INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A., and Trevi S.p.A.
v.
State of Kuwait
(ICSID Case No. ARB/17/8)

DECISION ON PROVISIONAL MEASURES

Mr. Cavinder Bull SC, President of the Tribunal
Dr. Stanimir Alexandrov, Arbitrator
Professor Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Mr. Benjamin Garel

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23 November 2017

Table of Contents

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 1

III. FACTUAL BACKGROUND AS PRESENTED BY THE CLAIMANTS 8

IV. THE PARTIES' POSITIONS 17

A. The Claimants' Application 17

B. The Respondent's Position on the Claimants' Application 28

C. The Respondent's Application 36

D. The Claimants' Position on the Respondent's Application 40

V. THE TRIBUNAL'S ANALYSIS 44

A. The Tribunal has the power to decide on provisional measures 44

B. The Claimants' Application 46

(1) No imminent risk of harm 46

(2) Alleged right to non-aggravation of the dispute 57

C. The Respondent's Application 58

(1) Exclusivity of ICSID proceedings 58

(2) Continuation of works 61

(3) Maintenance of bonds 64

(4) Alleged right to non-aggravation of the dispute 64

VI. THE TRIBUNAL'S DECISION 64

I. INTRODUCTION

1. This decision addresses and rules upon the Claimants' Request for Provisional Measures filed on 12 April 2017 ("**Claimants' Application**"), as well as the Respondent's Request for Provisional Measures filed on 21 June 2017 ("**Respondent's Application**") (collectively, the "**Applications**").

2. The Claimants are Rizzani de Eccher S.p.A. ("**Rizzani**"), Obrascón Huarte Lain S.A. ("**OHL**") and Trevi S.p.A. ("**Trevi**"). Rizzani and Trevi are corporations incorporated under the laws of the Italian Republic.[1] OHL is a corporation incorporated under the laws of the Kingdom of Spain.[2]

3. The Respondent is the State of Kuwait.

4. The Claimants and the Respondent are hereinafter collectively referred to as the "**Parties**".

II. PROCEDURAL BACKGROUND

5. On 7 February 2017, the Claimants filed their Request for Arbitration against the Respondent with the International Centre for Settlement of Investment Disputes ("**ICSID**").

6. In their Request for Arbitration, the Claimants alleged that the Respondent's conduct in relation to their purported investment violated a number of provisions under the Agreement between the Italian Republic and State of Kuwait for the Promotion and

[1] Company Registration Report of Rizzani, Exhibit C-4; Company Registration Report of Trevi, Exhibit C-6.

[2] Notarial Deed and Bylaws of OHL, Exhibit C-5.

Protection of Investments of 17 December 1987 and its Protocol of the same date ("**Italy-Kuwait BIT**")[3] and the Agreement between the Kingdom of Spain and the State of Kuwait for the Promotion and Reciprocal Protection of Investments of 8 September 2005 ("**Spain-Kuwait BIT**")[4] (collectively, the "**BITs**").

7. The Claimants also expressly requested, in their Request for Arbitration, to submit a formal request for provisional measures as a matter of urgency after the registration of the request.[5]

8. On 3 March 2017, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Institution Rules, and notified the Parties of the registration of the case.

9. On 12 April 2017, the Claimants submitted their Request for Provisional Measures, together with accompanying factual exhibits and legal authorities. By a letter dated 13 April 2017, the Secretary-General of ICSID decided that the briefing schedule would be as follows: (a) Respondent's Response to the Request to be filed by 26 April 2017; (b) Claimants' Reply to be filed by 10 May 2017; and (c) Respondent's Rejoinder to be filed by 24 May 2017.

10. On 20 April 2017, the Respondent requested that the briefing schedule be extended by two weeks to account for, among other matters, the Respondent's Counsel's recent appointment to the case. By letter dated 24 April 2017, the Claimants took issue with the Respondent's reasons for the extension but consented to the extension of the briefing schedule as requested by the Respondent. Accordingly, the

3 Legal Authority CL-1.
4 Legal Authority CL-2.
5 Claimants' Request for Arbitration dated 7 February 2017 at [183].

Secretary-General of ICSID revised the briefing schedule on 25 April 2017 as follows: (a) Respondent's Response to the Claimants' Request for Provisional Measures to be filed by 10 May 2017; (b) Claimants' Reply to be filed by 24 May 2017; and (c) Respondent's Rejoinder to be filed by 7 June 2017.

11. In paragraphs 219 to 223 of their Request for Arbitration, the Claimants made a proposal to the Respondent regarding the number of arbitrators and the method of their appointment. By a letter dated 20 April 2017, the Respondent confirmed that the Parties were in agreement that the Tribunal would be composed of three arbitrators, that each Party would appoint a co-arbitrator, and that the President of the Tribunal would be designated by agreement of the Parties.

12. By a letter dated 6 March 2017, the Claimants appointed Dr. Stanimir Alexandrov as arbitrator. ICSID informed the Parties of Dr. Alexandrov's acceptance of his appointment by a letter dated 8 May 2017.

13. In accordance with the revised briefing schedule as approved by the Secretary-General, the Respondent filed its Response to the Claimants' Request for Provisional Measures on 10 May 2017, together with accompanying factual exhibits and legal authorities. The Claimants subsequently filed their Reply on their Request for Provisional Measures on 24 May 2017, together with accompanying factual exhibits and legal authorities.

14. By a letter dated 1 June 2017, the Respondent appointed Professor Zachary Douglas QC as arbitrator. ICSID informed the Parties of Professor Douglas QC's acceptance of his appointment by a letter dated 7 June 2017.

15. By a letter dated 2 June 2017, the Respondent requested a two-week extension to file its Rejoinder to the Claimants' Request for Provisional Measures, which was due to be filed on 7 June 2017. In its letter, the Respondent alleged, among other things, that it was only in the Claimants' Reply filed on 24 May 2017 that the Claimants revealed for the first time that Rizzani had filed an action in the domestic court in Milan, Italy on 10 February 2017, and apparently obtained an *ex parte* order on 13 February 2017 for provisional measures. The Respondent further stated in its letter that it would also seek provisional measures from the Tribunal ordering the Claimants to withdraw the Italian court actions and enjoining them from commencing any other such proceedings. On 5 June 2017, the Secretary-General of ICSID granted the Respondent's request and directed that the Respondent submit its Rejoinder on 21 June 2017.

16. On 21 June 2017, the Respondent submitted its Rejoinder to the Claimants' Request for Provisional Measures and its Request for Provisional Measures, together with: (a) a witness statement of Mr John Andrew Faulkner; and (b) accompanying factual exhibits and legal authorities.

17. Further to the Respondent's Request for Provisional Measures filed on 21 June 2017, the Secretary-General of ICSID established the following briefing schedule in accordance with ICSID Arbitration Rule 39(5): (a) Claimants' Response to the Respondent's Request for Provisional Measures to be filed by 6 July 2017; (b) Respondent's Reply to be filed within two weeks from the date of receipt of the Claimants' Response; and (c) Claimants' Rejoinder to be filed within two weeks from the date of receipt of the Respondent's Reply.

18. By a letter dated 5 July 2017, the Claimants objected to the Respondent's Application and requested that the Tribunal first rule on the Claimants' Application before turning

to any remaining aspects of the Respondent's Application. By a letter dated 28 July 2017, the Respondent replied to the Claimants' letter dated 5 July 2017 and asked that the Tribunal consider the Respondent's Application simultaneously with the Claimants' Application. The Claimants responded to the Respondent's letter on 4 August 2017.

19. On 5 July 2017, the Parties jointly filed a request for the Chairman of the ICSID Administrative Council ("**Chairman**") to appoint an arbitrator to be President of the Tribunal pursuant to Article 38 of the ICSID Convention and Rule 4(1) of the ICSID Arbitration Rules.

20. By a letter dated 24 July 2017, ICSID invited the Parties to consider five candidates for appointment as presiding arbitrator pursuant to ICSID's practice and with a view to promoting the appointment of mutually agreeable arbitrators, and stated that the Chairman would appoint the President of the Tribunal should this ballot procedure fail.

21. On 31 July 2017, both Parties submitted their completed ballots to ICSID.

22. On 2 August 2017, ICSID informed the Parties that they had failed to reach an agreement, and that ICSID would therefore proceed with the appointment of the President of the Tribunal in accordance with Articles 38 and 40(1) of the ICSID Convention. The letter further stated that it was their intention to propose to the Chairman the appointment of Mr. Cavinder Bull SC as the presiding arbitrator.

23. As ICSID did not receive any observations from the Parties on the appointment of Mr. Cavinder Bull SC as the presiding arbitrator, ICSID informed the Parties on

10 August 2017 that the Chairman would proceed to appoint Mr. Cavinder Bull SC and would notify the Parties once the Tribunal is constituted.

24. By a letter dated 11 August 2017, ICSID informed the Parties that the Tribunal was constituted, that the proceeding was deemed to have begun on that day and that Mr. Benjamin Garel, ICSID Legal Counsel, would serve as the Secretary of the Tribunal.

25. On 18 August 2017, the Tribunal established a new briefing schedule in respect of the Respondent's Application as follows: (a) Claimants' Response to the Respondent's Request for Provisional Measures to be filed by 4 September 2017; (b) Respondent's Reply to be filed within two weeks from the date of receipt of the Claimants' Response (i.e. 18 September 2017); and (c) Claimants' Rejoinder to be filed within two weeks from the date of receipt of the Respondent's Reply (i.e. 2 October 2017).

26. By a letter dated 31 August 2017, the Claimants requested a 10-day extension to file their Response to the Respondent's Request for Provisional Measures (i.e. until 14 September 2017), arguing that the Respondent requested and obtained two extensions of time of 14 days each to file its Response and its Rejoinder to the Claimants' Request for Provisional Measures. The Respondent objected to the Claimants' request by a letter dated 1 September 2017.

27. By a letter dated 4 September 2017, the Claimants withdrew their request for an extension of time to submit their Response to the Respondent's Request for Provisional Measures, on the understanding that the Respondent will comply with the calendar set forth by the Tribunal and will communicate its availability for a hearing by the next day, at the latest. On the same day, the Claimants submitted their

Response to the Respondent's Request for Provisional Measures, together with accompanying factual exhibits and legal authorities.

28. On 11 September 2017, the Respondent requested a two-week extension to file its Reply to its Request for Provisional Measures, which was due to be filed on 18 September 2017. By a letter dated 14 September 2017, the Claimants objected to the Respondent's request.

29. On 15 September 2017, the Tribunal granted the Respondent's request for an extension of time. The Tribunal stated that it was mindful that the extension of time would not affect the hearing dates or more generally delay the proceedings, and it also noted that no prejudice resulting from the requested extension has been specified. The Tribunal thus directed that the Respondent's Reply to its Request for Provisional Measures be filed by 2 October 2017 at the latest and the Claimants' Rejoinder by 18 October 2017 at the latest.

30. On 2 October 2017, the Respondent submitted its Reply to its Request for Provisional Measures, together with: (a) the second witness statement of Mr John Andrew Faulkner; and (b) accompanying factual exhibits and legal authorities.

31. By a letter dated 4 October 2017, the Claimants requested an extension of time identical to that granted to the Respondent, and to file their Rejoinder on or before 30 October 2017. On 6 October 2017, the Respondent objected to the Claimants' request, arguing that as the hearing on provisional measures was set to begin on 3 November 2017 and if the Claimants were to file their Rejoinder on 30 October 2017, that would leave only three intervening days to review their submissions which would impair the Respondent's ability to prepare for the hearing.

32. On 7 October 2017, the Tribunal granted the Claimants an extension until 27 October 2017 to file their Rejoinder on the Respondent's Request for Provisional Measures.

33. On 27 October 2017, the Claimants submitted their Rejoinder on the Respondent's Request for Provisional Measures, together with accompanying factual exhibits and legal authorities.

34. The hearing on provisional measures was held in Paris, France on 3 and 4 November 2017 ("**Hearing**").

III. FACTUAL BACKGROUND AS PRESENTED BY THE CLAIMANTS

35. For the purposes of this decision, the Tribunal sets out below a brief summary of the factual background asserted by the Claimants in their Request for Arbitration.[6] The Tribunal makes no determinations in relation to the Claimants' assertions at this stage.

