INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AGILITY PUBLIC WAREHOUSING COMPANY K.S.C.

Claimant

and

REPUBLIC OF IRAQ

Respondent

ICSID Case No. ARB/17/7

AWARD

Members of the Tribunal
Mr. Cavinder Bull SC, President
Mr. John Beechey
Prof. Sean D. Murphy

Secretary of the Tribunal
Ms. Geraldine Fischer

Date of dispatch to the Parties: 22 February 2021

REPRESENTATION OF THE PARTIES

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The Republic of Iraq

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Ministry of Justice
The Republic of Iraq

and

Mr. Salem Chalabi
Office of the Prime Minister
The Republic of Iraq

and

Mr. Donald Francis Donovan
Ms. Catherine Amirfar
Ms. Ina C. Popova
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TABLE OF COMMONLY USED ABBREVIATIONS/DEFINED TERMS

2007 Loan Transaction	Agility's initial investment of USD 250 million to fund Korek's license fee payment in 2007
2011 Equity Transaction	The transaction between Agility, Orange, and Korek whereby Agility and Orange acquired an indirect stake in Korek from Korek's Iraqi shareholders
2015 BIT or BIT	Agreement Between the Government of the State of Kuwait and the Government of the Republic of Iraq for Reciprocal Promotion and Protection of Investments, which entered into force on 4 February 2015
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
Agility or Claimant	Agility Public Warehousing Company K.S.C., a company incorporated under the laws of the State of Kuwait
Alcazar	Alcazar Capital Partners, Agility's wholly-owned subsidiary
CMC	Communications and Media Commission
CMC Order	The decision of the CMC dated 2 July 2014, which provided that the 2011 Equity Transaction was void
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Iraq or Respondent	The Republic of Iraq
IH	International Holdings Limited, incorporated in the DIFC to serve as IT Ltd's common holding company
Iraqi Administrative Court	The Shoura Administrative Court in Iraq

IT Ltd	Iraq Telecom Limited, a company owned by Agility and Orange as a joint venture vehicle
KCR Decree or KCR Administrative Order	KRG Directorate of Registration of Local Companies, Administrative Order No. 4961 dated 19 March 2019
Korek	Korek Telecom Company LLC, an Iraqi telecommunications company incorporated in August 2000
KRG	The Kurdistan Regional Government of Iraq
KRG Guarantee	A guarantee issued by the KRG for the benefit of Agility in connection with its investment in Korek in 2007

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement Between the Government of the State of Kuwait and the Government of the Republic of Iraq for Reciprocal Promotion and Protection of Investments, which entered into force on 4 February 2015 (the "**2015 BIT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

2. The Claimant is Agility Public Warehousing Company K.S.C. ("**Agility**" or the "**Claimant**"), a Kuwait Shareholding Company incorporated and existing under the laws of the State of Kuwait ("**Kuwait**").

3. The Respondent is the Republic of Iraq ("**Iraq**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "Parties." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to the Claimant's investment in an Iraqi telecommunications joint venture. The Claimant alleges that the Respondent breached its substantive obligations under the 2015 BIT and customary international law.

II. PROCEDURAL HISTORY

6. On 9 February 2017, ICSID received a request for arbitration dated 8 February 2017 from Agility Public Warehousing Company K.S.C. against the Republic of Iraq (the "**Request**").

7. On 24 February 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.

9. The Tribunal is composed of Mr. Cavinder Bull SC, a national of Singapore, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Mr. John Beechey, a national of the United Kingdom, appointed by the Claimant; and Prof. Sean D. Murphy, a national of the United States of America, appointed by the Respondent.

10. On 20 December 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Geraldine Fischer, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

11. On 31 January 2018, the Tribunal held a first session with the Parties by teleconference.

12. On 14 February 2018, the Tribunal issued Procedural Order No. 1 governing procedural matters.

13. In accordance with the timetable set forth in Procedural Order No. 1, on 30 April 2018, the Claimant filed a Memorial on the Merits ("**Claimant's Memorial**") designated "Highly Sensitive Information/Attorney's Eyes Only", together with a Witness Statement of Mr. Ihab Fekry Aziz Bassilios with Exhibits IA-001 through IA-014; a confidential Witness Statement designated as "Attorney's Eye's Only" ("**AEO**") with Exhibits C-001 through C-025; an Export Report of Compass Lexecon with Exhibits CLEX-001 through CLEX-074; an Export Report of Ms. Reema I. Ali with Exhibits RA-001 through RA-010; Exhibits C-001 through C-100; and Legal Authorities CL-001 through CL-094.

14. On 4 July 2018, the Tribunal, after hearing from the Parties, granted the Claimant's request to admit an 18 January 2018 decision of the Iraqi Supreme Administrative Court into the record as Exhibit C-101.

15. In accordance with Procedural Order No. 1, on 6 August 2018, the Respondent filed its Preliminary Objections to Jurisdiction *Ratione Temporis* and Request for Bifurcation together with Legal Authorities RL-001 through RL-020.

16. On 17 September 2018, the Claimant filed Observations on the Respondent's Request for Bifurcation together with Legal Authorities CL-095 through CL-135.

17. On 11 October 2018, the Tribunal held a hearing on bifurcation in London, U.K. (the "**Bifurcation Hearing**"). In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following individuals were present at the Bifurcation Hearing:

For the Claimant:

Mr. Cyrus Benson	Gibson, Dunn & Crutcher LLP
Mr. Rahim Moloo	Gibson, Dunn & Crutcher LLP
Mr. Philip Shapiro	Gibson, Dunn & Crutcher LLP
Mr. Philipp Kurek	Kirkland & Ellis International LLP
Mr. Bader El-Jeaan	Meysan Partners
Mr. Abdulwahab Sadeq	Meysan Partners

For the Respondent:

Mr. Donald Francis Donovan	Debevoise & Plimpton LLP
Ms. Catherine Amirfar	Debevoise & Plimpton LLP
Ms. Sarah Lee	Debevoise & Plimpton LLP
Ms. Tegan Grace	Debevoise & Plimpton LLP

Court Reporter:

Ms. Diana Burden	Diana Burden Reporting

18. On 31 October 2018, the Tribunal issued Procedural Order No. 2 granting the Respondent's Request for Bifurcation.

19. Following the Parties' agreement, the Tribunal issued a revised procedural timetable on 5 January 2019.

20. On 10 January 2019, the Claimant filed a Counter-Memorial on Preliminary Objections *Ratione Temporis* designated "Highly Sensitive Information/Attorney's Eyes Only", together with an Expert Report of Dr. Jonathan Owens with Exhibits JO-001 through JO-017; and Legal Authorities CL-136 through CL-176.

21. On 21 February 2019, the procedural timetable was modified further to the Parties' agreement.

22. On 25 February 2019, the Respondent filed a Reply on Preliminary Objections *Ratione Temporis*, together with Legal Authorities RL-021 through RL-055.

23. On 15 March 2019, the procedural timetable was again modified pursuant to the Parties' agreement.

24. On 22 March 2019, the Claimant filed a Rejoinder on Preliminary Objections *Ratione Temporis* designated "Highly Sensitive Information/Attorney's Eyes Only", together with Legal Authorities CL-177 through CL-193.

25. On 1 April 2019, the President of the Tribunal held a pre-hearing organizational meeting with the Parties and the Secretary of the Tribunal by teleconference.

26. On 9 April 2019, the Tribunal issued Procedural Order No. 3 on hearing organization.

27. On 12 April 2019, further to the Parties' agreement and Procedural Order No. 3, the Respondent submitted new Exhibits R-001 through R-003; new Legal Authorities RL-0056 through RL-0062; and revised Legal Authorities RL-0042 and CL-0138.

28. On 15 April 2019, further to the Parties' agreement and Procedural Order No. 3, the Claimant submitted new Legal Authority CL-0194. Further to the Parties' agreement, too, the Claimant submitted Exhibit C-102 on 18 April 2016.

29. On 24 and 25 April 2019, a Hearing on Preliminary Objections *Ratione Temporis* was held at the International Dispute Resolution Centre in London, U.K. (the "Hearing on

Jurisdiction"). In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following individuals were present at the Hearing on Jurisdiction:

For the Claimant:

Mr. Cyrus Benson	Gibson, Dunn & Crutcher LLP
Mr. Rahim Moloo	Gibson, Dunn & Crutcher LLP
Ms. Lindsey Schmidt	Gibson, Dunn & Crutcher LLP
Mr. Philip Shapiro	Gibson, Dunn & Crutcher LLP
Mr. Patrick Taqui	Gibson, Dunn & Crutcher LLP
Mr. Philipp Kurek	Kirkland & Ellis International LLP
Mr. Bader El-Jeaan	Meysan Partners
Mr. Abdulwahab Sadeq	Meysan Partners

For the Respondent:

Mr. Donald Francis Donovan	Debevoise & Plimpton LLP
Ms. Ina Popova	Debevoise & Plimpton LLP
Mr. Nawi Ukabiala	Debevoise & Plimpton LLP
Ms. Sarah Lee	Debevoise & Plimpton LLP
Mr. Andrew Esterday	Debevoise & Plimpton LLP
Mr. Simon Alton	Debevoise & Plimpton LLP
Mr. Salem Chalabi	Stephenson Harwood LLP

Court Reporters:

Ms. Georgina Ford	Briault Reporting
Mr. Ian Roberts	Briault Reporting

30. Pursuant to the Parties' agreement, on 26 April 2019, the Claimant submitted Exhibits C-103 and C-104.

31. The Parties filed their Submissions on Costs on 20 May 2019.

32. On 9 July 2019, the Tribunal issued its Decision on Jurisdiction, which forms part of this Award. In its Decision on Jurisdiction, the Tribunal decided *inter alia* as follows:

    (1) The Tribunal dismisses the Respondent's jurisdictional objection *ratione temporis* in respect of the Claimant's denial of justice claim.

(2) The Tribunal dismisses the Respondent's jurisdictional objection *ratione temporis* in respect of the Claimant's claim arising from the Respondent's alleged failure to implement the CMC Order.

(3) The Tribunal allows the Respondent's jurisdictional objection *ratione temporis* in respect of the rest of the claims made by the Claimant in its Memorial.

(4) As to all other matters, the Tribunal retains in full its jurisdiction and powers generally to decide such matters in these arbitration proceedings, whether by order, decision or award.

33. On 2 September and 26 December 2019 and 20 February 2020, following the Parties' agreements, the Tribunal issued Procedural Order Nos. 4, 5 and 6, revising the procedural calendar.

34. On 13 March 2020 the Respondent filed a Counter-Memorial on the Merits ("**Respondent's Counter-Memorial**"), together with Exhibits R-0007 to R-0036; Legal Authorities RL-0004, RL-0088 through RL-0105; an Expert Report of Dr. Reyadh Al-Kabban with Exhibits RAK-001 through RAK-002; an Expert Report of Mr. Robert Grien with Exhibits RG-001 through RG-024; and Exhibits R-0025, R-0028, R-0035 through R-0036.

35. On 30 March 2020, further to the Parties' agreement, the Tribunal issued Procedural Order No. 7, modifying the procedural calendar.

36. On 6 May 2020, the Tribunal issued Procedural Order No. 8 on document production.

37. On 18 May 2020, after various exchanges between the Parties, the Tribunal issued Procedural Order No. 9 (**"PO 9"**) concerning eight documents which the Claimant argued should be subject to an AEO designation ("**Eight Documents**").[1] In this Order, the

[1] Exhibits C-025, C-030, C-032, C-033, C-095, RC-021, RC-024, and RC-025.

Tribunal denied the Claimant's AEO designations over the Eight Documents and the corresponding references in the Claimant's submissions. The Claimant was ordered to elect to either: (a) withdraw the Eight Documents (and their corresponding references in the Claimant's submissions) from the record; or (b) provide the Respondent with un-redacted and non-AEO versions of the Eight Documents (and their corresponding references in the Claimant's submissions) within 10 days. In addition, the Claimant was ordered to pay the Respondent its costs related to its challenge of the Claimant's AEO designations. If the quantum of those costs could not be agreed between the Parties, each Party was to provide the Tribunal with its cost submissions within 3 weeks of the date of the Order. The Tribunal did not receive any cost submissions.

38. On 22 June 2020, the Tribunal issued Procedural Order No. 10, denying the Claimant's 28 May 2020 application that the Tribunal reconsider Procedural Order No. 9. The Tribunal further ordered that the "Claimant either: (a) withdraw the Eight Documents (and their corresponding references in the Claimant's submissions) from the record; or (b) provide the Respondent with un-redacted and non-AEO versions of the Eight Documents (and their corresponding references in the Claimant's submissions)" within 10 days. The Claimant was ordered to pay the Respondent its costs in responding to the Claimant's reconsideration application. If the quantum of those costs could not be agreed between the Parties, each Party was to provide the Tribunal with its cost submissions within 3 weeks of the date of the Order. The Tribunal did not receive any cost submissions.

39. On 2 July 2020, the Claimant withdrew the Eight Documents.

40. On 18 July 2020, the Claimant filed a Reply on the Merits ("**Claimant's Reply"**), together with Exhibits C-142 through C-178; Legal Authorities CL-213 through CL-273; a Second Witness Statement of Mr. Ihab Fekry Aziz Bassilios; a Witness Statement of Mr. Tarek Sultan; a Second Expert Report of Ms. Reema I. Ali with Exhibits RA-011 through RA-032; an Expert Report of Prof. Noah Feldman with Exhibits NF-001 through NF-018; an Expert Report of Prof. Jan Paulsson with Exhibits JP-001 through JP-020; a Second Report of Raedas Consulting Limited with Exhibits RC-026 through RC-046; an Expert Report of

Mr. Santiago Dellepiane A. and Mr. Eric Madsen of BRG with Exhibits BRGDM-001 through BRGDM-040; and an Expert Report of Mr. Mark Williams of BRG with Exhibits BRGW-001 through BRGW-046.

41. On 21 July 2020, after carefully considering the Parties' arguments relayed in their written submissions of 7 and 13 July 2020 and at a 15 July 2020 teleconference between the Parties and the Tribunal, the Tribunal issued Procedural Order No. 11, denying the Claimant's application to (a) extend the deadline for the submission of the Parties' Reply and Rejoinder respectively, and to establish new hearing dates in view of Respondent's admitted inability to locate and produce documents during shutdowns due to the COVID-19 pandemic; and (b) order Respondent to take additional steps to comply with its document production obligations.

42. On 23 September 2020, the Respondent filed a Rejoinder on the Merits ("**Respondent's Rejoinder**"), together with a Reply Expert Report of Dr. Reyadh Al-Kabban; an Expert Rebuttal Report of Mr. Robert Grien; Exhibits R-0089 through R-0142; and Legal Authorities RL-0004-ENG (Revised), RL-0088-ENG (Revised), RL-0121 through RL-0144.

43. On 28 September 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by videoconference.

44. On 2 October 2020, the Tribunal issued Procedural Order No. 12 on hearing organization.

45. Between 12 and 16 October 2020, the Tribunal held a hearing on the merits by videoconference (the "**Hearing on the Merits**"). In addition to the Members of the Tribunal and the Acting Secretary of the Tribunal, the following individuals were present at the Hearing:

For the Claimant:

Mr. Cyrus Benson	Gibson, Dunn & Crutcher LLP
Mr. Rahim Moloo	Gibson, Dunn & Crutcher LLP
Ms. Lindsey Schmidt	Gibson, Dunn & Crutcher LLP

Mr. Moeiz Farhan	Gibson, Dunn & Crutcher LLP
Mr. Philip Shapiro	Gibson, Dunn & Crutcher LLP
Mr. Patrick Taqui	Gibson, Dunn & Crutcher LLP
Ms. Wendy Cai	Gibson, Dunn & Crutcher LLP
Mr. Sam Berman	Gibson, Dunn & Crutcher LLP
Mr. Bader El-Jeaan	Meysan Partners
Mr. Abdulwahab Sadeq	Meysan Partners
Ms. Abby Cohen Smutny	White & Case LLP
Mr. Brody Greenwald	White & Case LLP
Mr. John Willems	White & Case LLP
Ms. Noor Davies	White & Case LLP
Mr. Samy Markbaoui	White & Case LLP
Mr. Andrei Popovici	White & Case LLP

Experts:

Mr. Santiago Dellepiane A.	Berkeley Research Group
Mr. Eric Madsen	Berkeley Research Group
Mr. Noah Feldman	Harvard Law School
Ms. Reema Ali	AP Consulting

Witnesses:

Mr. Tarek Sultan	Agility Public Warehousing
Mr. Ihab Aziz	Agility Public Warehousing

For the Respondent:

Ms. Catherine Amirfar	Debevoise & Plimpton LLP
Ms. Ina Popova	Debevoise & Plimpton LLP
Ms. Elizabeth Nielsen	Debevoise & Plimpton LLP
Ms. Sarah Lee	Debevoise & Plimpton LLP
Ms. Suzanne Zakaria	Debevoise & Plimpton LLP
Ms. Mary Grace McEvoy	Debevoise & Plimpton LLP
Mr. Richard A. Brea	Debevoise & Plimpton LLP
Mr. Ramsey Nassar	Debevoise & Plimpton LLP
Mr. Salem Chalabi	Office of the Prime Minister of the Republic of Iraq

Experts:

Mr. Robert Grien	TM Capital Corp.
Dr. Reyadh Al-Kabban	Al-Kabban & Associates

Court Reporter:

Ms. Claire Hill	Claire Hill Realtime Reporting

Interpreter:

Mr. Marwan Abdel-Rahman

46. On 18 November 2020, the Parties submitted their Post-Hearing Briefs.

47. On 4 January 2021, the Parties submitted their Cost Submissions, and on 22 January 2021, the Parties presented further submissions on interest.

48. The proceedings were closed on 3 February 2021.

III. RELEVANT FACTS

49. The Tribunal first sets out below a summary of the relevant facts that have led to this dispute. The Tribunal will elaborate on the facts as needed in subsequent sections of this Award.

A. THE CLAIMANT'S INVESTMENT

50. In March 2004, the Coalition Provisional Authority of Iraq established the Iraqi Communications and Media Commission (the "**CMC**"), an administrative institution responsible for licensing and regulating telecommunications, broadcasting, information services, and other media in Iraq.[2]

51. In August 2007, the CMC awarded a nationwide mobile telecommunications license ("**License Agreement**")[3] to Korek Telecom Company LLC ("**Korek**"), which was an Iraqi limited liability company incorporated in August 2000 with the Registration Directorate of Companies of the Kurdistan Regional Government in the Republic of Iraq (the "**KRG**").[4]

[2] Coalition Provisional Authority Order No. 65 ("**Order 65**") dated 20 March 2004, Exhibit C-002.

[3] Mobile Telecommunications Services License Agreement between the CMC and Korek Telecom dated 30 August 2007, Exhibit C-003 ("**License Agreement**").

