

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

In the arbitration proceeding between

**ALMASRYIA FOR OPERATING & MAINTAINING
TOURISTIC CONSTRUCTION Co., LLC**

Claimant

and

STATE OF KUWAIT

Respondent

ICSID Case No. ARB/18/2

**DISSENTING OPINION on the Respondent's Application under Rule 41(5) OF THE
ICSID ARBITRATION RULES.**

Members of the Tribunal

Mr. Pascal Dévaud

Prof. Dr. Rolf Knieper

Prof. Ricardo Ramírez Hernández (*Presiding Arbitrator*)

Secretary of the Tribunal

Ms. Catherine Kettlewell

Date of dispatch to the Parties: 1 November 2019

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I. REASONS FOR DISSENTING

1. The Award rendered by the majority of the Tribunal is essentially ill-founded. The Application pursuant to Rule 41(5) of the ICSID Arbitration Rules (the “Application”) had to be dismissed for the reasons exposed hereunder.
2. The Award of the majority of the Tribunal significantly undermines the requirements of Rule 41(5) aiming at the protection of due process rights of claimants (*i.e.* of investors), and thus unduly favors respondents (*i.e.* States). It not only weakens due process requirements and Rule 41(5) as applied by former ICSID tribunals so far, it also more importantly changes the subtle balance found in investment treaties between the investors’ interests on the one hand, and the States’ interests on the other hand: The award of the majority of the Tribunal gives respondents (and thus States) the undue privilege of obtaining, in ICSID arbitration proceedings, the dismissal of claimants in a summary way without that due process rights of claimants (*i.e.* of investors) be complied with.
3. The most important duty of arbitral tribunals is to comply with due process requirements, since they ensure that the arbitral tribunal considers and discusses all the parties’ relevant allegations, legal arguments and adduced evidence. An arbitral tribunal failing to comply with due process requirements does not fulfill its mission, in particular when this failure is detrimental to the merits of a party’s claims.
4. The obvious specificity of the Application is that it occurs at a very early stage of the proceedings. This specificity of Rule 41(5) has been naturally dealt with by previous ICSID Tribunals which logically held that the standard to be applied for due process requirements is higher than at the end of full-fledged arbitration proceedings. In particular:
 - “*It would in principle be inappropriate to consider and resolve novel issues of law in a summary fashion, which would inevitably limit the Parties’ opportunity to be heard and the Tribunal’s opportunity to reflect*”¹;

¹ *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea (“PNG v. Papua New Guinea”)*, ICSID Case No. ARB/13/33, decision on the Respondent’s objection under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2014, para. 94.

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- “Given the potentially decisive nature of an Article 41(5) objection [...], it is appropriate that claimant’s Request for Arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favor of the claimant”²; and
 - “It would therefore be a grave injustice if a claimant was wrongly driven from the judgment seat by a final award under Art. 41(5), with no opportunity to develop and present its case under the written and oral procedures prescribed by Rules 29, 31 and 32”³.
5. As exposed hereunder, the Award of the majority of the Tribunal fails in many instances to comply with due process requirements, in particular with the requirements (cited *supra*) developed by ICSID Tribunals in connection with the application of Rule 41(5), what renders this summary Award dismissing Claimant’s claims ill-founded.
 6. Also, even though this summary Award cites part of the rules developed by previous ICSID Tribunals⁴ for the application of Rule 41(5), it does not apply them to the extent required in its reasoning parts⁵, as explained hereunder.
 7. It is consequently a necessity to dissent.
 8. For the purpose of conveying with accuracy each Party’s relevant allegations, legal arguments and claims, the factual background and the description of each Party’s position hereunder are composed of citations of the Parties’ briefs and of statements made during the December 14, 2018 hearing, as well as of the corresponding parts of the exhibits the Parties adduced in evidence.

² Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, *RSM Production Corporation v. Grenada* (“*RSM Production Corporation v. Grenada*”), Case No. ARB/10/6, award, 10 December 2010, par 6.1.3.

³ *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan* (“*Trans-Global*”), ICSID Case No. ARB/07/25, The Tribunal’s Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para. 92.

⁴ Award, part B.

⁵ Award, parts C and D.