36. According to the Request for Arbitration, in 2010, the Respondent began the tendering process for a large infrastructure project for the construction, completion and maintenance of roads, overpasses, storm-water drainage, sewer and other services for Jamal Abdul Nasser Street, Kuwait City, Kuwait (the "**Project**").[7] The Project involves the construction of an elevated six-lane expressway spanning nearly 7.2 km in total length, along with associated infrastructure, to replace the existing Jamal Abdul Nasser Street. Extending west of the city centre, the highway will

[6] Claimants' Request for Arbitration dated 7 February 2017.
[7] Claimants' Request for Arbitration dated 7 February 2017 at [14].

connect downtown Kuwait City to numerous hospitals, ministries and housing developments, along with Kuwait University and the city's major port.[8]

37. On 28 August 2010, a joint venture constituted of the Claimants and a Kuwaiti company, Boodai Constructions w.1.1 ("**Boodai**") (collectively, the "**JV**") submitted a tender for the Project to an organ of the Respondent, the Ministry of Public Works ("**MPW**").[9] The JV's bid was accepted, and on 3 February 2011, the JV concluded a contract with the MPW[10] entitled "Construction, Completion and Maintenance of Roads, Overpasses, Storm-Water Drainage, Sewer and other Services for Jamal Abdul Nasser Street" ("**Contract**").[11] The Contract provided that the total price of the works was expected to be KWD 242,420,240.954 (approximately USD 800 million).[12]

38. Initially divided into two milestones and five phases, the Project was slated to begin on 1 May 2011 and be completed on 28 October 2016.[13] However, throughout the life of the Project, the Respondent has allegedly obstructed smooth progress of the works, thereby causing the Claimants significant cost and delay while exhibiting "unexpected and unjustified hostility toward the JV".[14]

39. In support of their assertions above, the Claimants list a series of actions purportedly taken by the Respondent to delay and disrupt the regular progress of the works. According to the Claimants, the Respondent has:

8 Claimants' Request for Arbitration dated 7 February 2017 at [15].
9 Claimants' Request for Arbitration dated 7 February 2017 at [17].
10 Claimants' Request for Arbitration dated 7 February 2017 at [17] and [18].
11 Contract No. RA/167, Exhibit C-1.
12 Contract No. RA/167, Exhibit C-1.
13 Claimants' Request for Arbitration dated 7 February 2017 at [18].
14 Claimants' Request for Arbitration dated 7 February 2017 at [19].

(a) failed to ensure the issuance of the necessary construction permitting by the 1 May 2011 commencement date. On 26 July 2011, nearly three months after the scheduled commencement date, the JV received only partial permitting;[15]

(b) failed to make key appointments to the detriment of the Project. The Contract foresaw the participation of both an official of the MPW (the "**Engineer**") and a consultant (the "**Engineer's Representative**"). However, the MPW: (i) failed to appoint the Engineer Representative until 7 July 2011, despite the JV's multiple calls to do so since 5 May 2011;[16] (ii) failed to appoint the Engineer until 17 July 2011;[17] (iii) failed to hold the foreseen pre-construction meeting until 20 September 2011;[18] and (iv) failed to provide the JV with fundamental points, lines and levels of reference until 26 September 2011 despite the JV's appeals since 13 April 2011;[19]

(c) failed to provide the JV with timely access to critical areas of the Project site to the detriment of the Project. For instance, the MPW failed to provide the JV access to the grounds of Kuwait University, which are directly in the path of the Project, despite the JV's multiple requests to do so since 26 April 2011.[20] Permission was finally granted on 7 July 2012 for the JV to access a limited area of the Kuwait University to conduct pile testing but the JV was subsequently refused access to the university and its equipment on 11 July 2012. The JV was forced to leave its equipment idle inside the university from 11 July 2012 to 4 August 2012 when it was permitted to remove it.[21] On 10 January 2013, the Engineer's Representative finally provided confirmation

15 Claimants' Request for Arbitration dated 7 February 2017 at [22] to [25].
16 Claimants' Request for Arbitration dated 7 February 2017 at [28].
17 Claimants' Request for Arbitration dated 7 February 2017 at [29].
18 Claimants' Request for Arbitration dated 7 February 2017 at [30].
19 Claimants' Request for Arbitration dated 7 February 2017 at [31].
20 Claimants' Request for Arbitration dated 7 February 2017 at [34] to [38].
21 Claimants' Request for Arbitration dated 7 February 2017 at [39] and [40].

of permission to take possession of the site to commence works, more than 18 months after possession was required.[22] According to the Claimants, similar scenarios unfolded with regard to possession of other key sites, including the premises of the Water Distillation Plant, the Kuwait Port Authority North and the Kuwait Port Authority South;[23]

(d) failed to respect the foreseen sequence of works at significant cost to the Claimants. For instance, as the Project required the demolition of the Ghazali Bridge, the JV provided a proposed detour scheme on 20 October 2012 in order to temporarily divert the bridge's traffic away from the area of works. However, the Engineer's Representative rejected the proposed detour scheme. The JV resubmitted a detour scheme on 27 October 2013 and in December 2014. However, on 14 April 2015, rather than finally approving the detour scheme, the MPW instructed the JV to continue construction of a separate portion of the Jamal Abdul Nasser Street highway instead. This required the JV to re-sequence its works on the Project, and allegedly forced the JV to delay its works along the mainline of the Project;[24]

(e) provided the JV with a Project design ("**Design**") containing substantial inconsistencies and errors. The Engineer's Representative was notified of these inconsistencies and errors by way of requests for information ("**RFIs**") from the JV. However, the MPW's responses to the RFIs were substantially delayed (for instance, there was one response which came 225 days later), provided vague and inconclusive answers and/or instructed the JV to perform the calculations and modify the design themselves.[25] As the errors in the

22 Claimants' Request for Arbitration dated 7 February 2017 at [42].
23 Claimants' Request for Arbitration dated 7 February 2017 at [44].
24 Claimants' Request for Arbitration dated 7 February 2017 at [45] to [55].
25 Claimants' Request for Arbitration dated 7 February 2017 at [57] to [66].

Design required the JV to modify the related drawings and perform additional engineering work, the JV claimed that this amounted to a variation and submitted a claim for an extension of time and financial compensation to the Engineer on 7 April 2015;[26] and

(f) failed to provide adequately designed and planned detours. As the Project works were to be built on an existing carriageway and on land adjacent to the carriageway, it was necessary for road detours to be constructed and existing services that interfered with the construction works to be diverted before any permanent work could commence. However, the JV discovered conflicts between the drawing in the Design for the proposed new utilities in Phase 1 and the MPW's traffic management requirements, as well as defects in the MPW's design specifications for traffic detours throughout the whole Project site. Consequently, the JV "had to endure a particularly protracted submittals process", install new utilities in advance of constructing detours and/or add extra protection to existing utilities during the construction of overpasses, ramps and service roads.[27]

40. The Claimants further assert that the Respondent's "unreasonable and arbitrary behavior and the resulting design inadequacies and various delays and disruptions" as set out above led to significant increases in both the costs associated with the Project and the time needed for its completion.[28] Consequently, the JV submitted two consolidated interim claims, namely Interim Clam No. 1 ("**IC1**")[29] and Interim Claim No. 2 ("**IC2**")[30], which set out entitlements for defined periods of time.

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26 Claimants' Request for Arbitration dated 7 February 2017 at [67].
27 Claimants' Request for Arbitration dated 7 February 2017 at [74] to [81].
28 Claimants' Request for Arbitration dated 7 February 2017 at [82].
29 IC1, Exhibit C-2.
30 IC2, Exhibit C-3.

However, according to the Claimants, these claims were handled by the Respondent with significant delay and procedural irregularities.

41. IC1, which covered the period from 1 May 2011 to 25 September 2013, was submitted to the MPW on 3 June 2014. In IC1, the JV claimed: (i) an extension of time to perform the Contract by 664 days for Milestone 1 and 506 days for Milestone 2; and (ii) an additional payment of KWD 19,746,881.12 (approximately USD 64,700,000).[31] The Claimants assert that, despite the JV's attempts to follow up on the status of IC1 "at every opportunity, including at all monthly progress meetings", the MPW remained silent.[32]

42. On 22 May 2016, the JV submitted IC2, which covered the period from 25 September 2013 to 25 April 2015, to the MPW. As an update to the claims put forward in IC1, the JV revised its total claims to: (i) an extension of time to perform the Contract by 1060 days notwithstanding its proposals to mitigate those delays; and (ii) the additional payment of a total of KWD 76,654,223.12 (approximately USD 251,450,000).[33]

43. On 9 August 2016, the MPW issued a one-page letter[34] rejecting the JV's claims for additional compensation in their entirety, without any reasoning or justification. The MPW further decided to grant only an extension of time of 151 days, which was conditional upon the JV's waiver of all "entitlements against the aforementioned claim, and [any] right in any judicial or amicable claim or any extension of time for the Contract".[35]

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31 Claimants' Request for Arbitration dated 7 February 2017 at [85] to [86].
32 Claimants' Request for Arbitration dated 7 February 2017 at [87] to [90].
33 Claimants' Request for Arbitration dated 7 February 2017 at [91] and [92].
34 MPW's Determination on IC1 of 9 August 2016, Exhibit C-71.
35 Claimants' Request for Arbitration dated 7 February 2017 at [94].

44. On 23 September 2016, the MPW issued its determination on IC2.[36] In the said determination, the MPW rejected all claims for additional compensation and extension of time in their entirety, save for an entitlement to an extension of time (the duration of which was not confirmed) for the Ghazali Road works but without any associated compensation for the costs.[37]

45. In addition to the above, the Claimants assert that the Respondent has exhibited unexpected and unjustified hostility toward the JV, which they say includes:

(a) the continual harassment and the issuance of threats and orders to terminate the contracts of staff. For instance, the MPW required the JV to terminate, at short notice and without justification, the contracts of senior staff members;[38]

(b) the application of numerous financial penalties in an arbitrary manner. For instance, the MPW notified the JV on 12 February 2014 of its intent to withhold KWD 629,000 (approximately USD 2,060,000) from the JV for an alleged failure to submit a recovery programme, even though the JV was not required to do so given that the delay was caused by MPW. The said penalty was increased to KWD 931,600 (approximately USD 3,050,000) by 25 May 2014;[39] and

(c) threatening to issue a retroactive negative variation order for the span-by-span method ("**SBS Method**"). The Design foresaw a balanced cantilever method for the erection of the elevated highway. On 21 August 2011, the JV proposed that the MPW consider an alternative erection method known as the

36 MPW's Determination on IC2 of 23 September 2016, Exhibit C-72.
37 Claimants' Request for Arbitration dated 7 February 2017 at [95].
38 Claimants' Request for Arbitration dated 7 February 2017 at [99].
39 Claimants' Request for Arbitration dated 7 February 2017 at [105] to [110].

SBS Method, which the JV explained could result in possible cost saving for the Respondent of KWD 1,600,000 (approximately USD 5,250,000). The SBS Method was only approved on 23 February 2012, and under the conditions that, *inter alia*, any costs of redesign be borne by the JV, that the entire duration of the Project be reduced by four months and that the JV waive present claims in terms of time or money as a result of the SBS Method. On 15 March 2012, the JV agreed to those conditions, and stated on record that the alternative method of erection did not represent a variation order and that the accounting of all elements affected by the SBS Method were to be carried out in accordance with the current terms and conditions of the Contract. On 15 December 2014, the MPW made clear its intention to apply a negative variation order against the alleged costs savings made by the JV on the basis that the amount of steel reinforcement used for the SBS Method was less than that foreseen in the Contract, which the JV vigorously contested. On 3 January 2016, the MPW informed the JV of its decision to apply a negative variation order in the amount of KWD 14,076,577 (approximately USD 46,150,000), which the Claimants allege is in direct contrast with the parties' agreement concerning the SBS Method.[40]

46. In their Request for Arbitration, the Claimants argue that the Respondent's actions as set out above amount to breaches of the Contract, and that these breaches effectively equate to breaches of the BITs pursuant to the "umbrella clause" (i.e. Article 3.2) under the Spain-Kuwait BIT and/or the "Most Favoured Nation" clause (i.e. Article 3) in the Italy-Kuwait BIT.[41] The Claimants further argue that the Respondent's actions, taken together, amount to a breach of the applicable

[40] Claimants' Request for Arbitration dated 7 February 2017 at [111] to [124].
[41] Claimants' Request for Arbitration dated 7 February 2017 at [127] to [133].

prohibitions against the illegal expropriation of the Claimants' investment.[42] In addition, the Claimants assert that the conduct of the Respondent amounts to violations of other guarantees and standards of treatment that must be accorded to foreign investors, including: (i) the fair and equitable treatment standard;[43] (ii) the rule against unreasonable measures;[44] and (iii) the full protection and security standard.[45]

47. The reliefs sought by the Claimants in their Request for Arbitration are:[46]

(a) an order, on an interim basis, that the Respondent be refrained from calling any bonds in its possession, pending the outcome of the proceedings;

(b) an order, on an interim basis, that the Project works be brought immediately to a halt, pending the outcome of the present proceedings;

(c) an order, on an interim basis, that the Respondent be refrained from implementing a retroactive negative variation order in relation to the SBS Method;

(d) a declaration that the Respondent has breached Articles 2, 3, 5 and 10 of the Italy-Kuwait BIT, and Articles 3 and 5 of the Spain-Kuwait BIT;

(e) an order that the Respondent cease its acts in breach of the BITs and international law;

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[42] Claimants' Request for Arbitration dated 7 February 2017 at [171] to [175].
[43] Claimants' Request for Arbitration dated 7 February 2017 at [134] to [163].
[44] Claimants' Request for Arbitration dated 7 February 2017 at [164] to [170].
[45] Claimants' Request for Arbitration dated 7 February 2017 at [176] to [178].
[46] Claimants' Request for Arbitration dated 7 February 2017 at [227].