[4] Korek Constitutional Documents, Exhibit C-001.

52. In September 2007, the Claimant made an initial investment of USD 250 million to fund the second instalment of the license fee payment which Korek needed to pay to the CMC.[5] The Claimant's 2007 investment was made through its wholly owned subsidiary, Alcazar Capital Partners ("**Alcazar**"), which agreed to make the USD 250 million investment in Korek via a convertible senior loan note dated 11 September 2007 (the "**Convertible Note**").[6] The Convertible Note was entered into between Korek and Alcazar, and gave Agility the option to convert the USD 250 million debt into equity in Korek at its election.[7]

53. The Claimant's 2007 investment was made in reliance on a sovereign guarantee by the KRG (the "**KRG Guarantee**").[8] Under the KRG Guarantee, the KRG undertook to "finally and irrevocably, jointly and severally with Korek Telecom, guarantee towards [Alcazar], until full and final payment of the loan, in principal and interest, by Korek Telecom, the payment of such loan upon [Alcazar's] first demand."[9]

54. In late 2010, Korek required further financial support and technical help in expanding its network.[10] The Claimant identified the French telecommunications company, Orange S.A. ("**Orange**"), formerly known as France Telecom S.A, as a suitable partner to inject both capital into Korek and to provide technical assistance as required.[11]

55. Following extensive multi-party negotiations, Agility and Orange agreed to invest approximately USD 810 million for an indirect 44% minority stake in Korek and USD 285 million of Shareholders' debt (the "**2011 Equity Transaction**"). The remaining 56%

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[5] Payment confirmation dated 11 September 2007, Exhibit C-005.

[6] Convertible Loan Agreement between Korek and Alcazar dated 11 September 2007, Exhibit C-004; Korek Telecom Convertible Senior Promissory Note dated 11 September 2007, Exhibit C-006.

[7] Korek Telecom Convertible Senior Promissory Note dated 11 September 2007, Exhibit C-006.

[8] First Witness Statement of Mr. Ihab Fekry Aziz Bassilios dated 30 April 2018 ("**Aziz First Witness Statement**"), ¶ 16; Witness Statement of Mr. Tarek Sultan dated 17 July 2020 (corrected as of 31 August 2020) ("**Sultan Witness Statement**"), ¶ 11.

[9] Sovereign Guarantee of the Kurdistan Regional Government ("**KRG Guarantee**") dated 11 September 2007, Exhibit C-007.

[10] Aziz First Witness Statement, ¶ 17; Korek Audited Financial Statements for the year ended 31 December 2010, Exhibit CLEX-001.

[11] Aziz First Witness Statement, ¶ 17; Sultan Witness Statement, ¶ 16.

interest would continue to be held by Korek's Iraqi shareholders (the "**Iraqi Shareholders**").[12]

56. Under the terms of the License Agreement, the CMC's approval was required for any transaction that would change control of 10% or more of Korek's shares.[13] Following communications between Korek and the CMC on 13 March and 21 April 2011,[14] the CMC provided its consent to the transfer of Korek's shares to International Holdings Limited ("**IH**") under the 2011 Equity Transaction by way of a letter to Korek dated 29 May 2011 which states that the CMC's consent was subject to the fulfilment of several conditions ("**29 May 2011 Letter**").[15] On 5 June 2011, Korek sent a letter to the CMC accepting the conditions contained in the CMC's 29 May 2011 Letter.[16]

57. Thereafter, the 2011 Equity Transaction was implemented by way of a series of steps in accordance with a subscription agreement dated 27 July 2011 ("**2011 Subscription Agreement**").[17] Essentially, the Claimant (a) "converted" its Convertible Note (plus USD 86 million in accrued but unpaid interest); and (b) paid an additional USD 50 million in cash, in exchange for (c) a 23.7% indirect equity interest in Korek, and (d) receipt of a note from an investment vehicle for a USD 100 million shareholder loan. Simultaneously, Orange invested USD 430 million in cash in exchange for a 20.3% indirect equity interest in Korek and receipt of a note from the investment vehicle for a USD 185 million shareholder loan. The two notes were backed by a USD 285 million note owed by IH to the investment vehicle, which was guaranteed by Korek.[18]

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[12] Sultan Witness Statement, ¶ 16.

[13] License Agreement, Article XXIV(C), Exhibit C-003.

[14] Letter from Korek to the CMC dated 13 March 2011, Exhibit C-010; Letter from Korek to the CMC dated 7 April 2011, Exhibit C-011; Minutes of a meeting between the CMC and Korek on 21 April 2011, Exhibit C-012.

[15] Letter from the CMC to Korek dated 29 May 2011, ("**29 May 2011 Letter**"), Exhibit C-013.

[16] Letter from Korek to the CMC dated 5 June 2011, Exhibit C-014.

[17] Amended and Restated Subscription Agreement Relating to Korek dated 27 July 2011, ("**2011 Subscription Agreement**"), Exhibit C-015.

[18] Aziz First Witness Statement, ¶¶ 28(a)-28(b); Second Witness Statement of Mr. Ihab Fekry Aziz Bassilios dated 17 July 2020 ("**Aziz Second Witness Statement**"), ¶ 4.

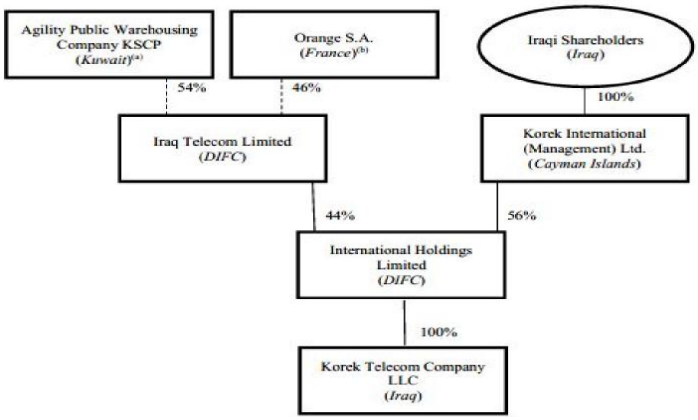
58. The following ownership structure was established under the 2011 Equity Transaction:[19]

(a) IH, a holding company incorporated in the Dubai International Financial Centre (the "**DIFC**"), wholly owned Korek.

(b) Iraq Telecom Limited ("**IT Ltd**"), the Claimant's and Orange's investment vehicle incorporated in the DIFC, held 44% of the shares in IH. The Claimant held 54% of IT Ltd through the Cayman Islands company, Alcazar, and Orange held 46% through the company, Atlas Services Nederland B.V. ("**Atlas**"), incorporated in the Netherlands.

(c) Korek International (Management) Limited ("**CS Ltd**"), the Iraqi Shareholders' investment vehicle incorporated in the Cayman Islands, held the remaining 56% of the shares in IH. An Iraqi national, Mr. Sirwan Barzani, owned 75% of the shares in CS Ltd.

59. A diagram showing the group's structure following implementation of the 2011 Equity Transaction is set out below:[20]



60. On 20 July 2011, the Registrar of Companies in the Kurdistan Region ("**KCR**") issued, in relation to Korek, Order No. 2959 "[r]egistering all the shares of Mr. Sirvan Saber Mostafa, equal to 75%, Mr. Chavoshin Hassan Chavoshin, equal to 20% and Mr. Jaghsi Hamu

[19] Aziz First Witness Statement, ¶ 29.

[20] Claimant's Memorial dated 30 April 2018, ("**Cl. Mem.**"), ¶ 45.

Mostafa, equal to 5% of the company shares under the new shareholder of the new Emirates International Holdings [*i.e.* IH]" ("**KCR Order No. 2959**").[21]

61. As a result of the investments made by the Claimant and Orange in accordance with the 2011 Equity Transaction, Korek's capital was increased from 23.7 billion dinars to 213.5 billion dinars.[22] Further, of the USD 480 million in cash invested by the Claimant and Orange, USD 162.5 million was paid to the CMC in August 2011 in settlement of the final license fee instalment payable by Korek prior to closing, in line with the first condition set out in the CMC's 29 May 2011 Letter.[23]

62. A Shareholders' Agreement dated 10 March 2011 between IH, Korek, CS Ltd, IT Ltd and Mr. Barzani (the "**IH Shareholders' Agreement**") provided the governance structure for the group.[24] Under the IH Shareholders' Agreement, IT Ltd had a call option (available during three different time periods at the initiation of Orange, the Claimant or IT Ltd itself) which permitted it to acquire further shares in IH, such that it could gain an aggregate shareholding of 51% in IH (the "**Call Option**").[25]

B. THE CMC ORDER

63. On 10 December 2013, the CMC sent Korek a letter stating that the CMC could not verify whether Korek had met the requirements imposed by the CMC for the 2011 Equity Transaction. It requested Korek to explain the reasons for Korek's apparent failure to meet such requirements within a week of the letter.[26] When Korek failed to respond, the CMC sent another letter to Korek on 16 January 2014 to reiterate its request.[27]

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[21] KCR Order No. 2959 dated 20 July 2011, Exhibit R-104; *see also* Exhibit C-158.

[22] Aziz Second Witness Statement, ¶ 4, citing KCR Order No. 6325 dated 4 August 2011, Exhibit C-162 and KCR Order No. 2909 dated 20 July 2011, Exhibit C-158.

[23] Aziz Second Witness Statement, ¶ 5(a), citing Letter from Korek to the CMC dated 9 August 2011, Exhibit C-021, and Payment confirmation dated 10 August 2011, Exhibit C-022.

[24] IH Shareholders' Agreement dated 10 March 2011, Exhibit C-008.

[25] IH Shareholders' Agreement dated 10 March 2011, Clause 23, Exhibit C-008.

[26] Letter from the CMC to Korek dated 10 December 2013, Exhibit C-026.

[27] Letter from the CMC to Korek dated 16 January 2014, Exhibit C-029.

64. On 22 January 2014, after the Claimant and Orange had pressed it to reply to the CMC, Korek responded to the CMC's letters, disputing that it had failed to fulfil any conditions applicable to the 2011 Equity Transaction.[28] Following Korek's submission of the 22 January 2014 letter, no further action was taken by the CMC and the Claimant assumed that the matter had been resolved.[29]

65. On 29 May 2014, Orange publicly declared its intention to exercise the Call Option.[30]

66. Twelve days later, on 10 June 2014, the CMC sent a third letter to Korek, stating that Korek was no longer majority-owned by Iraqi nationals and therefore was obligated to pay a higher regulatory fee on its revenues.[31]

67. On 19 June 2014, the CMC Director General issued a memorandum to the CMC's Board of Commissioners, requesting that it, *inter alia*, consider "the partnership desired between Korek company and the foreign French company France Telecom/Agility as null, void and invalid."[32] Thereafter, the CMC Board of Commissioners decided, in its session held on 24 June 2014, to consider "the approval of [the CMC] based upon the principle of partnership dated 29/5/2011 as void and null" as the conditions of that approval had not been met.[33]

68. On 2 July 2014, the CMC sent a further letter to Korek stating, *inter alia*, that the CMC had made a final decision to consider the partnership between Korek, Orange and the Claimant as "void, null and invalid" and that Korek was "to reinstate the status as it was on 13/3/2011." The CMC required Korek, within fifteen days from the date of the letter, to

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[28] Aziz First Witness Statement, ¶ 50, citing the email exchange between AbouCharaf and the KSC between 13 December 2013 and 17 January 2014, p. 1, Exhibit IA-002, and the Letter from Korek to the CMC dated 22 January 2014, Exhibit C-0031.

[29] Aziz First Witness Statement, ¶ 52.

[30] "Orange aims to boost Korek, Meditel stakes to over 50% - CEO", *Telecompaper*, 29 May 2014, available at: https://www.telecompaper.com/news/orange-aims-to-boost-korek-meditel-stakes-to-over-50-ceo--1016498 (last visited 30 April 2018), Exhibit C-034.

[31] Letter from the CMC to Korek dated 10 June 2014, Exhibit C-035.

[32] Memorandum from the CMC Director General to the CMC Board of Commissioners dated 19 June 2014, Exhibit C-036.

[33] CMC Decision to revoke partnership between Korek Ltd. and France Telecom/Agility ("**CMC Order**"), Exhibit C-037.

"... take the procedures to revoke and terminate any contracts assigning shares in [Korek]'s capital that were concluded after 13/3/2011, prove this revocation in the legal entries with the companies registrar and provide [the CMC] with a new statement proving the return of shares to their original owners" (the "**CMC Order**"). [34]

C. THE APPEAL TO THE CMC APPEALS BOARD

69. On 17 July 2014, Korek filed an appeal against the CMC Order to the CMC Appeals Board.[35]

70. While Korek's appeal to the CMC Appeals Board was pending, the CMC wrote to the KCR on 10 August 2014 setting out the terms of the CMC Order and requesting that the KCR "take the necessary measures to annul all the dispositions which have taken place with regard to shares or shareholdings in the capital of [Korek] after March 13th, 2011, to record this annulment in the records [the KCR] hold[s] of the Korek Company and to provide [the CMC] with an official statement noting that the annulment has been recorded and implemented and that the shares disposed after March 13th, 2011 have been returned to their original owners."[36]

71. On 18 August 2014, the CMC Appeals Board rejected Korek's appeal ("**CMC Appeals Board Decision**"). [37]

72. Following the CMC Appeals Board Decision, the CMC sent a letter dated 4 September 2014 to Korek, reiterating the terms of the CMC Order and ordering that Korek take the necessary steps within fifteen days of the letter.[38]

73. On 7 September 2014, the CMC sent a letter to the KCR which referred to the CMC Appeals Board Decision of 18 August 2014 and requested that the KCR, *inter alia*,

[34] CMC Order, Exhibit C-037.
[35] Korek appeal to the CMC Appeals Board dated 17 July 2014, Exhibit C-038.
[36] Letter from the CMC to KCR dated 10 August 2014, Exhibit C-163.
[37] CMC Appeals Board decision dated 18 August 2014, Exhibit C-039.
[38] Letter from the CMC to Korek dated 4 September 2014, Exhibit C-040.

undertake the procedures for revoking and cancelling the assignment of shares in Korek entered into after 13 March 2011.[39]

74. On 22 September 2014, the Claimant and Orange wrote to the CMC directly, stating, *inter alia*, that they had been given no notice of the proceedings, nor any opportunity to be heard by the CMC.[40] However, the CMC did not correspond with the Claimant and Orange and instead continued communicating directly with Korek.[41]

75. On 2 December 2014, the CMC opened an enforcement file with the Ministry of Justice of the Republic of Iraq ("**MOJ**").[42] On the same day, upon the CMC's request, the MOJ wrote to the KCR and asked it to notify Korek of the CMC Appeals Board Decision and take steps to "annul and invalidate the contracts that transfer the shares in Korek's capital" ("**2 December 2014 Letter**").[43]

D. THE APPLICATIONS TO THE IRAQI COURTS

76. On 16 October 2014, Korek filed a claim with the Iraqi Administrative Court, seeking judicial review of the CMC Order (the "**Administrative Court Proceedings**").[44]

77. On 15 December 2014, one of the Claimant's shareholders, Mr. Majid Hilal Abdul-Hussein, filed an application to join the Administrative Court Proceedings.[45] This application was rejected by the Administrative Court on 16 February 2015.[46]

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[39] Letter from the CMC to KCR dated 7 September 2014, Exhibit C-041.

[40] Letter from Agility and Orange to the CMC dated 22 September 2014, Exhibit C-042.

[41] Minutes of meeting between the CMC and Korek held on 16 October 2014, Exhibit C-046; Letter from the CMC to Korek dated 2 November 2014, Exhibit C-051; Letter from the CMC to Korek dated 12 November 2014, Exhibit C-057; Letter from Korek to the CMC dated 27 November 2014, Exhibit C-059; Letter from IT Ltd to the CMC dated 1 December 2014, Exhibit C-061; Letter from the CMC to Korek dated 16 December 2014, Exhibit C-065.

[42] Ministry of Justice ("**MOJ**"), Enforcement Department, File No. 2979/2014, Report of Opening of an Enforcement File dated 2 December 2014, Exhibit R-0110.

[43] Letter from the MOJ, Enforcement Department to KCR dated 2 December 2014, Exhibit C-063.

[44] Korek submission to the Administrative Court dated 16 October 2014, Exhibit C-047.

[45] Application of Majid Hussein to the Administrative Court dated 15 December 2014, Exhibit C-064.

[46] *See* Decision of the Supreme Administrative Court dated 28 July 2015, Exhibit C-071.

78. On 16 February 2015, IT Ltd submitted an application to join the Administrative Court Proceedings ("**IT Ltd's Joinder Application**"). [47]

79. On 24 February 2015, Mr. Majid Hilal Abdul-Hussein filed an appeal to the Supreme Administrative Court against the Administrative Court's decision of 16 February 2015. On 28 July 2015, Mr. Majid Hilal Abdul-Hussein withdrew his appeal.[48]

80. On 18 January 2016, the Administrative Court denied IT Ltd standing in the Administrative Court Proceedings and rejected its Joinder Application. The Administrative Court provided no written opinion and gave its ruling orally.[49]

81. On 25 January 2016, the Administrative Court dismissed Korek's claim for lack of jurisdiction, holding that "the matter is not within the jurisdiction of the Administrative Court."[50]

82. On 21 February 2016, Korek filed an appeal to the Iraqi Supreme Administrative Court against the Administrative Court's decision' ("**Korek's Appeal**").[51] On 18 January 2018, the Iraqi Supreme Administrative Court denied Korek's Appeal.[52]

E. THE IRAQI PARLIAMENT'S RECOMMENDATION

83. Concurrently, on 25 October 2014, the Claimant submitted a complaint against the CMC Order to the Iraqi Council of Representatives (the "**Council**").[53] On 23 November 2014, the President of the Iraqi Parliament issued an order forming a special investigative committee to investigate the Claimant's complaint (the "**Parliamentary Committee**").[54]

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[47] Submission of IT Ltd to the Administrative Court dated 16 February 2015, Exhibit C-070.
[48] Decision of the Supreme Administrative Court dated 28 July 2015, Exhibit C-071.
[49] *See* email exchange between Mr. Louis AbouCharaf of Korek and Mr. Deepak Jain of Agility between 19 and 23 January 2016, Exhibit C-0073.
[50] Decision of the Administrative Court dated 25 January 2016, Exhibit C-074.
[51] Submission of Korek to the Iraqi Supreme Administrative Court dated 21 February 2016, Exhibit C-075.
[52] Decision of Iraqi Supreme Administrative Court dated 18 January 2018, Exhibit C-101.
[53] *See* Resolutions of the Parliamentary Committee dated 11 January 2015, Exhibit C-067.
[54] *Ibid.*

84. The Parliamentary Committee ultimately "found that the [CMC] had no authority to terminate the partnership contract between the partners (Korek and France Telecom Agility)" and recommended "[o]bligating the [CMC] to cancel [the CMC Order]" on 11 January 2015.[55] The CMC did not comply with the Parliamentary Committee's recommendation.