II. FACTUAL BACKGROUND

9. To the extent required to address the Respondent’s Application, and for that limited purpose only, this dissenting opinion briefly conveys the factual background to the dispute as pleaded in the Claimant’s Request for Arbitration. In full compliances with Rule 41(5), the facts mentioned below do not constitute any finding on any facts disputed by the Parties, still less any final findings of fact.
10. The dispute opposes the State of Kuwait (“Kuwait”), the Respondent, and Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C., the Claimant (“Almasryia”), a limited liability company incorporated under the laws of Egypt, with the entry number in the Egyptian Commercial Registry 37929⁶. Claimant has also been active under the trade name The Egyptian Company For Operation & Maintenance of Tourist Facilities⁷ (with the same entry number in the Egyptian Commercial Registry).
11. As set out in the Request for Arbitration, Almasryia “*signed a joint venture investment agreement on 15.5.2009 with Mr. Faisal Bandar Alotaibi for himself and in his capacity as a guardian of the heirs of Bandar Alotaibi to develop and construct many touristic hotels, real estate and logistics projects on a land located at Al Kheran area – north Al Khafji city east Alwafra in Kuwait*”⁸.
12. The parties, as mentioned in the signed May 15, 2009 joint venture agreement (the “JVA”), are: “*First Mr. Faisal Bandar Al-Otaibi for himself and as an agent for the heirs of the late Bandar Marzouq Al-Otaibi*”⁹ (JVA, page 1), “*second Al-Massryah for Operating and Maintaining Touristic Construction CO*”¹⁰ (JVA, page 1), and “*third Bin Samar Contracting Co.*”¹¹ (JVA, page 1).
13. In its “*preface*”¹², the JVA states that “*The first part is owned by Mr. Bandar Marzouq Al Otaibi a piece of land located in the north of Al Khafji City, East f Al Wafra. It is bordered on*

⁶ Exhibit C7.

⁷ Exhibit C9.

⁸ Request for Arbitration, page e.

⁹ Exhibit C5.

¹⁰ Exhibit C5.

¹¹ Exhibit C5.

¹² Exhibit C5.

*the north by Al Khairan Road [...]. The first party owns the land by inheritance from their father, Mr. Bandar Marzouq Al-Otaibi*¹³.

14. The JVA provides for “*the establishment of residential and tourist communities*”¹⁴ (item 1), including a “*hotel sector [...] commercial sector [...] residential sector [...] therapeutic sector*”¹⁵ (item 2).
15. According to Claimant, “*in accordance with this agreement*”¹⁶, it “*purchased and became the owner of 5% of the property of the whole land, and of 50% of this joint venture*”¹⁷.
16. The JVA provides that “*the second party [i.e. Claimant] has 5% of the entire land and project*”¹⁸ (item 3) and that the “*first party [i.e. Al-Otaibi heirs] is committed to [...] transferring the share of the land to the second party [i.e. Claimant]*”¹⁹ (item 5).
17. With respect to the successive owners of the considered land (“Land”), Claimant alleges that “*[b]efore the joint venture agreement was signed, the whole land was owned by Faisal Bandar Alotaibi and his brother who are the heirs of the late Bandar Alotaibi. The latter had purchased this land from Mr. Abdullah Bin Abdelhady Akshan on 2.09.1971 by a virtue of legal deed issued by the judge of Qaisoumia court in the Kingdom of Saudi Arabia. At this time, this land was located in the Saudi Arabia territory and under the full authority of Saudi Arabian state*”²⁰.
18. A deed (“*deed of ownership*”, as mentioned by Claimant in its list of exhibits attached to its Request for Arbitration), “*No. 412*” issued on “*11/7/1319 A.H.*” (September 2, 1971) by the Judge of Al Qaisoma Court (Saudi Arabia), provides that “*There appeared before me, [...] Bandar Marzouq Al-Otaibi, known to two present witnesses, and states that he bought the plot located north of Al-Khaffi city east Wafra [...] from the so-called Abdullah bin Abdulhadi bin Akshan Al-Akshan [...]. By virtue of his ownership of that plot as mentioned above, he sold and assigned the same to the aforesaid person according to the testimony of both of Met’eb bin Awadallah Al-Otaibi and Khalid bin Hanawi Al-Otaibi*”²¹.

¹³ Exhibit C5.