(f) an order that the Respondent compensate the Claimants for its breaches of the BITs and international law in an amount to be determined at a later stage, plus interest until the date of payment;

(g) an order for such other and further relief the Tribunal considers appropriate; and

(h) an order that the Respondent pay all the costs and expenses of this arbitration, plus interest until the date of payment.

48. In the next section of this Decision, the Tribunal will review the Parties' positions and arguments in respect of the Claimants' Application and the Respondent's Application. Naturally, it is not meant to serve as an exhaustive review of the Parties' submissions on the two Applications at issue, but as a summary of the arguments that are relevant to the Tribunal's analysis and findings. Regardless, the Tribunal has carefully considered all of the submissions made by the Parties, whether in writing or made orally during the Hearing.

IV. THE PARTIES' POSITIONS

A. The Claimants' Application

49. In the Claimants' Application, the Claimants seek the following six provisional measures:[47]

> "a. That all ongoing works for the Project shall be immediately brought to a halt pending the final outcome of the arbitration proceedings;

[47] Claimants' Request for Provisional Measures dated 12 April 2017 at [58].

b. That the [Respondent], during the pendency of this arbitration, shall refrain from calling any bonds issued by the Claimants through the [Claimants' Bank, the Kuwait Branch of BNP PARIBAS (the "**Bank**")] made in favour of the [Respondent], for and in relation to the Project;

c. That the [Respondent], during the pendency of this arbitration, shall refrain from applying further delay penalties, including those which it has, to date, postponed;

d. That the [Respondent], during the pendency of this arbitration, shall refrain from implementing a retroactive negative variation order in relation to the SBS Method;

e. That the [Respondent] and/or their agencies or entities refrain from engaging in any other conduct that aggravates the dispute between the parties and/or alters the *status quo*; and

f. That the [Respondent] be ordered…to pay all costs and expenses relating to the provisional measures phase, including, but not limited to, administrative and legal fees, with interest as of the date of the [Decision on Provisional Measures] until the date of effective payment."

50. In its Request for Provisional Measures, the Claimants state that they urgently require the provisional measures "in order to preserve their right to maintain the *status quo* of the dispute pending final adjudication by the Tribunal".[48]

51. The Claimants argue that given the Respondent's "past established pattern or arbitrary and unpredictable behavior and threats" (as set out above), there is an "immense and imminent risk" that the Respondent will "unilaterally, and with no justification, (i) implement a retroactive negative variation order for the adoption of the SBS Method in the Project, (ii) apply further delay penalties which have recorded in payment certificates but deferred, and (iii) call the bonds in its possession".[49]

52. According to the Claimants, the Respondent's treatment of the Claimants "has worsened substantially" since the Claimants sent the Notice of Investment Dispute to

[48] Claimants' Request for Provisional Measures dated 12 April 2017 at [1].
[49] Claimants' Request for Provisional Measures dated 12 April 2017 at [3].

the Respondent on 7 September 2017.[50] By way of example, the Claimants say that the MPW informed the Central Tenders Committee on 4 April 2017 of its unwillingness to "cooperate with [the Claimants]" and to "enter into any contract with [the Claimants] or to qualify them for any future project" because the Claimants have allegedly breached the Contract and resorted to international arbitration. In response, the Central Tenders Committee decided that it would choose whether to approve the termination of the Contract once it had received further information from the MPW.[51]

53. The Claimants argue that they have established the required circumstances for the Tribunal to grant the requested provisional measures.

54. In this regard, the Claimants disagree that the Respondent's "six-pronged test"[52] is the applicable test, and submit that the Tribunal's power to grant provisional measures stems exclusively from Article 47 of the ICSID Convention, the ICSID Arbitration Rules and the framework for treaty interpretation. The Claimants state that "a plain reading of the language of Article 47 provides broad and open-ended powers to the Tribunal to make orders destined to maintain the Parties' rights, especially through the maintenance of the *status quo* and prevention of the aggravation of the dispute, as is required in the present circumstances".[53] However, the Claimants accept that while ICSID tribunals enjoy wide discretion in granting provisional measures, a showing of necessity and urgency is generally required.[54]

50 Claimants' Request for Provisional Measures dated 12 April 2017 at [4].

51 Claimants' Reply on Provisional Measures dated 24 May 2017 at [46] to [47].

52 At [58] of the Respondent's Response to the Claimants' Request for Provisional Measures dated 10 May 2017, the Respondent states that "[a]s the foregoing authorities indicate, a party seeking provisional measures bears the burden of establishing that, at the time of filing the request, there is an urgent need [1] for the requested measures to avoid irreparable harm [2] to a right belonging to the party. It is also well-established that the requesting party must show: a *prima facie* basis for jurisdiction [3]; a *prima facie* case and a reasonable chance of success on the merits [4]; that the requested measures do not require prejudging the merits [5]; and that the measures do not unduly harm the other party [6]".

53 Claimants' Reply on Provisional Measures dated 24 May 2017 at [81] and [82].

54 Claimants' Rejoinder to the Respondent's Request for Provisional Measures dated 27 October 2017 at [22].

55. Applying the above test to this case, the Claimants argue that the requested provisional measures are required to preserve the *status quo* and to prevent the aggravation of the dispute.

56. First, the Claimants assert that they are unable to sustain progress on the Project any longer in the face of the Respondent's continuing and worsening hostility and arbitrariness. Further, the Claimants expect to contribute at least KWD 4,500,000 (approximately USD 14,750,000) to the JV to finance works during the period January to June 2017, which the Claimants anticipate the Respondent will "refuse to pay". This sum will likely increase due to the Respondent's "unjustifiable refusal to pay the JV all sums due". Consequently, the only "fair and viable option is to alleviate the cash flow burden currently forced upon the Claimants by suspending the works until such time as these arbitration proceedings are concluded".[55]

57. Secondly, the Claimants submit that the *status quo* is the solvency of the Claimants and their existence as functioning business, and not the continuation of the Project. In this regard, the "threat of death" from the forced continuation of the Project is coupled with threats of: (i) abusive calling of the bonds; (ii) imposition of the negative variation order in respect of the SBS method; and (iii) application of the myriad delay penalties:[56]

    (a) In relation to (i), the Claimants say that the Respondent's actions indicate that "it very likely intends to call the bonds", which the Bank has issued in the Respondent's favour, once the Respondent has "extracted maximum value

[55] Claimants' Request for Provisional Measures dated 12 April 2017 at [7] to [9]. See also Claimants' Reply on Provisional Measures dated 24 May 2017 at [96].

[56] Claimants' Reply on Provisional Measures dated 24 May 2017 at [97] to [101].

from the Investment".[57] At present, the Respondent holds bonds issued by the Bank in the total sum of KWD 45,478,760 (approximately USD 148,800,000).[58] The Bonds are unconditional and on-demand. As such, the Respondent is entitled to payment in full in respect of each bond simply by submitting a request to the Bank, even if none of the defaults against which the bonds protect the Respondent have occurred.[59] Given the Respondent's repeated, continuous and unjustified hostility toward the Claimants to date and its unexpected, arbitrary actions, the Claimants are "legitimately and seriously concerned" that the Respondent will disregard the purpose of the bonds and call on them "in retaliation for the institution of these proceedings or once the works are nearing completion".[60]

(b) With regard to (ii), the Claimants allege that the Respondent has, in continuance of its prior pattern of conduct whereby it arbitrarily applied penalties to the JV, wrongfully and without justification applied and then deferred substantial delay penalties.[61] In particular, the latest Interim Payment Certificate covering the period of the works up to 28 February 2017 applied, but then deferred unjustified delay penalties of KWD 10,807,617 (approximately USD 35,360,000).[62] As of 3 November 2017, the outstanding delay penalties amount to approximately USD 80 million.[63]

(c) As for (iii), the Claimants assert that the Respondent continues to threaten an arbitrary issuance of a retroactive negative variation order for use of the SBS

57 Claimants' Request for Provisional Measures dated 12 April 2017 at [18].
58 Claimants' Request for Provisional Measures dated 12 April 2017 at [19] and [20].
59 Claimants' Request for Provisional Measures dated 12 April 2017 at [21].
60 Claimants' Request for Provisional Measures dated 12 April 2017 at [22].
61 Claimants' Request for Provisional Measures dated 12 April 2017 at [10] to [16].
62 Claimants' Request for Provisional Measures dated 12 April 2017 at [17]. See also Interim Payment Certificate No. 62 of 12 March 2017, p2, Exhibit C-116.
63 Transcript of hearing, 3 November 2017, p 73 lines 20 to 22.

Method in the amount of KWD 9,871,067.151 (approximately USD 32,330,000).[64] While the Respondent claims that the negative variation order would be issued to cover alleged cost savings arising for a reduced requirement for steel reinforcement when employing the SBS Method, the Respondent has failed to acknowledge that additional quantities of other materials were required, including concrete. In any event, the price per segment of the highway was fixed in the Contract, and the Respondent does not have the right to unilaterally impose a change to the price which was contractually agreed and fixed.[65]

58. According to the Claimants, the failure to grant provisional measures will cause the Claimants irreparable harm.[66] The continuation of the Project involves the continuous input of additional liquidity and the exponential growth of the financial burden on the Claimants. The Claimants have already been severely affected by the Respondent's summary denial of their entitlement to USD 251,450,000 as set out in IC2, the JV suffers ongoing losses amounting to approximately USD 110,000 per day, and the calling of bonds and the imposition of a negative variation order would immediately result in further liabilities of approximately USD 148,800,0000 and USD 32,400,000 respectively. In this regard, the Claimants argue that:

(a) the consequences of suffering the above financial setbacks are obvious, given that OHL is a listed company;

(b) as for Rizzani, if such liabilities were to arise, it would make the company insolvent, prevent the company from paying salaries to thousands of

64 Claimants' Reply on Provisional Measures dated 24 May 2017 at [50].
65 Claimants' Request for Provisional Measures dated 12 April 2017 at [29] to [34].
66 Claimants' Reply on Provisional Measures dated 24 May 2017 at [31] to [43].

employees and put the continued existence of the company in jeopardy. There would also be a powerful and disastrous domino effect. For instance, Rizzani's other financial counterparties[67] would very likely seek to revoke all other financial facilities granted to Rizzani and demand the immediate repayment of financed amounts; and

(c) a similar domino effect would likely be felt by all the Claimants in terms of their reputations more generally, especially since construction companies such as the Claimants are required, by tender conditions or law, to expressly declare whether other employers have called bonds on their projects or applied other penalties to them.

59. Thirdly, the Claimants accept that the Tribunal will have to "perform a proportionality assessment, and consider any limitation provisional measures would cause to [the] Respondent's rights".[68] However, the Claimants argue that any such limitation is minimal and pales in comparison with the Claimants' need for protection. The Claimants say that:

(a) the Respondent grossly exaggerates the alleged harm it would endure if the Project were halted. The Jamal Abdul Nasser Street is mostly complete and open to the public, and with the associated preapproved detours, adequately links all key locations and infrastructure that it was designed to serve;[69]

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67 Rizzani has in place a financing agreement with Unicredit S.p.A for the value of EUR 50,000,000, the banking facilities contract between BNP Paribas Kuwait Branch and Rizzani provides Rizzani with uncommitted banking facilities of up to approximately KWD 11,000,000 for the purpose of the Project and Banza Nazionale de Lavoro S.p.A has issued guarantees for up to EUR 242,508.293 for the benefit of Rizzani and another Italian construction company in relation to another construction project in Algeria. See Claimants' Reply on Provisional Measures dated 24 May 2017 at [42].