F. THE CLAIMANT'S ATTEMPTS TO IMPLEMENT THE CMC ORDER

85. Subsequent to its unsuccessful attempts to challenge the CMC Order, the Claimant sought to comply with the CMC Order and to return its investment to its status prior to the 2011 Equity Transaction.

86. On 17 May 2016, the Claimant wrote to the CMC to ask for clarification of the CMC's order to "reinstate the status as it was on 13/3/2011," and for guidance on how to implement such an order.[56] As the CMC did not respond, the Claimant repeated its enquiries in two letters to the CMC dated 15 June 2016[57] and 24 October 2016.[58] The 24 October 2016 letter also set out the Claimant's interpretation that the CMC Order required the "reinstatement of a guarantee by the Government of Kurdistan in the Republic of Iraq to Alcazar for the USD 250 million convertible senior promissory note."[59]

87. By way of a letter dated 20 June 2017 to Korek and the Iraqi Shareholders, the Claimant asserted, *inter alia*, that in order to implement the CMC Order, the KRG Guarantee that existed as part of the 2007 Loan Transaction would have to be reinstated.[60]

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[55] *Ibid.*

[56] Letter from Agility to the CMC dated 17 May 2016, Exhibit C-076.

[57] Letter from Agility to the CMC dated 15 June 2016, Exhibit C-077.

[58] Letter from Agility to the CMC dated 24 October 2016, Exhibit C-080.

[59] *Ibid*.

[60] Letter from Agility to Korek and the Iraqi Shareholders dated 20 June 2017, Exhibit C-083.

88. On 21 July 2017, Korek responded to the Claimant's 20 June 2017 letter, stating, *inter alia*, that it was "apparent from [the Claimant's] letter that [the Claimant] is citing the CMC Order to justify the basis upon which it proposes to withdraw from the joint venture."[61]

89. On 2 August 2017, the Claimant wrote to Korek again, urging Korek to work with the Claimant to take steps to implement the CMC Order, failing which the Claimant would write directly to the KRG to demand reinstatement and immediate payment under the KRG Guarantee.[62] Korek responded on 8 August 2017 stating that the Claimant had "failed to explain the basis upon which [it] appear[s] to expect that [it] should be entitled to withdraw the full value of [its] investment." The letter also stated that Korek considered the Claimant's intentions to write to the KRG to be "ill-advised", given that the "Convertible Note (i) is no longer in effect and (ii) was in any case transferred away from Alcazar."[63]

90. On 22 August 2017, the Claimant wrote to the KRG, stating, *inter alia*, that "it appears that, pursuant to the CMC Order, in order to '*reinstate the status as it was on 13/3/2011*,'—in addition to the foreign shareholders returning their shares to Korek's original Iraqi shareholders—Korek must reinstate Alcazar's Convertible Note and the Government of Kurdistan must reinstate the attendant Guarantee."[64]

91. In the absence of any reply to its letter of 22 August 2017, the Claimant wrote to the KRG again on 10 December 2017, stating that it had not received a response and reserving all of its rights in respect of the KRG Guarantee.[65] The KRG did not respond and did not reinstate the KRG Guarantee.[66]

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[61] Letter from Korek to Agility dated 21 July 2017, Exhibit C-085.
[62] Letter from Agility to Korek and the Iraqi Shareholders dated 2 August 2017, Exhibit C-087.
[63] Letter from Korek to Agility dated 8 August 2017, Exhibit R-0113.
[64] Letter from Agility to the Kurdistan Regional Government dated 22 August 2017, Exhibit C-088 (emphasis in original).
[65] Letter from Agility to the Kurdistan Regional Government dated 10 December 2017, Exhibit C-091.
[66] Aziz First Witness Statement, ¶ 89.

G. THE KCR DECREE

92. On 24 June 2018, after the Council had concluded its investigation and the Supreme Administrative Court had rejected Korek's Appeal, the MOJ wrote to the KCR to repeat the terms of the MOJ's 2 December 2014 Letter.[67] The KRG Representative in Baghdad also sent a letter to the KCR to follow up on MOJ's letter dated 24 June 2018.[68]

93. On 19 March 2019, the KCR issued an order stating that: "1. Order was issued to cancel the administrative order [KCR Order No. 2959]" and that the "percentages of shares were changed in the following manner: **Sirwan Saber Mostafa: 75 percent, Chavshin Hassan Chavshin: 20 percent, Jaghshi Hamou Mostafa: 5 percent**" (emphasis in original).[69]

IV. THE PARTIES' REQUESTS FOR RELIEF

94. In the Claimant's Reply, the Claimant requests that the Tribunal:

> *(a) DECLARE that Respondent is in breach of its obligations under the BIT and customary international law;*
>
> *(b) DIRECT Iraq to pay USD 614.1 million in damages for the value of (i) the Sovereign Guarantee backed Convertible Note reinstated plus interest accrued through today's date, and (ii) the return of USD 50 million cash investment plus pre-award interest as a result of Iraq's partial and improper implementation of the CMC Order;*
>
> *(c) In the alternative to (b), DIRECT Iraq to pay USD 552.7 million in damages for the value of the Sovereign Guarantee-backed Convertible Note reinstated and honored plus interest accrued through today's date caused as a result of Iraq's partial and improper implementation of the CMC Order and/or its repudiation of the Sovereign Guarantee;*

[67] Letter from MOJ, Enforcement Department to the KCR dated 24 June 2018, Exhibit R-116.

[68] Letter from the KRG Representative in Baghdad to the KCR dated 17 July 2018, Exhibit R-0118.

[69] KCR Administrative Order No. 4961 dated 19 March 2019, ("**KCR Decree**") Exhibit R-120; *see also* Exhibit C-102.

(d) In the alternative to (c), DIRECT Iraq to pay Agility USD 652.1 million in damages as the value of Agility's indirect equity position in Korek as of 1 July 2014 assuming Orange exercises Call Option plus pre-award interest as a result of Iraq's denial of justice;

(e) In the alternative to (d), DIRECT Iraq to pay Agility USD 353.1 million in damages as an alternative calculation of value of Agility's indirect equity position in Korek as of 1 July 2014 plus pre-award interest as a result of Iraq's denial of justice;

(f) ORDER interest not covered in any damages award, including post-award interest on all sums awarded at a rate established on the amount of the award;

(g) ORDER Iraq to pay all costs of and associated with this arbitration, including Agility's legal fees and expenses, management time, legal counsel, witnesses, experts and consultants' fees and expenses, administrative fees and expenses of the International Centre for Settlement of Investment Disputes, and the fees and expenses of the Arbitral Tribunal together with post-award interest on those costs so awarded; and

(h) AWARD such other and further relief as the Tribunal deems just and proper.[70]

95. In the Respondent's Rejoinder, the Republic seeks an order:

(a) Denying in full the relief Agility requests in paragraph 315 of its Reply;

(b) Ordering Agility to pay all the costs of the arbitration and reimburse the Republic's costs (including attorneys' fees) incurred in the arbitration, plus interest thereon at a commercially reasonable rate, if payment is not received by the Republic within 30 days of the issuance of the Final Award; and

[70] Claimant's Reply on the Merits dated 17 July 2020 ("**Cl. Reply**"), ¶ 315. *See also* Claimant's Post-Hearing Brief dated 18 November 2020 ("**Cl. PHB**"), ¶ 110.

(c) Ordering such other relief as the Tribunal may determine to be just and appropriate.[71]

V. MERITS

96. Following the Tribunal's Decision on Jurisdiction, the Claimant has two remaining claims: (a) the failure to implement claim; and (b) the denial of justice claim.

97. The Tribunal has carefully reviewed and considered the Parties' submissions on the Claimant's two remaining claims. For the purposes of framing the Tribunal's analysis and findings, the Tribunal has outlined the Parties' main arguments below. Naturally, it is not meant to serve as an exhaustive review of the Parties' submissions, 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 on the Merits.

A. ALLEGED FAILURE TO IMPLEMENT THE CMC ORDER

98. The Claimant's entire failure to implement claim presumes the lawfulness of the CMC Order, as it recognizes that the Tribunal has determined that it has no jurisdiction to make a finding on the lawfulness of the CMC Order.[72] Accordingly, the only question before the Tribunal is whether the manner in which the Respondent has implemented the CMC Order violates the 2015 BIT.

99. In the Claimant's view, the Respondent's implementation of the CMC Order is "partial, improper, discriminatory and unlawful" and violates the BIT because it constitutes:[73]

(a) an unlawful expropriation of Agility's investment;

[71] Respondent's Corrected Rejoinder on the Merits dated 23 September 2020 ("**R. Rejoinder**"), ¶ 187; *see also* Respondent's Post-Hearing Brief dated 18 November 2020 ("**R. PHB**"), ¶ 83.

[72] Hearing on the Merits, Transcript (Day 1) (Claimant's Opening), pp. 8:24-9:7.

[73] Cl. Reply, ¶ 107.

(b) a violation of fair and equitable treatment;

(c) an impairment of Agility's investment by arbitrary and discriminatory measures;

(d) a failure to accord Agility's investment full protection and security;

(e) a failure to provide national treatment protections; and

(f) a breach of the MFN Clause of the BIT by failing to observe its obligations.

100. The underlying foundation of the Claimant's failure to implement claim is that the CMC Order, when properly interpreted, requires the rescission of the 2011 Equity Transaction and a restoration of the *status quo ante* as at 13 March 2011, and further that the Respondent assumed an obligation to bring about such restoration. According to the Claimant, this means that insofar as possible, all parties must be put back in the position that they were in prior to the 2011 Equity Transaction, and in particular, that the Claimant ought to be put back in the position whereby it held the Convertible Note that was secured by the KRG Guarantee.[74] On this basis, the Claimant submits that the Respondent acted contrary to the terms of the CMC Order by, *inter alia*: (a) not taking steps to restore the KRG Guarantee; (b) not compelling Korek to execute the rescission of the 2011 Equity Transaction documents; (c) transferring new Korek shares that were created as part of the 2011 Equity Transaction to the Iraqi Shareholders by way of the KCR Decree; and (d) failing to disgorge the USD 162.5 million that the CMC received in 2011.[75]

101. The Respondent argues that the Claimant is trying to hold "*the Government of Iraq responsible for what comes down to a shareholder dispute*" about how to address financially a government-mandated change in equity ownership in Korek.[76] According to the Respondent, all the CMC Order required was that Korek unwind the share transfer from the Iraqi shareholders to the foreign shareholders (IH) that was one part of the 2011 Equity

[74] Cl. Post-Hearing Brief, ¶ 11.

[75] Cl. Reply, ¶¶ 7-13; Claimant's Opening Submissions Vol 1, dated 12 October 2020 ("**Cl. Opening Slides Vol 1**"), p. 6.

[76] Hearing on the Merits, Transcript (Day 2) (Respondent's Opening), p. 84.

Transaction, and nothing more.[77] The Respondent emphasizes that the CMC Order states nothing about unwinding the various financial arrangements associated with the 2011 Equity Transaction, including any aspects of Korek's debts or financing, or of the KRG Guarantee.[78] Further, the Respondent argues that the CMC Order does not create an obligation for the Respondent to ensure that such financial transactions are unwound, including any obligation on the Respondent itself to reinstate the KRG Guarantee.[79] On this basis, the Respondent submits that the KCR Decree was not a failure to implement the CMC Order, but rather the opposite; a fulfilment of exactly what the CMC Order required.[80]

(1) Expropriation

a. The Claimant's Position

102. The Claimant submits that its loan to Korek to fund the CMC license fee payment on its behalf and the KRG Guarantee itself are all part of the Claimant's bundle of rights which qualify as an investment (as defined at Article 1(1) of the BIT) that is capable of expropriation.[81] In particular, the Claimant relies on Articles 1(1)(a), (b) and (d) of the BIT, which define an investment to include assets and rights which result from, or take the form of, "…other forms of debt rights in companies; and other debts, loans and securities issued by an investor,"[82] "claims to money or any performance in accordance with a contract" and "[a]ny right conferred by law or contract."[83]

103. According to the Claimant, the manner in which the Respondent implemented the CMC Order is an unlawful expropriation of the Claimant's investment[84] and the expropriation was issued (i) without compensation, (ii) without due process, (iii) in a discriminatory manner,

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[77] R. Rejoinder, ¶ 16.

[78] Hearing on the Merits, Transcript (Day 2) (Respondent's Opening) p. 17:4-7.

[79] R. Rejoinder, ¶¶ 16-17.

[80] *Ibid*.

[81] Cl. Reply, ¶¶ 119-120.

[82] Cl. Reply, ¶ 117, citing 2015 BIT Article 1(1)(a), Exhibit CL-048.

[83] Cl. Reply, ¶ 120, citing 2015 BIT, Articles 1(1)(b), 1(1)(d), Exhibit CL-048.

[84] Cl. Memorial, ¶ 206, Cl. PHB, ¶ 28. Cl. Reply, ¶ 126.

and (iv) without a public purpose.[85] The Claimant argues that the KCR Decree transferred the benefit of the investment made by the Claimant and Orange pursuant to the 2011 Equity Transaction to the Iraqi Shareholders, without ensuring that the Claimant's secured debt position and USD 50 million was restored, while at the same time "the KRG refused to honor, and instead repudiated, the Sovereign Guarantee."[86]

104. The Claimant argues that the Respondent's implementation of the CMC Order is also expropriatory as the KCR Decree did not properly "reinstate" the *status quo ante* with respect to Korek's shareholding as required under the CMC Order. According to the Claimant, any unwinding of the 2011 Subscription Agreement would have required: (a) reversing the capital increases that were effected by Korek through the Claimant's (and Orange's) payment of funds; (b) the cancellation of the shares issued in connection with these capital increases; (c) the return of the payment for those shares; and (d) the return of the USD 162.5 million in license fees which the CMC received in 2011.[87]

105. As a consequence of this alleged expropriation, the Claimant contends that it was deprived of the totality of its investment in Korek; the Iraqi Shareholders have 182.5 million shares in Korek (162.5 million shares more than they had prior to the 2011 Equity Transaction). Finally, Iraq received over USD 700 million in license fees.[88]

b. The Respondent's Position

106. The Respondent does not dispute that the Claimant has an investment susceptible of being expropriated. However, the Respondent argues that the KCR Decree is not an act independent of the CMC Order, and the legality of the CMC Order falls outside the scope of the Tribunal's jurisdiction. In other words, the breach that the Claimant alleges arose from the KCR Decree is the very same as that which it alleged resulted from the CMC Order itself, the latter claim being time-barred.[89] The Respondent asserts that there is no

[85] Cl. Reply, ¶ 134.
[86] Cl. Reply, ¶¶ 128-129.
[87] Cl. Reply, ¶¶ 128-132; *see also* Cl. Opening Slides Vol 1, p. 73; Cl. PHB, ¶ 28.
[88] Cl. Opening Slides Vol 1, p. 73.
[89] R. Rejoinder, ¶ 51.

material difference between what the CMC Order required and what the KCR Decree actually did.[90]

107. According to the Respondent, the CMC Order did not order the shares in Korek to be transferred "for free." Instead, the consequences of unwinding the equity was a matter for Korek and Agility to sort out among themselves, based on the terms of the relevant contracts between them, according to the business risks that they each took, for which the Respondent has no responsibility.[91]

108. The Respondent further argues that the CMC Order and the KCR Decree are all indifferent to the exact number of shares thus transferred or revoked; what the CMC Order was concerned with, and what the KCR reinstated, was simply control of Korek by Iraqi shareholders rather than foreign shareholders. In any case, the Respondent submits that "the KCR *could not* unilaterally have decreased Korek's share capital under Iraqi law without a properly issued request from Korek to that effect."[92]

109. With regard to the USD 162.5 million in license fees received by the CMC, the Respondent submits that the Claimant cannot seek a return of those fees as part of an unwinding of the 2011 Equity Transaction, because they were not made pursuant to the 2011 Subscription Agreement or the agreements referred to therein. Rather, they were merely payment of the long overdue instalment of the license fee that Korek owed the CMC under its License Agreement.[93]

c. The Tribunal's Analysis

110. Article 7(1)(a) of the BIT provides that:

> *Investments of investors of one Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated or otherwise subjected to any other measures having effect*

[90] R. Rejoinder, ¶ 52.

[91] R. Rejoinder, ¶ 48; *see also* Respondent's Opening Submissions dated 13 October 2020, ("**R. Opening Slides**"), p. 41.

[92] R. Rejoinder ¶ 63.

[93] Hearing on the Merits, Transcript (Day 2) (Respondents' Opening), p. 139:7-19; R. Rejoinder ¶ 91.

> *equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") by the other Contracting Party except for public purpose that pertains to national interest of that Contracting Party and against prompt, adequate and effective compensation. The expropriation shall be carried out on a non-discriminatory basis in accordance with generally applicable legal procedures.*[94]

111. Article 7(1)(3) of the BIT further provides that:

> *For the purposes of this agreement, the term "expropriation" shall also apply to interventions or regulatory measures by a Contracting Party that have the same effect as expropriation results in* ***depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of his investment*** *such as the freezing or blocking of the investment, levying arbitrary or excessive tax on the investment, compulsory sale of all or part of the investment, or other comparable measures.* [95]

112. It is well settled that a State expropriates an investment "when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property."[96]

113. At the outset, it is important to emphasize that the Tribunal has already found that any claims of expropriation as a result of the CMC Order itself occurred prior to the 2015 BIT and therefore fall outside the scope of its temporal jurisdiction.[97] As such, in order for the Claimant to succeed, it needs to show that there has been an independently actionable expropriation that does not flow from the alleged unlawfulness of the CMC Order.

114. In its Reply, the Claimant focused its expropriation claim on the KCR's act of issuing the KCR Decree in its capacity as an arm of the State.[98] At the Hearing on the Merits, however, the Claimant's expropriation claim centered on the failure to reinstate the KRG Guarantee.

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[94] 2015 BIT, Article 7(1)(a), Exhibit CL-048.

[95] 2015 BIT, Article 7(3), Exhibit CL-048 (emphasis added).

[96] *Compañia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶ 77, Exhibit CL-222. *See* also Cl. Reply, ¶ 112 and fn. 221.

[97] Decision on Jurisdiction dated 9 July 2019, ¶ 243.

[98] Cl. Reply, ¶¶ 125-133.

This was confirmed by the Claimant's counsel during the Hearing when he stated that the alleged expropriation claimed by the Claimant is "***not*** the expropriation of the shares" but the expropriation of the KRG Guarantee.[99]

115. To determine whether the issuance of the KCR Decree can constitute an independently actionable expropriation separate from the CMC Order, the Tribunal first has to determine what the CMC Order, when properly interpreted, required.