¹⁴ Exhibit C5.

¹⁵ Exhibit C5.

¹⁶ Request for Arbitration, page e.

¹⁷ Request for Arbitration, page e.

¹⁸ Exhibit C5.

¹⁹ Exhibit C5.

²⁰ Request for Arbitration, page e.

²¹ Exhibit C1.

19. With respect to the heirs of the late Bandar Marzouq Al-Otaibi, Claimant submitted, with its Request for Arbitration, a December (or September as mentioned in the list of exhibits attached to the Request for Arbitration) 2009 document, issued by the “*State of Kuwait, Ministry of Justice, Legal Authentication Department, Division of Estate*”²², stating that “*in accordance with Succession Limitation no. 1572/2004 + Deeds issued by the Sharia Courts no. 412 – 11/7/1391 + draft drawing as per the Deeds no. 412 dated 11/7/1391 A.H., heirs of Bandar Marzouq Hazem Al-Otaibi:*
- *Faisal Bandar Marzouq Hazem Al-Otaibi [...]: 50%;*
 - *Khalid Bandar Marzouq Hazem Al-Otaibi [...]: 50%”*²³.
20. As to the sums paid in connection with the JVA, Almasryia explains that “*the Claimant in order to conclude this agreement spent more than 20 millions USD to purchase the 5% of the land, in addition to the visibility study fees, expert inspection reports and marketing expenses to encourage investors and clients to invest and purchase in its future projects on the land*”²⁴.
21. The signed JVA provides that:
- “*the second party [i.e. Claimant] paid 20 000 000 \$ (twenty millions USD) for its share in the land and project to the first party [i.e. Al-Otaibi heirs] what is:*
- *the amount of 20 000 000 \$dollars received by the first party [i.e. Al-Otaibi heirs] in cash in the date of signing of the contract.*
 - *in addition to all the expenses that have been spent in advance in the work of soil sludge and the work of lifting the area and through specialists in the layers of the earth.*
 - *expenses and equipment necessary for the establishment of residential and tourist communities.*
 - *the cost of preparing feasibility studies on this land.*
 - *costs of architectural and construction drawings”*²⁵ (item 3).
22. After allegations in connection with the signing of the JVA, the Request for Arbitration turns to an international convention: “*On 13.07.1982 the Kingdom of Saudi Arabia and the State of*

²² Exhibit C2.

²³ Exhibit C2.

²⁴ Request for Arbitration, page e.

²⁵ Exhibit C5.

*Kuwait had concluded a convention called – Al-Taef Convention – to put a division line to separate the border of both states and after such convention the claimant’s land was located within the border of the state of Kuwait (appendix no. 6). Pursuant to this Convention the State of Kuwait was engaged to register the land and authenticate it with the name of the owner of the land [...] or to compensate with the market price of this land*²⁶.

23. *Almasryia further alleges, after mentioning said convention, that “the Claimant and its partner Mr. Faisal Bandar Alotaibi for himself and in his capacity [...] started to follow the procedures to handover all related certificates and premises from the competent authority (the Kuwaiti government) to fulfill all necessary documents to start develop the land and establish its project*²⁷.
24. *As to the result of the undertaken administrative steps, Almasryia alleges that “the Claimant and its partner was shocked when the government of the state of Kuwait informed them that it will neither register the land with their name nor compensate them*²⁸. Claimant adds that “*by this act the investment of the claimant in the state of Kuwait was totally destroyed*²⁹.
25. *The administrative steps concerning the Land undertaken before Kuwaiti authorities are further described in a judgement submitted by Claimant with its Request for Arbitration*³⁰. This judgement, entered by the Kuwaiti “*Ministry of Justice, Court of First Instance, Circuit: Administrative 3*³¹ (page 1) dated “*19/2/2015*³² (page 1), in the matter filed “*on 19/04/2011 and initially recorded before the circuit of Commercial Civil Government*³³ (page 2) against six Kuwaiti governmental and administrative authorities by Faisal Al-Otaibi “*for himself and in his capacity as a guardian of his brother Khalid [...] Al-Otaibi and attorney of Ghazwaa [...] Al-Otaibi being the heirs of the late [...] Al-Otaibi*³⁴ (page 1), held that “*the dispute in the current case is about the cancellation of the negative decision by the abstinence of the real-estate registration authentication department from issuing an ownership deed of the land in question [...]*³⁵ (page 12).