68 Claimants' Reply on Provisional Measures dated 24 May 2017 at [103].

69 Claimants' Reply on Provisional Measures dated 24 May 2017 at [104].

(b) the detours in place have been explicitly approved by the Respondent, and were built to demanding specifications to prevent congestion. Overall, the current area of open road, including completed parts of the Project and detours, have increased from 357,000 square metres to 618,000 square metres since the Project began;[70]

(c) the arrangements regarding drainage and utilities are also approved by the Respondent and would not, contrary to the Respondent's claim, lead to "massive flooding". In addition, the traffic plan which the Claimants agreed with MPW mandates myriad safety measures for detours on the Project, so as to render them safer than the majority of Kuwaiti roads;[71]

(d) any delay to the Project would not cause delay to neighbouring projects as such projects are "independent" from the Project. The Contract makes no mention of neighbouring projects, and the Respondent had not raised with the JV concerns that delays to the Project would prevent neighbouring projects from completing;[72]

(e) in the event that the provisional measures were granted, the Claimants would also not demobilise all staff but would continue to provide supervised teams responsible for security, health and safety and for maintaining the detours, utilities and stormwater management system;[73] and

70 Claimants' Reply on Provisional Measures dated 24 May 2017 at [13] to [16].
71 Claimants' Reply on Provisional Measures dated 24 May 2017 at [17] to [19].
72 Claimants' Reply on Provisional Measures dated 24 May 2017 at [20] and [21].
73 Claimants' Reply on Provisional Measures dated 24 May 2017 at [29].

(f) the Respondent will not face any issues of liquidity if it was enjoined from calling the bonds, applying delay penalties or implementing the negative variation order.[74]

60. In addition, the Claimants submit that even if the Tribunal applies the Respondent's "six-pronged test", the Claimants' request for provisional measures should still be granted.

61. First, the Claimants argue that the Tribunal has *prima facie* jurisdiction because:

(a) *prima facie* jurisdiction is satisfied when a duly ratified instrument of consent exists and a breach of rights is alleged. In the present case, the Claimants' Request for Arbitration has been duly registered by the ICSID Secretariat pursuant to the two BITs and the ICSID Convention, and the alleged breaches of the BITs are, to say the least, plausible;[75]

(b) the Respondent's objection that the Tribunal does not have *prima facie* jurisdiction because the cooling-off period was not respected is "absurd". Not only would it have been futile in the circumstances to continue attempting negotiations in the face of the Respondent's "continuous and deafening silence", the alleged "defect" boils down to a mere 28 days which have passed many times over by now;[76]

[74] Claimants' Reply on Provisional Measures dated 24 May 2017 at [106].
[75] Claimants' Reply on Provisional Measures dated 24 May 2017 at [114].
[76] Claimants' Reply on Provisional Measures dated 24 May 2017 at [115].

(c) the Respondent's argument that there is a lack of a protected investment is "equally absurd". Investor-State arbitration is no stranger to cases involving the construction sector, with at least 69 such cases publicly known;[77] and

(d) the Respondent's argument that "mere contract breaches by a State do not become treaty claims even in the presence of an umbrella clause" has been widely criticised. Further, the presence of choice of forum clauses has not prevented tribunals from hearing claims brought under umbrella clauses, and there is nothing contentious about the importation of substantive protections through an MFN clause. In any case, while the Respondent may find the above "controversial", this is not sufficient to deprive the Tribunal of *prima facie* jurisdiction.[78]

62. Secondly, the Claimants argue that they are in agreement with the Respondent that a *prima facie* case on the merits is established when allegations are not frivolous. According to the Claimants, the Respondent's submissions do not attempt to demonstrate the alleged frivolity of the Claimants' claims on the merits, but simply restate the Respondent's jurisdictional objection that the case is a "contract dispute that should have been brought before the domestic courts of Kuwait". Such jurisdictional objections are not relevant to the existence of a *prima facie* case on the merits.[79]

63. Thirdly, the Claimants submit that the granting of the requested provisional measures would not amount to a prejudgment on the merits. The Claimants say that it is unclear how the granting of the provisional measures with regard to the bonds,

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77 Claimants' Reply on Provisional Measures dated 24 May 2017 at [115].

78 Claimants' Reply on Provisional Measures dated 24 May 2017 at [115] and [116].

79 Claimants' Reply on Provisional Measures dated 24 May 2017 at [117] to [122].

negative variation order and delay penalties could "cast a shadow" on the Respondent's ability to present its case, and the discontinuation of the Project until the conclusion of the proceedings would also not presume any outcome. The Claimants are also not seeking provisional measures "equivalent to the final result sought".[80]

64. Fourthly, the Claimants submit that provisional measures are inherently urgent once they are destined to preserve the *status quo* and non-aggravation of the dispute. In any case, the urgency of the Claimants' situation is self-evident. The JV "hemorrhages losses" on the Project with every passing day and the Respondent is free to call, at any moment and with immediate effect, more than a hundred million dollars' worth of bonds, negative variation order and myriad delay penalties.[81]

65. Fifthly, the Claimants argue that the requested measures are needed to avoid irreparable harm. In this regard, the Claimants state that irreparable harm in the ICSID context must be understood as "synonymous with serious, substantial or significant harm". The Respondent's definition of "irreparable harm" as harm that cannot ultimately be compensated by monetary damages would all but exclude provisional measures within the ICSID framework, thereby depriving Article 47 of its *effet utile*.[82]

66. Sixthly, the Claimants assert that the requested measures would not cause the Respondent "disproportionate harm" as the harm which the Respondent alleges it would suffer if the requested provisional measures are ordered is either grossly exaggerated or non-existent. The Respondent's alleged harm also pales in

80 Claimants' Reply on Provisional Measures dated 24 May 2017 at [124] to [128].
81 Claimants' Reply on Provisional Measures dated 24 May 2017 at [129] to [134].
82 Claimants' Reply on Provisional Measures dated 24 May 2017 at [135] to [143].

comparison with the harm the Claimants would suffer without the granting of provisional measures.[83]

B. The Respondent's Position on the Claimants' Application

67. The Respondent submits[84] that there is no merit to the Claimants' argument that Article 47 of the ICSID Convention offers the kind of broad, open-ended availability of provisional measures that Claimants allege. Instead, the "overwhelming weight of authorities" confirm that provisional measures may only be granted if the Claimants prove:[85]

(a) an urgent risk of imminent, irreparable harm;

(b) a *prima facie* showing of jurisdiction;

(c) a *prima facie* case on the merits;

(d) that the urgent, irreparable harm to the Claimants "greatly" outweighs the harm that would be caused to the Respondent if the interim measures were granted; and

(e) that the request does not require the Tribunal to prejudge the merits of the claims.

[83] Claimants' Reply on Provisional Measures dated 24 May 2017 at [144].
[84] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [124] to [130].
[85] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [130].

68. According to the Respondent, the Claimants have failed to meet these stringent standards.

69. First, the Respondent argues that that there is no urgency or threat of imminent, irreparable harm. According to the Respondent, the ICSID tribunals have uniformly agreed that provisional measures should be granted only when they "are necessary to preserve a party's rights and where the need is urgent in order to avoid irreparable harm". The burden of showing these elements falls squarely on the requesting party and where supporting evidence is lacking, provisional measures must be denied.[86] The Respondent further argues that it is widely recognised that the requirement of "irreparable harm" is not present when the alleged harm can be adequately remedied by monetary damages.[87]

70. In response to the Claimants' argument that provisional measures are "inherently urgent" if they are intended to preserve the *status quo* and non-aggravation of the dispute, the Respondent claims that in the first place, it is the Claimants who are seeking to change the *status quo* by stopping work on an ongoing Project and precluding MPW from exercising its own remedies under a Contract currently in force.[88] In contrast, there has been no threat by the Respondent to terminate the Claimants' Contract.[89] There has also been no aggravation of the dispute or "worsening conditions" that would justify the Claimants' request to stop work on the Project, nor any of the other provisional measures they seek.[90] In fact, as the

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86 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [133].

87 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [133] and [134].

88 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [137].

89 Respondent's Response to the Claimants' Request for Provisional Measures dated 10 May 2017 at [79].

90 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [50] to [83]; Respondent's Response to the Claimants' Request for Provisional Measures dated 10 May 2017 at [39] to [56].

Claimants themselves recognize, it is in the interest of MPW to facilitate progress of the Project so that it can be completed.[91]

71. The Respondent further argues that if the core premise of the Claimants' request for provisional measures is the alleged financial burden that the Claimants would face in continuing performance of the Project, it is not clear what the reason for the Claimants' purported "financial stress" is. According to the Respondent, MPW has upheld its side of the bargain: (i) it gave the Claimants a 10% advance payment in the amount of KWD 24,242,024; (ii) it released to the Claimants, without legal obligation, retention monies in the amount of an additional KWD 13,296,524 to assist in their cash flow; and (iii) it has punctually paid the monthly invoices presented by the Claimants.[92] Further, the Claimants' allegation of the threat of "financial ruination" is only made in respect of one of the three Claimants, Rizzani and there is no evidence to support the allegation of Rizzani's financial difficulties.[93] In any case, the potential issuance of the negative variation order, the deferred delay penalties, or a supposed risk of calling on bonds are hypothetical future possibilities which cannot serve as proof of imminent, irreparable harm.[94]

72. In respect of each of the Claimants' requested provisional measures, the Respondent takes the following positions:

    (a) The request to stop work on the Project: the Respondent claims that there is an "improper motivation" behind this request - the Claimants' strategy is to hold the Project hostage until the Respondent gives in to the Claimants'

[91] Respondent's Response to the Claimants' Request for Provisional Measures dated 10 May 2017 at [55]

[92] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [138].

[93] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [140].

[94] Respondent's Response to the Claimants' Request for Provisional Measures dated 10 May 2017 at [65].

demands on the pending contractual disputes between the parties. In addition, the Claimants have not shown that halting the Project is urgently needed to avoid imminent, irreparable harm. If the "intolerable financial burden" stems from the Claimants' purported claims to additional compensation which they sought in IC1 and IC2, or the allegation that Claimants are incurring losses of USD 110,000 per day on the Project, the Claimants have not presented any evidence at all to substantiate their claims that these have led to their financial inability to sustain work on the Project. In any event, even if the Claimants were to prevail on all of their claims during the course of this arbitration, they can obtain monetary damages in compensation at that point in time.[95]

(b) The request to enjoin the Respondent from calling on the bonds: the Respondent argues that the Claimants' expressed fear that the Respondent is "highly likely" to call one or all of the bonds "is nothing more than a made-up storyline with no evidence to support it". The JV is required under the Contract and Kuwaiti law to post and maintain a variety of bonds to guarantee a myriad of obligations. Unless the Claimants are planning on breaching these obligations, there is no reason why any or all of these bonds would be called, immediately or in the near future. There has also been no threat to call on the bonds. Quite apart from the lack of evidence that any call of any of the bonds is likely or highly likely to cause the financial ruination of Rizzani, there is no reason to believe that the four JV partners could not and would not collectively sustain the financial burden that would entail.[96]

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[95] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [142] to [148].

[96] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [150] to [158].

(c) The request to enjoin the Respondent from applying delay penalties: the Respondent states that it is undisputed that MPW is not deducting delay penalties from progress payments or otherwise collecting delay penalties from Claimants. MPW is merely recording the delay penalties incurred by Claimants. The Respondent also explains that the amounts of these delay penalties will not be finalised until the end of the Project, and that the mere recording of penalties, years away from actual collection, represents no harm, let alone imminent, irreparable harm, to the Claimants.[97]

(d) The request to enjoin the Respondent from implementing the negative variation order: the Respondent submits that the discussions regarding the negative variation order have been ongoing for two and a half years and there is no evidence that MPW has taken actual measures to impose the negative variation order at the present time. Even if a final decision on the negative variation order was taken and applied, there is no evidence that the amount of the variation order (i.e. USD 32 million) would jeopardise the financial stability of the Claimants, especially given that it reflects the price of steel reinforcement for which they have been paid, but which they have not had to purchase for use in the works. There is also no evidence of the means by which the final decision on a negative variation order would be effected, and it should not be presumed that the Claimants would effectively be presented with a bill for USD 32 million requiring an immediate lump-sum payment.[98]

(e) The request to enjoin the Respondent from "aggravating" the dispute and altering the status quo: the Respondent argues that the Claimants' request

[97] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [159].

