT).[622] It says that this head of relief gives rise to a 'legal and practical impossibility', since the Tribunal does not have jurisdiction to overturn a decision directed to a separate legal entity. It would affect Jordan's rights to pursue any legal action against third parties; and the Government does not have authority to order the judicial branch to annul or prevent the enforcement of a judgment.[623]

3. Moral damages

268. The Claimants submit that they are entitled to moral damages.[624]

269. The Respondent says that the Claimant relies almost exclusively on International Court of Justice cases involving personal injuries. It says the Tribunal only has jurisdiction in respect of damage to property rights associated with an investment, and in any case ICISD tribunals have 'regularly rejected claims for moral damages' which will only be granted in the most egregious of cases.[625]

[616] Claimants' Memorial, [503]-[517].

[617] Claimants' Memorial, [518]-[527].

[618] Claimants' Memorial, [528]-[529].

[619] Claimants' Reply, [667]-[669].

[620] Claimants' Reply, [670]-[667].

[621] Claimants' Reply, [678]-[684].

[622] Respondent's Counter-Memorial, [321]; Respondent's Rejoinder, [254]-[261].

[623] Respondent's Counter-Memorial, [329].

[624] Claimants' Memorial, [530]-[539]; Claimants' Reply, [685]-[700].

[625] Respondent's Counter-Memorial, [330]-[338]; Respondent's Rejoinder, [262]-[267].

VI. MERITS: THE TRIBUNAL'S ANALYSIS

A. Issues for determination

270. The present case is remarkable for the elaborate attention paid by both Parties to the proper interpretation of the detailed provisions of Jordanian tax law. This is despite the fact that, as both Parties accept, the present Tribunal is not constituted to determine a dispute as to Jordanian tax law at all. Rather its sole task is to decide whether or not the Respondent is in breach of the obligations that it assumed as a matter of public international law towards the Claimants as Kuwaiti investors under the provisions of the BIT. It is therefore essential to begin the Tribunal's own analysis by placing the dispute on Jordanian tax law within the proper context in which it arises on the plane of public international law before this Tribunal.

271. The Claimants allege that the Tax Measure was an 'arbitrary or discriminatory measure[]' and that the Respondent breached Article 3(1) of the BIT, impairing the Claimants' investment by the imposition of such a measure. Such a measure also constituted unfair and inequitable treatment in breach of the Respondent's guarantee in Article 4(1). The essence of their complaint is that the imposition of the Measure was predetermined as a result of political pressure following a public and Parliamentary outcry at the perceived excessive profits realised by the Claimants.

272. The Claimants' investment vehicle UTT challenged the original imposition of the Measure before the Jordanian courts. They ultimately failed in the domestic jurisdiction, the Court of Cassation upholding the judgment of the Tax Court of Appeal that the tax on the sale proceeds had been lawfully imposed. The Claimants say that the fate of their challenge in the Jordanian courts is irrelevant to their present complaint, and that, to the extent that the Respondent seeks to rely on those judgments, it is not entitled to do so because the Claimants were the victims of a denial of justice before those courts. On any view, it is essential to clarify the status and relevance of those decisions to the substantive issues that arise for decision in the present proceedings.

273. The Tribunal determines that it must address the arguments of the Parties and assess the evidence under three sub-issues:

(a) *Effect of the Jordanian court decisions.* What is the effect, if any, of the fact that UTT challenged the Tax Measure in the Jordanian courts and of the judgments of those courts on the legality of the Measure as a matter of Jordanian law for the question of international law that this Tribunal must decide?

(b) *Predetermination/political pressure.* Subject to (a) above, was the imposition of the Tax Measure by the ISTD in fact predetermined as a result of political pressure?

(c) *Denial of justice.* To the extent that the Tribunal determines under (a) above that the judgments of the Jordanian courts are potentially relevant to its enquiry, should it nevertheless disregard them because, as the Claimants contend, those decisions were

inexcusable–decisions that no reasonably competent judge could make–and as a result were a denial of justice?

274. Before proceeding to address each of these three sub-issues, the Tribunal first identifies a number of matters that are agreed between the Parties or at least not in dispute between them.

B. Matters agreed or not in dispute

275. The Tribunal's task is assisted by a measure of agreement between the Parties on a number of salient legal issues and by the fact that a number of other points are not in dispute between them.

276. These matters relate to:

(a) The content of the arbitrary treatment standard under international law;

(b) The scope of the review standard for a substantive denial of justice; and

(c) The relevance of the allegation of political motivation.

277. *Arbitrary treatment standard:* The Parties achieved a measure of agreement on the content of the arbitrary treatment standard prescribed by Art 3(1) BIT. The starting point is that authoritatively stated by a Chamber of the ICJ in *ELSI* namely:[626]

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law…. It is a wilful disregard of due process of law, an act which shocks, or least surprises, a sense of juridical propriety.

278. The Respondent invokes this formulation of the standard as sufficient in itself.[627]

279. The Claimants submit that *ELSI* does not set out an exhaustive definition of the concept of arbitrariness in international law, but that in any event Respondent's conduct breaches the *ELSI* standard;[628] since 'arbitrariness … is the opposition to the rule of law, wilful disregard of law, capriciousness … as explained in the *ELSI* case.'[629] They add that conduct may also be arbitrary if it is biased, not based on facts and politically motivated. In the Tribunal's view these are further potential indicia of a decision that is in opposition to the rule of law and are therefore consistent with the *ELSI* formulation.[630]

280. *Review standard for substantive denial of justice.* The Respondent accepts that, if the Tribunal finds that it may or must assess the treatment of Claimants' investment by the Jordanian courts, it is not bound by the doctrine of *res judicata* to give effect to the decisions of those

[626] *ESLI* (Ex CL-58 / RL-19), [128].

[627] Respondent's Counter-Memorial, [218]-[221]; Respondent's Rejoinder, [191].

[628] Reply [240]-[264]; Claimants' Closing Skeleton, [86]-[87].

[629] Tr Day 6, 43:10-13.

[630] Claimants' Reply, [251].

courts:[631] 'It is certainly correct that, if a denial of justice could be established, the Respondent would not be able to rely upon the decisions of its courts.'[632]

281. Further, the Parties agree that the Tribunal is entitled to find a denial of justice, even where there was no failure in due process, if the substantive decision was one that is inexcusable, being one that no reasonably competent judge could make.[633]

282. Three further consequences flow from the position that the Parties have adopted on the review standard:

(a) The Claimants do not invite the Tribunal to act as a further court of appeal on the correctness, *as a matter of Jordanian law*, of the imposition of the Tax Measure. The Claimants stated that '[i]t is not our case, it is absolutely not our case.'[634]

(b) Conversely, the Respondent does not invite the Tribunal to give *res judicata* effect to the decisions of the Jordanian courts as to the legality of the tax measure: 'we are not saying … this is strictly a res judicata, and asking you to apply res judicata'.[635]

(c) Both Parties accept that a denial of justice may arise as a result of a decision of the judicial branch in an individual case that is inexcusable. In view of this agreement, the Tribunal is not required to decide itself two potentially disputed issues of international law:

(i) Whether it is necessary to show some larger systemic failure in the judicial system of the state;[636] or

(ii) Whether a denial of justice may be found on the ground of the substantive content of the decision.

283. *Relation to political motivation claim.* The Respondent accepts that, if the ISTD's decision to impose the Tax Measure were predetermined as a result of a wrongful political motivation, its actions *might* be capable of giving rise to a claim of arbitrary conduct,[637] unless it could be said that the Measure was nevertheless lawfully imposed. It will therefore be necessary to decide on political motivation in any event.

[631] Tr Day 1, 138:2-4.

[632] Respondent's Skeleton Argument, [23]

[633] Claimants: Tr Day 6, 48:4-14; Respondent: Tr Day 6, 152 :8-17.

[634] Tr Day 1, 86:21-3.

[635] Tr Day 1, 138:2-4.

[636] As the reference to the disavowal of the courts in the *Azinian* formulation may suggest.

[637] Tr Day 6, 150:4–151:2.

C. Relevance of the Jordanian Court Decisions

1. Introduction

284. The Claimants' principal complaint in these proceedings is that the imposition of the Tax Measure (that UTT is liable for tax on the sale of its shares in UMC) is a breach of Jordan's international law obligations under the BIT, specifically the obligation not to 'impair by arbitrary or discriminatory measures' (BIT, Article 3(1)) their investments.

285. The Claimants also allege that the same conduct gives rise to breaches of a number of other provisions of the BIT: that it amounts to a failure to afford fair and equitable treatment (including that it breached the Claimants' legitimate expectations); that the Respondent failed to afford the Claimants' investment full protection and security; and that its conduct was discriminatory. It also relies (through alleged incorporation by reference) on alleged duties to provide legal stability and not to impair rights to liquidate.

286. Nevertheless, the allegation that the Tax Measure was arbitrary or discriminatory lies at the heart of the Claimants' case. In the Tribunal's view, the claim is most appropriately analysed under this head. It most directly addresses the substantive complaints that the Claimants make about their treatment at the hands of the Respondent. Protection from arbitrary or discriminatory conduct also forms part of the fair and equitable treatment standard.[638] For reasons explained below, it is scarcely to be thought that a different standard could apply to the assessment of the arbitrary or discriminatory character of the state's treatment under this head than under Article 3(1).

287. The Tribunal therefore begins by analysing the relation between this standard and the decisions of the Jordanian courts.

288. A principal ground upon which the Claimants base their allegation of arbitrary conduct is that the imposition of the Tax Measure was unlawful as a matter of Jordanian law: 'At the heart of this case is the meaning of a key provision of Jordanian legislation and its (mis)application'.[639]

289. UTT challenged the Tax Measure in the Jordanian courts. On 25 April 2012, the Court of Cassation upheld the imposition of the Tax Measure, dismissing UTT's appeal.[640]

290. The Respondent alleges that the Claimants' case 'stands or falls on whether … the decisions of the Jordanian [T]ax Court of Appeal and the Court of Cassation are arbitrary.'[641]

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[638] *Waste Management, Inc. v United Mexican States* (Award) ICSID Case No ARB(AF)/00/3 (2004) ***(Waste Management II)*** (Ex CL-24 / Ex RL-10), [98]: 'fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary…'.

[639] Claimants' Closing Skeleton, [1].

[640] Ex C-128 / Ex R-44.

[641] Tr Day 1, 132 :2-5.

291. By contrast, the Claimants assert that '[t]he arbitrariness claim raised by the claimants hinges on the ISTD's taxation measure of UTT that Jordan is demanding the claimants to pay, not on the Jordanian court's [sic] decisions'.[642]

292. The issue for the Tribunal's decision on this part of the case may be stated as the following question of law:

Is the Tribunal to assess whether the Respondent's treatment of Claimants' investment was arbitrary for the purpose of Article 3(1) of the BIT by reference to:

(a) The Tax Measure alone (making for this purpose its own assessment of ISTD's application of Jordanian law); or

(b) The conduct of the State as a whole *vis-à-vis* the Claimants' investment, taking into account for that purpose the Jordanian court decisions on the Tax Measure, considering whether the latter were themselves arbitrary, being a denial of justice?

293. In *Azinian v Mexico,*[643] the Tribunal stated the following principle (the ***Azinian* principle**):

> A governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level*…. What must be shown is that the court decision itself constitutes a violation of the treaty…. For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated.

294. The Parties had raised this case in their written submissions,[644] but had not fully joined issue on the application of the above principle. The Tribunal specifically invited them to address the relevance, if any, of the principle in their closing submissions.[645]

295. The Respondent invoked the *Azinian* principle, pleading: 'That dictum applies in this case'.[646]

296. The Claimants invited the Tribunal to reject Respondent's reliance on the *Azinian* principle in this case on a number of grounds.[647]

2. Claimants' Objections

297. The Claimants raise two sets of arguments:[648]

(a) *Positively* they argue that the Tribunal should limit its consideration to the Tax Measure alone, because the arbitrariness treaty standard imposes an obligation of

[642] Tr Day 6, 38:18-21

[643] *Azinian v Mexico* (Ex RL-1), [97]-[100] (emphasis in original).

[644] Respondent's Counter-Memorial, [4], [211]-[212]; Claimants' Reply, [231], [520].

[645] Tr Day 1, 96 :9-22; Tr Day 4, 186L4-25; Tribunal Questions, 28 April 2016.

[646] Respondent's Closing Skeleton, [16].

[647] Tr Day 6, 70; CCsl, 56-64

[648] Tr Day 6, 39-98; CCsl, 29-67.

conduct, breach of which is complete upon the imposition of the Measure, not an obligation of result; and

(b) *Negatively* they dispute the application of the *Azinian* principle on four grounds:

(i) That it is inapplicable *ratione personae*, the Jordanian proceedings having been taken by UTT not Claimants;

(ii) That it is inapplicable *ratione materiae*, the Claimants' claims in the arbitration not being coincident with the issues decided in the Jordanian court decision;

(iii) That the arbitrariness standard as stated in *ELSI* does not support the principle; and

(iv) That *Azinian* failed to take into consideration the principles invoked by Claimants, including (in addition to (a) above): that municipal judicial decisions are mere facts in international law; and that the characterisation of an act as legal under national law does not affect its characterisation as illegal under international law: Article 3 of the ILC Draft Articles on the Responsibilities of States for Internationally Wrongful Acts (**ARSIWA**).

3. Character of arbitrary measures obligation

298. The Claimants submit that the obligation not to impair by arbitrary measures is one of conduct not result.[649] They maintain that the Respondent has ignored the independent character of the Claimants' claims; equated arbitrariness with denial of justice; misapplied the arbitrariness obligation, relying instead on authorities relevant to the fair and equitable treatment standard; and sought to treat the whole course of events as a complex act to be construed as if arbitrariness were an obligation of result.

299. The Respondent replies that the distinction that the Claimants seek to draw is not based in customary international law and does not assist the Tribunal in interpreting an arbitrariness provision. It maintains that the Tribunal is never going to be limited to what happened on 30 April 2008, unless nothing happened after that date.[650]

300. The Respondent concludes:[651]

> In such a situation, where the precise issue decided by domestic courts is being placed before an international tribunal (after the issue has been voluntarily placed before the domestic courts by the investment vehicle), the intuitively correct approach is to accord deference to the domestic court's decision (absent any denial of justice). If it were otherwise, the international tribunal would simply be operating as a final court of appeal.

[649] Tr Day 6, 39-68; CCsl, 29-42.