116. The CMC Order takes the form of a letter signed by the Director General of the Commission that is addressed solely to Korek with the subject "Decision to revoke partnership between [Korek] and [Orange] / [the Claimant]."[100]

117. The preamble of the CMC Order states that it was issued "[i]n reference" to several communications between the CMC and Korek, namely "the letter of [Korek] under No. (11-50) dated 13/3/2011", "the meeting report dated 21/4/2011", the letter of [the CMC] under No. (2713) dated 29/5/2011, "the letters of [Korek], the first one under No. (11-95) dated 5/6/2011, and the second under No. (116-011) dated 9/8/2011", and "the letter of [the CMC] under No. (9642) dated 10/12/2013."[101]

118. The substantive part of the CMC Order merits careful scrutiny and is reproduced in full below:

> *We inform you that, after long and deep study of the subject of partnership between your company and the foreign French company France Telecom/Agility, studying its different legal and factual aspects, and in respect of the authority granted to our Commission by virtue of the terms of the meeting which was held on 21/4/2011 between our Commission and your company, and based upon the regulatory role exercised by our Commission within the framework of verifying that the suspension conditions have been met, upon which the partnership was based, and to determine the appropriate*

[99] Hearing on the Merits, Transcript (Day 1) (Claimant's Opening), pp. 84:6–85:14 (emphasis added). *See also* Cl. PHB, ¶ 29 ("Agility's case is not that Iraq expropriated Agility's shares in Korek in March 2019, but that Iraq expropriated the KRG Guarantee").

[100] CMC Order, Exhibit C-037.

[101] *Ibid*.

> *legal consequences, including the revocation of the mentioned partnership in light of the fact that the suspension conditions have not been collectively met, the Board of Commissioners decided, in its session held on 24/6/2014, in report No. 19/2014,* ***to consider the approval of our Commission based upon the principle of partnership dated 29/5/2011 as void and null*** *as the suspension conditions, to which you were committed to fully carry out, have not been met by virtue of the report of the meeting dated 21/4/2011 and by virtue of your repetitive letters.*
>
> *Thus, we inform you by virtue of this letter of the final decision of our Commission by considering* ***the partnership, desired between you and the foreign French company France Telecom/Agility, as void, null and invalid*** *because the related suspension conditions have not been met, and for lack of evidence thereof without any legal or material effects of any type whatsoever.* ***And we warn you in this respect to immediately proceed, within a period of no later than 15 days from the date of this letter, to reinstate the status as it was on 13/3/2011, take the procedures to revoke and terminate any contracts assigning shares in your company's capital that were concluded after 13/3/2011, prove this revocation in the legal entries with the companies registrar and provide our Commission with a new statement proving the return of shares to their original owners.*** *Otherwise, your company shall bear all the legal consequences and necessary procedures will be taken against your company to compel you to obey and execute the content of the decision mentioned above.*[102] *(emphasis added)*

119. The Parties have differing views of what the proper interpretation of the CMC Order entails. Put simply, the Claimant endorses a broad interpretation (*i.e.* that the order requires a reinstatement of the *status quo* as of 13 March 2011 in every aspect, which extends not only to a reinstatement of the percentage ownership of Korek's shares, but also a reversion of the actual number of Korek shares and all commercial arrangements which existed between the parties at the time, which included the reinstatement of the KRG Guarantee),[103] whereas the Respondent endorses a narrow interpretation (*i.e.* that all the

[102] CMC Order, Exhibit C-037.

[103] Cl. Reply, ¶ 128.

order required was the unwinding of the share transfer under the 2011 Equity Transaction).[104]

120. As explained below, the Tribunal is of the view that both the text of the CMC Order and the context in which it was issued favor the Respondent's narrow interpretation.

121. **First**, the wording of the CMC Order suggests that it only relates to the issue of Korek's shareholding, not its underlying commercial arrangements.

122. The operative parts of the CMC Order arise from the CMC's final decision to consider "the partnership, desired between [Korek] and the foreign French company [Orange]/ [the Claimant], as void, null and invalid" (as set out in the second paragraph of the CMC Order).

123. In particular, the CMC Order expressly requires Korek to do the following within fifteen days from the date of the CMC Order: (a) "reinstate the status as it was on 13/3/2011"; (b) "take the procedures to revoke and terminate any contracts assigning shares in [Korek's] capital that were concluded after 13/3/2011"; (c) "prove this revocation in the legal entries with the companies registrar"; and (d) "provide [the CMC] with a new statement proving the return of shares to their original owners."

124. The CMC Order does not make any explicit reference to steps that the Claimant argues should be taken under the CMC Order, such as the reinstatement of Korek's financial position (which would include any debts owed by Korek to the Claimant as at 13 March 2011 under the Convertible Note), the restoration of the KRG Guarantee, the cancellation of any new shares created after 13 March 2011, or the return of any license fees paid to the CMC.

125. As such, the literal wording of the CMC Order does not make clear that any of these steps need to be taken by Korek, or any other party for that matter. In fact, the express wording of the penultimate sentence of the CMC Order focuses solely on the return of Korek's

[104] R. Rejoinder, ¶ 16.

shares to the original owners and for the change in shareholding to be reflected in the records of the KCR.

126. The first paragraph of the CMC Order sets out the decision made by the CMC's Board of Commissioners on 24 June 2014 to consider "the approval of [the CMC] based upon the principle of partnership dated 29/5/2011 as void and null."[105] This is a reference to the CMC's conditional approval of the "partnership between [Korek] (Licensee) with the French company, [Orange]" as set out the CMC's 29 May 2011 Letter.[106]

127. The Tribunal understands that the CMC's Board of Commissioners' role is to, *inter alia*, "oversee and receive reports from the Director General" and "provide strategic and budgetary guidance to the Commission."[107] It therefore appears that the CMC's Board of Commissioners' decision gave rise to the CMC's final order that is set out in the second paragraph.

128. The first paragraph also indicates the context under which the CMC Board of Commissioners made their decision, namely, that this was done "***in respect of the authority granted to the [CMC] by virtue of the terms of the meeting which was held on 21/4/2011 between [the CMC] and [Korek]***, and ***based upon the regulatory role exercised by [the CMC]*** *within the framework of verifying that the suspension conditions have been met*" (emphasis added).[108]

129. The minutes of the meeting on 21 April 2011 between the CMC and Korek ("**21 April 2011 Minutes**") in turn state, amongst other things, that it was agreed as follows:

> *Korek company requested approval to dispose of the license for the interest of a third party based upon Article 24, paragraph b, being Korek Holding company that is intended to be established in Dubai provided that the latter contributes to the company composed of Orange and Agility; 56% of the shares to CS Ltd company and 44% of the shares to IT Ltd company composed of Orange and Agility*

[105] CMC Order, Exhibit C-037.

[106] Letter from the CMC to Korek dated 29 May 2011, Exhibit C-013.

[107] Order 65 dated 20 March 2004, Exhibit C-002.

[108] CMC Order, Exhibit C-037.

> *provided that the approval is based upon the following conditions …*
>
> *In case of failure to meet any of the following conditions, this approval shall be considered invalid and all consequences thereof are invalid, and Korek company shall not be entitled to file an appeal against the decision…*[109]

130. The 21 April 2011 Minutes appear to be referring to Article XXIV (*i.e.* Article 24), paragraph B of the License Agreement which states that:

> ***[Korek] may not assign**, sub-license, transfer, or otherwise **dispose of this License Agreement, or the rights derived therefrom, in favor of any third party** for a period of two years after the Effective Date [i.e. 30 August 2009], and may do so thereafter **only as is provided for in this License Agreement and with the prior written approval of [the CMC]**.* [110] *(emphasis added)*

131. In the Tribunal's view, the express wording of the first paragraph of the CMC Order indicates that it is solely concerned with the CMC's "regulatory role" of policing the transfer of Korek's license to IH and monitoring whether the conditions for approval had been met. In fact, the reference to the Board of Commissioners' decision to consider the "approval of [the CMC] …dated 29/5/2011 as null and void" suggests that the CMC Order merely seeks to nullify the conditional approval which the CMC gave on 29 May 2011, which would only require reversal of Korek's shareholding and license to the status as at 13 March 2011. This leans in favor of the Respondent's interpretation that the CMC Order only concerns the unwinding of the share transfer and nothing more.

132. **Secondly**, the CMC's regulatory purview does not appear to cover any steps other than the share transfers resulting in a change of control in Korek.

133. The CMC acts as the national regulatory authority for media and telecommunications in Iraq.[111] It is important to keep this as a frame of reference as the role of the CMC and the

[109] Minutes of the meeting on 21 April 2011, Exhibit C-012.

[110] License Agreement, Exhibit C-003.

[111] Expert Report of Reema I. Ali dated 30 April 2018 ("**Ali First Report**"), ¶ 35.

scope of its powers would inform how a reasonable person would objectively interpret the CMC order.

134. Pursuant to the License Agreement,[112] the CMC's role in the 2011 Equity Transaction is limited to:

(a) providing written approval for Korek to "assign, sub-license, transfer, or otherwise dispose of this License Agreement, or the rights derived therefrom, in favor of any third party" after 30 August 2009 under Article XXIV(B); and

(b) providing written approval for "any direct or indirect change in the control of a significant interest in [Korek], including a change arising through the sale, transfer, assignment, sub-licensing, disposal or modification of voting rights associated with Qualifying Shares", without which such assignment would be deemed unlawful and in breach of the License Agreement under Article XXIV(C). A 'significant interest' is defined in Article XXIV(C) to mean "ten percent (10%) or more of the Qualifying Shares then in issue or ten percent (10%) or more of the total voting rights then outstanding in [Korek]."

135. There is nothing in the License Agreement which suggests that the CMC has oversight regarding any arrangements that were made under the 2011 Equity Transaction apart from those set out above, and the Claimant has not pointed to anything under the legislation governing the CMC (*i.e.* Coalition Provisional Authority Order No. 65 dated 20 March 2004 ("**Order 65**"))[113] that suggests otherwise. In fact, the Claimant's own Iraqi law expert, Ms Reema Ali, stated that the License Agreement "does not provide the CMC with the ability to monitor or opine on Korek's business dealings with outside shareholders."[114]

136. The limited scope of the CMC's authority is also evidenced by Order 65(9) which sets out the only available sanctions that the CMC may impose. Such sanctions are limited to the

[112] License Agreement, Exhibit C-003.

[113] Order 65 dated 20 March 2004, Exhibit C-002.

[114] Ali First Report, ¶ 61(a)(ii); *see also* Hearing on the Merits, Transcript (Day 4) (Ali), pp. 61–62.

following: (1) issuing warnings to the licensee; (2) requiring publication of an apology; (3) requiring mitigation or repair of harm to consumers; (4) imposing financial penalties and placing liens on relevant bank accounts if the penalties are not paid on time; (5) suspending licenses; (6) seizing equipment for which access into the licensee's premises is granted; (7) suspending operations; (8) closing operations; and (9) terminating or withdrawing licenses.[115]

137. According to Ms. Ali, no other Iraqi law, either general or applicable to the CMC or the telecommunications industry in particular, confers any right on the CMC to impose other sanctions. While the CMC may accrue additional powers contractually, the CMC's remedies in the License Agreement, as provided in Section 27(C), are similar to the sanctions enumerated in Order 65 and do not meaningfully exceed them.[116]

138. The Tribunal also gives weight to the fact that the CMC was only asked to approve the transfer of Korek's shares to non-Iraqi entities and to establish IH with the foreign entity holding 44% of the shares. In Korek's letter to the CMC dated 13 March 2011, the Claimant merely asked the CMC "to approve the transfer of [Korek]'s shares outside Iraq and the investment by each of [Orange] and [the Claimant] in Korek company according to the provisions of Chapter H/24 of the license."[117]

139. Similarly, in Korek's follow up letter to the CMC dated 7 April 2011, Korek merely asked the CMC to "approve the project to establish [IH] in partnership with IT Ltd according to the mentioned proportions [of shareholding set out in the letter, *i.e.* CS Ltd to hold 56% of the shares, and IT Ltd to hold 44% of the shares]."[118]

140. The fact that the CMC was never asked to approve the commercial aspects of the 2011 Equity Transaction, and never approved such aspects, suggests that neither the Claimant nor Korek considered that the CMC had the power to annul the underlying contracts which

[115] Ali First Report, ¶ 45, citing Order 65 dated 20 March 2004, Section 9, Exhibit C-002.
[116] *Ibid*., ¶ 46.
[117] Letter from Korek to the CMC dated 13 March 2011, Exhibit C-010.
[118] Letter from Korek to the CMC dated 7 April 2011, p. 4, Exhibit C-011.

gave effect to the 2011 Equity Transaction. Indeed, there is no evidence that the CMC was provided with any documents setting out the underlying financial arrangements between the relevant parties.

141. The narrow interpretation of the CMC Order is further supported by the fact that the documentary evidence reveals that prior to the commencement of the arbitration, the fact that the CMC Order was limited to addressing the transfer of shares is how all parties, including the Claimant, interpreted it.[119] In particular, the Claimant (through IT Ltd) itself stated in its letter to the CMC dated 1 December 2014 that "[t]he CMC has only a limited **contractual** authority to approve any share transfer of a 'significant interest' (defined as 10% or more) in the share capital of Korek" (emphasis in original).[120] In the face of such evidence, the Claimant's argument that the Tribunal should draw an adverse inference that "the Respondent did not have a different contemporaneous understanding from what [Claimant] and [the Respondent] articulated at the time"[121] has no factual basis and cannot stand.

142. The Tribunal is not convinced that the CMC's regulatory authority extends to regulating Korek's commercial arrangements. Instead, the CMC was only responsible for regulating the transfer of the License Agreement to a third party (*i.e.* Article XXIV(B)) and the transfer of control of more than 10% in Korek's shareholding from its Iraqi Shareholders to foreign shareholders.

143. Bearing in the mind the limited role of the CMC, the Tribunal is also of the view that some of the steps which the Claimant suggests ought to be taken under the CMC Order fall outside the CMC's scope of authority and cannot be taken to form part of the CMC Order.

(a) With regard to the reinstatement of the KRG Guarantee (which forms the core of the Claimant's expropriation claim), a precondition for the operation of the KRG Guarantee is the existence of the Convertible Note. In this regard, the Claimant has

[119] Hearing on the Merits, Transcript (Day 2) (Respondent's Opening), p. 19:8 *et al.*
[120] Letter from IT Ltd. to the CMC dated 1 December 2014, p. 4, Exhibit C-061.
[121] Cl. PHB, ¶15.

accepted that the Convertible Note must be reinstated before the KRG Guarantee can be reinstated.[122] However, there is nothing which suggests that the CMC has the authority to order that the Convertible Note be reinstated. The Claimant has not pointed to any basis for the CMC to compel Korek to reinstate the Convertible Note which is a private contractual arrangement between Korek and Alcazar.

(b) The Tribunal accepts the Respondent's argument that the issue of whether the Convertible Note or the Claimant's additional investment needs to be restored to it, and on what terms, is a matter governed and determined by the various transactional documents between the Claimant, Korek, and Orange and not by the CMC Order, which only addresses the discrete issue of the share transfer.[123]

(c) With regard to cancellation of new shares, the Tribunal notes that the source of the CMC's authority to regulate Korek's shares stems from Article XXIV(C) of the License Agreement, which is solely concerned with the change in control of a significant interest in Korek's shareholding. As such, the Tribunal is persuaded that the CMC Order only requires the percentages of Korek's shares to be reinstated and is indifferent as to the number of shares transferred or revoked. Again, any issues regarding the reversal of the issuance of additional shares is to be governed by the contractual documents between the relevant parties and not the CMC.

(d) In any case, even if the CMC Order somehow required the CMC to cancel the new shares, the Tribunal is of the view that this cannot amount to a breach of the 2015 BIT due to a lack of causation. As observed in *Lauder v. Czech Republic*, in order for a finding of compensable damage to be made, it is necessary that there exists no intervening cause for the damage.[124] In the present case, the Claimant has not denied that the KCR could not unilaterally have decreased Korek's share capital under Iraqi

[122] Hearing on the Merits, Transcript (Day 1) (Claimant's Opening), p. 87:4-13; Hearing on the Merits, Transcript (Day 3) (Aziz), p. 74; *see also* Aziz First Witness Statement, ¶ 88.

[123] R. Rejoinder, ¶ 24.

[124] *Lauder v. Czech Republic*, UNCITRAL, Award, 3 September 2001, ¶ 234, Exhibit RL-091.

law without a properly issued request from Korek to that effect.[125] As noted by the Respondent, Korek's failure to initiate any decrease in share capital does not, and cannot, constitute a BIT breach by Iraq.

(e) With regard to the return of the USD 162.5 million received by the CMC, it appears to the Tribunal that these fees cannot be said to be a consequence of the CMC's approval under its 29 May 2011 Letter which ought to be reversed under the CMC Order. Instead, these fees were payable as a result of the License Agreement, which pre-dates the 2011 Equity Transaction. [126]

144. In light of the above, the Tribunal endorses the narrow interpretation advanced by the Respondent. In other words, the CMC Order cannot, and does not, require the reinstatement of Korek's debt position, the reinstatement of the KRG Guarantee, the cancellation of the shares issued in connection with the 2011 Equity Transaction, or the return of the payment made to the CMC.

145. Having decided the proper interpretation of the CMC Order, the Tribunal now turns to the issue of whether there was a direct expropriation by virtue of the KCR Decree as alleged by the Claimant. As the Tribunal has no jurisdiction over the lawfulness of the CMC Order, the Tribunal similarly has no jurisdiction over any expropriation claims that arise solely as a result of a faithful implementation of the CMC Order. Put another way, in order to succeed in its expropriation claim, the Claimant needs to show that the KCR Decree was not a faithful implementation of the CMC Order.

146. The KCR Decree states that:

> *1- Order was issued to cancel the administrative order no. (2959), dated 07/20/2011 [i.e. KCR Order No. 2959].*
>
> *2- It was ordered to restore the company's shares to the period before 03/13/2011.*

[125] R. Rejoinder, ¶ 63; Iraqi Companies Law 21 of 1997, Art. 59(2), Exhibit RL-0123.

[126] Hearing on the Merits, Transcript (Day 2) (Respondent's Opening), pp. 139:13-140:12.

. . . .