[98] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [161] and [162].

violates well-established principles regarding provisional measures. Such a broad request does not enable the Tribunal to identify the risk from which the Claimants need to be protected, the nature of such risk and the urgency and necessity of the provisional measures.[99]

(f) The request to order the Respondent to pay all costs of the provisional measures phase, including maintenance during project suspension: the Claimants have, in their Reply,[100] requested for the first time for costs of continued maintenance. The Respondent argues that the Tribunal should not allow the Claimants to be compensated for costs arising from a situation that they themselves will have created to the detriment of the Party from which they seek costs. It would also appear that the Claimants' promise to maintain the deteriorating detour roads and unfinished utilities until the final outcome of the arbitration proceedings is contingent on the Tribunal granting a cost award in favour of the Claimants.[101]

73. Secondly, the Respondent submits that the requested measures would cause greater harm to the Respondent and/or third parties than the harm allegedly faced by the Claimants.[102] Granting the interim measures requested by the Claimants, particularly the request to stop all works on the Project, would according to the Respondent irreparably: (i) prevent adjacent projects from completion and opening to traffic; (ii) cause acute, potentially fatal, safety risks for drivers and pedestrians alike; and (iii) lead to an indefinite period of traffic congestion and non-access to numerous

99 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [166].

100 Claimants' Reply on Provisional Measures dated 24 May 2017 at [147(vi)].

101 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [168] and [169].

102 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [170]; Respondent's Response to the Claimants' Request for Provisional Measures dated 10 May 2017 at [91] to [98].

commercial and public establishments, several hospitals among them. Harm caused to third parties, such as contractors, pedestrians, drivers, commercial and other establishments, as a result of the disrupted road works, could also expose the Respondent to further litigation and criminal liability. The alleged harm to the Respondent and/or third parties is discussed in more detail in the Witness Statements of Mr John Andrew Faulkner, the Respondent's witness. The Tribunal will not detail Mr Faulkner's evidence here, but will refer to it in its decision below, where relevant.

74. Thirdly, the Respondent argues that that the provisional measures requested would require the Tribunal to prejudge the merits of the case. According to the Respondent, the underlying basis of the Claimants' Application is the financial burden they allegedly face in continuing the Project without a favourable resolution of their contract claims. Claimants argue that this financial burden is due to: (i) the denial of their requests for additional compensation in IC1 and IC2; (ii) MPW's proposed negative variation order in respect of the SBS Method; and (iii) the recording and possible future application of contractual delay penalties. Granting the provisional measures requested by the Claimants would therefore require the Tribunal to decide on those questions, finding that the Claimants are entitled to the additional time and money that they alleged in IC1 and IC2 for works performed in prior years; that they are not obliged to account for overpayments they received for anticipated steel expenditures and that they bear no blame for delays in completing the works by the established contractual deadline. Only on such a basis would halting a major and ongoing infrastructure project and depriving MPW of its contractual rights could possibly be justified.[103]

[103] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [171] to [174].

75. Fourthly, the Respondent submits that the Claimants have not established a *prima facie* case on jurisdiction because:[104]

(a) the fact that the Claimants' Request for Arbitration has been duly registered by the ICSID Secretariat is not sufficient for the Tribunal to hold that it has *prima facie* jurisdiction over the dispute. The Tribunal must itself be satisfied that there is *prima facie* basis for jurisdiction;

(b) the Claimants failed to observe the six-month cooling-off period required by both the Italy-Kuwait and the Spain-Kuwait BITs. The Claimants also do not explain why it would have been futile to comply with the six-month cooling-off period;

(c) the Claimants do not contest that in the Contract governing the Project, they agreed to the exclusive jurisdiction of the domestic courts of Kuwait for any disputes arising between the parties relating thereto. The contractually-agreed exclusive jurisdiction of the domestic courts in Kuwait would prevent the Tribunal from exercising jurisdiction, even if there were an umbrella clause, as in the case of the Spain-Kuwait BIT. If the Claimants elevate their contractual claims to be cognizable under the BITs via an umbrella clause, they cannot cherry-pick and all provisions of the Contract, including the forum selection clause, must be given full effect; and

(d) the Claimants do not have an "investment" for the purposes of the ICSID Convention and the BITs. The Claimants' activities in Kuwait have been conducted under a one-time construction contract to perform road upgrading

[104] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [175] to [187].

works, for which they were paid a 10% advance payment and periodic progress payments. The Project did not require the Claimants to invest their own funds, but was intended to have a "positive cash flow".

76. Fifthly, the Respondent asserts that the Claimants have not established *prima facie* valid treaty claims with a likelihood of success.[105] In this regard, the Respondent argues that the key element is not the *prima facie* existence of a dispute, but whether or not there are *prima facie* valid treaty claims having a likelihood of success. There are serious doubts whether the Claimants have a valid treaty claim, or merely a contract claim which must be resolved through the courts of Kuwait. In any case, on the evidence submitted, none of the Claimants may be said to have established a *prima facie* case on the merits of a *likelihood of success* of their contract claims, whether they constitute treaty claims or not. Under the Contract, it is for the MPW to determine the amount of extension of time for the completion of the Works, and the amount (if any) to be added or deducted from the sum named in the tender. Consequently, the Claimants' claims in IC1 and IC2 have already been resolved and must be considered *prima facie* invalid.

C. The Respondent's Application

77. In the Respondent's Application, the Respondent seeks the following seven provisional measures:[106]

"(i) Withdraw any and all proceedings against the Respondent or any of its governmental subdivisions relating to the dispute that is the subject matter of this arbitration that have been commenced in the courts of

[105] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [188] to [192].

[106] Respondent's Rejoinder to the Claimants' Request for Provisional Measures and the Respondent's Request for Provisional Measures dated 21 June 2017 at [207].

Milan, Italy, as well as any such other proceedings that have been commenced before any other national court or authority in any country, whether judicial, administrative or otherwise, during the pendency of this arbitration, in violation of the ICSID Convention and/or the exclusive jurisdiction clause of the Contract;

(ii) Vacate the *ex parte* judgments obtained in the court in Milan, Italy;

(iii) Inform the Tribunal and Respondent as to whether any other proceedings relating to the dispute that is the subject matter of this arbitration have been commenced before any national court of authority, whether judicial, administrative or otherwise, during the pendency of this arbitration;

(iv) Refrain from commencing any other proceedings relating to the dispute that is the subject matter of this arbitration before any other national court or authority in any country, whether judicial, administrative or otherwise, during the pendency of this arbitration, in violation of the ICSID Convention and/or the exclusive jurisdiction clause of the Contract;

(v) Continue to perform works on the Project duly required under the Contract and in accordance with the present program of works scheduled for completion by February 2019;

(vi) Continue to maintain in place all bonds required for the Project under the Contract and/or under the laws of Kuwait for the duration of the Project until Claimants have completed all of their contractual obligations; and

(vii) Refrain from engaging in any other conduct that aggravates the dispute between the Parties and/or alters the *status quo*."

78. The Respondent asserts that it seeks provisional measures aimed at ensuring that the Claimants carry out their contractual and legal obligations and do not violate the rules of ICSID arbitration during the course of this case, "[n]othing more, nothing less".[107]

79. First, the Respondent states in its Reply on Provisional Measures dated 2 October 2017[108] that it maintains its jurisdictional objections in this case, and that its request for provisional measures is made without prejudice to and without waiving those

[107] Respondent's Reply on Provisional Measures dated 2 October 2017 at [15].
[108] Respondent's Reply on Provisional Measures dated 2 October 2017 at [25].

objections. The Respondent also argues that it is fully entitled to maintain and preserve its jurisdictional objections even while seeking provisional measures.[109]

80. Secondly, the Respondent submits that the Claimants must be enjoined from taking recourse to domestic court actions in respect of the subject matter of this dispute, whether in Milan, Italy or elsewhere, as well as the other provisional measures it has requested, including full disclosure of their actions and withdrawal of the Milan actions. In this regard, the Respondent points to two *ex parte* actions filed by the Claimants Rizzani and Trevi in the domestic courts in Milan, Italy within three days of initiating this ICSID arbitration, where both Rizzani and Trevi succeeded in obtaining injunctions preventing MPW, the Municipality of Kuwait and the Ministry of Labor and Social Affairs from calling on any of the bonds posted in connection with the Project.[110]

81. The Respondent argues that the two Milan court proceedings commenced by the Claimants violate Article 26 of the ICSID Convention, which provides that once parties have consented to arbitration pursuant to the Convention, such consent "shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".[111]

82. In addition, the Respondent asserts that the Claimants' undertaking to withdraw the Milan proceedings after this Tribunal rules on the Claimants' Application is insufficient. That undertaking cannot stand as a substitute for an order of the Tribunal granting the Respondent's requests for provisional measures (i) through (iv) which go

109 Respondent's Reply on Provisional Measures dated 2 October 2017 at [29].
110 Respondent's Reply on Provisional Measures dated 2 October 2017 at [34] to [38].
111 Respondent's Reply on Provisional Measures dated 2 October 2017 at [39] to [52].

beyond the Milan actions. An affirmative order is also required to ensure the Claimants' compliance.[112]

83. Thirdly, in relation to its request to compel continued performance by the Claimants, the Respondent argues that it has every reason to be alarmed by the Claimants' assertions in this case as a serious threat that they are ready to walk away from the Project.[113] In this regard, the Respondent submits that: (i) the continuation of the cooperation between parties in the framework of contracts constitutes the *status quo* that is to be preserved by interim measures;[114] (ii) irreparable harm to the Respondent, the public welfare and innocent third parties would be caused if the project works do not continue;[115] (iii) the balance of hardships weighs in favor of granting the Respondent's request, given that the Claimants' accusations that they have been subjected to a "pattern of hostility" bear no relationship to reality;[116] and (iv) the request does not require the Tribunal to prejudge the merits, since it is uncontested that the Contract is valid and currently in force.[117]

84. In response to the Claimants' argument that the Respondent's request is simply the "mirror image" of the Claimants' request for an order to stop works, the Respondent asserts that if the Tribunal were to deny the Claimants' request for an order to stop work on the Project, that would only mean that the Claimants failed to obtain the Tribunal's blessing to walk away. It is not the same as an order compelling the Claimants to continue performing their contractually required works on the Project.[118]

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112 Respondent's Reply on Provisional Measures dated 2 October 2017 at [54] to [59].
113 Respondent's Reply on Provisional Measures dated 2 October 2017 at [83].
114 Respondent's Reply on Provisional Measures dated 2 October 2017 at [90] to [95].
115 Respondent's Reply on Provisional Measures dated 2 October 2017 at [96] to [132].
116 Respondent's Reply on Provisional Measures dated 2 October 2017 at [133] to [168].
117 Respondent's Reply on Provisional Measures dated 2 October 2017 at [169] to [173].
118 Respondent's Reply on Provisional Measures dated 2 October 2017 at [89].

85. Fourthly, as for the Respondent's request that the Claimants maintain all bonds under the Project, the Respondent argues that it has every reason to take seriously the threat that Claimants will walk away from their obligations in respect of the Project bonds. According to the Respondent, if the Claimants are not ordered to preserve the validity of the bonds, MPW and other relevant third parties would face the imminent loss of their contractual and legal rights. Conversely, the Claimants' contention that maintaining the bonds for the Project would subject Claimants to irreparable harm is both speculative and unsubstantiated.[119]

86. Fifthly, the Respondent submits that it requires an order from the Tribunal expressly requiring the Claimants to refrain from engaging in any further conduct that would aggravate this dispute because the Claimants' "abusive and obstructionist conduct to date should serve as an indication that, without provisional measures, Claimants will consider themselves at liberty to engage in further improper, bad faith conduct aggravating the dispute or altering the *status quo*".[120]

D. The Claimants' Position on the Respondent's Application

87. The Claimants assert that each of the Respondent's requests is untenable, as the harm caused to the Claimants if they were to be granted far outweighs the harm that the Respondent would suffer should they be denied. According to the Claimants, the Respondent's requests must be denied to prevent the dispute from being aggravated.