[650] Tr Day 6, 231:8-20 (counsel mistakenly referring to 30 April 2010).

[651] Respondent's Closing Skeleton, [10].

301. In addition to *Azinian*, the Respondent cites in support:[652]

(a) *Bosca v Lithuania* in which the Tribunal held, citing *Helnan v Egypt*, that:[653]

> when a tribunal is considering an issue of domestic law previously ruled upon by a domestic court, the tribunal 'will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.'

(b) *Awdi v Romania*,[654] which repeated with approval the same dictum from *Helnan;* and

(c) *Mondev v USA*,[655] which held:

> It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal.

302. The Claimants base the distinction between obligations of conduct and obligations of result on draft Articles 20 and 21 that were prepared by Ago for the first reading of ARSIWA.[656] The Claimants accepted in answer to a question from the Tribunal,[657] that these draft articles were, on the proposal of Crawford, rejected on second reading and not adopted into the final text of ARSIWA. As a result, the Claimants did not satisfy the Tribunal that the distinction, which they invoke as interpreted by them, forms part of customary international law, providing a rule of decision in the present case.

303. The distinction was not retained in ARSIWA, such a classification being 'no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose'.[658]

304. Even if the distinction were to be applied to the arbitrary treatment standard in Article 3(1) of the BIT, it would in any event likely be construed as an obligation of result not conduct since:

(a) The obligation arises in the context of the treatment of persons within the internal legal order, not direct State-to-State relations;

(b) The obligation is not one of best efforts: it is a non-contingent guarantee; and

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[652] Respondent's Closing Skeleton, [11]-[13].

[653] *Bosca v Lithuania* (Ex RL-55), [198], citing *Helnan International Hotels A/S v Arab Republic of Egypt* (Award) ICSID Case No ARB/05/19 (2008), [106].

[654] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alda El Corporation v Romania* (Award) ICSID Case No ARB/10/13 (2015) (Ex CL-366), [327].

[655] *Mondev v USA* (Ex CL-134), [126].

[656] Ex CL-368, p. 116; CCsl, 37.

[657] Tr Day 6, 57 :2-12.

[658] J. Crawford, *State Responsibility: The General Part* (Cambridge UP, 2013), 223.

(c) The obligation does not prescribe the means to be adopted, only the outcome (that the investment should not be subjected to arbitrary measures).[659]

305. The Tribunal's overriding duty is to interpret and apply the primary obligation in question, namely Article 3(1) of the BIT, which provides:

> **Protection of investments**
>
> Investments, made by investors of either Contracting State, enjoy full protection and security in the territory of the other Contracting State, in compliance with the recognized principles of international law and with the provisions of this Agreement. Neither Contracting State shall in any way impair by arbitrary or discriminatory measures such investments or associated activities including the use and enjoyment of the management, development, maintenance and expansion of these investments or related activities.

306. The Respondent accepts that, there being no obligation under the BIT or the ICSID Convention to resort to local remedies, if there had been no application to the local courts, the Tribunal would have been entitled to evaluate whether the Tax Measure alone constitutes an arbitrary measure.[660]

307. To this extent, then, Article 3(1) may *potentially* be invoked in relation to a single measure if it rises to the level of an international delict. This is not the present case. Here the measure has been subject to challenge in the local courts. The question is the extent to which the decisions of those courts are to be taken into account in the Tribunal's overall assessment of arbitrary conduct.

308. A Chamber of the ICJ held in *ELSI*: 'Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law…. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'.[661]

309. The protection from arbitrary measures requires the Tribunal to assess whether the investment has been subject to 'a wilful disregard of due process of law', not whether the act is 'opposed to a rule of law'. This necessarily entails consideration of the whole process of law to which the investment was subjected.

310. The Claimants contend that the conduct of the courts is not relevant in a case where the lawfulness of the conduct is confirmed by judicial process, but accept that it is relevant to consider the availability of local fora to remedy a breach of the arbitrariness standard.[662]

311. It is difficult to see a basis for the distinction. Either the decisions of the local courts are relevant and to be taken into account whatever the outcome or they are not. In the present case, the real question is whether the decisions of the local courts are to be disavowed.

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[659] *Request for Interpretation of the Judgment of 31 March 2004 in Avena and other Mexican Nationals (Mexico v United States of America)* [2009] ICJ Rep 3 (Ex CL-165), p 17, [44].

[660] Tr Day 6, 231 :21–232:6.

[661] *ELSI* (Ex CL-58 / Ex RL-19), [128].

[662] Tr Day 6, 67 :19-21.

312. The standard requires consideration of the extent of 'due process' afforded to the investment. This necessarily entails the judicial part of the process, since otherwise the Tribunal would be unable to assess whether or not the Respondent's conduct was 'opposed to the rule of law' and would not be assessing the treatment to which the investment was subject as a whole.

313. The requirement to view the state's actions in relation to the investment, taken as a whole would seem to be as applicable to impairment by arbitrary measures as to fair and equitable treatment.[663]

314. The Tribunal accepts that each such cause of action is distinct and that fair and equitable treatment involves consideration of a broader range of other factors that may not be in issue in an arbitrary measures claim. Nevertheless, arbitrariness is a recognised factor in fair and equitable treatment.[664] Both causes of action are concerned with a lack of due process.[665]

315. Both causes of action protect the treatment accorded to the investment in relation to measures adopted by the host state. In this they may be contrasted with a claim for expropriation, which crystallises at the moment the investor's property is taken.[666]

316. In summary, the alleged distinction between obligations of conduct and obligations of result:

(a) Does not operate as a general basis for classification of all obligations in international law;

(b) If it were applied, would more likely lead to the protection from arbitrary measures being categorised as an obligation of result; and,

(c) Does not in any event exclude from consideration the outcome of the investment vehicle's resort to the local courts.

317. Application of the primary obligation upon the State not to impair the investment by arbitrary measures requires a tribunal to consider the totality of the state's conduct vis-à-vis its treatment of the investment, including the decisions of its courts.

318. This conclusion does not in itself determine what effect a tribunal is to give to such local court decisions if they uphold the validity of the State measure under municipal law. It is this effect that is the subject of the first element of the principle stated in *Azinian*: that a governmental authority cannot be faulted for acting in a manner validated by its courts, *unless* the conduct of the courts themselves constitutes a breach of treaty.

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663 *The Rompetrol Group N.V. v Romania* (Award) ICSID Case No ARB/06/3 (2013) (Ex CL-229), [198]; *Ioan Micula Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (Award) ICSID Case No ARB/05/20 (2013) (Ex RL-44), [505].

664 *Waste Management II* (Ex CL-24 / Ex RL-10), [98].

665 *Waste Management II* (Ex CL-24 / Ex RL-10), [98].

666 *Phosphates in Morocco (Italy v France) (Preliminary Objections)* (1938) PCIJ Ser A/B No 74.

319. It is now necessary to consider the grounds relied upon by the Claimants to exclude the application of this principle.

4. Applicability of the Azinian principle

320. Claimants identify four substantive grounds to exclude the application of the *Azinian* principle in this case (summarised at [(b)] above).

321. Two of the grounds seek to distinguish *Azinian* on the facts in light of:

(a) The scope of national court proceedings *ratione personae;* and

(b) Their scope *ratione materiae*.

322. The other two grounds critique *Azinian* for its inconsistency as a matter of general international law as to:

(a) The *ELSI* concept of arbitrariness; and

(b) The status of municipal law in international law.

It is necessary to take each of these points in turn.

(i) Scope of national court proceedings *ratione personae*

323. The Claimants submit that the *Azinian* principle cannot apply to their claim, since they were not party to the Jordanian court proceedings, which were brought by the investment vehicle, UTT, acting through its liquidator. The decisions, being *res inter alios acta*, cannot bind them.[667]

324. This submission raises (a) a question of *fact* as to the capacity of the liquidator; and (b) a question of *law* as to the relevance of decisions taken in respect of the claim of the investment vehicle as opposed to the investor.

325. On the facts, the liquidation being voluntary, the liquidator was appointed by the shareholders and directors of UTT to act on UTT's behalf.[668]

326. The Claimants accept that the only person that could have contested the Tax Measure before the Jordanian courts under Jordanian law is the taxpayer – here UTT.[669] The Claimants submit that they are entitled to bring their own treaty claim. For that purpose, they are entitled to allege a denial of justice perpetrated on the underlying company through which their investment was made.[670]

[667] CCsl, 45-48; Tr Day 6, 70-78.

[668] Tr Day 6, 72 :1-7.

[669] Tr Day 6, 73 :21-25.

[670] Tr Day 6, 74:1-14.

327. The Respondent had argued in its written pleadings that, since only UTT and not the Claimants were party to the Jordanian court proceedings, the Claimants could not themselves have suffered a denial of justice.[671]

328. The Claimants dispute this proposition and contend that they are entitled to bring a claim of a denial of justice perpetrated on their investment vehicle. They point out that the tribunal in *Arif v Moldova* had had no authority cited to it for its proposition that the investor could not assert a denial of justice claim where it had not itself been a party to the local court proceedings.[672]

329. The Claimants submit that the proposition in *Arif* is incorrect. They invoke *Cotesworth and Powell v Colombia*[673] in which the tribunal decided a claim by two individual British investors that the partnership that they had formed with two other investors in Colombia had been the subject of a denial of justice. The tribunal held:[674]

> The administration of justice, guaranteed to all persons living in a civilized country, interests all. It especially interests all parties who are either mediately or remotely affected by it. To illustrate: If the sentence of a judge, given in a suit of A versus B, be illegal and manifestly injust, and in its consequence directly affecting the interests of C, the latter may ask a revision of the proceeding; and this although he may not have had previous occasion or necessity to take part in the suit. In the present case, the claimants were not bound to take part in the proceeding which led to the decision. Therefore if irregularities had taken place in the bankruptcy proceeding, before the date mentioned, they directly affected the interests of the claimants; and for this reason they had a right to demand that justice be administered according to the laws of the country.

330. The award in *Cotesworth* is widely cited as authoritative on denial of justice.[675] Its reasoning that the perpetration of an injustice on their investment (in that case through a joint venture) 'directly affected the interests of the claimants' is equally applicable here to the investment made by the Claimants through a company in which they were shareholders with other investors.

331. In the present case, the Claimant investors adopt as the basis of their claim the harm done to their investment vehicle. The Claimants cannot approbate and reprobate by relying on such harm as the basis for their claim without taking into account the steps taken by the investment vehicle to redress the allegedly unlawful assessment, which forms part of the overall treatment of the investment.

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[671] Respondent's Counter-Memorial, [158], [165]; *Mr Franck Charles Arif v Republic of Moldova* (Award) ICSID Case No ARB/11/23 (2013) (***Arif v Moldova***) (Ex RL-6).

[672] Claimants' Reply, [236]; *Arif v Moldova* (Ex RL-6), [426].

[673] H. La Fontaine, *Pasicrisie Internationale* (1902) (Ex CL-220), p 173.

[674] H. La Fontaine, *Pasicrisie Internationale* (1902) (Ex CL-220), p 176.

[675] A. V. Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp 289-291; J. Paulsson, *Denial of Justice in International Law* (2005), p 217.

332. Although in *Helnan, Bosca* and *Awdi* the claimant was itself a party to the local proceedings, in *Azinian* the US claimants sued in international arbitration for harm allegedly done to their Mexican investment company — the plaintiff in the local Mexican proceedings.[676]

333. In *ELSI*, a Chamber of the ICJ declared admissible a claim of arbitrary conduct brought by the United States on behalf of the American investors in relation to conduct affecting their Italian investment company, though the local proceedings had been brought by the trustee in bankruptcy for the local subsidiary and not by the investors themselves.[677] It follows that it is not determinative that the liquidator appointed by the Claimants (or his successor) did not act on the Claimants' instructions or represent them directly in the Jordanian proceedings.

334. If the Claimants are entitled to bring an international claim for a denial of justice perpetrated on their investment vehicle:

(a) They are not bound by a national court decision if it constitutes a denial of justice under international law, including where that decision is inexcusable because no reasonably competent judge could have rendered it; but

(b) It does not follow that such a decision is irrelevant where the national court proceedings meet the international law standard, not constituting a denial of justice.

335. The Tribunal therefore concludes that this first ground of objection is not well founded and must be rejected.

(ii) Scope of national court proceedings *ratione materiae*

336. The Claimants also object to the application of the *Azinian* principle to the present case on the ground that the Jordanian court proceedings did not have the same scope *ratione materiae,* observing that the claim in the Jordanian courts dealt only with the question whether the Tax Measure was legally imposed under Jordanian law and not with the Claimants' other complaints about the process by which the Measure was imposed, and further evidence has since come to light.[678]

337. The Claimants' observation is correct. How far does it serve to distinguish the *Azinian* principle? The Respondent accepts that the Tribunal is entitled to evaluate in any event the Claimants' case on predetermination and political influence. The *Azinian* principle in this case only goes to the question whether the Tax Measure was arbitrary on the ground that it was not lawfully imposed as a matter of Jordanian law and that the Respondent failed to afford redress for its unlawful conduct.[679] Nevertheless, the Claimants accept that this is the most important issue in the case. This ground of objection does not address the central question of

[676] As the Claimants accepted in response to a question from the Tribunal: T6/86/12-16.

[677] *ELSI* (Ex CL-58 / Ex RL-19), [59]-[61].

[678] CCsl, 49-52; Tr Day 6, 78-83.

[679] See Tr Day 6, 82 :23–83:5.

the relevance of the Jordanian court proceedings in so far as they do rule on the legality of the Tax Measure.

(iii) The *ELSI* concept of arbitrariness

338. Without prejudice to their submission that the concept of arbitrariness is broader than that articulated in *ELSI,* the Claimants submit that, as a matter of international law, the *Azinian* principle is inconsistent with the test of arbitrary conduct applied by a Chamber of the ICJ in that case.[680] The Claimants construe *ELSI* as establishing that each State measure is to be assessed separately for its consistency with the protection from arbitrariness, so that the subsequent decisions of the local courts will not be dispositive as to the character of the original measure. The Claimants parse for this purpose the reasoning of the Chamber.[681] The Tribunal must therefore carefully consider the manner in which the Chamber approached the question before it.

339. The original measure in that case (the Order issued by the Mayor of Palermo for the requisition of the claimant's factory) had been the subject of criticism by the Prefect and Court of Appeal of Palermo. The United States relied on those criticisms as evidence of arbitrary conduct.[682] The Chamber held that it was appropriate for it to consider the grounds advanced in those subsequent decisions in order to assess whether they were equivalent to a finding of arbitrary action.