²⁶ Request for Arbitration, page f.

²⁷ Request for Arbitration, page f.

²⁸ Request for Arbitration, page f.

²⁹ Request for Arbitration, page f.

³⁰ Exhibit C4.

³¹ Exhibit C4.

³² Exhibit C4.

³³ Exhibit C4.

³⁴ Exhibit C4.

³⁵ Exhibit C4.

26. As to court proceedings initiated after the failure of the administrative steps undertaken as to the Land, Claimant alleges that “*by its partner as a representative of the joint venture agreement*”³⁶, it “*submitted its disputes against the state of Kuwait before the Kuwaiti instant court on the year of 2011, the court dismissed the claim for formal reason, that the claimant submitted its request to register the land after the expiry date [...]*”³⁷.
27. As to the “*representative of the joint venture agreement*”³⁸, the JVA provides, in its item 5, that “*the first party [i.e. Mr. Al-Otaibi] is committed to guarantee the delivery of the land, transferring the share of the land to the second party [i.e. Claimant], issuing an instrument from the state of Kuwait on behalf of the purchaser [i.e. of Claimant]*”³⁹.
28. According to the translation of the judgement of the administrative court submitted by Claimant with its Request for Arbitration, the subject matter of the dispute was as follows: Faisal Al-Otaibi “*for himself and in his capacity as a guardian of his brother Khalid [...] Al-Otaibi and attorney of Ghazwaa [...] Al-Otaibi being the heirs of the late [...] Al-Otaibi*”⁴⁰ (page 1) “*demanded to be given a Kuwaiti document stating his ownership of the plot with its borders and milestones shown in the instrument issued on 11/07/1391 A.H. corresponding to 02/09/1971 by the judge of Al-Qaisomah Court [...], according to the resolution promulgated by the government of Kuwait to compensate Kuwaiti citizens for the land that were located at the Kingdom of Saudi Arabia and located after the division line within the borders of the State of Kuwait [...]*”⁴¹ (page 2).
29. The Kuwaiti administrative court, in its February 19, 2015 judgement, held “*not to accept the case for the absence of the negative administrative decision [...]*”⁴² (page 16).
30. In its Request for Arbitration, Almasryia claims that, by refusing to register “*the land with their [Almasryia’s and the late Bandar Alotaibi heirs’] name or to compensate them, the state of Kuwait breached Al-Taef Convention and the Bilateral Investment Treaty between the state of Egypt and the state of Kuwait in its articles no 6 and 7*”⁴³.

³⁶ Request for Arbitration, page f.

³⁷ Request for Arbitration, page f.

³⁸ Request for Arbitration, page f.

³⁹ Exhibit C5.

⁴⁰ Exhibit C4.

⁴¹ Exhibit C4.

⁴² Exhibit C4.

⁴³ Request for Arbitration, page f.

31. Article 6 of the Convention for the Promotion and Protection of the Investments between the Governments of the Arab Republic of Egypt and of the State of Kuwait signed on April 17, 2001 (“BIT”) provides for the indemnification of the investor, by a contracting State, for the loss resulting from war. Article 7 BIT provides for the indemnification of the investor in case of expropriation.
32. As relief, Claimant is seeking in particular, in its Request for Arbitration, the Tribunal to “*order the State of Kuwait to provide the Claimant with all necessary certificates to authenticate its ownership of the land*”⁴⁴, to “*appoint an expert to evaluate the market price of the land in order to compensate Claimant*”⁴⁵ and to “*order the State of Kuwait to pay to the Claimant 320,000,000 USD as compensation related to all damages occurred from its breach of obligations stated in the BIT dated 26.04.2002*”⁴⁶.
33. In its December 3, 2017 Clarification Memorandum and in its January 4, 2018 Memorandum answering the ICSID Secretariat’s December 11, 2017 queries⁴⁷, Claimant:
 - a. repeated, as in the Request for Arbitration, that “*by its partner as a representative of the joint venture agreement*”⁴⁸, it “*submitted its disputes against the state of Kuwait before the Kuwaiti instant court on the year of 2011 [...]*”⁴⁹;
 - b. asserted that, with the exchange of letters between Mr. Al-Otaibi and the Amir of Kuwait, Claimant also submitted by way of representation its claims to Kuwait pursuant to Article 10(2) BIT; and
 - c. alleged that the exchange of letters between Claimant and Mr. Al-Otaibi is evidencing that Mr. Al-Otaibi acted before the Kuwaiti authorities also on behalf of Claimant.