88. First, in respect of the suspension of the works on the Project, the Claimants argue that the Respondent's hostility and arbitrary conduct is causing daily losses to the JV

119 Respondent's Reply on Provisional Measures dated 2 October 2017 at [174] to [193].
120 Respondent's Reply on Provisional Measures dated 2 October 2017 at [194] to [196].

of USD 109,000 per day. As the Claimants cannot absorb losses of this magnitude indefinitely, the Claimants' principal request in the Claimants' Application is for the suspension of the Project. However, in the Respondent's Application, the Respondent has merely filed a mirror request, i.e. request (v), that the Claimants be compelled to continue working so as to complete the works by February 2019. Such a request, if granted, would "condemn Claimants to irreparable harm whilst resulting in the avoidance of little harm to Respondent".[121] In this regard, the Claimants assert that any suspension would be carried out further to a considered suspension plan, which would *inter alia* set out plans to store plant and materials safely and to preserve the integrity of the works that have been built, as well as provide supervised teams responsible for security, health and safety and for maintaining the detours, utilities and the stormwater management system.[122]

89. Additionally, the Claimants argue that if the Tribunal were to grant the Respondent's request that the Claimants perform works scheduled "for completion by February 2019", this would amount to a gross prejudgment of the merits. In particular, it would require the Tribunal to prejudge the Claimants' claim that the Respondent failed to respect its obligations undertaken with regard to the Claimants' investment, in that it *inter alia* unjustifiably and arbitrarily refused to grant the contractually foreseen extensions of time that entitle the Claimants to a completion date later than February 2019.[123]

90. Secondly, in respect of the Respondent's request that the Claimants be ordered to maintain the bonds, the Claimants argue this request is also a mirror image of the

[121] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [3] to [4].
[122] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [6].
[123] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [76] to [79].

Claimants' requests for the suspension and freezing of the bonds.[124] In any case, whether or not the Tribunal considers that the Respondent should be allowed to call the bonds during the pendency of this arbitration, the Claimants will have no choice but to maintain all bonds in effect.[125]

91. The Claimants further assert that the value of the bonds (approximately USD 150,000,000), whilst significant to the Claimants, is relatively modest for the Respondent which is a sovereign State. In any event, the Respondent is not currently in possession of this sum, and would not suffer harm if it were to continue not to possess the bonds for the pendency of this arbitration. Conversely, if the Claimants were to be deprived of such sum, which the Claimants currently possess, this would irreparably harm the Claimants, as the bond call would cause "cascading defaults through the financing arrangements of [Rizzani] leading to its bankruptcy, negatively affect the share price of OHL, and permanently harm the reputations of all Claimants".[126]

92. Thirdly, the Claimants assert that the Respondent's requests in relation to domestic proceedings are "not only utterly futile, but also unjustified in law".[127] In this regard, the Claimants argue that a provisional measure will only be granted to enjoin domestic proceedings if the exclusivity of the arbitration proceedings is in fact threatened.[128] However, the Milan court has revoked its decisions and the Claimants have decided not to file any appeal against the revocation. In any event, the Claimants have undertaken on several occasions to withdraw any ongoing court

[124] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [49] to [52].

[125] Claimants' Response to Respondent's Request for Provisional Measures dated 4 September 2017 at [101].

[126] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [7].

[127] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [8].

[128] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [43].

proceedings and vacate any decisions regardless of the Tribunal's decision on the Claimants' Application.[129]

93. The Claimants also assert that they needed urgent injunctive relief at a time when the Tribunal had not yet been constituted, and there was no prospect of a tribunal being constituted rapidly. In the absence of a tribunal able to grant interim relief, the Claimants had no choice but to seek injunctive relief from the Milan court.[130]

94. Fourthly, the Claimants argue that the fact that the Respondent has put forth its own request for provisional measures necessarily satisfies the *prima facie* jurisdiction requirement for the grant of provisional measures. According to the Claimants, it would be nonsensical to file a request for provisional measures before the Tribunal and, at the same time, contend that one of the requirements for the grant of such request is not met. It would also be illogical for the Respondent to argue that the Tribunal lacks *prima facie* jurisdiction in relation to the Claimants' request for provisional measures, but that it has *prima facie* jurisdiction in relation to its own request for provisional measures. By introducing its own request for provisional measures, the Respondent has waived its objections to the Tribunal's *prima facie* jurisdiction.[131]

95. Fifthly, in response to the Respondent's request that the Claimants pay all the costs the Respondent has incurred in relation to the provisional measures phase, the Claimants argue that this request must be dismissed outright. It has always been the Claimants' position that the Respondent's requests (i) to (iv) are utterly pointless as the Claimants would have withdrawn any ongoing proceedings before the Italian

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129 Transcript of hearing, 3 November 2017, p 26 lines 4 to 16.

130 Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [25].

131 Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [14].

courts upon receiving the Tribunal's decision on its request to freeze the bonds, irrespective of the outcome of the decision.[132]

V. THE TRIBUNAL'S ANALYSIS

A. The Tribunal has the power to decide on provisional measures

96. The Tribunal's power to recommend provisional measures is governed by Article 47 of the ICSID Convention, which provides:

> "**Article 47**
>
> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

97. In addition, ICSID Arbitration Rule 39 provides that:

> "**Rule 39**
> **Provisional Measures**
>
> (1) At any time after the institution of the proceedings, a party may request that provisional measures for the preservation of its rights to be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[132] Claimants' Rejoinder to Respondent's Request for Provisional Measures dated 27 October 2017 at [257] to [258].

> (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
>
> (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

98. Neither the Claimants nor the Respondent has challenged the Tribunal's power to grant provisional measures under Article 47 of the ICSID Convention. As set out above, both Parties have filed their respective requests for provisional measures. Both Parties also participated at the Hearing and sought orders for provisional measures from this Tribunal. In addition, both the Claimants' and the Respondent's Counsel accepted, at the Hearing on 3 November 2017, that the Tribunal has the authority to decide on their respective provisional measures requests.[133] The Tribunal is therefore satisfied that it has the power under Article 47 of the ICSID Convention to rule on the Claimants' and the Respondent's Applications.

99. It is generally accepted that Article 47 of the ICSID Convention confers a broad discretion on the Tribunal to grant provisional measures.[134] However, this power must be exercised in a manner consistent with the very nature of provisional measures, i.e. they are measures granted before parties have had the full opportunity to present their respective cases.[135] In this regard, the Tribunal recognises that

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133 Transcript of hearing, 3 November 2017, p 181 lines 2 to 9.

134 *Saipem S.p.A. v. the People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures dated March 21, 2007 ("***Saipem v Bangladesh***") at [175], Legal Authority RL-21; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010 ("***Quiborax v Bolivia***") at [105], Legal Authority CL-41.

135 *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015 ("***PNG v Papua New Guinea***") at [103], Legal Authority CL-38.

provisional measures are extraordinary measures which ought not to be granted lightly.[136]

B. The Claimants' Application

(1) No imminent risk of harm

100. In order to succeed in obtaining provisional measures, the requesting party must show that the provisional measure sought is both urgent and necessary.

101. Although these requirements are not set out in express terms in the ICSID Convention, it is well-established[137] that an order of provisional measures will only be granted if the measure sought is necessary to preserve a party's rights and where the need is urgently required to avoid serious or irreparable harm. In the words of the ICSID tribunal in *Occidental v Ecuador*:[138]

> "***It is also well established that provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitely lost***…In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the ***measures are <u>necessary</u> to preserve a party's rights and where the need is <u>urgent</u> in order to avoid irreparable harm.*** The jurisprudence of the International Court of Justice dealing with provisional measures is well established: a provisional measure is necessary where the actions of a party "are capable of causing or of threatening irreparable prejudice to the rights invoked". A measure is urgent where "action prejudicial to the rights of either party is likely to be taken before such final decision is given". [Emphasis added.]

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136 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007 ("***Phoenix Action v Czech Republic***") at [32] to [33], Legal Authority CL-45.

137 See also *Quiborax v Bolivia* at [113], Legal Authority CL-41; and *Phoenix Action v Czech Republic* at [33], Legal Authority CL-45.

138 *Occidental Petroleum Corp. v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007 ("***Occidental v Ecuador***") at [59], Legal Authority CL-37.

102. Similarly, the ICSID tribunal in *PNG v Papua New Guinea* stated that:[139]

> "The requirements of necessity and urgency are also well-established…***it is well-established that an order of provisional measures will only be granted if these measures are necessary to preserve the requesting party's rights, and are urgently required to avoid serious harm***". [Emphasis added.]

103. As the tribunal in *PNG v Papua New Guinea* observed, there are variations in approach or the precise wording used by the ICSID tribunals as to whether the requirement is that of "irreparable harm", or whether a demonstration of "serious" harm will suffice. Regardless of what the exact terminology should be, the Tribunal agrees with the reasoning of the tribunal in *PNG v Papua New Guinea* that the term "irreparable" harm must be understood as requiring a material risk of "serious or grave damage to the requesting party, and not harm that is literally "irreparable"".[140] The degree of "seriousness" or "gravity" required will necessarily vary from case to case, depending on the circumstances of each case and the nature of the relief requested.

104. Further, in view of the twin requirements of urgency and necessity, it must follow that the harm alleged by the requesting party must be "imminent", and not "potential or hypothetical". As the tribunal in *Occidental v Ecuador* rightly noted:[141]

> "Provisional measures are not meant to protect against any ***potential or hypothetical harm susceptible to result from uncertain actions***. Rather, ***they are meant to protect the requesting party from imminent harm***." [Emphasis added.]

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139 *PNG v Papua New Guinea* at [114], Legal Authority CL-38.

140 *PNG v Papua New Guinea* at [109], Legal Authority CL-38.

141 *Occidental v Ecuador* at [89], Legal Authority CL-37.

105. The Tribunal now addresses requests (a) to (d) of the Claimants' Application (collectively, the "**Claimants' Requests**"),[142] namely:

(a) that all ongoing works for the Project be immediately brought to a halt pending the final outcome of the arbitration proceedings ("**Claimants' Request A**");

(b) that the Respondent, during the pendency of this arbitration, refrain from calling any bonds issued by the Claimants for and in relation to the Project ("**Claimants' Request B**");

(c) that the Respondent, during the pendency of this arbitration, refrain from applying further delay penalties, including those which it has, to date, postponed ("**Claimants' Request C**"); and

(d) that the Respondent, during the pendency of this arbitration, refrain from implementing a retroactive negative variation order in relation to the SBS Method ("**Claimants' Request D**").

106. Having reviewed the evidence and considered the submissions made by the Parties, the Tribunal is not satisfied that there is any imminent risk of harm justifying the Claimants' Requests A, B, C and D. The burden rested on the Claimants to make out their case of urgency and necessity and the Tribunal finds that the Claimants have failed to do so.

142 Claimants' Request for Provisional Measures dated 12 April 2017 at [58(a)] to [58(d)].

107. First, it is not disputed that the delay penalties have been expressly deferred. This fact and the Claimants' inability to produce any credible evidence that that situation is about to change fatally undermines the Claimants' Request C. Whilst the Claimants have expressed the fear that they may be required to pay the delay penalties soon, that is no substitute for evidence. The Tribunal also records that the Respondent had stated in its briefs[143] that the MPW will only deduct delay penalties once the Project achieves completion. Indeed, the Respondent's Counsel repeatedly made clear during the Hearing that the Respondent has no intention to impair the Claimants' cash flow. For example, Respondent's Counsel stated at the Hearing that: "more than anything else, MPW wants the Claimants to finish the Project. It doesn't want to drive them out and it doesn't want to impair their cash flow. They need that to finish. That would be counter-productive. MPW wants this project to proceed to completion in the normal course".[144]

108. Secondly, it is also not disputed that the "negative variation order" in respect of the SBS Method has not yet been imposed, and that the issue has been under discussion for two and a half years. Again, there is no evidence that the Respondent is about to issue such a variation order and in the absence of that, it is not appropriate to grant interim measures. Thus, the Claimants' Request D must be dismissed.

109. The Tribunal is fortified in its conclusion by the fact that the Claimants themselves say that there is merely a "potential" that the Respondent would apply the negative variation order. The Claimants' Reply on Provisional Measures states at [38]:[145]

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143 See, for example, the Respondent's Response to the Claimants' Request for Provisional Measures dated 10 May 2017 at [23].

144 Transcript of hearing, 3 November 2017, p 104 lines 17 to 22.

145 Claimants' Reply on Provisional Measures dated 24 May 2017 at [38].

"37. In short, continuing the Project involves the continuous input of additional liquidity and the exponential growth of the financial burden on Claimants.

38. This financial stress, along with a ***potential*** call on the bonds and the ***potential*** application of a negative variation order, is leading to significant harm to Claimants." [Emphasis added.]