340. It was in that context that the Chamber observed that:[683]

> the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.

341. In this passage, the Chamber is addressing the reverse position to that which pertained in *Azinian* and in the present case. It is dealing with the effect of local court judgments critical of the original measure as unlawful according to municipal law, not judgments upholding the lawfulness of the measure under municipal law.

342. In any event, the passage does not support the proposition that the Claimants advance. The Chamber finds that, where a measure is subsequently quashed by a local court, it would be absurd if it could 'for that reason, be said to have been arbitrary in the sense of international law'. The necessary implication is that, while the subsequent quashing of a measure might not

[680] CCsl, 53-55; Tr Day 6, 83-85.

[681] *ELSI* (Ex CL-58 / Ex RL-19), [123]-[129].

[682] *ELSI* (Ex CL-58 / Ex RL-19), [123].

[683] *ELSI* (Ex CL-58 / Ex RL-19), [124].

ipso facto remove its arbitrary character, nevertheless the measure must be assessed in the light of its subsequent fate on the municipal plane. The Chamber had already proceeded on the basis that it would consider the reasoning of the local courts in *its* assessment for international law purposes (even though such decisions were not binding upon it).[684]

343. In the present Tribunal's view, if local decisions are relevant where the underlying measure is quashed, they will also be relevant where they have upheld the measure.

(iv) Status of municipal law in international law

344. Finally, the Claimants submit that the *Azinian* principle is inconsistent with the general rules that it invokes on the status of municipal law in international law: (a) the rule that municipal law is to be treated as fact not law in the international sphere; and (b) the rule that '[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law'.[685] The Claimants argue that *Azinian* and the other tribunals that approved its approach did not consider and apply these principles and that the *Azinian* principle is, as a result, not well founded in international law.[686]

345. The general proposition that international law treats municipal law as fact is a corollary of the second principle invoked by the Claimants. It is for international law to determine for itself and in accordance with its own rules the legality of the acts of States. If it were bound as a matter of law by the internal law of the State whose responsibility is invoked, the international tribunal would not fulfil its mandate to judge the conduct of that State by applying international law to the matters before it.

346. Does this principle assist with the resolution of the problem in the present case?

347. *In the first place*, it is not disputed that the Tribunal is to apply an international law standard (being that set forth in Article 3(1) of the BIT, as interpreted in accordance with general international law) to determine whether the Respondent subjected the Claimants' investment to arbitrary conduct. To this question, the decisions of municipal courts cannot be binding upon the Tribunal. Nor is this question answered by reference to internal Jordanian law.

348. *In the second place,* the law applicable to the Tribunal is not simply international law. Article 42(1) of the ICSID Convention provides that:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

[684] *ELSI* (Ex CL-58 / Ex RL-19), [123].

[685] ARSIWA (Ex CL-41), Art 3.

[686] ARSIWA (Ex CL-41); CCsl, 57-67; Tr Day 6:86-98.

349. The Claimants accept in answer to a question from the Tribunal that this requires the Tribunal to characterise the issues before it and to decide which issues are governed by international law and which by national law.[687]

350. They point out correctly that, in the passage cited from the *Azinian* award, the tribunal was concerned with the effect of a local court decision on a question that could only be decided according to national law: the validity of the termination of a contract.[688] This is not an issue that can be determined by international law. A determination by a local court (that is not subject to criticism on grounds of denial of justice) that a contract has been validly terminated may be issue-dispositive, because if there is no contract, the claimant will have no continuing property interest that can form the basis for an international claim of expropriation. That is what the *Azinian* tribunal holds in the second element of the principle as cited above ('For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated'.).[689]

351. The Claimants distinguish the present case on the basis that taxation is a sovereign prerogative and international law can – indeed must – be applied directly to such measures.[690]

352. The Tribunal accepts that there is indeed a difference between the context of the question as it arose in *Azinian* and the present case. In *Azinian,* there was certainly an incidental question that had to be decided according to municipal law, namely whether or not the contract had been validly terminated.

353. Does this distinction exclude the application of the *Azinian* principle in the present context? The decisions in *Awdi* and *Bosca* do not indicate any such limitation. In *Bosca,* for example, the tribunal, while finding that it was not bound by decisions of the Lithuanian courts in making its own assessment of whether the fair and equitable treatment standard had been breached, nevertheless endorsed the proposition that it should give due deference to such decisions unless there was evidence of a denial of justice, which there was not.

354. In the present case, the Tribunal is called upon to decide the international law question of whether the Respondent's conduct breached the treaty standard of protection of investments from arbitrary measures. It is not called upon to determine *per se* the legality *vel non* of the Tax Measure under Jordanian law. Nevertheless, the Claimants invite the Tribunal, as part of its assessment of whether the Tax Measure was arbitrary, to consider whether it had a legal basis under Jordanian law. Both Parties advance very detailed evidence, including many other decisions of the Jordanian courts, on that question. The Claimants' case is not that Jordan had no right to tax the transaction. Rather it is that, properly construed, Jordanian law did not tax the transaction and that the ISTD and the courts misapplied that law. This allegation necessarily requires the Tribunal to assess Jordanian law.

[687] Tr Day 6, 97:13–98:16.

[688] Tr Day 6, 90:1-13.

[689] *Azinian v Mexico* (Ex RL-1), [100].

[690] Tr Day 6, 90:14-24.

355. The fact/law distinction invoked by the Claimants as their first principle under this head does not assist the Tribunal to determine the relevance of the Jordanian decisions relating to the instant case to its task. Nor does it provide a sufficient ground upon which those decisions are to be excluded in its assessment of arbitrary conduct.

356. If the totality of the state's conduct is to be taken into account (as concluded at [317] above), the Tribunal is still obliged to determine the effect of the Jordanian court decisions on whether the underlying Tax Measure was arbitrary. On this question, the first element in the *Azinian* formulation ('A governmental authority surely cannot be faulted for acting in a manner validated by its courts …. *What must be shown is that the court decision itself constitutes a violation of the treaty*') is still applicable.

357. *In the third place,* however the Tribunal treats Jordanian law, it is bound to seek to construe it faithfully in the manner that it would be applied by the higher Jordanian courts. It may not simply disregard the doctrine of the municipal courts and arrive at its own interpretation. The Permanent Court of International Justice so held in *Brazilian Loans*,[691] a decision relied upon by the Claimants on this part of their argument. The Court said:

> Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.
>
> It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.
>
> Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. It this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law.

358. *Brazilian Loans* states a rule about how an international tribunal is to approach a question of domestic law when such a question arises in the course of its decision. The requirement is to take the domestic jurisprudence into account.

359. If this were, as the Claimants submit, the applicable rule, the Tribunal would be bound to 'pay the utmost regard' to the decision of the Court of Cassation at issue in the present case. The Respondent does not contend that the Tribunal is obliged to give *res judicata* effect to the local court decisions in this case. It submits that *Brazilian Loans* requires the Tribunal to approach those decisions with due deference.[692] In this way, it will make 'a just appreciation of the jurisprudence of municipal courts'.

[691] *Brazilian Loans* (Ex CL-252), p 124.

[692] Tr Day 1, 137:21–139:21.

360. *In the fourth place*, however,[693] these cases are not concerned with, and do not establish the dispositive principle in relation to, the effect of municipal court decisions rendered in the context of the very dispute at issue.

361. Where the local court decision is rendered in the instant case, the international tribunal, applying the standards of international law, is obliged to disregard the decision if it comes to the view that it must do so because the claimant has been subject to a denial of justice or that the decision must otherwise be disavowed in application of the applicable international law standards. Further, for the reasons already explained, the decision will not necessarily be finally dispositive of the international law issue.

362. Equally this essential qualification upon the applicability of the local court decision does not justify the Tribunal in departing from the local court decision where it finds that there has been no denial of justice. Otherwise it would set itself up as a further court of appeal on questions of national law.

363. Contrary to the Claimants' submission, this conclusion is consistent with ARSIWA Article 3. It is precisely because the Tribunal is applying an international law standard to judge the conduct of the Respondent that it will determine whether the Claimants have been the subject of a denial of justice in the Respondent's courts. At the same time, a misapplication of national law by those courts that does not amount to a denial of justice will not breach the international standard.

5. Conclusion

364. For these reasons (and subject to the qualifications already noted), the *Azinian* principle is well founded and applicable to the present case.

365. The Tribunal therefore concludes that, in assessing whether the Respondent's treatment of Claimants' investment was arbitrary for the purpose of Article 3(1) of the BIT, it will consider the whole course of Respondent's conduct, taking into account not only the Tax Measure but also the decisions of the Jordanian courts, assessing whether the latter constituted a denial of justice.

366. This finding has the following five consequences:

(a) The Tribunal will not set itself up as a court of further appeal to determine the correctness of the decision of either the ISTD or the Jordanian courts as a matter of Jordanian law.

(b) Rather, it will consider whether the judgment of the Court of Cassation was inexcusable (being one that no reasonably competent court could arrive at) in order to decide whether the Claimants have suffered a denial of justice and thus been subjected to arbitrary treatment.

[693] As Respondent points out Respondent's Closing Skeleton, [9].

(c) The Tribunal will refer to Jordanian law for the purpose of making this assessment, but not for the purpose of substituting its decision for that of the Court of Cassation.

(d) Unless the Tribunal finds that the judgments of the Jordanian courts gave rise to a denial of justice, the consequence will be that the ISTD cannot be faulted for having acted on a construction of the law validated by the courts.

(e) The Tribunal will take its assessment on this issue into account, together with its assessment of the evidence as to whether the Tax Measure was politically motivated and predetermined, in arriving at its overall decision as to whether the Respondent has breached Article 3(1) of the BIT.

D. Was the ISTD's imposition of the Tax Measure predetermined/politically motivated?

367. The second major issue that arises for the Tribunal's decision is whether the ISTD's imposition of the Tax Measure upon UTT was predetermined and politically motivated as a result of political pressure, such that it was taken for an improper purpose other than to apply the law properly.

368. This issue must be addressed as a question of fact upon the Tribunal's appreciation of all relevant aspects of the evidence adduced before it. In this context, the Tribunal is in the fortunate position that it has not only a voluminous documentary file, containing both publicly available documentation and internal Jordanian Government documents, but also the oral evidence of many of the key witnesses.

369. Of particular relevance to this part of the case, the Tribunal had the benefit of hearing oral evidence at the hearing from the following witnesses produced by the Claimants:

(a) Mr Fouad Alghanim, the Chairman and majority shareholder in the First Claimant and the Second Claimant in his own right. He gave evidence as to the reaction in Jordan to the sale of UMC's investment in UTT to Batelco and the levying of the Tax Measure;[694] and

(b) Mr Michael Dagher, a director of and shareholder in UTT. He too gave evidence as to the same matters.[695]

370. Further, the Tribunal heard evidence from the following officials from the Jordanian Tax Department as follows:

(a) Mr Eyad Al Kudah, the Director-General of ISTD between 2004 and 2008;[696]

[694] Witness Statement of Mr Fouad Alghanim, [60]-[63]; Tr Day 2, 1-84.

[695] Witness Statement of Mr Michael Dagher, [68]-[85]; Second Witness Statement of Mr Michael Dagher, [5]-[15]; Tr Day 2, 85-154.

[696] Witness Statement of Mr Eyad Al Kudah, [18]-[33]; Second Witness Statement of Mr Eyad Al Kudah; Tr Day 2, 174-203; Tr Day 3, 13-55.

(b) Mr Musa Mawazreh, the Director of the LTPD between 2006 and 2008;[697]

(c) Mr Ali Almusned, who was in 2006 the Head of the Consultancy Section within the Legislation Department of the ISTD and a member of the 2006 internal ISTD Committee formed to review the taxability of the sale;[698] and

(d) Mr Aktham Batarseh, the assessor in the LTPD, who was a member of the 2008 Assessment Committee that decided that tax was payable on the sale.[699]

371. Each of these witnesses was cross-examined by counsel for the opposing party and also answered questions from the Tribunal.

372. The Tribunal has already set forth in Part III sections D and E above a detailed narrative of the events surrounding the sale of UMC and the subsequent imposition of the Tax Measure. Its purpose now is to appraise that evidence in its significance to the question whether the Tax Measure was imposed for an improper political purpose.

373. The Claimants put their case on the evidence in two ways:

(a) *Events following the sale in 2006.* First, they invite the Tribunal to conclude that the Respondent had already taken the decision to tax UTT's sale proceeds in 2006 at the time when the sale was announced and that it had done so as a result of media and Parliamentary pressure on the Government in view of a public perception of an illegitimate profit on the sale.

(b) *Events leading to the imposition of the Tax Measure in 2008.* Second, the Claimants maintain that the actions of the ISTD leading to the actual imposition of the Tax Measure in 2008 demonstrate that, so far from making a proper determination according to law, the Department was merely following through on the Government's determination to impose a politically motivated tax on UTT rather than making a proper assessment according to law.

1. Events following the sale in 2006

374. *Immediate ISTD reaction to taxability of sale.* There is no doubt that, almost immediately following the completion of the UTT's sale of its shares in UMC to Batelco on 24 June 2006,[700] the Jordanian press voiced criticisms of the deal. The newspaper editorials questioned whether the Government had granted UTT its licence too cheaply in light of the sale price. They went on to suggest that the Government ought at least to condition its approval of the sale on the payment of the requisite tax on the sale.[701]

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[697] Witness Statement of Mr Musa Mawazreh, [12]-[36]; Tr Day 3, 101-151.

[698] First and Second Witness Statements of Mr Ali Almusned; Tr Day 4, 66-105.

[699] Witness Statement of Mr Aktham Batarseh; Tr Day 3, 151-161; Tr Day 4, 15-64.

[700] Share Purchase Agreement dated 24 June 2006 (Ex C-54 / Ex R-199).

[701] 'About Umniah Deal', press report dated 26 June 2006 (Ex C-162); *Al Anbat* 'Who laughs against whom?, 2 July 2006 (Ex C-219).

375. The Press sought explanations from Government Ministers and from responsible officials, including from the Director-General of the ISTD, Mr Kudah.[702] He is quoted as 'an informed source' in the following terms:[703]

> From his side, an informed source at the Income and Sales Tax Department has said that in principle the deal is subject to income and sales taxes, stressing that his Department has not received any documents in relation with the sale process yet. He added that the deal would be handled in accordance with the law, i.e., it will be subjected to tax after studying its tax and accounting file. He regarded it unlikely that the deal be exempted from income and sales taxes.