7- The percentages of shares were changed in the following manner:

Sirwan Saber Mostafa: 75 percent Chavshin Hassan Chavshin: 20 percent

Jaghshi Hamou Mostafa: 5 percent." (emphasis in original)[127]

147. The first line of the KCR Decree unequivocally states that it was issued to cancel the KCR Order 2959. The KCR Order No. 2959 in turn states:

> *...[A]t the request of the shareholders of* ***Korek Telecom Co. Ltd****, registered under the entry no. 167 on 16/8/2000, we issue the following orders based on authorities and responsibilities delegated to us:*
>
> *1. Excluding all the shares of Mr. Sirvan Saber Mostafa, equal to 75% of the company shares*
>
> *2. Excluding all the shares of Mr. Chavoshin Hassan Chavoshin, equal to 20% of the company shares*
>
> *3. Excluding all the shares of Mr. Jaghsi Hamu Mostafa, equal to 5% of the company shares*
>
> *4. Registering all the shares of Mr. Sirvan Saber Mostafa, equal to 75%, Mr. Chavoshin Hassan Chavoshin, equal to 20% and Mr. Jaghsi Hamu Mostafa, equal to 5% of the company shares under the new shareholder of the new Emirates International Holdings.*
>
> *...*
>
> *6. The number of shares will be as follows:*

[127] KCR Decree, Exhibit R-120 and Exhibit C-102.

Emirates International Holding Company [i.e. IH] 100% ....
(emphasis in original)[128]

148. It is clear from the above that the effect of the KCR Decree is to revoke the transfer of share ownership made under the KCR Order No. 2959 (*i.e*. the change from 75%, 20% and 5% split between the Iraqi shareholders to 100% of the shares being owned by IH) and to confirm that the shares had reverted to their original percentage ownerships.

149. As such, the Tribunal finds that there is no material difference between what was ordered under the CMC Order and what was implemented under the KCR Decree. Consequently, the Tribunal is of the view that the Claimant's expropriation claim does not succeed.

150. For completeness, the Tribunal notes that the Claimant's Reply sets out, in a single line, the allegation that the Respondent's "repudiation of its obligation to repay the 2007 loan principal and interest under the [KRG] Guarantee is itself an expropriation."[129] However, during the Hearing on the Merits, the Claimant has not actively pursued an expropriation claim based on the alleged repudiation by the KRG. Instead, Claimant's arguments regarding the alleged repudiation by the KRG focus on whether this amounts to a breach of the umbrella clause contained at Article 5(3) of the Japan-Iraq BIT, which it seeks to import into the 2015 BIT's Most-Favored-Nation clause.[130] These arguments are dealt with below at paragraphs 177 to 192 of this Award. As explained in detail below, the Tribunal's view is that the evidence does not support the Claimant's contention that the KRG Guarantee remained in force post the 2011 Equity Transaction. As such, the Claimant's expropriation claim based on this flawed factual premise is unsustainable.

(2) Fair and Equitable Treatment ("FET")

a. The Claimant's Position

151. The Claimant submits that the Respondent breached the FET standard when it: (a) refused to engage with the Claimant on how to implement the CMC Order; and (b) improperly

[128] KCR Order No. 2959 dated 20 July 2011, Exhibit R-0104 and Exhibit C-158.
[129] Cl. Reply, ¶ 133.
[130] Cl. PHB, ¶ 36.

implemented the CMC Order, which was arbitrary and unreasonable because the implementation violated the terms of the CMC Order, and was discriminatory in that it gave a windfall to the Iraqi Shareholders (and the Iraqi State), while eviscerating the Claimant's investment.[131]

152. The Claimant argues that the CMC Order was insufficient to explain the way in which the parties were to go about unwinding a complex, multi-faceted investment transaction. Relying on the decision of *PSEG Global v. Turkey*,[132] the Claimant asserts that both the CMC and the KRG failed to respond to its queries and concerns regarding the CMC Order made and expressed since May 2016.

153. According to the Claimant, this type of inaction, non-responsiveness and lack of transparency from multiple arms of a government in the face of a persisting and aggravating disagreement between a State and a foreign investor is precisely the type of conduct that investment treaty tribunals have found to constitute an FET violation.[133]

154. In addition to arguing that the Respondent acted in violation of the FET standard by failing to implement the CMC Order in line with the Claimant's broad interpretation of the CMC Order (which the Tribunal has rejected above), the Claimant also argues that:

(a) the KCR Decree violated due process as it was issued without a court order, without notice to the Claimant and without a legitimate purpose; and

(b) the Claimant's legitimate expectations have been frustrated by the Respondent eviscerating the arrangements in reliance upon which it was induced to invest. In this regard, the Claimant claims that the KRG Guarantee was considered a "condition precedent" to the Claimant's investment in Korek that induced the Claimant's

[131] Cl. PHB, ¶ 31, Cl. Opening Slides Vol 1, p.78.

[132] *PSEG Global Inc. and Konya Ilgın Electrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, Exhibit CL-068.

[133] Cl. Reply, ¶¶ 161-166.

investment and that the Claimant "would never have accepted an unsecured debt position in Korek at any time."[134]

b. The Respondent's Position

155. The Respondent argues that the Claimant's "failure to engage" claim is flawed, as a mere failure to respond to letters that make various ill-founded complaints about a governmental decision that had already been affirmed on appeal, from an investor who had already threatened a dispute and even commenced arbitration, cannot possibly be the kind of conduct that violates the 2015 BIT.[135]

156. In any case, the Respondent submits that it was not for the CMC Order to explain the way in which the parties ought to go about unwinding the 2011 transaction. Instead, this is what the Claimant's highly sophisticated contracts with the other relevant parties should have foreseen.[136]

157. With respect to Claimant's point that the KCR Decree is a violation of due process, the Respondent argues that it did not constitute a violation of the FET standard as it was issued in compliance with Iraqi due process and procedure; specifically, it was issued on the basis of a decision by an Iraqi competent court, where proper notice was given, as required by Iraqi law.[137]

158. As for the Claimant's point about the alleged frustration of its legitimate expectations, the Respondent argues a claim based on expectations arising from the mere text of the KRG Guarantee would fail because the Claimant voluntarily forewent that Guarantee in 2011.[138]

c. The Tribunal's Analysis

159. Article 3(2) of the BIT provides that:

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[134] Cl. Reply, ¶¶ 160-176; Cl. Opening Slides Vol 1, p. 81.
[135] R. Rejoinder, ¶¶ 85-86. *See also* R. PHB, ¶ 43.
[136] R. Rejoinder, ¶ 87.
[137] R. Rejoinder, ¶¶ 89-90. Hearing Tr. (Day 2) (Respondent's Opening), pp. 80-81; R. Opening Slides, pp. 96-97.
[138] R. Rejoinder, ¶ 71. *See also* R. PHB, ¶ 42.

> *Investments by investors of either Contracting Party in the territory of the other Contracting Party shall be given equitable and fair treatment and shall enjoy full protection and security in consistence with its laws and regulations as well as the provisions of this agreement.*[139]

160. The Tribunal agrees with the Claimant's position that the standard is a broad and flexible protection, requiring a fact-specific assessment to determine whether conduct is "fair" and "equitable" in the context and the particular circumstances of the dispute. It "should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."[140]

161. The Tribunal further agrees with the Claimant's assertion that inaction by a State may constitute an FET violation. For example, in *PSEG Global v. Turkey*, the tribunal held that Turkey had breached its FET obligations in the course of its negotiations with claimants. The *PSEG* tribunal noted that:

> *[t]he fact that key points of disagreement went unanswered and were not disclosed in a timely manner,* ***that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, all are manifestations of serious administrative negligence and inconsistency****. The Claimants were entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.* [141]

162. Additionally, a breach of legitimate expectations may give rise to a FET violation. In order for such a claim to succeed, the claimant must establish that:

> *…(a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and*

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[139] 2015 BIT, Article 3(2), Exhibit CL-048.

[140] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, Exhibit CL-058. Cl. Reply, ¶ 148.

[141] *PSEG Global Inc. and Konya Ilgın Electrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 246, Exhibit CL-068 (emphasis added).

(c) these representations were subsequently repudiated by the state.[142]

163. In light of the Tribunal's decision to reject the broad interpretation of the CMC Order proposed by the Claimant, the portions of the Claimant's case that the FET standard was breached, because the Respondent improperly implemented the CMC Order (based on that same broad interpretation), cannot be made out. That said, the Tribunal notes that the Claimant seeks to rely on other grounds to make out its FET claim and considers these grounds below.

164. **First**, with regard to the Claimant's "failure to engage claim", the Claimant relies on only three letters (two to the CMC on 17 May 2016 and 24 October 2016, and one to the KRG dated 22 August 2017) in support of its submission that the Respondent had failed to engage with the Claimant on how to implement the order.[143]

165. The Tribunal is not persuaded that the Respondent's failure to respond to these three letters is of itself sufficient to make out a claim for breach of the FET standard. In the Tribunal's view, the Respondent's conduct falls short of the requirement of a pattern of conduct set out in *PSEG Global v. Turkey* upon which the Claimant relies. After all, aside from requiring the prior shareholdings to be reinstated, the CMC Order does not require the Respondent to do anything in respect of implementing the Order. That being the case, any failure to engage would not be material.

166. **Secondly,** in relation to the Claimant's argument that the KCR Decree violated due process, the Claimant asserts that this was done "without a court order, without notice to the Claimant and without a legitimate purpose."[144] The Claimant relies on Article 68 of the Iraqi Commercial Companies Law No. 21/1997 which states that "[a]ny transfer of ownership of shares other than through the sale method must be recorded in the corporate

[142] Respondent's Counter Memorial dated 13 March 2020 ("**R. Counter Memorial**"), ¶ 83, citing *Antaris v. The Czech Republic*, PCA Case No. 2014-1, Award, 2 May 2018, ¶ 360(3), Exhibit RL-104; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶ 10.3.7, Exhibit RL-095; *see also* Cl. Reply, ¶ 159.

[143] Cl. Reply, ¶¶ 161-166.

[144] Claimant Slides Vol 1, p. 81.

register on the basis of a decision issued by the ***competent court***" (emphasis added).[145] According to the Claimant, the CMC Appeals Board is not a competent court of jurisdiction under Article 68.

167. However, the Claimant's argument is contradicted by the Federal Court of Cassation's decision No. 835/Transitional Civil Authority/2014 dated 29 May 2014 ("***Waha Decision***") where the court clearly stated that the CMC's decisions are the product of an entity chaired by a judge, binding under the law and do not require a court decision before they are enforced:

> *... pursuant to Order No. (65) issued by the Coalition Provisional Authority regarding the Iraqi Communications and Media Commission, clause 6 of Section 8 of the aforementioned decision stipulated that the decisions issued by the Appellate Board are final decisions because the Appellate Board is one of the Communications and Media Commission's bodies, is chaired by a judge, and its decisions are binding under the law, are final,* ***and do not require a court decision to enforce them***.[146]

168. Accordingly, the Tribunal is not persuaded that the Claimant's case for lack of due process is made out, especially given that the Claimant has not provided a clear explanation as to what is said to be the appropriate notice that ought to be given to an indirect shareholder such as the Claimant in this particular case.

169. For completeness, the Tribunal highlights that the assertion that the KCR Decree was made without any legitimate purpose would fail in view of the Tribunal's finding that there is no material difference between what was ordered under the CMC Order and what was implemented under the KCR Decree.

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[145] Second Expert Report of Reema I. Ali dated 17 July 2020 ("**Ali Second Report**"), ¶¶ 54-55; Iraqi Commercial Companies Law No. 21/1997, Article 68 ("Any transfer of ownership of shares other than through the sale method must be recorded in the corporate register on the basis of a decision issued by the competent court.") Exhibit RA-007.

[146] Federal Court of Cassation, No. 835/Transitional Civil Authority/2014, Decision dated 29 May 2014, Exhibit R-106 (RAK-007)(emphasis added); R. PHB, ¶ 65; Hearing on the Merits, Transcript (Day 4) (Al-Kabban), pp. 74:18-75:12; Corrected Reply Expert Report of Dr. Reyadh Al-Kabban dated 30 September 2020 ("**Al-Kabban Reply**"), ¶ 99.

170. **Thirdly,** in respect of the claim that the Claimant's legitimate expectations were frustrated when the KRG Guarantee was not reinstated, the Tribunal is not satisfied that there was any representation from the Respondent that the KRG Guarantee would be reinstated or that the Respondent would ensure that the Claimant would not be placed in the position of an unsecured debt holder. While the Tribunal accepts that the Claimant considered the KRG Guarantee to be a condition precedent to the Claimant's earlier investment in Korek,[147] this is superseded by the fact that the Claimant later chose to convert the Convertible Note (thereby extinguishing the KRG Guarantee) in the 2011 Equity Transaction.[148]

171. The Claimant's own evidence indicates that by the time the Claimant entered into the 2011 Equity Transaction, the Claimant did not have any expectation that the KRG Guarantee would continue to apply. In particular, the Chief Executive Officer and Vice Chairman of the Claimant, Mr. Tarek Sultan, admits that the Claimant did *not* seek to obtain a similar sovereign guarantee in connection with the 2011 Equity Transaction in reliance upon three protections: (a) the Claimant's equity ownership in Korek; (b) the fact that the 2011 Equity Transaction was structured through heavily negotiated contracts which gave the Claimant the comfort that it could enforce its contractual rights should the need arise; and (c) the Claimant's partnership with Orange.[149] During cross-examination, Mr. Sultan also confirmed that as part of the 2011 Equity Transaction, the Claimant opted for a guarantee on the note owed to the Claimant (and to Orange) from Korek (as opposed to one from the KRG).[150]

172. The Claimant's contention that it had legitimate expectations that the KRG Guarantee would be reinstated is further undermined by its admission in its response to the

[147] Sultan Witness Statement, ¶¶ 11-12.

[148] Aziz First Witness Statement, ¶ 28(a); Aziz Second Witness Statement, ¶ 4.

[149] Sultan Witness Statement dated 17 July 2020, ¶¶ 17-20.

[150] Hearing on the Merits, Transcript (Day 3) (Sultan), pp. 32:19-33:3; Guarantee made by Korek Telecom Company LLC as guarantor of 27 July 2011, Exhibit C-020.

Respondent's discovery request for the "[e]xecuted final versions of documents evidencing Agility's 2007 Loan and the 2011 Investment Transaction", where it stated that:

> ***Claimant does not claim it had any expectation at the time of its Investment that the KRG Guarantee would be reinstated****. To the contrary, it is Claimant's case that at the time of its Investment in Iraq, it did not expect, and could not have expected, that Iraq would later issue the unlawful CMC Decision, and therefore that the Sovereign Guarantee would need to be reinstated in light of Iraq's own Order.*[151]

173. Nor has the Claimant identified any representations from the Respondent that were made ***after*** the Claimant extinguished the KRG Guarantee in 2011 which can be said to have induced the Claimant's further investment into Korek in 2011. The only representation from the Respondent identified in the Claimant's pleadings is the KRG Guarantee itself; specifically, the KRG Guarantee's express statement that the KRG will guarantee "full and final payment of the loan, in principal and interest, by Korek Telecom."[152] However, the KRG Guarantee does not go so far as to say that it would continue to apply or be reinstated after having been extinguished, nor does it provide a blanket guarantee that the KRG would ensure that the Claimant would never be placed in the position of an unsecured debt holder. In summary, the Tribunal finds that the three grounds set out above (whether taken individually or as a whole) are insufficient to constitute a FET violation.

(3) Impairment, Full Protection and Security, and National Treatment Protection

174. The Claimant has also claimed that the Respondent's "partial and improper" implementation of the CMC Order: (a) impaired the Claimant's investment by arbitrary and discriminatory measures in breach of Article 3(3) of the 2015 BIT; (b) failed to accord the Claimant's investment full protection and security in breach of Article 3(2) of the 2015 BIT; and (c) failed to provide national treatment protection under Article 4 of the 2015 BIT.

[151] Procedural Order No. 8, Annex B, pp. 4-6 (emphasis added).

[152] Cl. Reply, ¶ 175(a).

175. In view of the Tribunal's finding that the Respondent's implementation of the CMC Order was neither partial or improper, the Tribunal does not find it necessary to address the Claimants' claims on these separate grounds, given that these claims share the same factual foundation which the Tribunal has already rejected, namely, that the CMC Order required the Respondent to reinstate the *status quo* as of 13 March 2011 in every aspect.[153]

176. To the extent that the Claimant's national treatment protection claim appears to be based on the argument that it was arbitrary and discriminatory for the Respondent to order that Korek's shares be transferred to the Iraqi Shareholders "for free" under the CMC Order,[154] such an argument inevitably deals with the merits of the CMC Order, which is an issue that does not fall under the scope of the Tribunal's jurisdiction.[155]

(4) Most-Favored-Nation ("MFN")

a. The Claimant's Position

177. The Claimant seeks to import an umbrella clause contained at Article 5(3) of the Japan-Iraq BIT ("**Umbrella Clause**") into the 2015 BIT.[156] According to the Claimant, investment treaty tribunals have recognized that an MFN clause (such as the one set out at Articles 5(1) and (2) of the 2015 BIT) may operate to permit the importation of substantive provisions not included in the treaty at issue.[157]

178. The Claimant asserts that the Umbrella Clause requires the Respondent to observe "any obligation" which it may have entered into with regard to investments and investment activities of investors as defined in the BIT.[158]

[153] Cl. Reply, pp. 79-87.
[154] Cl. Reply, ¶¶ 194-195.
[155] Decision on Jurisdiction, ¶¶ 135, 237-238.
[156] Cl. Reply, ¶¶ 201-212.
[157] Cl. Reply, ¶ 198.
[158] Cl. Reply, ¶ 205.

179. According to the Claimant, many investment treaty tribunals have recognized that umbrella clauses extend to obligations entered into by the State through agreements concluded not only with the claimant investor, but with subsidiaries of the claimant investor.[159]

180. On the facts, the Claimant argues the KRG is a constituted subdivision of Iraq and an organ of the State,[160] and that "[i]t indeed is evident from [the] Respondent's Counter-Memorial that the [KRG] Guarantee has been repudiated and will not be honoured"[161] The Claimant further argues that the repudiation of the KRG Guarantee is a failure to observe an obligation entered into with regard to Agility's investment attributable to Respondent and in breach of the Umbrella Clause.[162]

b. The Respondent's Position

181. The Respondent is silent on whether the MFN clause at Article 5(1) and (2) of the 2015 BIT could apply to import the Umbrella Clause.[163]

182. The Respondent says, however, that the Claimant's claim fails for the principal reason of lack of privity. According to the Respondent, many investment tribunals have recognized that an umbrella clause that applies to obligations "with regard to" investments made by investors does not apply to obligations undertaken by a State related to a subsidiary of an investor. Accordingly, the Respondent argues that the Claimant cannot enforce any breach or "repudiation" of that guarantee, because the Claimant was not the counterparty to the KRG Guarantee between the KRG and Alcazar.[164]

183. Further, on the facts, the Respondent argues that the Claimant cannot repudiate something that does not exist. The Respondent submits that the KRG Guarantee was terminated in 2011 (as was the associated loan), and that the Claimant's theory that it was somehow

[159] Cl. Reply, ¶ 214.