⁴⁴ Request for Arbitration, page g.

⁴⁵ Request for Arbitration, page g.

⁴⁶ Request for Arbitration, page g.

⁴⁷ Clarification Memorandum, page 2 ; Memorandum answering the ICSID Secretariat’s December 11, 2017 queries, page 1.

⁴⁸ Request for Arbitration, page f.

⁴⁹ Request for Arbitration, page f.

34. With respect to these exchanges of letters, Claimant submitted, with its December 3, 2017 Clarification Memorandum and with its January 4, 2018 Memorandum (answering the ICSID Secretariat’s December 11, 2017 queries), the following correspondence:
- a. Letter dated January 15, 2011, sent by Claimant to Mr. Al-Otaibi requesting that “*pursuant to our joint venture agreement dated 15/5/2019 [...], concerning the registration of the land, [...] he takes all required legal procedures to save guard its rights in the State of Kuwait*”⁵⁰, in particular by taking “*pursuant to article no 5 of [the] joint venture agreement, all legal procedures in the state of Kuwait in accordance with the articles stated in the convention of promotion and protecting the investors signed between the state of Egypt and the state of Kuwait in the year 2001 to be ready to submit a request for arbitration before ICSID [...] and to inform them with [Claimant’s] intention to go to arbitration on behalf of us and for our interest as it was mentioned in article 5 of our joint venture agreement*”⁵¹;
 - b. A December 8, 2014, request as to the land from Mr. Al-Otaibi’s Kuwaiti lawyer to the Amir of Kuwait⁵²; and
 - c. An April 10, 2016, request as to the land from Mr. Al-Otaibi to the Kuwaiti Municipality with the words “*resorting to arbitration*”⁵³ (the Kuwaiti Municipality received the April 10, 2016 request on April 11, 2016⁵⁴), being noted that Mr. Al-Otaibi, who would have had the duty to act “*on behalf of the purchaser*”⁵⁵ pursuant to wording of the JVA, was expressly acting “*as an agent for the partners and the heirs*”⁵⁶, as mentioned in this April 10, 2016 request.
35. As to the reference to Claimant’s “*intention to go to arbitration on behalf of [Claimant] and for its interest as it was mentioned in article 5 of our joint venture agreement*”⁵⁷, mentioned in its letter dated January 15, 2011 to Mr. Al-Otaibi, the JVA provides, in its item 5, that: “*the*

⁵⁰ Exhibit C9.

⁵¹ Exhibit C9.

⁵² Exhibit C8.

⁵³ Exhibit C8.

⁵⁴ Exhibit C8.

⁵⁵ Exhibit C5.

⁵⁶ Exhibit C8.

⁵⁷ Exhibit C9.

litigation and arbitration procedures outside the State of Kuwait shall be in the name of the second party [i.e. of Claimant]”⁵⁸.

III. SUMMARY OF THE PARTIES’ SUBMISSIONS ON THE APPLICATION

A. The Respondent’s Application

36. The Respondent raises three objections in the Application regarding the Claimant’s Request for Arbitration: first, that the jurisdictional requirement of the “*six-month cooling off period*”⁵⁹ set out in Article 10(2) BIT would not be satisfied, second that “*there are simply no allegations in the Request for Arbitration that Claimant has sustained damage as a result of war or armed conflict, national emergency or any other events referred to in Article 6 [of the BIT]*”⁶⁰, and third that “*the property Claimant alleges has been expropriated from it (a 5% interest in the land) is not, and has never been, owned by Claimant*”⁶¹.

1. Jurisdiction

37. In referring to Article 10(2) BIT, Respondent asserts that “*Claimant has not only failed to seek an amicable settlement with Respondent during a period of six months prior to submitting the claim to arbitration (as required) but it also failed to notify Respondent of its claim at all prior to filing the Request for Arbitration (also required)*”⁶².