376. The Claimants allege that this passage demonstrates that, in response to the press criticism, Mr Kudah acted in a 'highly irregular'[704] manner and had predetermined that it would be taxed irrespective of the legal position and despite the fact that any assessment for tax purposes would not be due until at the earliest the following year.[705]

377. There is certainly evidence that the press disclosures placed the Government under pressure. Mr Dagher informed Mr Alghanim, when he sent him a copy of the press report on 30 June 2006, 'Lots of pressure from the government and I have been told by the Minister of trade and industries that we may have to pay an additional 3/1000 for stamp duties'.[706] This sum was levied by the Ministry of Finance on 3 July 2006 and paid by Mr Dagher under protest.[707]

378. The issue for the Tribunal is what effect, if any, that media and political pressure had on the ISTD. Mr Kudah was pressed at length under cross-examination about his statement to the press reported on 30 June 2006. He maintained his evidence that he had not discussed the matter with the Minister of Finance.[708] His evidence that the ISTD was not put under pressure from the Minister of Finance or anyone else in Government[709] was not challenged under cross-examination. He insisted that the answer that he had given did not prejudge the Department's actual assessment of the tax due on the sale, but rather indicated his view only 'in principle' prior to examination of the file.[710]

379. A majority of the Tribunal found Mr Kudah to be a reliable witness and sees no reason to doubt his testimony on this issue, which is consistent with a fair reading of his reported words at the time. His initial reaction does not suggest pre-determination. Rather, Mr Kudah insisted at the time that a decision as to taxability would only be taken 'in accordance with the law' and 'after studying [UTT's] tax and accounting file'.

380. Mr Kudah certainly went on to say that '[h]e regarded it unlikely that the deal be exempted from income and sales taxes'. The Tribunal certainly has reservations about the basis on which

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[702] Umniah Deal…Association of Ideas'", press report dated 30 June 2006 (Ex C-159).

[703] 'Umniah Deal…Association of Ideas', press report dated 30 June 2006 (Ex C-159).

[704] Claimants' Closing Skeleton, [17].

[705] Claimants' Reply, [306].

[706] Ex C-62.

[707] Above at [60].

[708] Tr Day 2, 194:2-4.

[709] Witness Statement of Mr Eyad Al Kudah, [24].

[710] Tr Day 2, 188:15-17.

Mr Kudah felt able to make this statement even expressed in the qualified manner that it is. He readily accepted at the Hearing that he is not and never has been a tax assessor and is not qualified to express a view on the detailed provisions of the Tax Law including the exemption in question.[711] There had been no tax assessment of UTT and one was not due until 2007 at the earliest. Nevertheless, the question whether this statement itself suggests that a decision would be made otherwise than in accordance with the law depends upon whether there was a credible legal basis for the imposition of the Taxation Measure, an issue to which the Tribunal will return when it considers that question in the context of the decisions of the Jordanian courts in section E below.

381. *2006 ISTD internal committee report.* In response to the initial press reports, Mr Kudah formed an internal technical committee within the ISTD to investigate further the taxability of the transaction and to report to him.[712] This Committee included Mr Almusned, who gave evidence before the Tribunal. The Committee reported on 5 July 2006. It concluded:[713]

> From reading the provisions of the Income Tax Law we find that Article (3) stated a general rule of subjecting the income earned within the Kingdom for any person or gained from it. And it asserted on subjecting profits or gains of any source unless it was expressly excluded or exempt by the Tax Law or any other Law.
>
> Therefore, and in principle, the profits of the deal between the two parties are subject to tax, as there was a profit made for the parties who sold their shares and they received an income in the Kingdom, where it is fact in this deal that there was a big difference between the sale price and the net investment value in the sold shares which includes taxable income from the goodwill (shuhra) or the re-evaluating of the right to use the Operating Licence or …… Where as the value of the shares in the capital is about (29) Million Dinars and the value of all the Company's Assets is about (62) Million Dinars while the sale value was about (300) Million Dinars. Deciding what this deal was precisely and stating the legal description requires the review of all the documents relating to the subject including the Sale Contract between the parties.

382. In his written statement, Mr Almusned denies that the 2006 Committee 'reached the view that profits from the transaction between the parties were subject to tax because we were following a "smear campaign" against UTT' or that it was influenced by the media coverage. He deposes: 'The committee only discussed the issue referred to it from a legal and accounting perspective'.[714] Mr Almusned was taken to this paragraph in cross-examination and confirmed it.[715] His evidence on this point was not challenged.

383. A majority of the Tribunal concludes that this internal report does not support a finding of political pressure or pre-determination. On the contrary, it approaches the matter 'in principle' and on the basis of the law. At the same time, it adds the proviso that an actual assessment will require 'review of all the documents'. The Report refers to a distinction between the sale price and what it refers to as 'the net investment value in the sold shares

[711] Tr Day 2, 198:17-21, Tr Day 2, 201:1–202:9.

[712] Tr Day 2, 196:5-19.

[713] ISTD internal memorandum dated 5 July 2006 (Ex C-70 / Ex R-5).

[714] Second Witness Statement of Mr Ali Almusned, [2].

[715] Tr Day 4, 80:8-16.

which includes taxable income from the goodwill (shuhra)' as well as 'the value of shares in the capital…and the value of all the Company's Assets'.

384. As will be seen, this distinction between goodwill and capital was treated as material to the subsequent determinations of both the ISTD and the Jordanian Courts as to the tax treatment of the transaction. It is not necessary at this stage in the analysis for the Tribunal to reach a view as to the tenability of the distinction drawn in the memorandum. It is sufficient to observe that the memorandum is consistent with an assessment, necessarily provisional at that stage given that no tax assessment was then due or could be made, as to the legal basis upon which any such assessment would have to be made.

385. *Parliamentary questions to the Government.* In the meantime, Parliament was seeking further explanations from the Government as to the grant of the UMC licence and the subsequent sale, including its taxability.[716] This led to a number of official enquiries.

386. In September 2006, the Prime Minister formed a Committee comprising a number of persons including Mr Kudah to address four questions that had been raised by the Parliamentary Financial and Economics Committee.[717] The second of those questions was, in relevant part: 'Why was there no imposition of income tax on the (goodwill of the company)'.[718]

387. Mr Kudah accepted, in answer to a question from a member of the Tribunal, that, although it was normal for the Prime Minister to establish a committee of the relevant specialist organs of the State to respond to a question from Parliament, he could not recall another occasion on which such a committee had been formed to consider the affairs of another taxpayer.[719]

388. The Committee reported to the Prime Minister on 15 January 2007.[720] On the relevant portion of the second question that had been raised, the Committee concluded:[721]

> Article 3 of the Income Tax Law No. 57 of 1985, as amended, provides as follows:
>
> a. Income accrued or earned in the Kingdom from the following sources by any person shall be subject to tax:
>
> 7. Key money and goodwill
>
> As regards collecting income tax on goodwill, this claim should be against the sellers who acquire income from goodwill, i.e. the sellers who sold their shares in the Company and generated income in the Kingdom as a result of goodwill. The claim should not be against the Company because the Company has not realized any income from the sale of the shares by the former owners to the current owners. The Income and Sales Department will follow up the collection of the tax dues on the sellers of their shares in Umniah

[716] See above [63]–[65]; in particular, Parliamentary Enquiry No 247 dated 3 July 2006 (Ex. C-68, C-76); Parliamentary Memo No 35 dated 5 July 2006 (Ex. C-203, C-204); Parliamentary Memo No 36 from Financial and Economics Committee dated 6 July 2006 (Ex. C-185).

[717] Ex C-191.

[718] Parliamentary Memo No 36 from Financial and Economics Committee dated 6 July 2006 (Ex C-185).

[719] Tr Day 3, 52:17–53:7.

[720] Ex R-4.

[721] Ex R-4, p 2.

> Company at the end of the year in which the sale was carried out in accordance with the legal procedures set out in the applicable Income Tax Law.

389. *The District Attorney's 2007 investigation.* In March 2007, on further application by members of Parliament to the Speaker of the House, Parliament requested that the Public Prosecutor investigate the grant of the licence to UMC. On 30 October 2007, the District Attorney issued his Report following investigation, which report was approved by the Attorney General.[722] The District Attorney concluded that the licence had been awarded to UMC in accordance with the law and in pursuance of Government policy; that the Government had addressed all Parliamentary questions in a detailed and unambiguous manner and that there was nothing to denote a suspicion of the occurrence of a felony or misdemeanour that warranted prosecution.

390. Mr Alghanim maintained in his witness statement that 'Following the sale of UMC to Batelco, there has been continued hostility against UTT by the Respondent'.[723] Under cross-examination, he accepted the following propositions that were put to him by counsel following a review of the press and Parliamentary objections and the District Attorney's report:[724]

> Q. In fact, what is really happening is that certain concerns have been expressed about the issue of the licence to UMC, and we see that in certain of the press reports, and the Jordanian Government then acts to verify that there were no irregularities in the issue of that licence, and it concluded that there was no irregularity.
>
> A. Correct.
>
> Q. And that treatment is entirely what you would expect, isn't it?
>
> A. Correct.

391. A majority of the Tribunal concludes from its review of this material that it does not serve to establish that the Government had pressured the ISTD to tax the transaction regardless of the law. Rather, in responding to questions from Parliament, the Government had acted to be able to assure itself and Parliament that the original grant of the licence had been in accordance with the law and as to the proper basis on which any tax consequences were to be determined. The Tribunal accepts that it was unusual, even unprecedented, that a Prime Ministerial Committee should be asked to consider the taxability of a specific transaction as part of its remit. It finds however that this follows from the nature of the questions that the Press and Parliamentarians were asking. It is understandable that a Prime Minister should then seek to inform himself as to the tax position in relation to the transaction.

392. The Committee's view on the legality of the grant of the licence was then also confirmed by the District Attorney in an independent investigation requested directly by Parliament.

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[722] Ex C-84.

[723] Witness Statement of Mr Fouad Alghanim, [60].

[724] Tr Day 2, 60:3-13.

393. In the view of a majority of the Tribunal,[725] these steps are all consistent with a State conducting itself according to basic principles of constitutional government and the Rule of Law.

394. The specific passage in the Committee Report dealing with tax addresses a specific question as to the collection of tax on goodwill raised by Parliament. It confirms that tax is payable on goodwill by the sellers and that the ISTD will follow up once that tax becomes due 'in accordance with the legal procedures set out in the applicable Income Tax Law.'

395. In the Tribunal's opinion, this passage is consistent with a decision to apply the law, not a decision to proceed to collect a tax irrespective of the provisions of the law.

396. Accordingly, a majority of the Tribunal does not find in the events of 2006-2007 that the Respondent acted in an arbitrary manner *vis-à-vis* the Claimants' investment by deciding to impose a tax on the sale irrespective of the provisions of the law in response to press or political pressure.

397. Arbitrator Fortier has come to a different conclusion on the significance of the political events. He explains his view of the matter in his Separate Opinion. In view of the fact, however, that he agrees with the Tribunal's analysis of the position at international law *vis-à-vis* the decisions of the Jordanian courts, he joins in the Tribunal's *dispositif.*

398. It is now necessary to consider the process by which the ISTD in fact imposed the Tax Measure in 2008.

2. Events leading to the imposition of the Tax Measure in 2008

399. *UTT's tax returns.* Pursuant to Article 26(a) of the 1985 Tax Law, at least if UTT had a source of taxable income, it would have been required to submit a tax return in respect of the year to 31 December 2006 by 30 April 2007. It is common ground that UTT did not file any tax returns from the time of its establishment. The Claimants say that this is because it was a holding company that did not produce income; the Respondent contends that all companies must file an annual return whether or not they are income producing or a mere holding company.[726] It is not necessary for the Tribunal to resolve this point. The simple fact is that UTT did not file a return setting forth its statement of its tax position.

400. *UTT's annual company returns.* Moreover, UTT was not up-to-date with the filing of its Annual Returns, including financial statements, with the CCD. It did not file any set of financial returns until filing its 2005 Financial Statements (dated 29 October 2007) on 27 January 2008.[727] The CCD responded on the same date by requesting statements for the period 2003-2007.[728] This exchange initiated internal memoranda within the CCD and further correspondence with UTT. It was not until 5 March 2008 that UTT filed with the CCD a copy of the Minutes of the

[725] Arbitrator Fortier takes a different view of this aspect of the matter, for the reasons explained in his Separate Opinion.

[726] Above at [72]-[73].

[727] Ex R-8.

[728] Ex R-7.

Extraordinary General Meeting (**EGM**) of 22 June 2006 that had authorised the sale of its interest in UMC to Batelco and the related reduction of share capital and payments to shareholders.[729]

401. Three days later, on 8 March 2008, UTT held another EGM at which the shareholders decided to place the Company into voluntary liquidation.[730]

402. On 19 March 2008, UTT filed its Financial Statements for the year ended 31 December 2006 (the year of the sale), together with the auditor's report thereon dated 3 November 2007.[731]

403. In its internal report of 31 March 2008, the CCD noted the sale and the opinion of the management and the auditors that no tax was payable on the sale.[732] The CCD concluded that the proposed reduction in capital as a result of the shareholders' withdrawals did not appear to be justified by the company's balance sheet.[733] On 14 April 2008, the CCD directed UTT to file financial statements for 2007 so that the Department could ascertain the up-to-date position and consider UTT's request for a decrease in the Company's capital.[734]

404. *The 2008 tax assessment.* It is against this background that Mr Mawazreh, Director of the LTPD at ISTD, decided on 15 April 2008 to form a committee of three assessors (the **2008 Assessment Committee**), including Mr Batarseh, to assess and audit UTT and UMC for income and sales tax for all unassessed years until the end of 2006.[735]

405. Mr Mawazreh was unable to recall or explain precisely why it was that the matter of UTT's tax assessment for the period to 31 December 2006 came to his attention, resulting in the appointment of the assessment committee in April 2008, rather than in 2007, when (in the view of the Department) UTT failed to file a tax return as it ought to have done. In oral evidence in answer to the President's question, he accepted that '[i]n reality, I don't know why this didn't happen after 30 April or 30 May or 30 June 2007'.[736]

406. The Tribunal finds that the most likely explanation for the ISTD's formation of an assessment committee on 15 April 2008 was the shareholders' decision to place UTT into voluntary liquidation and its belated filings with the CCD that disclosed the proposed capital reduction. If tax were due on the disposal, the ISTD would have to assess it and issue an assessment notice before the company was wound up and the opportunity to claim the tax was lost. This is consistent with the ISTD's letter of 21 April 2008 (signed by Mr Mawazreh on Mr Kudah's behalf) to CCD informing the Companies Controller that UTT had not filed its tax returns and

[729] Ex R-11.