[160] Cl. Opening Slides Vol 1, p. 101 (citing ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Exhibit RL-009); Expert Report of Professor Noah Feldman dated 17 July 2020 ("**Feldman Report**"), ¶ 53.

[161] Cl. Reply, ¶ 217.

[162] Cl. Reply, ¶ 218.

[163] R. Rejoinder, ¶ 109.

[164] R. Rejoinder, ¶ 109.

repudiated thereafter is irreconcilable with its principal claim that the KRG Guarantee ought to be reinstated.[165]

c. The Tribunal's Analysis

184. The Parties have cited various authorities on whether an umbrella clause can extend to obligations undertaken by a State related to a subsidiary of an investor. The Tribunal finds that it is unnecessary to delve into these authorities since this claim can be easily disposed of on the facts, given that the Claimant's contention that the KRG Guarantee was repudiated by the KRG is unfounded. As explained below, the Claimant's own witness testimonies and the contemporaneous documentary evidence show that it was the Claimant which voluntarily exchanged the Convertible Note for equity in Korek as part of the 2011 Equity Transaction, and thereby extinguished the KRG Guarantee that secured the Convertible Note.

185. Insofar as the Claimant appears to be suggesting that the KRG Guarantee was never terminated but was repudiated by the KRG at some indeterminate time,[166] this is completely at odds with the Claimant's primary case that the KRG Guarantee ought to be reinstated.

186. Turning to the evidence, the Group Chief Financial Officer of the Claimant, Mr. Ihab Fekry Aziz Bassilios, stated in his First Witness Statement that the Claimant invested into Korek "***by converting the Convertible Note***, plus interest, and making an additional USD 50 million cash contribution—***in exchange for*** a 23.7% indirect equity interest in Korek and a USD 100 million shareholder loan."[167]

187. On cross-examination, Mr. Aziz appeared to backtrack on his earlier position and testified that "what has happened in 2011 was not technically a conversion of the convertible debt" but "actually a contribution of the [Convertible] [N]ote and its features."[168] Regardless of

[165] R. Rejoinder, ¶¶ 100-108.
[166] Cl. Reply, ¶ 175(c).
[167] Aziz First Witness Statement, ¶ 28(a) (emphasis added); *see also* Aziz Second Witness Statement, ¶ 4.
[168] Hearing on the Merits, Transcript (Day 3) (Aziz), p. 64:7-13.

whether the Convertible Note was "converted" or "contributed", Mr. Aziz admitted during the Hearing that the Convertible Note had been "exchanged" for equity in Korek as part of the 2011 Equity Transaction:

> Q. So Agility exchanged the 2007 Convertible Note for equity in Korek in lieu of cash, and that resulted in Agility being repaid under the 2011 Investment Transaction structure, isn't that right?
>
> A. I mean, repayment in the sense of cash, that I can comfortably say has never been the case. But as I mentioned, it was a contribution into the transaction, in exchange for shares.
>
> Q. So it was in exchange for equity, that's your point?
>
> A. ***Yes***.
>
> Q. And here, when [Alcazar] transferred the 2007 Convertible Note in 2011, in lieu of cash, ***the Convertible Note was extinguished when [Alcazar] was effectively paid in full***, is that right?
>
> A. I mean, it was exchanged for shares, and accordingly, the Convertible Note has been exchanged for the 23.7% in Korek.[169]

188. In a similar vein, Mr. Sultan also acknowledged that: (a) the Claimant had previously informed its shareholders by way of its Annual Report in 2011 that the Claimant had formed "a joint venture with France Telecom and ***converted [its] Korek debt into equity***"[170]; and (b) it was accurate for the Claimant to describe the 2011 Equity Transaction as one where "Alcazar ***converted its US$250 million Convertible Note*** approximately US$80 million of accrued interest, and an additional US$50 million cash investment into a 24% equity stake in Korek and a US$100 million shareholder loan" in its letter to the KRG dated 22 August 2017.[171]

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[169] Hearing on the Merits, Transcript (Day 3) (Aziz), pp. 64:25-65:16 (emphasis added).

[170] Hearing on the Merits, Transcript (Day 3) (Sultan), pp. 25:16-26:14 (emphasis added); *see* Agility 2011 Annual Report, Exhibit R-0022.

[171] Hearing on the Merits, Transcript (Day 3) (Sultan), pp. 26-28 (emphasis added); *see* Letter from Agility to the Kurdistan Regional Government dated 22 August 2017, Exhibit C-088.

189. Furthermore, Mr. Sultan admitted that, by 2012, Alcazar was no longer in a position to demand the payment of the Convertible Note.[172]

190. In addition, Korek's financial statements indicate that the Convertible Note and the KRG Guarantee which secured it must have been effectively terminated as part of the 2011 Equity Transaction when the underlying loan was considered to be paid "in full" by Korek. In particular, Korek's 2011 financial statements state that:

> *As of the 31 December 2010, no repayments against principle [sic] loan or interest amount were made which resulted in accrued interest calculated at a rate of 9%, and the right of conversion has not been exercised.*
>
> *During the year 2011, the company has paid the principal loan and the related interest in full.*[173]

191. In the following year, Korek's financial statements no longer referred to the Convertible Note, and only referred to the new 2011 loan that IH concluded with IT Ltd as part of the 2011 Equity Transaction.[174]

192. The evidence set out above makes clear that the Convertible Note was no longer in force following the 2011 Equity Transaction as the Claimant had voluntarily "exchanged" the Convertible Note for equity in Korek. As such, there is no basis for the Claimant's assertion that the KRG repudiated the KRG Guarantee and therefore the Tribunal finds that the Claimant's MFN claim is not made out.

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[172] Hearing on the Merits, Transcript (Day 3) (Sultan), p. 52:14-21.

[173] Korek Audited Financial Statements for the Year Ended 31 December 2011, p. 20, Exhibit BRGW-011; *see also* Hearing on the Merits, Transcript (Day 3) (Aziz), pp. 66:20–67:07.

[174] Korek Financial Statements for the Year Ended 31 December 2012, p. 15 ("On 27 July 2011, International Holding borrowed an amount of USD 285,000,000 from Iraq Telecom Limited and transferred the facility to Korek as a shareholders loan. International Holding will repay the loan to Iraq Telecom during 2015 in accordance with the signed agreement. The interest rate on the loan is 11.25% which represents the applicable margin of 11% plus LIBOR"), Exhibit R-0105.

B. ALLEGED DENIAL OF JUSTICE

(1) The Claimant's Position

193. The Claimant's alternative claim is that the Respondent failed to accord the Claimant's investment fair and equitable treatment when it prevented the Claimant access to the administrative court proceedings in Iraq to challenge the CMC.

194. The Claimant submits that the obligation not to deny justice falls within the scope of the obligation to accord fair and equitable treatment as set out at Article 3(2) of the BIT, and that it is also considered to be a principle of customary international law.[175]

195. According to the Claimant, Article 7(4) of State Shoura Council Law No. 65 of 1979 (as amended) ("**State Shoura Council Law**") gives third parties the right to intervene where there is reason to "fear harm" to those involved. On this basis, the Claimant says that this provision alone permits any of the Claimant's shareholders or subsidiaries to join the proceedings as the CMC Order could be reasonably interpreted to pose a threat to their interest in Korek.[176]

196. The Claimant also relies on Article 7(11) of the State Shoura Council Law which states that where the State Shoura Council Law is silent, the Code of Civil Procedure applies. By reason of Article 7(11) of the State Shoura Council Law, the Claimant alleges that Article 69 of the Code of Civil Procedure applies and provides that any person of "interest" has a right to join the proceedings.[177]

197. Separately, the Claimant argues that the designated appellate authority referred to in Article 7(4) of the State Shoura Council Law must be a judicial body properly instituted in accordance with Iraqi law and independent from the executive branch, and that where there

[175] Cl. Mem., ¶¶ 145-147; Cl. Reply, ¶ 254; Cl. PHB, ¶ 60. Expert Report of Jan Paulsson dated 17 July 2020, ¶ 37.
[176] Ali First Report, ¶ 82.
[177] *Ibid*.

is no other form of appellate review available, the Administrative Court has the jurisdiction to decide the validity of administrative orders.[178]

198. In this regard, the Claimant alleges that "the best interpretation of Iraqi law is that the [CMC] Appeals Board is not itself an "avenue of appeal" under [the State] Shoura Council Law" as such an interpretation would be the most consistent with the Iraqi Constitution.[179] The Claimant's arguments on this issue primarily focus on whether interpreting the CMC Appeals Board as the designated appellate authority would be in violation of Article 100 of the Iraqi Constitution, which states that "[i]t is prohibited to stipulate in the law the immunity from appeal for any administrative action or decision."[180]

199. The Claimant argues that the Respondent did not provide it (whether via Korek or IT) with any judicial forum to challenge the CMC Order, thereby annulling the legal basis for its investment in Korek through IT.[181]

200. Furthermore, the Claimant argues that the Respondent's contention that Iraqi law does not allow the courts to review CMC Appeals Board decisions is an admission of, not a defense to, denial of justice. In this regard, the Claimant asserts that internationally deficient administration of justice may be caused equally by a State's executive, legislature, or judiciary and that a denial of justice may result from legislation denying judicial recourse.[182]

(2) The Respondent's Position

201. According to the Respondent, the Claimant's denial of justice claim has evolved throughout the arbitration.[183] The Respondent submits that the standard for denial of justice has not been met as the Claimant has not demonstrated that "the court system

[178] Cl. Reply, ¶ 284.

[179] Feldman Report, ¶¶ 35-38.

[180] Feldman Report, ¶ 35.

[181] Claimant's Opening Slides Vol 2, p. 4,

[182] Claimant's Opening Slides Vol 2, pp. 55-56; Cl. Reply, ¶¶ 272-273.

[183] R. Counter Memorial, ¶ 12; R. Rejoinder, ¶ 129; Hearing on the Merits, Transcript (Day 2) (Respondent's Opening), pp. 106-108.

fundamentally failed" or is "so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith."[184]

202. The Respondent emphasizes that the Iraqi court system consists of two sectors: (a) one for civil cases (which fall within the jurisdiction of the civil courts in the following three tier hierarchy - the Court of First Instance, the Court of Appeal and the Court of Cassation); and (b) one for administrative cases (which fall within a two tier hierarchy - the Administrative Court and the Supreme Administrative Court).[185] The Respondent's position is that the administrative courts have limited jurisdiction over certain administrative acts of the government according to Article 7(4) of the State Shoura Council Law, whereas the civil courts are able to hear all disputes except those under the limited jurisdiction of the administrative courts pursuant to Section 29 of the Civil Procedure Code.[186]

203. In addition, the Respondent stresses that since 2005, the Iraqi court system also includes the Federal Supreme Court, which is the highest court in Iraq on constitutional issues. According to the Respondent, the Federal Supreme Court is an independent judicial body and parties may challenge the constitutionality of provisions of Iraqi law to the Federal Supreme Court either directly, or with the permission of the court in situations where a party is engaged in litigation.[187]

204. The Respondent disagrees with the Claimant's contention that third parties are granted a statutory right to intervene before administrative courts under Article 7(4) of the State Shoura Council Law. Instead, the Respondent submits that Iraqi law provides the administrative courts with the *discretionary power* to accept or deny third party intervener applications and that Article 7(4) of the State Shoura Council Law merely specifies the

[184] R. Rejoinder, ¶ 133 (citing Exhibit CL-072, Exhibit CL-075); Hearing on the Merits, Transcript (Day 2) (Respondent's Opening), p. 110.

[185] Al-Kabban First Report, ¶ 20; Al-Kabban Reply, ¶¶ 17-28.

[186] Al-Kabban Reply, ¶¶ 24-25.

[187] Al-Kabban Reply, ¶¶ 29-33.

scope of the administrative court's jurisdiction as opposed to providing the applicant with a mandatory right to join such proceedings.[188]

205. Similar to the Claimant, the Respondent accepts that Article 7(11) of the State Shoura Council Law allows the Civil Procedure Code to apply on matters where the State Shoura Council Law is silent. To this end, the Respondent refers to, *inter alia*, Articles 69 and 70 of the Civil Procedure Code, which regulate third party intervener applications. According to the Respondent, Articles 69 and 70 of the Civil Procedure Code merely provide parties with the right *to request* to be joined in a suit,[189] while Articles 71 and 72 of the Civil Procedure Code provide for the circumstances in which the administrative courts "shall decline" the application, namely, where the intervention is not based on a "serious interest."[190] According to the Respondent, Iraqi law requires the administrative courts to review whether the third party intervener has a serious interest and if it finds that the third party does not have a serious interest, it shall decline the third party's intervener application.[191]

206. On the facts, the Respondent argues, first, that the Claimant fails to rebut that the Administrative Court correctly denied IT Ltd.'s request to intervene in Korek's administrative proceeding, as the Claimant has not shown that the Iraqi courts were wrong to find that IT Ltd. had no "serious interest", and, second, the Claimant does not deny that IT Ltd's application had the *same* reasoning and requested the *same* relief as that of Korek.[192] In the alternative, the Claimant fails to demonstrate that even if the courts were wrong, the Claimant has not shown that the courts were "so willfully and shockingly wrong as to violate international law."[193]

[188] Al-Kabban First Report, ¶¶ 26, 48;
[189] Al-Kabban First Report, ¶ 34.
[190] Al-Kabban First Report, ¶ 37.
[191] Al-Kabban First Report, ¶ 39.
[192] R. Rejoinder, ¶ 136.
[193] R. Rejoinder, ¶¶ 136, 138.

207. The Respondent similarly refutes the Claimant's new "legislative" denial of justice claim, which is that if the Iraqi courts followed correctly Iraqi law, then the Iraqi legal regime is "unconstitutional and contrary to natural justice."[194]

208. Furthermore, the Respondent emphasizes that the Claimant cannot establish that international law requires that Korek be allowed to challenge the CMC Order in a forum that had no jurisdiction over the claim, which the Claimant knew.[195] The Respondent further submits that prior tribunals have found that States have the freedom to set up their legal systems however they wish, and "[i]t is not for treaty tribunals to second-guess the national legislator's express designation of an appellate authority" nor "to wade into matters of the spheres of competence of national courts."[196]

(3) The Tribunal's Analysis

a. Standard of Proof

209. In the widely cited decision of *Elettronica Sicula S.p.A. (ELSI), U.S.A. v. Italy*, a denial of justice is defined as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[197]

210. It is clear that the threshold for a claim of denial of justice is high. This is recognised in the various authorities cited by both the Claimant and Respondent. For example, in *Loewen v. U.S.A.*,[198] the tribunal emphasised that there must be "***[m]anifest injustice*** in the sense of ***a lack of due process leading to an outcome which offends a sense of judicial propriety.***"

211. This same sentiment is echoed in *Dan Cake v. Hungary*,[199] where the tribunal determined that the decision of the Metropolitan Court of Budapest shocked "a sense of juridical

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[194] R. Rejoinder, ¶¶ 129-130.

[195] R. Rejoinder, ¶ 147.

[196] R. Rejoinder, ¶ 160 (citing, *e.g. Mamidoil* and *Arif v. Moldova, Krederi*).

[197] *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy*), ICJ Judgment, 20 July 1989, ¶ 128, Exhibit RL-122.

[198] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 132, Exhibit CL-052 (emphasis added).

[199] *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, ¶¶ 119, 146, Exhibit CL-032.

propriety" and was therefore a denial of justice when it failed to convene a composition hearing as required by Hungarian law, causing the liquidator to sell the claimant's assets. Notably, the tribunal was of the view that a denial of justice was made out, despite the fact that the tribunal could not be sure if the claimant would have been successful at the composition hearing; it was enough that the court's decision deprived the claimant "of the chance – whether great or small – to avoid the sale of its assets and its disappearance as a legal person."[200]

212. It is also clear that a claim for denial of justice is not made out merely because a court misapplied the domestic law. In order to succeed in a claim for denial of justice, the Claimant must go beyond a mere misapplication of domestic law and show that there was a failure of the national system as a whole. As observed by the tribunal in *Chevron v. Ecuador*:

> *... To meet the applicable test,* ***it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards*** *...*
>
> *The Tribunal has also borne in mind, as these legal materials confirm, that* ***the doctrine of denial of justice essentially addresses procedural unfairness and not (by itself) an error of fact or applicable national law,*** *although both may equally defeat the complainant's substantive rights.* [201]

213. Similarly, in *Pantechniki v. Albania*, the tribunal acknowledged that in order for a wrongful application of the law to cross the high threshold of a denial of justice, it must constitute an error that no competent judge would have reasonably made, thereby showing that a minimally adequate system of justice has not been provided:

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[200] Cl. Reply, ¶ 303 (citing *Dan Cake,* ¶ 145).

[201] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on the Track II, 30 August 2018, ¶¶ 8.36-8.37, Exhibit RL-105 (emphasis added).

> *The general rule is that 'mere error in the interpretation of the national law does not per se involve responsibility.'* ***Wrongful application of the law may nonetheless provide 'elements of proof of a denial of justice.' But that requires an extreme test: the error must be of a kind which no 'competent judge could reasonably have made Such a finding would mean that the state had not provided even a minimally adequate justice system.*** [202]

214. Likewise, the decision of *Franck Charles Arif v. Moldova* states that:

> *... The responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which* ***misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so****.* [203]

215. This high standard of what constitutes a denial of justice is in line with the fact that an international arbitration tribunal is *not* an appellate court and does not function to correct errors of domestic law. As noted in *RosInvest v. Russia*:

> *The Tribunal emphasises again that an international arbitration tribunal…* ***is not an appellate body and its function is not to correct errors of domestic procedural or substantive law*** *which may have been committed by the national courts.* ***The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law****.* [204]

216. In the premises, the Claimant must show that Respondent had not provided a minimally adequate justice system in order to satisfy the high threshold for a claim for denial of justice.

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[202] *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 94, Exhibit RL-047 (emphasis added).

[203] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 442, Exhibit CL-057 (emphasis added).