110. Further, even if a negative variation order were to be subsequently applied, there is no evidence before the Tribunal how that would be implemented - whether the negative variation order would be deferred until the end of the Project, whether it would be gradually deducted from progress payments over the course of the Project or whether it would be applied immediately. All this must lead to the conclusion that on order in the terms of the Claimants' Request D is not warranted.

111. Thirdly, it is not disputed that, to date, there has been no attempt by the Respondent to call on any of the bonds. There is no credible evidence that the bonds are about to be called, nor is there any evidence that the Respondent had articulated any threat to call on the bonds.

112. The Claimants did refer the Tribunal to MPW Internal Circular 15/2016,[146] and argued that "[i]f the [Respondent] were to decide to seek payment of [the outstanding delay penalties and the negative variation order], it would most likely do so by calling the project bonds". [147] However, as set out above, there is no evidence that the Respondent is about to call for payment of delay penalties which it has expressly deferred, nor that the Respondent is about to issue a negative variation order.

113. In the course of the Hearing, the Tribunal asked if the Respondent would be willing to provide some notice prior to a call of the bonds posted by Claimants for the

146 Letter from MPW No. 6/3/193/4300 dated December 6, 2016, Exhibit R-10.
147 Transcript of hearing, 3 November 2017, p 73 line 24 to p 74 line 5.

Project.[148] Having taken instructions after the Hearing, the Respondent's Counsel confirmed, by way of a letter dated 9 November 2017, that the Respondent "would be willing to make a good will gesture in regard to a potential call on any of the four bonds that have been issued on behalf of Claimants in favor of MPW, namely: the performance bond (having a value of approximately US$80 million), the advance payment bond (currently valued at US$18.5 million), and the two retention bonds (collectively amounting to US$43 million)" and to provide "10 days advance notice" to the Claimants in the event that circumstances arose in which the Respondent decided to call on any of the four aforementioned bonds. This is not something required by the contractual documentation which permits the Respondent to call on the bonds without any prior notice to the Claimants.

114. In the premises, including in light of the Respondent's undertaking discussed above, the Tribunal is not convinced that there is an imminent risk of harm justifying the Claimants' request that the Respondent be ordered to refrain from calling any bonds issued by the Claimants for the Project. The Claimants' Request B must therefore be dismissed.

115. Fourthly, in respect of the Claimants' Request A (i.e. that the works on the Project be suspended), the Claimants assert that they are unable to sustain progress on the Project any longer as the Claimants are incurring "huge daily losses" amounting to over USD 109,000 every day.[149] As a result, the only viable option is to "alleviate the cash flow burden currently forced upon the Claimants by suspending the works until such time as these arbitration proceedings are concluded".[150]

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148 Transcript of hearing, 4 November 2017, p 114 lines 8 to 25.

149 Transcript of hearing, 3 November 2017, p 22 lines 21 to 25.

150 Claimants' Request for Provisional Measures dated 12 April 2017 at [9].

116. To found this argument, the Claimants pointed to a one-page "summary table" of the "JV's Income and Liabilities between January and July 2017", a document created for the purposes of this arbitration, to support their assertion that the Claimants have suffered daily losses of USD 109,000.[151] The Claimants highlighted row 4 of the table which provides that "pending payments to suppliers, subcontractors and service providers" in the period January to July 2017 amount to KWD -1,129,022.028:

Item	SUMMARY	2017							
		JAN	FEB	MAR	APR	MAY	JUN	JUL	TOTAL
1	NET INCOME - MPW **(KWD)**	1,438,511	0	2,401,522	1,257,360	1,329,847	995,191	0	**7,422,431.345**
2	TOTAL PAYMENTS AS PER NBK BANK STATEMENT	-1,459,915	-1,477,353	-2,601,340	-1,347,534	-2,750,751	-1,846,513	-578,544	**-12,061,950.737**
3	TOTAL PAYMENTS AS PER BNP BANK STATEMENT	-68,918	-25,005	-85,924	-40,043	-118,014	-37,804	-15,835	**-391,543.041**
4	PENDING PAYMENTS TO SUPPLIERS SUBCONTRACTORS AND SERVICE PROVIDERS	-1,729,133	875,608	-475,750	278,653	517,316	-159,632	-436,084	**-1,129,022.028**
5	PENDING PAYMENTS TO SECONDED EMPLOYEES OF RDE AND OHL	-59,206	-63,392	-65,233	-65,233	-65,233	-48,552	-47,935	**-414,785.030**
6	OVERDUE INVOICES	0	0	0	0	-58,618	-119,000	-312,000	**-489,618.000**
2, 3, 4, 5 & 6	TOTAL LIABILITIES (DEBTORS) **(KWD)**	-3,317,172	-690,143	-3,228,248	-1,174,157	-2,475,300	-2,211,501	-1,390,398	**-14,486,918.836**
	MONTHLY OUTSTANDING AMOUNTS	**-1,878,661**	**-690,143**	**-826,725**	**83,203**	**-1,145,454**	**-1,216,310**	**-1,390,398**	**-7,064,487.491**

NET INCOME vs. TOTAL LIABILITIES (Period Jan'17 - Jul'17) (KWD)	**-7,064,487.491**
DAILY OUTSTANDING AVERAGE (Period Jan'17 - Jul'17) (KWD/day)	-33,323.054
DAILY OUTSTANDING AVERAGE (Period Jan'17 - Jul'17) (USD/day)	**-109,442.889**
Average Exchange Rate 1 Jan to 31 Jul 17 (USD Per KWD - xe.com)	3.28430

117. In the Tribunal's view, the evidence presented is not sufficient to show that the Claimants are in fact incurring daily losses amounting to over USD 109,000 every day, or that the Claimants are not able to sustain progress on the Project any longer because of these losses. The Tribunal is similarly unconvinced that these alleged daily losses can be attributed to the Respondent.

118. The Tribunal notes, in particular, that the alleged daily loss of USD 109,000 is derived by simply taking the difference between: (i) the JV's net income from the MPW; and (ii) outflows of funds from the JV over a 7-month period, and deducing a "daily outstanding average" from that figure.[152] However:

151 Exhibit C-272.

152 Transcript of hearing, 4 November 2017, p 84 lines 10 to 13 and p 84 line 23 to p 85 line 9.

(a) first, it has not been made clear to the Tribunal what payments were made by the JV set out at rows 2 and 3 of the "summary table" and whether those payments were made for the Project;

(b) secondly, the Claimants were unable to explain to the Tribunal how much of the KWD -1,129,022.028 (at row 4 of the "summary table") is caused by the Respondent. When the question was posed at the Hearing, Claimants' Counsel conceded that they have not been able to come up with the definite figures at this stage;[153]

(c) thirdly, the Claimants' position is that the "pending payments" set out at row 4 of the "summary table" are in fact "outgoing payments",[154] and they are recorded as a loss because the payments exceed the revenues.[155] However, the summary table also records that the "outgoing payments" are in the positive in the months of February, April and May 2017. This must necessarily mean that the Claimants have received payments from their suppliers, subcontractors and service providers in those months; and

(d) fourthly, the "summary table" merely shows that the JV's cash flow was in the negative from January 2017 to July 2017. There was no analysis of how this snapshot of 7 months represented a complete picture. There could after all be a mismatch in timing between expenditure and income across the life time of a project like this.

[153] Transcript of hearing, 4 November 2017, p 59 lines 14 to 24.
[154] Transcript of hearing, 4 November 2017, p 63 lines 5 to 8.
[155] Transcript of hearing, 4 November 2017, p 62 lines 12 to 23.

119. Crucially, the Claimants did not provide any evidence or financial analysis that such a loss would result in the JV or the Claimants being unable to survive. It seemed that the Tribunal was being asked to infer simply from the size of the loss asserted that there would be a serious impact on the JV and the Claimants. However, the loss asserted was not compared in any meaningful way to the financial state of the JV or the Claimants and thus the Tribunal was left in the dark as to the effect of this loss on the JV and the Claimants.

120. The Claimants relied on the test set out in *Micula v Romania*[156] to argue that "the protection of a business as a going concern justifies the recommendation of provisional measures".

121. The Tribunal is willing to adopt the reasoning in *Micula v Romania.* However, the difficulty for the Claimants was that they simply did not present sufficient evidence to show that interim measures were necessary to protect the Claimants as going concerns.

122. There was no evidence that Trevi and OHL were in a precarious financial position. The most that was said for OHL was that if the bonds were called upon, that would result in a reduction in the value of its shares. That is far from the threshold established in *Micula v Romania*.

123. There was some evidence before the Tribunal of Rizzani's financial situation, though this was rather belatedly introduced. First, the Respondent introduced into the record a copy of Rizzani's Annual Report and Consolidated Financial Statements for the

[156] *Ioan Micula and Others v Romania*, ICSID Case No ARB/05/20, Decision on Provisional Measures, 2 March 2011 at [68], as quoted in F. Campolieti, "The Rule of Non-Aggravation of the Dispute in ICSID Arbitration Practice", *ICSID Review*, Vol. 30, No. 1, 2015, pp217-230, p. 223, Legal Authority CL-44.

Financial Year 2016 dated 12 June 2017 ("**Rizzani's FY2016 Financial Statements**").[157] If Rizzani was truly on the brink of insolvency, it would be reasonable to expect that these financial statements would have indicated that clearly to the shareholders of Rizzani. However, there was no such disclosure in these financial statements.

124. Secondly, the Claimants introduced into the record Rizzani's Consolidated Stand-Alone Semi-annual Financial Statements as at 30 June 2017 ("**Rizzani's June 2017 Financial Statements**")[158]. This was in response to the Respondent's reliance on Rizzani's FY2016 Financial Statements.

125. The Claimants pointed to the fact that Rizzani's FY2016 Financial Statements reflected a negative net financial position of €74 million on 31 December 2016, and Rizanni's June 2017 Financial Statements reflected a negative net financial position of €141 million by June 2017.

126. However, the fact that Rizzani has a net negative financial position does not mean that it is insolvent, a position that the Claimants' Counsel candidly agreed with.[159] Further, the Claimants' Counsel responding to questions from the Tribunal represented that the increase in Rizzani's negative financial position from €74 million to €141 million was because of "increased borrowing" as Rizzani is "growing".[160] The picture that emerged is thus of a company which is getting new projects and which is borrowing money to fund those projects. This is far removed from the situation of financial distress.

157 Exhibit R-67.
158 Exhibit C-295.
159 Transcript of hearing, 4 November 2017, p 77 line 6 to p 78 line 8.
160 Transcript of hearing, 4 November 2017, p 77 lines 14 to 21 and p 80 lines 9 to 16.

127. The Tribunal was told that Rizzani has more than USD 400 million of existing bonds covering all the various projects it is involved in worldwide. The Claimants represented that for some of the other projects, Rizzani had provided bonds of similar quantum as compared to the Project in Kuwait. The Claimant asserted that if there was a call on the bonds in any of those projects (not just the Kuwait Project), this would lead to Rizzani's insolvency.[161] Such assertions did not prove that Rizzani was in a delicate financial position. If anything, these assertions indicate that the grant of the provisional measures requested by the Claimants would not remove the danger that the Claimants were alleging.

128. Perhaps most crucially, the Claimants did not provide any analysis on the specific tipping point at which Rizzani would slide into insolvency and cease to be a going concern. In fact, the Claimants accepted that there are no allegations or evidence in their submissions as to a specific tipping point.[162] The Claimants have simply not produced any evidence or analysis of what quantum of delay penalties and/or bonds being called would be financially unbearable to Rizzani and which would then send Rizzani into insolvency. Without clear evidence of this, the Tribunal cannot assume that even if the Respondent called on the bonds and/or demanded immediate payment of delay penalties, it would result in Rizzani's demise.

129. In the premises, the *Micula v Romania* test was not satisfied in this case.

130. For the reasons set out above, the Tribunal concludes that there is no imminent risk of harm justifying the Claimants' Requests A, B, C and D. The Claimants' Requests,

[161] Transcript of hearing, 4 November 2017, p 75 lines 8 to 25.
[162] Transcript of hearing, 4 November 2017, p 65 lines 2 to 10.

as set out at paragraphs 58(a) to (d) of the Claimants' Request for Provisional Measures, must therefore be rejected.

(2) Alleged right to non-aggravation of the dispute

131. In their request (e), as set out at paragraph 58(e) of the Claimants' Request for Provisional Measures, the Claimants seek an order from the Tribunal refraining the Respondent and/or their agencies or entities from engaging in any other conduct that aggravates the dispute between the Parties and/or alters the *status quo* ("**Claimants' Request E**").