[730] Ex C-95.

[731] Ex R-13.

[732] Ex R-15, p 3.

[733] Ex R-15, pp 5-6; and see Minutes from the Director of Financial Control dated 1 April 2008 (Ex R-181).

[734] Ex C-104 / Ex R-17.

[735] Ex C-106 / Ex R-28.

[736] Tr Day 3, 141:3-4.

requesting him not to approve the liquidation until the CCD had obtained the ISTD's clearance.[737]

407. The 2008 Assessment Committee's working paper, the Form for Auditing Annual Tax Returns and Assessment Decisions, for UTT was completed between 24 and 28 April 2008.[738]

408. The Committee minuted its Decision on 30 April 2008.[739] It found, in relevant part:

> On 26/6/2006, [UTT] sold its entire *ashom* shares as amounted to 18717600 *ashom* share which represents the cost of investment in [UMC] and which is equivalent to 66% of its capital to [Batelco] for an amount of 207,382,500 Jordanian Dinars.
>
> …
>
> There is no clear address for the company in order to audit its accounts. The balance sheets of the Company were obtained from the Ministry of Industry and Trade/Company Control.
>
> …
>
> Given the above, the Commission sees that the amount realized from the share sale profits which is the share of the company above in [UMC] represents goodwill resulting from the husas shares sale transaction in [UMC] where there is a large difference between the sale price and the investment cost and this difference represents goodwill.

409. The Committee then assessed UTT's taxable income on the basis of the net income declared in the accounts (after some adjustments not material for present purposes) at JD 188,682,338, resulting in income tax at 25% of JD 47,170,584 + an additional tax penalty as a result of not submitting a tax return of 22% of that sum, namely JD 10,377,528. On the same date, it issued a notification to UTT (the **Tax Measure**) estimating UTT's income and the tax due thereon.[740]

410. As further grounds upon which the Claimants base their claim that this Tax Measure was arbitrary, they allege that it was reached in undue haste and that UTT was effectively prevented from being heard, as the ISTD made inadequate attempts to contact UTT's representatives.[741]

411. The Tribunal has set forth in some detail at paragraphs [77] to [82] above the evidence that was given about this by both Parties. Mr Batarseh, a member of the Assessment Committee, gave evidence before the Tribunal about the Committee's working procedures. He was cross-examined at length about this, and in particular about the time taken to make the assessment and the Committee's efforts to contact UTT. The Tribunal found him to be a careful witness that gave consistent evidence about the manner in which the Committee worked.

412. The Tribunal has concluded that the ISTD cannot be said to have acted in an arbitrary manner in the way in which it carried out the tax assessment. The facts are that UTT had not filed any

[737] Ex C-107; Tr Day 3, 35:10-18 (cross-examination of Mr Eyad Al Kudah); Tr Day 3, 149:7–150:150-10 (cross-examination of Mr Musa Mawazreh).

[738] Ex C-224.

[739] Ex C-109 / Ex. R-30.

[740] Ex R-31.

[741] Second Witness Statement of Mr Michael Dagher, [8]-[15].

tax returns. Its position[742] was that it was not liable to tax on the sale proceeds and that, since it had not generated any taxable income it was not required to file a tax return. The result was that, if the ISTD took a different view, it would have to proceed on the basis of information that it collected. This was a step provided for by Article 30 of the 1985 Tax Law which provides:[743]

> In the instances where the taxpayer has not submitted the Return as provided in Article (26) & (27) of this law at the dates specified therein, the assessor shall conduct the assessment on that Taxpayer in the light of the information available to him and he shall notify him a notice of the Tax due on him.

413. The Claimants complain that the ISTD did not utilise all of the external information that might have been available to it.[744] The Tribunal finds that the ISTD acted reasonably in the circumstances in obtaining from the CCD UTT's financial information, including its 2006 Accounts that the Company had just filed one month previously.

414. The Tribunal would make two observations as a matter of common sense about these complaints: the first as to the significance of the voluntary liquidation and the second as to the nature of the assessment.

415. On 8 March 2008, UTT had decided to place itself into voluntary liquidation, notice of which was filed on 20 April 2008. As Mr Batarseh fairly observed in his statement, this fact 'required the committee to proceed … without delay'.[745]

416. The Claimants complain that insufficient effort was made to contact the Company's representatives. They do not contest the facts that ISTD did contact the representative who had been registered on the CCD file (Ms Sabra), who declined to assist, and Mr Zaarour, the voluntary liquidator, who was out of the country and said that he would attend to the matter on his return. Once the shareholders had decided one month previously on 8 March 2008 to place UTT into voluntary liquidation, it was surely incumbent upon UTT to ensure that the liquidator was available to represent the Company in its dealings with the Jordanian regulatory authorities. In the absence of a tax return filed by the taxpayer, the assessor is empowered by Article 30 of the 1985 Tax Law to conduct his assessment 'in light of the information available to him'.[746] It is only at that point that the assessor is obliged to notify the taxpayer by notice (as to which the provisions of Article 25 as to service of notices apply).

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[742] Supported by legal opinions that it had obtained from Jordanian counsel in September 2007: Ex C-91 / Ex R-144; Ex C-92; Ex C-93.

[743] Ex C-6.

[744] CCsl, 99, citing Ex C-227.

[745] Witness Statement of Mr Aktham Batarseh, [4].

[746] Claimants refer to the section of the ISTD internal memorandum (Ex C-227) dealing with administrative assessments in the case of a failure to provide a tax return. This memorandum sets out a number of pieces of information that an assessor may take into consideration in reaching his assessment. The Tribunal does not regard these steps as mandatory or as qualifying the general words of Article 30. Accordingly, a failure to follow any one or more of the steps there set out is not of itself arbitrary conduct.

Following due service, the taxpayer is entitled under Article 31(c) to object to the assessment.[747]

417. The second point is that the assessment that ISTD had to conduct was not complex. UTT had not produced any income in the years prior to 2006. In 2006, it reported one very significant item, namely the proceeds of the sale of its shares in UMC to Batelco. No doubt there was (and is) a diametric opposition of views between UTT and ISTD about the taxability of those proceeds. This does not in itself call into question the procedure that the ISTD adopted up to the notice of assessment, provided that there was a proper opportunity for the taxpayer to contest the assessment according to the law.

418. It is not disputed that Jordanian law provided for such an opportunity, first by administrative objection and then by appeal to the Tax Court of Appeal and ultimately to the Court of Cassation. As detailed in paragraph 83 above, UTT pursued these avenues of appeal. The Tribunal will consider the question whether in international law terms, they amounted to a denial of justice in the next section.

419. At this stage in its analysis, the critical question for the Tribunal is whether the evidence demonstrates that the Assessment Committee was motivated by considerations other than a proper application of Jordanian tax law in arriving at and imposing the Tax Measure.

420. Mr Batarseh deposed in his statement:[748]

> I confirm that neither I nor my two colleagues on the assessment committee imposed the tax for any reason other than the law required to do so. That was our job. We are tax assessment professionals, and my colleagues and I take our duties very seriously. We certainly did not take any political considerations into account when conducting our assessment.

421. He confirmed this statement orally before the Tribunal.[749] His evidence on this point was not challenged.

422. The Tribunal finds that the Tax Measure itself was not an arbitrary measure in the sense of being imposed for reasons other than a proper application of the law.

423. This does not, however, conclude the analysis. The question whether the Tax Measure was properly imposed under Jordanian law was contested by UTT in the Jordanian courts, but ultimately upheld by the Court of Cassation. As the Tribunal has already found, the Measure might still be found to be arbitrary as a matter of international law if and to the extent that the decision of the Court of Cassation was inexcusable, being one that no reasonably competent judge could make.

424. *The claim of discrimination.* Before approaching this issue, the Tribunal must conclude this section by dealing briefly with the question whether the Tax Measure was discriminatory for the purpose of Article 3 of the BIT. The Claimants' claim in this respect was that the tax

[747] Ex C-6.

[748] Witness Statement of Mr Aktham Batarseh, [12].

[749] Tr Day 3, 153:19–154:11.

treatment accorded to the sale of shares in private shareholding companies – even if it were valid as a matter of Jordanian law – was discriminatory because it drew an unjustified distinction between such companies and the sale of shares in other companies, which were not subject to tax; they also maintain that companies in the telecommunications sector specifically were the subject of discrimination.[750]

425. The Claimants do not in this case allege that they were targeted because of their Kuwaiti nationality. A member of the Tribunal specifically asked Mr Alghanim about this and he replied 'I don't want to accuse anybody of this'.[751]

426. The substantive protection from discrimination in investment treaties fulfils an important function in proscribing, as the *Waste Management II* tribunal observed, conduct that is 'discriminatory and exposes the claimant to sectional or racial prejudice'.[752] This element in the standard does not, however, require an international tribunal to undertake a substantive review generally of distinctions drawn in domestic law between different categories of persons, which distinctions are not drawn on such prejudicial grounds. A common feature of tax laws is to draw precise distinctions between different forms of corporate organisation and transactions in terms of their taxability. This does not in itself constitute discrimination. Accordingly, this element of the Claimants' claim must also be rejected.

E. Was the decision of the Jordanian Court of Cassation inexcusable?

427. The Tribunal turns finally to consider the decisions of the Jordanian courts – in particular that of the Court of Cassation as the final court of appeal – in light of the treaty standards.

428. *The Tribunal's approach.* It recalls its earlier analysis in section C above, which led it to apply the *Azinian* principle that '[a] governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level'.[753]

429. It summarised the consequences relevant to this part of the enquiry as:[754]

(a) The Tribunal will not set itself up as a court of further appeal to determine the correctness of the decision of either the ISTD or the Jordanian courts as a matter of Jordanian law.

(b) Rather, it will consider whether the judgment of the Court of Cassation was inexcusable (being one that no reasonably competent court could arrive at) in order to decide whether the Claimants have suffered a denial of justice and thus been subjected to arbitrary treatment.

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[750] Above [256].

[751] Tr Day 2, 79:10.

[752] *Waste Management II,* [98] (Ex. RL-10).

[753] *Azinian v Mexico* (Ex RL-1)*,* [97].

[754] Above [366].

(c) The Tribunal will refer to Jordanian law for the purpose of making this assessment, but not for the purpose of substituting its decision for that of the Court of Cassation.

(d) Unless the Tribunal finds that the judgments of the Jordanian courts were a denial of justice, the consequence will be that the ISTD cannot be faulted for having acted on a construction of the law validated by the courts.

430. It is important to keep these parameters in mind. Both Parties accepted that the Tribunal is not a court of further appeal on matters of Jordanian law. Yet the Tribunal was invited to consider detailed expert evidence and supporting authorities adduced by both Parties about Jordanian law and tax practice (and indeed also about international tax practice).

431. The experts who filed opinions and were examined at the hearing were:

(a) For the Claimants:

(i) Dr Ahmad Masa'deh of the Jordanian Bar;[755]

(ii) Mr Mohammed Al-Akhras, a Jordanian tax expert;[756] and

(iii) Ms Pam Jackson, an international tax expert.[757]

(b) For the Respondent:

(i) Mr Nabil Rabah of the Jordanian Bar;[758]

(ii) Mr Rafiq Dweik, a Jordanian tax expert;[759] and

(iii) Ms Kate Alexander, an international tax expert.[760]

432. The Tribunal will examine this evidence for the purpose, and to the extent, that it helps to illuminate the question for it, which – to repeat – is not the correctness *vel non* of the decision of the Jordanian courts as a matter of Jordanian law, still less the reasonableness of the distinctions actually drawn in the substantive provisions of Jordanian law. Rather the Tribunal is tasked with answering the very different question of whether the decisions were ones that no reasonably competent court applying Jordanian law could have come to.

433. In this regard, it is no disrespect to the very considerable specialist expertise provided to the Tribunal to observe that the nature of the Tribunal's task means that it is principally interested

[755] Expert Report of Dr Ahmad Masa'deh; Second Expert Report of Dr Ahmad Masa'deh; Third Expert Report of Dr Ahmad Masa'deh; Tr Day 4, 105-184, Tr Day 5, 1-97.

[756] Expert Report of Mr Mohammed Al-Akhras; Second Expert Report of Mr Mohammed Al-Akhras; Tr Day 5, 184-195.

[757] Expert Report of Ms Pam Jackson; Second Expert Report of Ms Pam Jackson; Tr Day 5, 217-231.

[758] Expert Report of Mr Nabil Rabah; Second Expert Report of Mr Nabil Rabah; Third Expert Report of Mr Nabil Rabah; Tr Day 5, 98-183.

[759] Export Report of Mr Rafiq Dweik; Second Expert Report of Mr Rafiq Dweik; Tr Day 5, 196-216.

[760] Expert Report of Ms Kate Alexander; Second Expert Report of Ms Kate Alexander; Tr Day 5, 232-250.

in the legal provisions themselves and their application in the instant case by the Jordanian courts against the background of prior Jordanian legal authority.

434. *The 1985 Tax Law.* At the heart of this question lie two provisions of the 1985 Tax Law[761] – a taxing provision and an exemption:

(a) The *taxing provision* is Article 3.A, which provides in relevant part that:

> Income accrued or earned in the Kingdom from the following sources by any person shall be subject to tax–:
>
> …
>
> 7. Consideration for vacancy, key-money, and goodwill.
>
> …
>
> 12. Profits or gains from any other source…which have not been granted an exemption under this law or any other law.

(b) The *exemption* that is in issue is Article 7.A.15.a, which provides in relevant part that:

> It shall be totally exempt from tax:
>
> …
>
> 15.a. *Capital gains, profits accrued from the buying and selling of lands, real estate, shares and bonds shall be considered part of these capital profits* except for gains resulting from sale or transfer of ownership of assets included in the rules of depreciation stipulated in this law, provided that the losses arising from the sale or transfer of ownership of such assets included by the rules of depreciation are deducted if they are realized. For the purposes of this law, this loss shall be determined to be equal either to the depreciation deducted for the purposes of this law or the incurred loss whichever is less.