[204] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Award, 12 September 2010, ¶ 275, Exhibit CL-072 (emphasis added).

b. Whether the Iraqi Administrative Courts Misapplied Iraqi Law and Violated International Law

217. When distilled down to its core, the first plank of the Claimant's case is that the Iraqi administrative courts misapplied Iraqi law when: (a) the Iraqi Administrative Court denied IT Ltd's Joinder Application on 18 January 2016; and (b) the Iraqi Administrative Court dismissed Korek's claim for lack of jurisdiction on 25 January 2016 and the Iraqi Supreme Administrative Court denied Korek's Appeal in this regard on 18 January 2018.[205]

218. Turning to the first issue regarding the denial of IT Ltd's Joinder Application, Ms. Ali (the Claimant's Iraqi law expert) confirmed, at the Hearing of the Merits, that the Claimant's position is that IT Limited had an avenue to intervene under Iraqi law, but the Iraqi court got it wrong when it denied the intervention:

> [PRESIDENT]: Just so I understand your evidence, am I right to understand that you say that IT Limited had standing in the administrative courts?
>
> A. Yes, sir.
>
> [PRESIDENT]: Do I understand you to mean therefore that the ***Iraqi court system actually permits IT Limited an avenue to intervene, but the court got it wrong when it denied the intervention***?
>
> A. ***That's correct.***[206]

219. Both Parties agree that the starting point is Article 7(4) of the State Shoura Council Law, which states that:

> *The administrative court shall have the jurisdiction to adjudicate the validity of individual and organisational administrative orders and decisions issued by the officials and agencies of ministries, and bodies that are not affiliated with a ministry and the public sector, and wherein no appellate authority is designated,* ***based upon a request from a person who has known, current and possible***

[205] Cl. Reply, ¶ 74.

[206] Hearing on the Merits, Transcript (Day 4) (Ali), pp. 62–63 (emphasis added).

> ***interest. However, a potential interest is sufficient if there is reason to fear harm to those concerned***. [207]

220. The Tribunal disagrees with the Claimant's position that Article 7(4) of the State Shoura Council Law alone is sufficient to show that any third party has the *mandatory right* to intervene because it has an interest in the matter. The Claimant has not cited any authority in support of this contention,[208] and there is nothing on the face of Article 7(4) of the State Shoura Council Law which confers such a right. Instead, as noted by the Respondent's Iraqi law expert, Dr. Reyadh Al-Kabban, Article 7(4) of the State Shoura Council Law merely sets out the jurisdiction of the administrative court.[209]

221. As the State Shoura Council Law is silent on the procedure governing third party intervention applications, Article 7(11) provides that the Civil Procedure Code would apply to fill the gap. Article 7(11) states that:

> *The provisions of Civil Procedure Law No. (83) of 1969, Evidence Law No. (107) of 1979 [i.e. the Civil Procedure Code] ... on the procedures followed by the Supreme Administrative Court, the administrative court and the official Administrative Court shall apply to any matter not specifically addressed in this law.*[210]

222. Under the Civil Procedure Code, Articles 69 and 71 govern the right to join proceedings. Article 69 of the Civil Procedure Code states that:

> *1- **Any person of interest <u>may request</u> to be engaged in the suit as a third party**, whether to join one of the suit's litigants or to independently apply for a judgment in his favor. Such a person shall be connected to the suit or to one of the litigants therein (whether in a joint liability or in a separable commitment) or if the judgment in the suit was thought to affect the same.*

[207] State Shoura Council Law No. 65 of 1979 (as amended), Art. 7(4), Exhibit RL-090 (emphasis added).

[208] Ali First Report, ¶ 82; Ali Second Report, ¶ 38.

[209] Al-Kabban First Report, ¶ 38.

[210] State Shoura Council Law No. 65 of 1979 (as amended), Art. 7(11), Exhibit RL-0090.

> *2- Each litigant **may request** the court to engage a person holding a proper capacity that would have enabled him to be a litigant in the case at the time it was filed, or to preserve the right of both litigants or of one of them….*[211]

223. Article 71 of the Civil Procedure Code states that:

> *Either litigant may object to the intervention of a third party in the claim. **If the court deems that the intervention or impleader is not based on a serious interest, and is only meant to delay the proceedings, then the court shall decide to reject to such intervention or impleader**, and shall continue to pursue the suit's proceedings.* [212]

224. In the Tribunal's view, there is nothing on the face of Article 69 or 71 Civil Procedure Code which confers any mandatory right upon a third party to intervene as alleged by the Claimant. In fact, Article 69 states that "[a]ny person of interest ***may request*** to be engaged" (emphasis added), which suggests that the court retains the discretion to allow or disallow the request.

225. The Claimant has sought to rely on several Iraqi cases which it says show that "an application to intervene under Article 69 of the Civil Procedure Code *must* be granted if the case cannot proceed without the intervener."[213] However, these cases are of little assistance to the Claimant as Korek's Appeal could have (and did in fact) proceed without IT Ltd. Further, while the Tribunal accepts that these cases do not expressly state that the courts have absolute discretion in deciding third party intervention applications, the Tribunal is of the view that these courts were *in effect* exercising their discretion when deciding whether the interveners should be joined in those cases.

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[211] Iraqi Civil Procedure Code, Art. 69, Exhibit RL-088 (emphasis added).

[212] Iraqi Civil Procedure Code, Art. 71, Exhibit RL-088 (emphasis added).

[213] Ali Second Report, ¶ 40(a) (emphasis in original), citing Court of Cassation Decision No. 1115 of 2009, 29 January 2009, Exhibit RA-018; Court of Cassation Decision No. 281/Civil Expanded/2009, 17 June 2009, Exhibit RA-019; Kirkuk Federal Court of Appeals Decision No. 117/T/H/2010, 25 August 2009 (acting as a court of cassation), Exhibit RA-020; Baghdad Court of Appeals/Rusafa Federal Court Decision No. 610/M/2009, 27 August 2009 (acting as a court of cassation), Exhibit RA-021.

226. In the present case, the Administrative Court's dismissal of IT Ltd's Joinder Application on 18 January 2016 was done orally. The only evidence of the Administrative Court's reasoning is set out in the email update from Korek's lawyer (who attended the hearing) which was sent on or around 23 January 2016 and which states *inter alia* that:

> *... the court noted there is a request submitted by the legal representative of IT Ltd. in the previous hearing in which he requests the court permission to intervene as third-party in this case, and the court had postponed the case to review the submitted request and review the case file. Further,* ***the court completed the case file and decided to decline the request submitted by the representative of the third party to intervene in the case as a third party)*** *(noting the applicant did not attend the session).*[214]

227. While the documents do not reveal the underlying reasons for the Administrative Court's dismissal of IT Ltd's Joinder Application, the Tribunal is nonetheless persuaded that the Administrative Court's decision to dismiss IT Ltd's Joinder Application does not satisfy the extreme test of being an error which no competent judge could reasonably have made.

228. In this regard, the Tribunal takes into account that IT Ltd's intervention application[215] effectively sought the exact same relief which was sought in Korek's application, [216] namely an annulment of the CMC Order. In this regard, it is clear from the documentary evidence that IT Ltd's Joinder Application mirrored Korek's application in both form and substance, and that the relief sought by both Parties was identical. In other words, IT Ltd had failed to identify a separate interest which required protecting apart from Korek's interest in its Joinder Application. The Tribunal is therefore persuaded by the Respondent's argument that the Administrative Court could have had a valid basis to find that IT Ltd (being a shareholder of IH which was in turn a shareholder of Korek) lacked a "serious interest" in the case which merits intervention.[217]

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[214] Email exchange between Mr. Louis AbouCharaf of Korek and Mr. Deepak Jain of Agility between 19 and 23 January 2016, Exhibit C-073(emphasis added.)

[215] IT Ltd.'s Petition to the administrative Court dated 16 February 2015, p. 6, Exhibit C-070.

[216] Korek's Petition to the Administrative Court dated 16 October 2014, p. 13, Exhibit C-047.

[217] Al-Kabban Reply, ¶¶ 44-50.

229. The Tribunal is unpersuaded by the Claimant's argument that IT Ltd could have sought to amend its pleadings under Article 59 of the Civil Procedure Code to seek further or different relief to that sought by Korek, as this argument is purely speculative.[218] The fact that the IT Ltd could have *hypothetically* applied for permission to amend its application does not detract from the fact that the Iraqi Court had a reasonable basis to reject IT Ltd's Joinder Application based on the papers before it.

230. Some reference has been made to the Iraqi Administrative Court's decision to reject the intervention application of Mr. Majid Hilal Abdul-Hussein (one of the Claimant's shareholders) which was substantively identical to IT Ltd's intervention application. In this regard, the Tribunal stresses that the lawfulness of the Court's decision to reject Mr. Majid Hilal Abdul-Hussein's intervention falls outside the scope of the Tribunal's decision. That said, the Tribunal notes that the Administrative Court has taken a consistent approach towards its application of Article 71 of the Civil Procedure Code in that it has similarly rejected Mr. Abdul-Hussein's intervention application.

231. Accordingly, the Tribunal considers that the Iraqi Court's dismissal of IT Ltd's Joinder Application falls short of the high threshold for a denial of justice. The fact that the Claimant has not been able to identify any authority whereby a denial of justice claim succeeded on the basis that a third party was not allowed to intervene in a court case fortifies the Tribunal's view.

232. Turning to the second issue regarding the dismissal of Korek's Appeal, it is common ground that pursuant to Article 7(4) of the State Shoura Council Law, the administrative courts only have jurisdiction over administrative matters "wherein no appellate authority is designated."[219] The issue therefore turns on whether the CMC Appeals Board can be said to constitute the "designated appellate authority" under Article 7(4) of the State Shoura

[218] Ali Second Report, ¶ 44 (c).

[219] Ali First Report, ¶ 75; Al-Kabban First Report, ¶ 21.

Council Law,[220] thereby depriving the Iraqi administrative courts from having the jurisdiction over the matter.

233. Sections 8(5)-(6) of Order 65 are directly relevant to this issue as they state that CMC's decisions may be appealed to the CMC Appeals Board and that these decisions are final once upheld:

> *Decisions of the Commission, whether rendered by the Director General or the Hearings Panel,* ***may be appealed to the Appeals Board***
>
> ...
>
> *The Appeals Board, upon hearing timely arguments from the parties, may uphold, overturn or remand decisions or orders before it to the Director General or the Hearings Panel.* ***Once upheld by the Appeals Board, decisions are final****.*[221]

234. In determining whether the CMC Appeals Board can be said to constitute the "designated appellate authority" under Article 7(4) of the State Shoura Council Law, the Tribunal finds it significant that the Iraqi courts, including Iraqi's apex court on constitutional issues (*i.e.* the Federal Supreme Court[222]) have consistently recognized the CMC Appeals Board as an appeal entity presided over by a judge whose decisions are judicial in nature and final. Specifically, the Iraqi courts have also expressly rejected the argument that such an interpretation is inconsistent with Article 100 of the Iraqi Constitution which provides that "it is prohibited to stipulate in the law the immunity from appeal for any administrative action or decision."[223]

235. For example, in the Federal Supreme Court Decision No. 53/Federal/Media/2017, 27 July 2017 ("***Zain FSC Decision***"), the Federal Supreme Court found that:

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[220] State Shoura Council Law No. (65) of 1979, Exhibit RL-090.

[221] Order 65 dated 20 March 2004, Exhibit C-002 (emphasis added).

[222] Al-Kabban First Report, ¶ 87; Al-Kabban Reply, ¶ 65.

[223] Constitution of the Republic of Iraq (2005), Art. 100, Exhibit RL-004.

> ***The Federal Supreme Court finds that the [CMC] Appeals Board constituted under the [Order 65], which was constituted of three members under the chairmanship of a judge, constitutes an appeal body recognized in law. It has jurisdiction to hear appeals brought against decisions issued by the Director-General of the [CMC] and also decisions issued by the Hearing Committee in the aforementioned Authority.*** *These are decisions of a special nature which require to be heard by a body which includes within its membership specialists in the subject being heard, in addition to its chairmanship which is undertaken by a judge. Hence the presence of an appeal body consisting of the Appeals Board is in accord with what is stated in Article 100 of the Constitution and is not a contravention of it. A statement to the contrary requires that there are numerous appeal bodies with the task of hearing the decisions of the appeal bodies provided for legally and this does not exist in the legal aspect because it prevents the stability of legal situations and decisions will be in a vicious circle. Furthermore,* ***Article 100 of the Constitution did not provide for restriction of the appeal to administrative acts or decisions before the judiciary. Rather it established a general constitutional principle. This is that it is not permitted to provide immunity from appeal for these actions or decisions issued by administrative bodies. It left to the legislator to specify the appeal body according to the administrative acts or decisions of the administrative bodies in accordance with the nature of these acts and decisions.***
>
> *Based on this,* ***determination of the appeal body the legislator specifies in Article 6 of Section 8 of [Order 65] is a legislative choice. It does not constitute a contravention of the Constitution and this is firmly established in the constitutional judiciary within Iraq in numerous judgments****....*[224]

236. These propositions of law were reiterated by the Federal Supreme Court in the recent Federal Supreme Court Case No. 151/Federal/2019, Judgment, 27 January 2020 ("***Dijlaa Decision***") which stated that:

> *...* ***The [CMC] Appeals Board … is formed of three members headed by a judge, and is considered as an appeal entity of law, because it ensures neutrality and administrative professionalism, as it is competent to consider the appeals against the decisions issued by the director general of the [CMC],*** *in addition to the*

[224] Federal Supreme Court, Zain Decision (2017), p. 6, Exhibit RA-026; *see also* Al-Kabban Reply, ¶ 67.

> *decisions issued by the (Hearing Committee) in the mentioned Commission,* ***therefore the existence of an appeal entity represented by (the [CMC] Appeals Board) is in accordance with the provision of article (100) of the Constitution and doesn't violate it*** ***because the mentioned article does not provide for the right to appeal against the judicial work or decisions****. Therefore, the texts and procedures subject of the appeal are considered a legislative option, and do not violate the Constitution. This is established in the judgments issued by this court including judgments no. (50/federal/2017) and no. (53/federal/2017) dated 06/20/2017 and 07/27/2017. Accordingly, the Plaintiffs' lawsuit has lost its constitutional substantiation, and it should be dismissed from this aspect.* [225]

237. The Court of Cassation has also arrived at the same conclusion. In the *Waha* Decision, the Court of Cassation observed that: "decisions issued by the [CMC] Appellate Board are final decisions because the Appellate Board … is ***chaired by a judge***, and its decisions are ***binding under the law, are final, and do not require a court decision to enforce them***."[226]

238. The Claimant takes the position that the Federal Supreme Court simply "got it wrong" in the decisions cited above.[227] The Claimant relies on the Court of Cassation Decision 3/Federal/Notification/2013, 6 May 2013[228] concerning the Retirement Law Committee to support its argument that special committees which are presided over by a judge are considered to be administrative in nature and their decisions are subject to appeal. In that case, the Federal Supreme Court allowed a constitutional challenge against Article 20(1) of the Retirement Law (which provides for the establishment of a committee for reviewing all retirees' cases headed by a judge and two members of the legal profession) and found that the decisions of that committee are subject to judicial appeal.

239. However, this case does not assist the Claimant as it is distinguishable on its facts. Unlike the present situation, which involves the CMC, Article 20(3)(a) of the Unified Retirement

[225] Federal Supreme Court Case No. 151/Federal/2019, Judgment, 27 January 2020, Exhibit RL-140 (emphasis added), *see also* Exhibit RA-028; *see also* Al-Kabban Reply, ¶ 67.

[226] Court of Cassation Decision No./835/Transitional Civil Authority/2014, Exhibit R-106（RAK-007) (emphasis added).

[227] Hearing on the Merits, Transcript (Day 4) (Ali), p. 49.

[228] Court of Cassation Decision 3/Federal/Notification/2013 dated 6 May 2013, Exhibit RA-023.

Law No. 27 of 2006 expressly designated the Court of Cassation as the appellate body to hear appeals against decisions of the Retirement Law Committee.[229] In contrast, Section 8(6) of Order 65 expressly provides that CMC Appeals Board is the entity that would hear appeals on decisions made by the CMC.[230]

240. In the present case, both the Administrative Court and the Supreme Administrative Court dismissed Korek's claim on the grounds that the matter was not "within [its] jurisdiction."[231] In the Tribunal's view, both these decisions are consistent with Iraqi case law which recognises the CMC Appeals Board as the appellate authority that is competent to issue final and binding decisions. On this issue, Tribunal notes that Federal Supreme Court decisions, such as the *Dijlaa Decision* and the *Zain FSC Decision*, are considered final and binding for all authorities pursuant to Article 94 of the Iraqi Constitution.[232]

241. Insofar as the Claimant has argued that the "best interpretation" of Order 65 is different from the one adopted by the Federal Supreme Court, the Tribunal is not persuaded that the Iraqi Constitution imposes a mandatory requirement that appeals be heard before a regular court. Article 100 does not stipulate that parties have a right to appeal an administrative action or decision before the judiciary per se, it simply provides that parties have a right to appeal.[233]

242. In these circumstances, the Tribunal considers that the Administrative Court and Supreme Administrative Court's dismissal of Korek's Appeal falls short of the high threshold for a denial of justice.

[229] Unified Retirement Law No. 27 of 2006 (excerpt) (now repealed by law No. 9 of 2014), Exhibit RA-015; Al-Kabban Reply, ¶ 85.

[230] Al-Kabban Reply, ¶ 85.

[231] Decision of the Administrative Court dated 25 January 2016, Exhibit C-074; Decision of Iraqi Supreme Administrative Court dated 18 January 2018, Exhibit C-101.

[232] Constitution of the Republic of Iraq (2005), Art. 94, Exhibit RL-0004.

[233] Al-Kabban Reply, ¶¶ 90-92.

c. Whether the Iraqi Legislative Framework Violates International Law

243. Next, the Tribunal considers the second plank of the Claimant's denial of justice claim which focuses on the alleged failings of the Iraqi legislative framework as the lack of due process afforded to the Claimant.[234]

244. The thrust of the Claimant's argument is that, even if the Iraqi courts properly interpreted Iraqi law, the Claimant was denied any opportunity to challenge the CMC Order as it was "foreclosed from the only forum in which it could have protected its legal and economic rights."[235]

245. In its Reply, the Claimant relies on *Glencore v. Colombia* for the proposition that due process under international law requires private individuals to be given an opportunity to have administrative decisions revisited by an independent and impartial judge, with the guarantee of a formal adversarial procedure. *Glencore v. Colombia* states at ¶1319 that:

> *It is undisputed that a breach of due process, whether in judicial proceedings or in administrative proceedings, may result in the violation of the FET standard. But the due process standard operates differently in different settings. In administrative proceedings … the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal.* ***Due process does not require strict separation of these functions - provided that the final administrative decision is subject to full judicial review. The private individual must have an opportunity to have the case revisited, this time by an independent and impartial judge, with the guarantee of a formal adversarial procedure.*** [236]

[234] Cl. Reply, ¶¶ 266-272; Claimant's Opening Slides Vol 2, p. 55.

[235] Cl. Reply, ¶ 269.

[236] Cl. Reply, ¶ 259, citing *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, Exhibit CL-236 (emphasis added).