132. It was not contested that provisional measures can be granted in order to avoid aggravation of a dispute. This general principle has been set out in the following terms by the ICSID tribunal in *Victor Pey Casado v Chile*:[163]

> "It relates to the general principle, frequently affirmed in international case-law, whether judicial or arbitration proceedings are in question, ***according to which "each party to a case is obliged to abstain from every act or omission likely to aggravate the case or to render the execution of the judgment more difficult***'. [Emphasis added.]

133. The Tribunal is not convinced by the evidence presented by the Claimants that the Respondent is engaged in conduct that aggravates the dispute and/or alters the *status quo*. Moreover, given that both Parties have each sought an order from the Tribunal requiring the other party to refrain from engaging in any conduct that aggravates the dispute and/or alters the *status quo*, the Tribunal expects that the Parties are aware of their obligations *not* to aggravate the dispute in the course of

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163 *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on Provisional Measures (25 September 2001) at [67], Legal Authority CL-64. See also *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016 ("***Teinver v Argentine Republic***") at [198], Legal Authority CL-51.

these arbitration proceedings and that they will act in compliance with those obligations. The Tribunal thus declines at this stage to make an order in respect of Claimants' Request E.

C. The Respondent's Application

(1) Exclusivity of ICSID proceedings

134. As has been recognised by numerous ICSID tribunals,[164] the right to exclusivity of ICSID proceedings under Article 26 of the ICSID Convention can be protected by way of provisional measures. Article 26 of the ICSID Convention provides:

> "**Article 26**
>
> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

135. Turning to the first four provisional measures sought by the Respondent in the Respondent's Application (as set out at paragraphs 207(i) to (iv) of the Respondent's Rejoinder to the Claimants' Request for Provisional Measures and Request for Provisional Measures), the Respondent seeks orders requiring the Claimants to:

(a) withdraw any and all proceedings against the Respondent or any of its governmental subdivisions relating to the dispute that is the subject matter of this arbitration that have been commenced in the courts of Milan, Italy, as well as any such other proceedings that have been commenced before any other

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164 *Teinver v Argentine Republic* at [193], Legal Authority CL-51; *Quiborax v Bolivia* at [127], Legal Authority CL-41; and *Tokios Tokelès v Ukraine* at [7], Legal Authority RL-28

national court or authority in any country, whether judicial, administrative or otherwise, during the pendency of this arbitration, in violation of the ICSID Convention and/or the exclusive jurisdiction clause of the Contract ("**Respondent's Request I**");

(b) vacate the *ex parte* judgments obtained in the court in Milan, Italy ("**Respondent's Request II**");

(c) inform the Tribunal and Respondent as to whether any other proceedings relating to the dispute that is the subject matter of this arbitration have been commenced before any national court of authority, whether judicial, administrative or otherwise, during the pendency of this arbitration ("**Respondent's Request III**"); and

(d) refrain from commencing any other proceedings relating to the dispute that is the subject matter of this arbitration before any other national court or authority in any country, whether judicial, administrative or otherwise, during the pendency of this arbitration, in violation of the ICSID Convention and/or the exclusive jurisdiction clause of the Contract ("**Respondent's Request IV**").

136. The Tribunal notes that during the second day of the Hearing, the Respondent's Counsel confirmed,[165] in response to the Tribunal's questions, that if the Claimants, through their Counsel, represented on record that the two *ex parte* orders obtained by Rizzani and Trevi in Milan, Italy were no longer in effect and that the Claimants

165 Transcript of hearing, 4 November 2017, p 116 line 13 to p 117 line 8.

were no longer taking any part in the proceedings that were ongoing in Italy, the Respondent would "withdraw the request to vacate the Milan court proceedings".

137. The Claimants' Counsel, Mr Silva Romero and Mr Michelangelo Cicogna, subsequently made the following representations on record during the Hearing:[166]

> "MR SILVA ROMERO: …The first way is that regarding ***Rizzani de Eccher, the decision was revoked and the deadline for filing an appeal already elapsed, and Rizzani didn't file an appeal*** because of the commitment that we had made in our papers not to pursue those actions now that we have the ICSID Tribunal constituted.
>
> Regarding Trevi and then – yes, Michelangelo wants to add something.
>
> MR CICOGNA: Regarding Trevi, the representation is the following, and the commitment, if you wish. ***The court revoked the Trevi order, the court is the same judge, the same person, same day. Trevi, for the reason just mentioned by Mr Silva Romero, decided not to appeal and the appeal period for Trevi is expired.***
>
> BNP bank, Banca Popolare di Milano, did appeal on the costs and on clerical orders of the record. The hearing is fixed on 22nd November. Trevi could, in theory, appear – not appeal, but appear – by November 20th. Should Trevi appear, they could only have a discussion on the limited grounds of appeal of Banca Popolare di Milano, which means cost of the clerical errors, so not we discuss the merits, because its principal term for appeal expired, and Trevi shall not appear.
>
> I think clearer than that I couldn't be." [Emphasis added.]

138. In addition, Mr Silva Romero also represented at the end of the Hearing that he was <u>not</u> aware of any other proceedings presently pending in any other jurisdictions relating to this arbitration.[167]

139. Having recorded the Claimants' representations made through their Counsel at the Hearing, and in light of the Respondent's Counsel's answers to the Tribunal's questions as set out at paragraph 136 above, the Tribunal is of the view that the

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166 Transcript of hearing, 4 November 2017, p 121 line 4 to p 122 line 4.

167 Transcript of hearing, 4 November 2017, p 124 lines 10 to 13.

issues relating to Respondent's Requests I, II and III are now moot. Consequently, it is not necessary for the Tribunal to make any orders in respect of Respondent's Requests I, II and III.

140. As for Respondent's Request IV, the Tribunal reiterates that Article 26 of the ICSID Convention provides that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy*" (emphasis added). It is not disputed, and the Tribunal emphasizes, that Article 26 of the ICSID Convention remains binding on all Parties.

141. Having said that, in the absence of any evidence of other proceedings relating to this arbitration having been commenced by the Claimants, and having regard to the Claimants' Counsel's representations set out at paragraph 138 above, the Tribunal is of the view that it is not necessary for any order to be made in respect of Respondent's Request IV.

(2) Continuation of works

142. The Tribunal shall now address request (v) of the Respondent's Application, which is set out at paragraph 207(v) of the Respondent's Rejoinder to the Claimants' Request for Provisional Measures and Request for Provisional Measures ("**Respondent's Request V**"). Specifically, the Respondent requests that the Tribunal issues an order requiring Claimants to "[c]ontinue to perform works on the Project duly required under the Contract and in accordance with the present program of works scheduled for completion by February 2019".

143. In the course of the Hearing, through their Counsel, the Claimants represented that even if the Tribunal were to deny the Claimants' request for suspension, the Claimants would eventually have "no other *rational* choice but to stop the works" (emphasis added).[168] The Respondent's Counsel characterised this as an "express statement of an intention to walk away" by the Claimants which was tantamount to the "repudiation" of the Contract.[169] The Tribunal is not prepared to find that the Claimants' caveated statement goes so far as to say that the Claimants will, to borrow the Respondent's Counsel's words, "walk away" from the Project should the Tribunal deny the Claimants' request for suspension of the works. It appeared to the Tribunal that the Claimants were saying that they would be compelled by the circumstances to stop work and the Tribunal understood this to be a reference to the Claimants' arguments of their difficult financial situation.

144. In any event, even if the statement was meant in the way that the Respondent interpreted it, the Tribunal is unable to conclude that irreparable harm would be caused to the Respondent in the event that the Claimants stop work on the Project.

145. First, even if the Claimants would eventually repudiate the Contract, there is nothing prohibiting the Respondent from terminating the Contract and taking steps to hire a replacement contractor. In this regard, Mr Faulkner (the Respondent's witness) testified at the Hearing that if the Claimants were to walk away from the Project now, there is "at this time…probably a good opportunity for a replacement contractor because obviously there are already contractors working on either side of Jamal Abdul Nasser Street…and also there are several new contracts with elevated bridges which are now starting in Kuwait". Mr Faulkner also testified that the "expected" period for the Respondent to get a replacement contractor in place to continue the

168 Transcript of hearing, 3 November 2017, p 23 lines 17 to 23.
169 Transcript of hearing, 4 November 2017, p 89 lines 10 to 13.

works would be "between three to six months".[170] The "expected" period may shorten if MPW were to take the view that a contractor is unlikely to complete their works, given that MPW would "surely" be "looking to get somebody on board earlier and be making preparations".[171]

146. Secondly, there is also nothing prohibiting the Respondent from invoking its contractual remedies, such as the calling on the bonds that were posted by the Claimants for the Project. In fact, the Claimants have, at the Hearing, emphatically undertaken to maintain and "extend the bonds for the duration of the Project":[172]

> "MR SILVA ROMERO: …Lastly, in addition, I should end our opening statement, members of the Tribunal, by insisting on two points that we say show the good faith that the Claimants show in this very case. ***First, Claimants would agree, as I already said, to extend the bonds for the duration of the Project. This commitment we wanted to be very clear you***".

147. Thirdly, any prejudice suffered by the Respondent as a result of the Claimants' repudiation of the Contract can be readily compensated by a monetary award.

148. For all these reasons, the Tribunal finds that there is no danger of irreparable harm justifying the Respondent's request that this Tribunal issues an order requiring the Claimants to perform works on the Project. The order sought is thus not necessary and the Respondent's Request V must be denied.

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170 Transcript of hearing, 3 November 2017, p 197 line 24 to p 198 line 22.
171 Transcript of hearing, 4 November 2017, p 33 line 5 to p 34 line 4.
172 Transcript of hearing, 3 November 2017, p 86 lines 19 to 25.

(3) Maintenance of bonds

149. As for request (vi) of the Respondent's Application, i.e. that the Claimants continue to maintain in place all bonds required by the Project ("**Respondent's Request VI**"),[173] this issue is now moot given the Claimants' clear undertaking at the Hearing to maintain and "extend the bonds for the duration of the Project".[174] No order from the Tribunal in respect of this request is therefore required.

(4) Alleged right to non-aggravation of the dispute

150. Turning to request (vii) of the Respondent's Application, i.e. that the Claimants refrain from engaging in any other conduct that aggravates the dispute between the Parties and/or alters the *status quo*,[175] as set out above at paragraph 133 above ("**Respondent's Request VII**"), the Tribunal trusts that both Parties will not aggravate the dispute in the course of these arbitration proceedings and sees no need to make an order in respect of Respondent's Request VII.

VI. THE TRIBUNAL'S DECISION

151. For the reasons set out above, the Tribunal finds, unanimously, after having reviewed the evidence and the Parties' respective arguments, that both the Claimants and the Respondent have failed to demonstrate that any order for provisional measures is justified in the circumstances.

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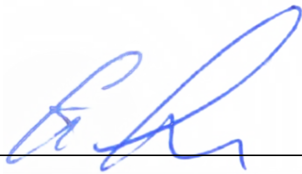
173 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and Request for Provisional Measures dated 21 June 2017 at [207(vi)].

174 Transcript of hearing, 3 November 2017, p 86 lines 19 to 25. The Claimants also stated, at [101] of their Response to the Respondent's Request for Provisional Measures dated 4 September 2017, that whether or not the Tribunal considers that the Respondent should be allowed to call the bonds during the pendency of this arbitration, the Claimants will have no choice but to maintain all bonds in effect.

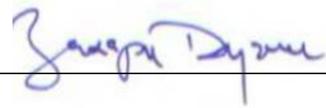
175 Respondent's Rejoinder to the Claimants' Request for Provisional Measures and Request for Provisional Measures dated 21 June 2017 at [207(vii)].

152. Accordingly, the Tribunal hereby rejects both the Claimants' and the Respondent's Applications in their entirety.

153. The Tribunal has, in its discretion, decided that the most appropriate costs order in respect of both Applications is to order the Parties to bear their own costs arising from these Applications. The Claimants and the Respondent will each bear one half of the costs of the Tribunal and the Center arising from these Applications.



Dr. Stanimir Alexandrov



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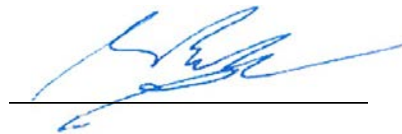

Mr Cavinder Bull SC

President

Date: 23 November 2017