435. UTT's essential ground of challenge to the Tax Measure before the Jordanian courts was that its profit on the sale of its shares in UMC was an exempt capital gain as 'profits accrued from the … selling of … shares' within the meaning of Article 7.A.15.a. It was not taxable '[p]rofits or gains' earned in the Kingdom from 'goodwill'.

436. The Tribunal has summarised the steps taken by UTT to challenge the Tax Measure in Part III Section F above. Each of its appeals was rejected, concluding with the judgment of the Court of Cassation on 25 April 2012.[762]

437. In view of the fact that the Claimants' objection before this Tribunal is as to the substance of the decision arrived at, the Tribunal will focus its consideration on the reasoning adopted by the Court of Cassation, the final court of appeal within the Jordanian legal system.

[761] Ex C-6 (emphasis added).

[762] Ex C-128.

438. *Court of Cassation judgment.* After reciting the procedure, UTT's grounds of appeal and the facts of the case, the Court of Cassation continued:[763]

> The realized income was considered as commercial profits realized in return of goodwill, and the profits realized from the goodwill income is what a company may obtain moral value in a given market resulting from a number of elements leading to the increase in the company value in the market, such as good reputation with clients or the quality of services and the concession;
>
> The income realized from goodwill is assessed by deducting the sale consideration from investment cost, and it is difficult to separate goodwill from the company upon its sale or transfer or merger;
>
> the jurisprudence of the Court of Cassation is e[s]tablished that goodwill is considered commercial profit accumulated during the life of the enterprise[[764]]
>
> …
>
> Looking back at the submitted evidence, it appears from that the Claimant did not submit any proof evidencing that these profits are not consideration for goodwill;
>
> It also appears to us that the Claimant is a limited liability company and that its contribution to the capital in this company is *husas* shares that are not tradable on the stock exchange….

439. The Court proceeded to cite the pertinent provisions of the Companies Law before concluding:[765]

> Therefore, the sale of the *husas* shares of the limited liability company is a commercial act.
>
> Whereas Article 7 of the Income Tax Law provides specifies the following:
>
> *a- It shall be totally exempt from tax*
>
> 1.5/1 Capital profits, profits accrued from the buying and selling of lands, real estate, shares and bonds shall be considered part of these capital profits.
>
> It is understood from this text that what is intended by the exempted *ashom* shares are the *ashom* shares of shareholding companies and the *ashom* shares issued by the government which are tradable and which sale or trading in is not deemed a commercial act, while the profits realized from the sale of the partners *husas* shares in a limited liability company is not excluded from income tax because the sale relates to *husas* shares which are sold by virtue of the method specified in accordance with Article 73 of the Companies Law and the profits realized by the Appellant are profits in consideration of goodwill arising from the sale of *husas* shares in a company providing services throughout the Kingdom and which obtained the concession right to invest in the field of telecommunication.

440. The central reasoning of the Court is that the exemption in Article 7.A.15.a for profits accrued from the selling of shares applies only to profits made from selling publicly traded shares on the Stock Exchange. Where, by contrast, the sale is of shares that may not be publicly traded

[763] Ex C-128 (in the agreed translation between the Parties: Annex B to the Parties' letter dated 12 May 2016).

[764] The Court referred in support to its decision in Case No 132/2011 dated 19 May 2011 (the *Rowwad* decision).

[765] Ex C-128 at CB2/453 in the Official Translation of 31 May 2016.

and the sale price includes an element of goodwill, that portion will be taxable under Article 3.A.7.

441. Was this an inexcusable decision that no reasonable court applying Jordanian law could come to?

442. *The question of interpretation.* As a general proposition (not specific to Jordanian law) the value of a share in a company may well include not only the material assets of the company but also an element in respect of goodwill, that is to say: a valuation of the portion of the internally-generated value of the share in the company represented by the reasonably-to-be-expected future economic benefits arising from the company's business as opposed to assets that can be separately identified and recognised.[766] It is upon the sale of a share in the company that any valuation of the goodwill will be tested, since the buyer is acquiring a share in an ongoing concern and not merely a share in a set of specific assets.

443. That the price of UTT's sale of its shares in UMC to Batelco included such a goodwill element is supported by the fact that Batelco included a sum in respect of such goodwill on the sale when it produced its Consolidated Accounts after the acquisition.[767]

444. The 1985 Tax Law provides that goodwill is included amongst income that is subject to taxation. At the same time, it exempts capital gains and provides that 'profits accrued from the buying and selling of … shares and bonds shall be considered part of these capital profits'.

445. There is, in the Tribunal's view, and irrespective of the actual decision of the Court of Cassation in the instant case, an apparent tension between these provisions of the Jordanian law. Such a tension is not unusual in tax legislation generally, since a common legislative technique in taxing statutes is for the legislator to impose taxes in one operative provision and then carve out exemptions from that which would otherwise be taxable in an exemption provision.

446. Such an apparent tension can only be resolved by seeking to apply to both provisions a good faith interpretation that gives each provision an *effet utile* in light of their legislative history and context and the manner in which the provisions have been interpreted by the Court of Cassation prior to this case.[768]

[766] IFRS 3 (2015) App A defines goodwill as: 'An asset representing the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognised.': Expert Report of Ms Kate Alexander, Ex EY-36; Expert Report of Ms Pam Jackson, App 1, [38]-[39]; Expert Report of Ms Kate Alexander, [2.1.15] & App C.

[767] Note 8 to these Accounts listed the total consideration for the purchase of UMC (in '000 Bahrani Dinars) as 156,849, the fair value of the assets acquired as (32,469) and goodwill as 124,380. It stated: 'The goodwill is attributable to the growth prospects of the acquired business and the significant synergies that are expected to arise after Batelco's acquisition of Umniah': Ex C-158, p 46.

[768] The question of the proper approach to interpretation of taxing statutes under Jordanian law was a matter of some debate between the experts, summarised at [145]-[150] above. In the end, the Tribunal does not consider that it is necessary to resolve all aspects of this debate in order to resolve the questions before it.

447. *The relevant context under Jordanian law.* The exemption on which the Claimants rely, Article 7.A.15.a, was enacted in its current form in 1995[769] (and last amended in 2001).[770] The Arabic word for shares used in that paragraph is '*ashom'.*

448. The Tribunal has recounted in detail in paragraphs [138] to [140] above the evolution of the relevant provisions of the Companies Acts.

449. For present purposes, the relevant point is that the precise form of company adopted for UMC–the private shareholding company limited by *ashom* shares–was only re-introduced into Jordanian company law by an amendment to the Companies Law in 2002.[771] Between 1989 and 2002, the only form of capital-based company constituted by *ashom* shares was a public shareholding company, whose shares could be traded on the Jordanian Stock Exchange.

450. The 2002 Companies Law provided for the possibility that the shares in this new version of the private shareholding company could be publicly listed and traded. The Claimants explained in their submissions that this provision was introduced, and the expression '*ashom'* shares used, so as to facilitate equity stock option schemes for workers and to facilitate the exit of such companies on the capital market.[772] But it is common ground that these provisions have not been given effect and that private shareholding companies are not currently traded on the Amman Stock Exchange.

451. Therefore in 1995, when the exemption in Article 7.A.15.a was introduced into the Tax Law, the only persons that could take advantage of the specific exemption for gains on the selling of *ashom* shares were those persons that held shares in public shareholding companies.

452. By contrast, Jordanian law has, since the inception of the 1964 Companies Law, recognised a category of company originally called the ordinary company.[773] It is common ground that such a company has a corporate personality, separate from that of the partners that hold shares in it, and that it is the company and not the partners in it that own the company's assets.[774]

453. It is also common ground that, upon the sale of his share (for which the Arabic word is '*husas'*), the shareholder or partner in such a company would be liable to tax on the goodwill element in the sale price of their share constituted by the difference between the fair market price of the underlying assets and the actual sale price.[775]

[769] Amending Income Tax Law No 14 1995, Art 4 (Ex AM1, App 2, No 5).

[770] Amending Income Tax Law No 25 2001 (Ex AM1, App 2, No 6).

[771] Arts 66(a)(*bis*) & Art 83(c) 2002 Temporary Amending Companies Law (Ex NR1, App 6, No 13).

[772] Tr Day 1, 60:9-16.

[773] Part One, Companies Law No 12 1964 (Ex AM1, App 2, No 12).

[774] Tr Day 5, 44:3-11; Tr Day 5, 45:6-12 (cross-examination of Dr Ahmad Masa'deh).

[775] Second Expert Report of Dr Ahmad Masa'deh, [6.18].

454. This is what the Court of Cassation decided in a consistent line of cases.[776] Characteristic of this reasoning is the following passage from the *Hamdan* decision:[777]

> [T]he owners of the Ordinary Company sold 60% of the Ordinary Company's Hussa shares …. They received 930,000 JOD as the sale price of the sold Hussa shares and this amount represents the estimated value of the Hussa shares aforementioned, in addition to consideration for goodwill.
>
> The Assessor for Income Tax did not charge the Appellants except for on the amount representing Goodwill.
>
> And this amount is subject to tax, in accordance with Article 3 paragraph (a) item (1) which subjects the Income generated from the profits or gains from any transaction or separate deal that is considered as business or trade for the reason that goodwill consideration is only a commercial gain accumulated during the life of the establishment and was received by its owne[r] upon the sale.
>
> Whereas the increase in the share's value which is the difference between the book value of these shares and the value as estimated on the date of the sale, and therefore is not taxable as it is considered a Capital Gain pursuant to Article 7 a 11 of the Income Tax Law.

455. The position was the same in relation to the original form of private shareholding company established under the 1964 Companies Law and maintained until its replacement by the limited liability company in 1989. The shares in such companies were referred to in the legislation as *'ashom',* but they could not be publicly traded.

456. The Court of Cassation held in its decision in *Ghassan Dhamen*[778] that the sale of Mr Ghassan's share in the Al-Amal Company[779] included an amount in respect of goodwill and that 'the amounts that were subjected to tax are the consideration for goodwill and consideration for goodwill is part of the profits and as such is taxable because it is profits'.

457. The position is also the same where what is sold is a share in a limited liability company – the form of corporation established under the 1989 Temporary Companies Law in place of the original type of private shareholding company and continued even after the 2002 reforms. Such shares were referred to in the legislation as *'husas'* shares and could not be offered publicly.[780]

458. This was confirmed by the Court of Cassation in *Rowwad*,[781] a case that also involved the sale of shares in a company operating a telecommunications business in Jordan. The Court held that 'whereas goodwill represents a source of income as per Article 3/a/7 of the income tax law, then subjecting it to tax agrees with the provisions of the Law'. The Court went on to

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[776] *Daoud Al-Issa* (Ex C-11 / Ex R-85); *Hamdan* (Decision) Court of Cassation Case No 727/1992 (1992) (***Hamdan***) (Ex C-12 / Ex R-86); *Arab Public Shareholding* (Ex AM1, App 3, No 15).

[777] Ibid.

[778] *Ghassan Dhamen* (Decision) Court of Cassation Case No 1956/2003 (2003) (Ex R-87). Claimants submit that in reality this case involved a transfer of the underlying assets of the company and not of shares, and that the Court of Cassation approached the matter on the basis that it did in view of the approach taken by the company's auditor: Tr Day 1, 61-67. The Tribunal considers that the judgment stands as authority for the proposition for which it is cited above.

[779] Claimants accept that this had been established as a private shareholding company under the 1964 Law: Tr Day 1, 59-60.

[780] Temporary Companies Law No 1 of 1989 (Ex AM1, App 2, No 13), Arts 54 & 56. UTT itself is such a company.

[781] *Rowwad* (Decision) Court of Cassation Case No 132/2011 (2011) (Ex C-174 / Ex R-105).

reject an argument that this goodwill was not owned by the ultimate shareholder. It held that as Rowwad 'owns *husas* shares in Bella, which in turn owns husas shares in Fastlink [the operating company]. Therefore, goodwill belongs to [Rowwad] (Appellant), since it owns the largest shares in the Company from which goodwill is realized'.

459. What, then, is the position where the sale is of *'ashom'* shares in a private shareholding company established under the 2002 Companies Act? Does the exemption under Article 7 apply to exempt the whole of the sale proceeds of shares in a private shareholding company from tax, even if part of the value of those shares is represented by goodwill in the company, or is the exemption limited to profits from *'ashom'* shares publicly traded on the Jordan Stock Exchange?

460. Prior to the decisions of the Jordanian courts in the instant case, the Tribunal has not been referred to any judicial authority or authoritative commentary directly on point either way.

461. The Tribunal is not itself charged with answering this question of Jordanian law itself. It must only consider whether the decision arrived at by the Court of Cassation was one that no reasonably competent court could have reached.

462. *The Claimants' criticisms.* The Claimants allege that the judgment 'is full of serious mistakes that no competent judge would have made'.[782] They say specifically that:

(a) The judgment wrongly shifted the burden of proof from the ISTD onto the taxpayer and failed to ensure that ISTD had identified and correctly calculated a source of income;

(b) It rejected the application of the exemption based on the manner by which UTT's shares (not UMC) are sold thus focusing on the wrong company;

(c) It imposed a requirement of a non-commercial act for share sales not found in Article 7.A.15.a; and,

(d) It wrongly held that UTT's profit came from consideration for the transfer of goodwill, and did so on the basis of an illogical connection between the type of services provided by UMC and the definition of goodwill.

463. The Tribunal has carefully reviewed the judgment of the Court of Cassation. The Court's reasons are expressed in compressed form. This in itself is not unusual for a judgment rendered by a Court in the Civil Law system. Considering each of the Claimants' points in turn:

(a) The Tribunal does not read the judgment as shifting the burden of proof. In the passage cited by the Claimants, the Court observes that '[l]ooking back at the submitted evidence it appears from that the Claimant did not submit any proof evidencing that these profits are not consideration for goodwill'.[783] The Tribunal has

[782] CCsl, 137-140.

[783] Ex C-128, CB2/452.

already found above that, since UTT did not submit a tax return, the ISTD was entitled under the 1985 Tax Law to proceed to make an assessment on the basis of the information that it was able to obtain. Dr Masa'deh, the Claimants' expert, accepted that, if a taxpayer wished to contest the assessment, the taxpayer bears the burden of proof to establish the basis for his contention.[784]

(b) The Tribunal does not consider that the Court confused the position of UTT with that of UMC. When the Court states: 'the Claimant is a limited liability company and that its contribution to the capital in this company is *husas* shares that are not tradable on the stock exchange',[785] the Court's reference to the 'its contribution to the capital of this Company' is, when read in the context of the preceding paragraph, a reference to UTT's shares in UMC. It is these shares that were the subject of the sale and of the Tax Measure. It is correct that UTT's shares in UMC were not tradable on the Exchange. The Court's substantive reasoning is clear and does not depend on the particular term used.