246. Although the CMC Appeals Board is not a court (in the sense that it not composed only of judges), the Tribunal notes that it is nonetheless presided over by a judge and serves as an appellate body capable of reviewing administrative decisions.[237]

247. In any case, it appears to the Tribunal that the Claimant, or at the very least, Korek, could have sought an audience before the Iraqi civil courts (as opposed to the administrative courts). In this regard, the Respondent's expert, Dr. Al-Kabban, asserts that "administrative decision[s] are still reviewable before other bodies in Iraq, including [the] civil court"[238] and that "if a party considers that a constitutional right has been violated, it is open to that party to put in a submission to the Federal Supreme Court."[239] Here, Dr. Al-Kabban draws a distinction between: (a) an application for the civil court to review decisions of the CMC, assess whether damage has been caused to the applicant, and order the suspension a decision of the CMC without impacting the finality of the CMC's decision (which he claims is permitted under Iraqi law before Iraqi civil courts), and (b) an application to challenge to the CMC's decision (which he claims is permitted before the CMC Appeals Board, but not permitted under Iraqi law before the administrative courts).[240]

248. The Tribunal finds that Federal Court of Cassation Decision No. 240/Civil Expanded Authority/2018 ("***Zain FCC Decision***") lends support to the Respondent's argument. In that case, the Chief Executive Officer of a telecommunications company brought a claim against the CMC before the Karada Court of First Instance for the suspension of the procedures taken by the CMC to enforce the fine that it had imposed. The Karada Court of First Instance initially stayed enforcement of the CMC's decision, but subsequently lifted the stay. Various appeal courts subsequently heard the case, and the Court of Cassation ultimately found that the CMC did not have the authority to issue the fine it sought to impose on the telecommunications company. The practical effect of the Court of

[237] Al-Kabban Reply, ¶ 61.

[238] Hearing on the Merits, Transcript (Day 4) (Al-Kabban), p. 71:15-17.

[239] Hearing on the Merits, Transcript (Day 4) (Al-Kabban), p. 72:6-8.

[240] Hearing on the Merits, Transcript (Day 4) (Al-Kabban), pp. 87-91.

Cassation's decision was to render the fine that the CMC attempted to impose on the telecommunication company unenforceable.[241]

249. It appears to the Tribunal that it would have been open to Korek to take the same route as the claimant in *Zain FCC Decision* to seek relief from the Iraqi civil courts. In such a scenario, it would have been possible for the Claimant to seek to intervene in that civil claim *via* IT Ltd (*i.e.* exactly as it had done before the Administrative Courts). This possibility was confirmed by the Claimant's own expert, Ms. Ali, during cross-examination at the Hearing on the Merits:

> Q. … In your view, the Zain proceedings that you describe in your report, and that we just discussed right now, ***show that CMC decisions are susceptible to judicial challenge***, is that right?
>
> A. ***Yes.***
>
> Q. In that case, the civil courts accepted jurisdiction over Zain's claims relating to a CMC decision that had been confirmed by the CMC Appeals Board, is that right?
>
> A. ***Yes***, because CMC in theory had standing in that court and they have jurisdiction over it, because it is a party to a licence agreement, and it is actually saying, "I have an issue with the licensor over – we have a dispute over this contract, and in the provision of 29 of the Civil Code it actually covers all disputes including disputes between a licensee and a licensor of CMC."
>
> Q. Korek had a dispute with the CMC, correct?
>
> A. Yes.
>
> Q. So Korek could have gone to civil courts?
>
> A. ***Korek could have***, IT couldn't.
>
> Q. And if Korek went to civil courts, then IT Limited, in your view, IT Limited could have joined in reliance of Articles 69 through 72 of the Civil Procedure Code which allows for joinder?

[241] Al-Kabban Reply, ¶ 86, citing Court of Cassation, Decision No. 240/Civil Expanded Authority/2018, p. 1, Exhibit RA-027.

A. ***Possibly, yes***, but Korek decided not to do, and Korek is not IT.[242]

250. The Tribunal accepts that, unlike Korek, IT Ltd is not a party to the License Agreement and may have had difficulties bringing a contractual claim in the Iraqi civil courts. However, this doesn't preclude IT Ltd, or the Claimant for that matter, from bringing a claim for non-contractual harm in the civil courts. Again, this was confirmed by Ms. Ali in cross-examination:

> [PROF. MURPHY] if the Iraqi Government takes an action such as through an administrative agency that causes harm to someone, and that person or company wants to bring a case in the civil courts for the harm that they have experienced, it's not for the purpose of overturning the administrative action, it's accepting the legality of that action, ***but it believes that incurred a tortious harm, a non-contractual harm, if you will, is that action something that the civil courts would be able to hear under your understanding of Iraqi law?***
>
> A. Yes, if the government committed a tort, a private party can sue it in the civil courts, that's correct.[243]

251. Taking the above into account, the Tribunal is of the view that Iraqi law offers an avenue for judicial recourse against the effects of decisions made by the CMC. As such, the Tribunal finds that the Claimant's second limb of its denial of justice claim cannot stand.

252. With regard to the *Zain FCC Decision*, the Tribunal notes that the Claimant has asserted in its Reply that there was a breach of the MFN standard when the Respondent accorded Zain's investment preferential treatment to the Claimant's investment, despite both investments being similarly situated.[244] The Claimant argues that in both instances, the decision of a CMC Appeals Board was challenged and in one instance the "Iraqi courts decided that CMC Appeals Board decisions could not be appealed (in the case of Korek

[242] Hearing on the Merits, Transcript (Day 4) (Ali), pp. 31:16–32:17 (emphasis added).
[243] Hearing on the Merits, Transcript (Day 4) (Ali), pp. 63:21–64:8 (emphasis added).
[244] Cl. Reply, ¶ 293.

and IT Ltd.) and in the other such an appeal was permitted (in the case of Zain Iraq [*Zain FCC Decision*]).”[245]

253. The Claimant appears to have dropped this claim as it did not advance arguments on this issue at the Hearing of the Merits[246] or in its Post Hearing Brief.[247] In any case, the Tribunal’s view is that this claim can be easily disposed of, given that the appeal in the *Zain FCC Decision* was not an appeal against the CMC Order as the Claimant suggests. Unlike the present case, the claimant in the *Zain FCC Decision* was not seeking to reverse the CMC Order, but merely to stay the suspension of executive procedures taken by the CMC to enforce a fine imposed on Zain.[248]

VI. DAMAGES

254. Given that the Tribunal has dismissed the Claimant’s claims in their entirety, the Tribunal does not find it necessary to address the issue of damages. That said, the Tribunal notes that even if the Claimant’s claims had been made out, the issue of damages is not a straightforward one.

255. With regard to the failure to implement claim, the Claimant seeks a combination of the investment and interest associated with this equity investment and the principal and interest on the Convertible Note.[249] However, this seemingly straightforward proposition is contingent on a series of speculative propositions – the Convertible Note would need to be reinstated by Korek, Korek must then refuse to pay the loan when asked to by Alcazar, and KRG in turn must then refuse to pay the amount owed under the KRG Guarantee when asked to by Alcazar. The Tribunal has reservations about such a basis for a claim for relief.

256. As for the denial of justice claim, the Claimant claims that its loss was an alleged “lost opportunity” to obtain a court judgment nullifying the CMC Order, but it seeks damages

[245] *Ibid*.
[246] *See* R. PHB, ¶ 75.
[247] Cl. PHB.
[248] Court of Cassation, Decision No. 240/Civil Expanded Authority/2018, p. 1, Exhibit RA-027.
[249] Cl. Reply, ¶ 251.

"equal to the value of its shareholding and the options it held" as of the CMC Order.[250] However, as the Respondent rightly points out, this formulation of damages appears to side step the Tribunal's holding that it has no jurisdiction to award damages for the consequences of the CMC Order. It also requires that the Tribunal step into the shoes of the Iraqi courts and seek to decipher what would have been done if the Iraqi courts had been presented with arguments and evidence that the Claimant never raised.[251]

VII. COSTS

257. Pursuant to the Tribunal's directions, each Party submitted their Costs Submissions to the Tribunal on 4 January 2021 and further submissions on what interest rate should be applied to any damages and/or costs that may be awarded by the Tribunal on 22 January 2021.

258. In respect of the advances of the administrative fees and expenses requested by ICSID, to date both Parties have paid the requested amounts.

259. In the Decision on Jurisdiction dated 9 July 2019, the Tribunal made costs orders in respect of both the bifurcation phase and the jurisdiction phase and ordered *inter alia* that:

a. the Claimant bear the full amount of the Tribunal's fees and expenses and direct expenses of USD 58,670.20 incurred in respect of the bifurcation phase;[252]

b. the Respondent will bear one quarter and the Claimant three quarters of the Tribunal's fees and expenses and direct expenses of USD 125,949.77 for the jurisdiction phase. [253]

[250] Cl. Reply, ¶¶ 311-312.
[251] R. Rejoinder, ¶ 179.
[252] Decision on Jurisdiction, ¶ 270.
[253] Decision on Jurisdiction, ¶ 272.

A. THE PARTIES' POSITIONS

(1) The Claimant's Position

260. The Claimant seeks all costs of the arbitration (except to the extent already determined in earlier Procedural Orders) to be borne by the Respondent.[254] The Claimant also seeks post-award interest on costs at a commercially reasonable rate until the date of payment on any sums awarded, with thirty days for payment before interest begins to accrue.[255]

261. The Claimant argues that the Tribunal should apply the general principle that the prevailing party should have its costs paid by the unsuccessful party and that it is entitled to costs if it succeeds on liability.[256]

262. The Claimant also argues that it is entitled to its costs because of alleged misconduct on the Respondent's part. To this end, the Claimant argues that the Respondent obstructed Claimant's ability to obtain documents and information[257] and aggravated the dispute by issuing the KCR Decree two years into the arbitration.[258]

263. The Claimant submits that its costs are reasonable in light of the complexity of the case and the substantial damages claimed.[259] The Claimant's breakdown of its fees and costs are as follows:[260]

[254] Claimant's Statement on Costs dated 4 January 2021 ("**Cl. Submission on Costs**"), ¶ 12.

[255] Cl. Submission on Costs, ¶¶ 2; 12(b); Claimant's Statement on Interest Rates dated 22 January 2021 ("**Cl. Submission on Interest Rates**"), ¶ 4.

[256] Cl. Submission on Costs, ¶¶ 3-4.

[257] Cl. Submission on Costs, ¶ 6.

[258] Cl. Submission on Costs, ¶ 9.

[259] Cl. Submission on Costs, ¶ 10.

[260] Cl. Submission on Costs, pp. 7-8.

Statement of Professional Fees

DESCRIPTION	AMOUNT / USD
PROFESSIONAL FEES	
Attorney's Fees	
Gibson, Dunn & Crutcher LLP White & Case LLP Kirkland & Ellis International LLP Meysan Partners	4,286,589.52 3,026,515.05 709,447.35 189,330.00
TOTAL ATTORNEYS' FEES	8,211,811.92
Witness and Expert Fees	
Jan Paulsson Reema Ali Berkeley Research Group/Compass Lexecon Professor Noah Feldman	64,800.00 653,690.88 1,435,949.34 179,600.00
TOTAL WITNESS & EXPERT FEES	2,334,040.22
CLAIMANT'S TOTAL PROFESSIONAL FEES	10,545,922.14

Statement of Costs

DESCRIPTION	AMOUNT
ADMINISTRATIVE COSTS	
Gibson, Dunn & Crutcher LLP White & Case LLP Kirkland & Ellis International LLP	292,277.63 1,067.72 66,546.42
TOTAL ADMINISTRATIVE COSTS	359,891.77
ARBITRATION COSTS	
ICSID Lodging Fee ICSID Advance Payments	25,000.00 355,000.00

TOTAL ARBITRATION COSTS	380,000.00
CLAIMANT'S TOTAL COSTS	739,891.77

264. As for the appropriate post-award interest rate on costs, the Claimant argues that this should be the 12-month USD LIBOR rate plus 3% to accrue on an annually compounded basis.[261] According to the Claimant, this is a conservative rate in line with what is generally awarded by tribunals and is further supported by the Claimant's damages expert's methodology of calculating a commercially reasonable rate.[262]

(2) The Respondent's Position

265. The Respondent seeks an order that the Claimant to pay all the costs of the arbitration and reimburse the Respondent's professional fees and costs, plus interest thereon at a commercially reasonable rate if payment is not received by the Respondent within 30 days of the issuance of the Award.[263]

266. Similar to the Claimant, the Respondent acknowledges that the general rule is that a prevailing party should be reimbursed the costs it incurred in defending itself in ICSID proceedings. On this basis, the Respondent argues that it is entitled to costs as the prevailing party.[264]

267. The Respondent also alleges that it is entitled to a costs award because the Claimant's ever-shifting claims significantly increased the burden that the Respondent had to incur in response.[265]

[261] Cl. Submission on Interest Rates, ¶ 2.
[262] Cl. Submission on Interest Rates, ¶ 2.
[263] Respondent's Submission on Costs dated 4 January 2021 ("**R. Submission on Costs**"), ¶ 10.
[264] R. Submission on Costs, ¶ 4.
[265] R. Submission on Costs, ¶¶ 2, 5-6.

268. The Respondent submits that it acted reasonably and in good faith to defend its interests throughout this arbitration[266] and that its costs are eminently reasonable, both in general and in light of the legal and factual issues involved.[267] The Respondent's breakdown of its fees and costs are as follows:

DESCRIPTION	AMOUNT / USD
PROFESSIONAL FEES	
Attorney's Fees	
DEBEVOISE & PLIMPTON LLP STEPHENSON HARWOOD MIDDLE EAST LLP	3,811,054.89 459,000.00[268]
TOTAL ATTORNEYS' FEES	4,270,054.89
Witness and Expert Fees	
Al-Kabban & Associates (Dr. Reyadh Al-Kabban) The Analysis Group (Mr. Robert Grien)	262,093.33 430,683.00
TOTAL WITNESS & EXPERT FEES	692,776.33
THE REPUBLIC'S TOTAL PROFESSIONAL FEES	4,962,831.22
ADMINISTRATIVE COSTS	
DEBEVOISE & PLIMPTON LLP	76,657.06
ARBITRATION COSTS	
ICSID Advance Payments since 20 May 2019	80,000.00
THE REPUBLIC'S TOTAL COSTS	156,657.06
THE REPUBLIC'S TOTAL FEES & COSTS	5,119,488.28

[266] R. Submission on Costs, ¶ 8.

[267] R. Submission on Costs, ¶ 9.

[268] According the Respondent, its professional fees include capped fees of US$459,000 for Stephenson Harwood Middle East LLP who remained as co-counsel on the matter following Mr. Salem Chalabi's move to the Office of the Prime Minister and assisted Debevoise & Plimpton LLP with "fact development, expert testimony, and document collection and production", R. Submission on Costs, p. 4, footnote 13.

269. With regard to the appropriate rate for post-award interest on costs, the Respondent argues that this should be the six-month USD LIBOR rate at the time of the Award plus 2% compounded semi-annually.[269] According to the Respondent, many tribunals have adopted the 6-month or 12-month LIBOR+2 rate compounding at the same interval.[270] The Respondent also argues that the phase-out of LIBOR at the end of 2021 does not defeat LIBOR as a benchmark for a commercial rate and that the Tribunal can avoid uncertainty in the event that amounts remain unpaid after LIBOR has been discontinued by specifying a fixed rate of post-award interest that corresponds to the specific, six-month LIBOR+2 figure as of the date of the Award (rather than a LIBOR-indexed rate).[271]

B. THE TRIBUNAL'S DECISION

270. Article 61(2) of the ICSID Convention provides that:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

271. This provision allows the Tribunal discretion in deciding the costs of the arbitration and the Parties' fees and costs. Further, Rule 28(1) of the ICSID Arbitration Rules provides:

> *Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide … with respect to any part of the proceeding, that the related costs … shall be borne entirely or in a particular share by one of the parties.*

[269] Respondent's Supplemental Submission on Interest dated 22 January 2021 ("**R. Submission on Interest Rates**"), ¶ 5.

[270] R. Submission on Interest Rates, ¶ 6.

[271] R. Submission on Interest Rates, ¶ 7.

272. The Tribunal notes that neither Party disputes the general rule that a prevailing party should be reimbursed the costs and that both Parties have sought orders for post-award interest to be paid if payment is not forthcoming (albeit on slightly different terms).

273. The Respondent overall has prevailed in the present arbitration and succeeded in its argument that the Claimant should be denied the relief it seeks in these proceedings. The Tribunal finds that the Respondent should be awarded the costs of the arbitration and its fees and costs, plus interest thereon at a commercially reasonable rate, if payment is not received by the Respondent within 30 days of the issuance of the Award.

274. The Tribunal is not persuaded by either the Claimant's or the Respondent's submissions that it is entitled to costs said to be attributable to the other Party's conduct of the arbitration. Each Party was entitled to put forward its best case and the Tribunal is of the view that each Party did just that.

275. As the Respondent prevailed on the merits and quantum, the Tribunal is of the view that it is reasonable to award the full sum of the total professional fees and administrative costs sought by the Respondent in both the merits and quantum phase. Taking matters as a whole, the Tribunal is of the view that the Claimant should bear the full costs of the arbitration (save for the costs incurred in respect of the bifurcation and jurisdiction phases which have already been apportioned in the Decision on Jurisdiction).

276. The total costs of the entire arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
President Cavinder Bull, *S.C.*	169,588.14
Co-arbitrator John Beechey	82,899.62
Co-arbitrator Sean Murphy	147,960.88
ICSID's administrative fees	158,000.00
Direct expenses (estimated)	83,024.02
Total	**641,472.66**

277. The above costs have been paid out of the advances requested by ICSID from the Parties and includes the Tribunal's fees and expenses and direct expenses incurred in respect of the bifurcation and jurisdiction phases (*i.e.* USD 58,670.20 and USD 125,949.77 respectively).[272]

278. Accordingly, the Tribunal orders that the Claimant pay the Respondent: (a) the Respondent's professional fees of USD 5,039,488.28; and (b) USD 136,116.36 by way of reimbursement of 50% of the costs of arbitration (USD 320,736.33) paid from the advances from both Parties, save for the already-apportioned Tribunal's fees and expenses and direct expenses incurred in respect of the bifurcation (USD 58,670.20) and jurisdiction (USD 125,949.77) phases.

VIII. DECISION

279. For the reasons set forth above, the Tribunal decides as follows:

(1) The Tribunal dismisses all the Claimant's claims on the merits and denies in full the relief sought by the Claimant in the Claimant's Memorial and the Claimant's Reply.

(2) The Claimant shall pay the Respondent's professional fees and administrative costs fixed at USD 5,039,488.28 and a proportion of the arbitration costs fixed at USD 136,116.36.

(3) In the event that the amount owing under (2) above is not received by the Respondent within 30 days from the issuance of this Award, the Claimant shall pay interest to the Respondent at the 6-month USD rate of LIBOR + 2% (as at the time of the Award) on any outstanding amount, compounded semi-annually.

[272] *See* Decision on Jurisdiction, ¶¶ 270, 272.