(c) The Court introduces the concept of 'commercial act' as part of its explanation of the reasons in principle for a distinction between what it rules to be tax exempt gains from publicly traded shares and non-exempt gains from goodwill made by commercial companies. This is a matter of the proper construction of the statute. It cannot, in the Tribunal's view, be characterised as incompetent or inexcusable.

(d) The Court's reference to UTT's profit from the sale of its shares as arising from the sale of shares 'in a company providing services throughout the Kingdom and which obtained the concession right to invest in the field of telecommunication' establishes the predicate for the requirement under Article 3.a.7 referenced in the next sentence for 'income accrued in the Kingdom' from, inter alia 'goodwill'. It does not introduce an irrelevant element.

464. As a result, the Tribunal does not find that, on a fair reading of the text, the Court's reasoning contains 'numerous serious mistakes', as the Claimants contend.

465. The Claimants emphasise that UTT's shares in UMC were *'ashom*' shares – the expression used in Article 7.A.15.a.

466. In the Tribunal's view, the particular expression used could not, in itself, reasonably be treated as determinative of the scope of the exemption:

(a) When asked by the President 'whether there is a difference in the legal character arising from the use of the word ashom as distinct from husas', Dr Masa'deh, the Claimants' expert, replied:[786]

> There is no difference in terms of the issue of ownership for whoever holds this share, husa or ashom. Probably there is a difference in terms of their selling and tradability.

[784] Tr Day 5, 90:10-25.

[785] Tr Day 5, 90:10-25.

[786] Tr Day 5, 94:20–95:2; Mr Ali Almusned agreed: Tr Day 4, 82:16–83:2.

> Ashoms are sold on the stock market, and husas of limited liability companies are sold via a simple sale transaction at the Controller of Companies. Other than that, they are just an indication of the ownership of a certain element of the company.

(b) It is apparent that the Jordanian legislature has used both terms variously for shares in the different forms of private companies that it has created since 1964. Further the Jordanian Courts do not appear to have treated either term as a term of art when determining the tax implications of the disposal of shares.

(c) Where the Courts have been invited to decide on the tax implications of the sale of shares (however described) in private companies, they have consistently held the portion of the sale price that is attributable to goodwill to be taxable.

(d) At the time the current exemption was introduced, the only form of '*ashom*' shares in Jordan were shares in public companies traded on the Stock Exchange.

(e) It appears that the possibility that shares in private shareholding companies could be publicly traded may have justified the use of term *'ashom'* in the 2002 legislation– though in the event this possibility has not become a reality.

467. The Respondent emphasises that its reading of the exemption is consistent with the reference in the text to 'profits accrued from the *buying and selling* of … shares'. This, it maintains, is consistent only with transactions on an Exchange where shares may be freely traded – bought and sold – and not with the sale of an undertaking by means of a share sale. The Claimants say that this argument was rejected by the Respondent's expert, Mr Rabah.[787] The Tribunal has examined the evidence given on this point and finds that Mr Rabah deposed that, whatever the name ascribed to the type of shares, if in substance the sale price for the sale of a private business by way of a transfer of shares is negotiated directly between the parties and involves an element of goodwill, that element will be taxable.[788] By contrast, in his opinion, the trading of shares in public companies is not taxable, whether or not the seller was an original subscriber.[789]

468. The Tribunal can understand a legislative policy that would encourage trading in shares quoted on the Stock Exchange by exempting such gains from tax. The value of such shares may go up or down from day-to-day dependent on many factors outside the control of the shareholder. The price of the shares is determined by the market and not by negotiation between the seller and the buyer. Mr Kudah explained the purpose of the exemption in the 1985 Tax Act as being 'a wish by the government to move to public shareholding companies and it was considered to be a kind of encouragement for investment and developing the market.'[790]

[787] CCsl, 5, citing Tr Day 5, 179:9-19.

[788] Tr Day 5, 178:10-23.

[789] Second Expert Report of Mr Nabil Rabah, [38].

[790] Tr Day 3, 51:22-25.

469. For the above reasons, the Tribunal finds the interpretation of the 1985 Tax Law upheld by the Court of Cassation in this matter to have been reasonably open to it. The Tribunal does not consider that the judgment is inexcusable.

470. *Relation to the international law standard.* Standing back from a close analysis of the approach of the Court, there is a larger point that goes to the test that this Tribunal must apply. It is this. The reason for considering whether the judgment of the Court was 'inexcusable' as a matter of public international law is in order to determine whether, in the totality *including* the actions of the judicial organs of the state, the Respondent's treatment of the Claimants' investment was arbitrary.

471. Where an international tribunal finds that a municipal court judgment is one that no reasonably competent judge could render, it will do so because it is left with 'justified concerns as to the judicial propriety of the outcome' such that it 'can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment'.[791]

472. In their pleadings, the Claimants alleged that the Court of Cassation's judgment was one that 'no *impartial*, reasonable and competent judge would have rendered'.[792] The mistakes were such that 'no competent judge would have committed *when acting in good faith*'.[793] But this allegation is not supported by the evidence the Claimants adduced.

473. While heavily criticizing the reasoning of the Court of Cassation in this matter as incorrect as a matter of Jordanian law, the Claimants' expert, Dr Masa'deh, was equally clear that he was not criticizing the fairness of the Court of Cassation. He said in terms in his Second Report that:[794]

> Finally and as a matter of principle I regret and reject the accusations contained in the Rabah Report claiming that I question the fairness of the Court of Cassation and in particular the Honorable Judge Nasrawi. Those accusations are false and unsubstantiated….

474. Dr Masa'deh was questioned about this statement at length under cross-examination and did not resile from it.[795] He explained that:[796]

> [W]hen I said, for instance, this is in violation of the law, this is inconceivable, this is unthought of or unheard of, these are ways that we as practitioners or academics often review and criticize man-made law….

[791] *Mondev v USA* (Ex CL-134), [127] (citing *ELSI* (Ex CL-58 / Ex RL-19) & Art 8(b) Final Harvard Draft Convention on the International Responsibilities of States for Injuries to Aliens), approved and applied in *Jan de Nul N.V., Dredging International N.V. v Arab Republic of Egypt* (Award) ICSID Case No ARB/04/13 (2008) (Ex CL-51), [193].

[792] Claimants' Reply, [561] (emphasis added).

[793] Claimants' Reply, [568] (emphasis added).

[794] Second Expert Report of Dr Ahmad Masa'deh, [8.1].

[795] Tr Day 4, 119:25–129:13.

[796] Tr Day 4, 124:5-8.

475. He confirmed, in answer to a question from a member of the Tribunal that he did not contest the independent character of the Jordanian judiciary.[797]

476. This point is a very important one. The Claimants insist that they do not invite the Tribunal to act as a further court of appeal on matters of Jordanian law. This necessarily means that, even if the Court of Cassation were wrong about Jordanian law, Jordan would commit no breach of the treaty protection from arbitrary treatment in this respect unless the judgment was 'improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment'. But the evidence given before the Tribunal does not support such a finding.

477. Finally, the Tribunal looks at the conduct of the Respondent State in the round against what it has found to be the standard applicable to the protection from arbitrary measures and the assurance of fair and equitable treatment. The Tribunal has considered both the claim that the original Tax Measure was predetermined and politically motivated and the question whether the subsequent judgment of the Court of Cassation upholding the validity of the Tax Measure was inexcusable.

478. A majority of the Tribunal has found that the Claimants have not made out their case on the evidence that the original Tax Measure was politically motivated (Arbitrator Fortier takes a different view on this aspect for the reasons that he explains in his Separate Opinion).

479. The whole Tribunal has found that the decision of the Court of Cassation cannot be impugned at the international law level as arbitrary – as being a decision that no reasonably competent tribunal could reach. Nor is there any sensible suggestion that the Court was itself politically motivated or acting in bad faith. In the circumstances the Tribunal finds that the Tax Measure was imposed according to an interpretation of Jordanian law upheld by the Court of Cassation in a decision that is not itself a breach of the State's international law obligations. For these reasons, the claim of arbitrary measures must fail.

F. The Claimants' other claims

480. As summarised above,[798] in addition to their claim of arbitrary treatment, the Claimants also allege the following treaty breaches:

(a) Full protection and security (Article 3(1));

(b) Legal stability and predictability (Article 12);

(c) Legitimate expectations (Article 4);

(d) Discrimination (Article 3(1) and Article 4); and,

(e) Impairment of rights to liquidate.

[797] Tr Day 5, 89:8-12.

[798] [227]-[260].

481. The Tribunal has already explained in Section A above its reasons for considering that the Claimants' claims are to be analysed primarily by reference to the protection in Article 3(1) of the BIT from arbitrary measures.

482. It has concluded that, on the claims as raised in the present proceedings, the protection from arbitrary treatment is also included within the more general requirement in Article 4(1) to afford 'fair and equitable treatment'.[799]

483. The Tribunal has explained its reasons for concluding that the present claim cannot be considered as apt to invoke the protection in Article 3(1) from 'discriminatory' measures – an element that is also comprised within the Article 4(1) assurance of fair and equitable treatment.[800] As a result of these two conclusions, the claim of breach of the fair and equitable treatment standard must also fail.

484. The Claimants also put their case in a number of other ways. They allege breaches of the assurance of full protection and security (Article 3(1)) and legal stability and predictability, which they submit is applicable under the Unified Agreement pursuant to Article 12). They allege that the Respondent's actions breached their legitimate expectations as to the tax position, which expectations were protected by the assurance of fair and equitable treatment. Finally, they allege impairment of their rights to liquidate their investment (a specific protection found in other BITs concluded by Jordan on which they rely pursuant to the assurance of most-favoured nation treatment under Article 4).

485. The Tribunal can deal with these claims shortly, since, in its view, they do not give rise to materially different considerations than those that it has already considered at length in relation to the primary claim of arbitrary treatment. They all depend upon the Claimants' primary assertion that the imposition of the Tax Measure by the ISTD, the validity of which was confirmed by the Court of Cassation, was politically motivated and based upon an interpretation of the 1985 Tax Law that was arbitrary, being one that no reasonably competent court applying the law in good faith could have reached.

486. If the Tribunal had found this to be so, it might well have occasioned other breaches of the Respondent's international law obligations (though there might then have been a question whether these additional claims added anything to the primary claim). But this is not the case. A majority of the Tribunal has rejected the claim that the Tax Measure was politically motivated on the evidence. The Tribunal as a whole has found that the decision of the Court of Cassation was not arbitrary: it was a decision that was reasonably open to the Court on the basis of the law.

487. It is therefore not necessary for the purpose of this case to decide two legal issues that the Parties debated in their written pleadings, namely:

[799] Above [313]-[315].

[800] Above [423]-[426].

(a) Whether the obligation to afford full protection and security may extend beyond the exercise of the police power to a more general obligation of due diligence;[801] and

(b) Whether Article 12 of the BIT is apt to incorporate a specific obligation to afford legal stability and predictability found in the Unified Agreement.[802]

488. The evidence before the Tribunal does not support the Claimants' allegation that they had a legitimate expectation that any disposal of their investment would not be subject to tax. The Claimants based this allegation primarily on a document entitled 'REACH Initiative' of March 2000.[803] This document contains in its Annex A1 an 'Analysis of Laws and Regulations Concerning Information Technology in Jordan.' In summarising the 1995 Law it states '***Article 3(a)*** THE GENERAL RULE is that income earned in or generated from the Kingdom is subject to income tax'.[804] It then notes under Exemptions: 'CAPITAL GAINS shall be exempted from income tax'.[805]

489. Mr Alghanim placed some reliance on this document at the hearing in support of his statement that 'one of the reasons that made me invest in Jordan was specifically that the sale of shares was exempt from taxation'.[806] He accepted that he had not discussed tax treatment with His Majesty King Abdullah during his meeting with him.[807] He deposed that he had been shown one page of the document 'which was given to me by my people, which stated that the capital gains is exempt from tax'.[808]

490. The Tribunal has carefully examined this document. It falls far short of the sort of specific assurance from the Government that could form the subject of a legitimate expectation as to the tax treatment that would be applied in Jordan on a sale of shares. Though addressed to the King, it was prepared by members of a private organisation, the Jordan Computer Society.[809] It presents a proposed national strategy for Jordan's information technology services sector. It does not represent itself to be an official Government document. Its analysis of the legal position with regard to tax simply summarises the effect of the 1995 Law. It does not address let alone answer the central question that arose in the present case as to the treatment of the goodwill portion of a private share sale.

491. The Claimants do not otherwise suggest that they received specific assurances from the Government as to this question that their transaction would be treated in any manner different than that required by the existing Jordanian tax law.[810]

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[801] Claimants above [246], CCsl 120-126; Respondent above [250].

[802] Claimants above [247], CCsl, 111-119; Respondent: see above, [251].

[803] Ex C-5; Request for Arbitration, [26].

[804] Ex C-5, Annex 1, A1-12.

[805] Ex C-5, Annex 1, A1-13.

[806] Second Witness Statement of Mr Fouad Alghanim, [8]; Tr Day 2, 19-28.

[807] Tr Day 2, 25:12-14.

[808] Tr Day 2, 23:22-25.

[809] Ex C-5, p 1.

[810] Claimants refer also to the WTO, *Report of the Working Party on the Accession of the Hashemite Kingdom of Jordan to the World Trade Organization,* WT/ACC/JOR/33WT/MIN(99)/9 (3 December 1999), [10] (Ex C-221); Claimants' Reply, [464];

492. For these reasons, the Tribunal does not consider that the Claimants' allegation that they had a legitimate expectation as to the tax treatment of the disposal is made out.

G. Costs

493. The Tribunal turns finally to the issue of costs.

494. Article 61(2) of the ICSID Convention addresses assessment and allocation of the costs of an ICSID arbitration:

> (2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

495. The Convention thus addresses three elements of costs: expenses incurred by the parties, fees and expenses of the members of the tribunal, and ICSID's own charges. Unlike some other arbitration texts, the Convention does not indicate principles or presumptions regarding the allocation of costs. Instead, Article 61(2) confers very broad discretion on the tribunal in deciding how and by whom costs are to be borne.

496. Rule 28(2) of the ICSID's Arbitration Rules then provides:

> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

497. In accordance with the Tribunal's directions, the Parties filed Submissions on Costs on 4 August 2016 (supplemented in the Respondent's case on 1 September 2016), followed by Reply Submissions on Costs on 8 September 2016.

1. The Claimants' submission on costs

498. The Claimants submit that they have incurred the following costs in connection with this arbitration:

Description	**Amount**
Payments to ICSID	US$525,000[811]
Legal costs	£3,582,940.28 + US$2,724,350.58 + US$444,850 + KWD 66,247.34
Expert costs	£638,840 + £153,758 + US$533,914.58

CCsl, 130. This passage consists of a summary of the provisions of the 1995 Law and does not amount to a representation by Jordan as to their meaning and effect.

[811] The Tribunal understands this figure to consist of $500,000 paid in advances under ICSID Administrative and Financial Regulation 14(3)(d) and $25,000 paid as the non-refundable lodging fee upon the filing of the Request for Arbitration.

Witness expenses	US$33,512.84 + KWD 29,760.81
Document management / bundles	£10,932 + £36,018.66

499. At the exchange rates prevailing at 1 August 2017[812] this amounts to approximately US$10,394,187.40.

2. The Respondent's submission on costs

500. The Respondent submits that it has incurred the following costs in connection with this arbitration:[813]

Description	**Amount in US$**
Payments to ICSID	500,000[814]
Legal costs (including expenses)	241,744.50 (Jordanian Counsel) + 392,110.411 (outside non-Jordanian Counsel) = 633,854.91
Expert costs	1,009,017.84
Other expenses	114,001.17
Document management / bundles	37,956.05

501. The total amount claimed by the Respondent in US dollars is US$2,294,829.97.

3. Fees and expenses of the Centre and the Tribunal

502. The Secretariat advises that the fees and expenses incurred in these proceedings by the Centre and the Tribunal, determined in accordance with its Administrative and Financial Regulations and the provisions of PO No 1 are as follows:

Arbitrators' fees and expenses	**Amount in US$**
Professor Campbell McLachlan, QC	234,694.10
The Honourable L. Yves Fortier, PC CC OQ QC	149,364.69
Professor Marcelo Kohen	143,259.59
Tribunal Assistant's fees and expenses (Jack Wass)	65,889.43
ICSID administrative fees	128,000.00
Direct expenses	117,255.40
TOTAL	**838,463.21**

503. The above costs have been paid out of the advances made to ICSID by the Parties as indicated in the paragraph below. Once the case account balance is final, the ICSID Secretariat will

[812] See https://www.oanda.com/currency/converter/. The exchange rate applied for the British Pound is 0.76047 and for the Kuwaiti Dinar is 0.30279.

[813] In its Statement of Costs, Respondent converted all sums paid in currencies other than US dollars into US dollars at the exchange rate prevailing of 13 July 2016. It presents all of its costs as converted into US dollars in a Summary of Costs. The Tribunal refers for this purpose to that Summary of Costs.

[814] After the deduction of bank charges, the amount received by ICSID was US$498,500.00.

provide the Parties with a detailed financial statement, and any remaining balance will be reimbursed to the Parties in proportion to the advances they made.

504. Each Party has contributed to date to the Secretariat's requests for advances on costs in accordance with paragraph 8 of PO No 1. These contributions amount to:

(a) For the Claimants: US$500,000.[815]

(b) For the Respondent: US$498,500.[816]

4. The Tribunal's decision on allocation of costs

505. Article 61(2) confers a broad discretion on the Tribunal as to the assessment and allocation of costs as between the Parties.

506. However, in the present case, both Parties are agreed as to the general approach that the Tribunal ought to take to allocation, namely that the successful party ought to recover its costs whatever the outcome (subject always to its consideration of whether particular costs were reasonably incurred).[817]

507. As the Respondent has in the event prevailed on the merits, it is entitled to reimbursement from the Claimants of its reasonably incurred costs.

508. The Tribunal has examined the Respondent's claim for costs and the Claimants' submissions on it. It notes that, on any view, the Respondent's costs were very considerably less than those incurred by the Claimants. They amount to US$1,794,829.97 *plus* their share of the advances required by the Centre of US$500,000, totalling US$2,294,829.97.

509. The Claimants explain the discrepancy between the costs of the respective Parties that 'the Respondent was able to secure heavily discounted services of counsel and experts, sometimes operating at significant loss'.[818]

510. Nevertheless, the Claimants submit that the Respondent's conduct of the proceedings increased the costs generally. They refer in particular to:

(a) The Respondent's pursuit of the Jordanian proceedings, which necessitated Claimants' application for provisional measures, the costs of which the Claimants seek in any event;

(b) Revisions in the Respondent's case on a rolling basis; and

[815] The Claimants claimed US$525,000. As noted above, the additional US$25,000 is the non-refundable lodging fee.

[816] As noted above, after bank charges, the amount received by ICSID is US$498,500.

[817] Claimants' Submission on Costs, [28]; Claimants' Reply Submission on Costs, [1]; Respondent's Additional Submission on Costs, [2].

[818] Claimants' Reply Submission on Costs, [23].

(c) The Respondent's alleged uncooperative approach, in particular in relation to document requests and translations.[819]

511. The Respondent replies that:

(a) As to the provisional measures application, '[i]f the Respondent is successful on the merits, then the Jordanian proceedings will proceed against the Claimants having been wrongly interrupted, and the Claimants' complaints will have been unfounded';[820]

(b) It denies having revised its case on a rolling basis, submitting that it has merely responded to the Claimants' case as it has developed; and

(c) It submits that its applications for document production were necessary and that the Claimants are as much responsible for increased translation costs.

512. The Tribunal has considered these factors. In the end, it does not regard any of them as sufficiently material to warrant an adjustment of the costs to be awarded:

(a) The fact that the Respondent has ultimately succeeded on the merits and that the Tribunal's provisional measures order must now be set aside does not have the consequence that the order should never have been granted. Nevertheless, the costs of this application (which neither Party has separately itemised) will have been modest in the scheme of the arbitration as a whole. Oral argument was conducted on the basis of limited written submissions at a hearing that was also devoted to other procedural issues.

(b) The Tribunal does not consider that the manner in which the Parties developed their arguments during the written phase was substantially out of the ordinary for a case of this kind. On any view, the issues raised were of some doubt and difficulty and called for evidence from (amongst other witnesses) experts on Jordanian law, whose successive reports, though lengthy, sought to respond to the issues as they were developed.

(c) As detailed in paragraph [20] above, the Tribunal had to issue a number of procedural orders during the production of documents phase of this arbitration, including as to the production of documents from third parties. It considers that these orders provided it with useful assurance as to the scope of evidence produced to it. Equally, the preparation of reliable translations of Arabic documents was of fundamental importance to the Parties and to the Tribunal. The Tribunal is well aware that legal translation is a highly specialised and difficult art. Although a number of directions had to be made to achieve a set of translations that were either agreed or officially

[819] Claimants' Submission on Costs, [7]-[17].

[820] Respondent's Reply Submission on Costs, [5].

prepared, the Tribunal does not consider that either Party sought to obstruct this process.

513. Nevertheless, the Tribunal is mindful of the fact that, while the Respondent has ultimately succeeded on the merits, it did not prevail on any of its jurisdictional objections. These were the subject of extensive pleading through the two rounds of the written phase and also of oral argument. The Parties have not in their costs outlines separately itemised the costs attributable to these arguments in their submissions, issues of jurisdiction having been dealt with together with the merits. In the exercise of its overall discretion as to apportionment of costs, and taking account of both the fact that the Respondent should not recover its own costs attributable to the jurisdiction issues and that the Claimants have incurred their own unnecessary costs on these issues, the Tribunal decides to reduce the total sum to be awarded to the Respondent by 20%.

514. The Tribunal has examined for itself the Respondent's breakdown of its claim for costs. It finds the sum claimed to have been generally reasonable, subject to two items which it has determined should be disallowed:

(a) A sum of US$307,110 is claimed in respect of fees incurred to Baker & McKenzie in respect of an 'International Tax Expert'. This is in addition to the sum of US$500,881 claimed in respect of Ernst & Young for the same category of work. Whilst the Tribunal was assisted by the expert evidence of Ms Kate Alexander of Ernst & Young, it received no evidence from any member of Baker & McKenzie nor was that firm counsel of record in the arbitration. The Respondent has not provided any explanation for this line item in its costs submissions. The Tribunal disallows it.

(b) A sum of US$12,977.64 is claimed in respect of fees incurred to Bond Solon for 'witness familiarisation'. The Respondent has not furnished any further information as to this item. The Tribunal does not consider that this is a cost that ought to be borne by the opposing party. Accordingly, it is also disallowed.

515. These two items together total US$320,087.64. Once this amount is subtracted from the Respondent's total claimed costs of $2,294,829.97, it leaves a sum of $1,974,742.33. The Tribunal has decided that this sum is to be reduced by 20%, being $394,948.46, in respect of costs attributable to jurisdiction issues. Once $394,948.46 is deducted from $1,974,742.34, the amount payable is US$1,579,793.87.

516. As a result, the Tribunal finds that the Claimants are to pay the Respondent the sum of US$1,579,793.87 in respect of its costs.

VII. DECISION

517. For all of the above reasons, the Tribunal hereby decides that:

(a) The Respondent's objections to jurisdiction are dismissed. The Tribunal has jurisdiction to determine all of the Claimants' claims in these proceedings.

(b) The Claimants' claims on the merits are dismissed.

(c) The Claimants shall pay the Respondent the sum of US$1,579,793.87 in respect of the Respondent's costs and expenses of and occasioned by this arbitration.

(d) The Tribunal's order as to provisional measures in PO No 2 dated 24 November 2014 is set aside.

SIGNED

The Honourable L. Yves Fortier QC
Arbitrator

Date: 27 September 2017

SIGNED

Professor Marcelo G. Kohen
Arbitrator

Date: 22 September 2017

SIGNED

Professor Campbell A. McLachlan QC
President of the Tribunal

Date: 19 September 2017

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)

SEPARATE OPINION OF THE HONORABLE L. YVES FORTIER

2 October 2017

1. I agree with the conclusion of the Tribunal that the decision of the Court of Cassation cannot be impugned at the international law level as arbitrary, being a decision that no reasonably competent tribunal could reach.

2. I also agree that there is no evidence that the Court was politically motivated or acting in bad faith.

3. I also join in the Tribunal's conclusion that the Tax Measure was imposed according to an interpretation of Jordanian law which was upheld by the Court of Cassation in a decision that is not itself a breach of the State's international law obligation.

4. Accordingly, the Claimants' claim of arbitrary treatment must fail as do all their claims of other breaches of the Respondent's international law obligations, to wit:

    a. Fair and equitable treatment (Article 4 of the BIT);

    b. Full protection and security and legal stability and predictability (Articles 3(1) and 12 of the BIT);

    c. Legitimate expectations (Article 4);

    d. Discrimination (Articles 3(1) and 4 of the BIT); and

    e. Impairment of rights to liquidate

    for the reasons given in paragraphs 476 to 488 of the Award.

5. These are the reasons why I have joined in the *dispositif*.

6. However, where I part company with my friends and distinguished colleagues is in my appraisal of the evidence which led to the imposition of the Tax Measure in 2008.

7. Having reviewed carefully the totality of the evidence, in particular the testimony of the Director General of the ISTD, Mr. Al Kudah, as well as the testimony of Mr. Almusned, I have formed the view that, as submitted by the Claimants, the Respondent acted in an arbitrary manner vis-à-vis the Claimants' investment by deciding to impose a tax on the sale by UTT of its shares in UMC to Batelco in 2006 in response to media and Parliamentary pressure on the Government in the light of the public perception of an illegitimate profit on the sale and irrespective of the provisions of the law.

8. Where my colleagues found Mr. Al Kudah to be a reliable witness, I found his evidence totally unconvincing.

9. A few days after the transaction and strident criticism of the deal by the Jordanian press, the die was cast when Mr. Al Kudah issued a statement which concluded that "it [was] unlikely that the deal be exempted from income and sales taxes".

10. In my opinion, the initial reaction to the transaction by the Director General of the ISTD does suggest a pre-determination to impose a tax on UTT. I found his denial under cross-examination unpersuasive.

11. Mr. Al Kudah then set up an internal technical committee (the "Committee") within the ISTD to investigate further the taxability of the transaction (para. 378 of the award).

12. A mere 5 days later, the Committee reported that "the profits of the deal between the two parties are subject to tax".

13. I note that my colleagues attach importance to the words "in principle" which precede that sentence.

14. After having listened to the evidence of Mr. Almusned, who was a member of the Committee, those words strike me as a mere fig leaf. In short, I was not impressed by the testimony of Mr. Almusned, who appeared to me to be simply parroting Mr. Al Kudah.

15. After the Committee issued its report, the pressure from members of Parliament continued unabated[*].

16. The process which gives me pause was then followed by the unprecedented constitution by the Prime Minister of a committee to address questions which had been raised by the Parliamentary Financial and Economics Committee (para. 383 of the award). I note that Mr. Al Kudah was a member of that special committee. He acknowledged that he could not recall another instance where a Prime Ministerial Committee was asked to consider the taxability of a specific transaction and the tax liability of a taxpayer.

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[*] See paragraphs 58, 59 and 382 of the Award.

17. One of the questions which was put to the Committee evidences, in my opinion, the pre-determination of the Respondent to levy a tax on UTT irrespective of the provisions of the law. That leading question was: "Why was there no imposition of income tax on the (good will of the company)?"

18. In short, these are the reasons why I reach the conclusion that the events of 2006-2007 demonstrate that the Respondent acted in an arbitrary manner vis-à-vis the Claimants' investment by deciding to impose a tax on the sale in response to media and political pressure and irrespective of the provisions of the law.

19. However, as noted earlier, I agree with the Tribunal's analysis of the position at international law vis-à-vis the decisions of the Jordanian Courts and I accordingly join in the Tribunal's *dispositif*. There was no denial of justice in this case.

20. If the Claimants had filed their request for arbitration immediately after the imposition of the Tax Measure in 2008, my decision may well have been different. But they chose to have recourse to the Jordanian courts rather than an international venue. The break of the link between the administrative decision and their recourse to the Jordanian courts is fatal to the Claimants' case.