38. For Respondent, Claimant’s argument whereby it “*relies on the above-mentioned proceedings filed by Mr. Al-Otaibi before the Kuwaiti courts (in which Claimant is not a party nor is even mentioned) and correspondence between Mr. Al-Otaibi and the Emir of Kuwait (which similarly does not mention Claimant) or correspondence between Claimant and Mr. Al-Otaibi to argue that Mr. Al-Otaibi had complied, on Claimant’s behalf, with the conditions precedent to the submission of a claim to arbitration provided for in Article 10 of the BIT*”⁶³, would be “*frivolous and obviously wrong*”⁶⁴.

⁵⁸ Exhibit C5.

⁵⁹ Application, para 13.

⁶⁰ Application, para. 4.

⁶¹ Application, para. 5.

⁶² Application, para. 13.

⁶³ Application, para. 14.

⁶⁴ Application, para. 15.

39. After merely citing its own translation of Article 10(2) BIT⁶⁵, Respondent infers from its wording that “*Article 10(2) therefore conditions Kuwait’s consent to ICSID arbitration on the lapse of a negotiation period of six months following the date on which the investor notifies Kuwait in writing of a dispute under the BIT*”⁶⁶.
40. Respondent also considers that, since Claimant’s name is not mentioned in the correspondence as to the Land sent by Mr. Al-Otaibi to the Kuwaiti authorities, or in Mr. Al-Otaibi’s pleadings before Kuwaiti courts, they cannot be considered as a notification from Claimant to Kuwait regarding a dispute under the BIT⁶⁷.

2. The claim for the compensation of war damages

41. Since Claimant, at the December 14, 2018 hearing, withdrew its claims based on Article 6 BIT⁶⁸, this issue is not relevant any more.

3. Alleged expropriation

42. For Respondent, “*to seek redress for the expropriation of property in any State, a claimant must by necessity first establish that he holds, or has held, ownership rights over that property pursuant to the laws of that State*”⁶⁹.
43. More generally, for Respondent, which cites case law and scholars, “*liability for expropriation under international law is dependent on the existence and nature of the rights allegedly expropriated*”⁷⁰.

⁶⁵ Application, para 52.

⁶⁶ Application, para 53.

⁶⁷ Application, paras 55-58.

⁶⁸ Hearing transcript, page 80 (lines 4-19).

⁶⁹ Application, para. 7.

⁷⁰ Application, para. 50.

44. Respondent alleges that “*Claimant’s sole basis for purporting to have the right to assert a claim against Respondent for expropriation of its 5% interest in the Land rests on a Joint Venture Agreement dated 15 May 2019*”⁷¹.
45. With respect to the Land, Respondent explains that it “*is situated in the Kuwaiti region of Wafra*”⁷², and that “*this region previously formed part of the so-called neutral zone between Kuwait and Saudi Arabia (the ‘Neutral Zone’)*”⁷³.
46. Respondent further alleges that “*Kuwait and Saudi Arabia agreed to share ‘equal rights’ in the Neutral Zone through the 1922 Uqair Convention [...]*”⁷⁴.
47. Respondent argues that:
- “In 1965, Kuwait and Saudi Arabia concluded an agreement by which they partitioned the Neutral Zone. [...] The 1965 Agreement entered into force on 26 July 1966”*⁷⁵.
48. To support its views as to the 1965 Agreement partitioning the “Neutral Zone”, Respondent relies on Articles 2, 3 and 16 of this Agreement, which are “*some relevant provisions on division of the Neutral Zone*”⁷⁶.
49. With respect to the 1982 Al-Taef Convention mentioned in the Request for Arbitration as the Convention “[*putting*] a division line to separate the border of both states [Kuwait and Saudi Arabia] and after such convention the claimant’s land was located within the border of the state of Kuwait”⁷⁷, Respondent expresses its disagreement: “*it is incorrect to state that this agreement ‘put a division line to separate the border of both states’ as such division line had already been established by the 1965 Agreement*”⁷⁸.
50. In its Rule 41(5) Application, Respondent also expresses its disagreement as to Claimant’s position whereby, pursuant to the Al-Taef Convention, “*the State of Kuwait was engaged to*

⁷¹ Application, para 8.

⁷² Application, para. 30.

⁷³ Application, para. 30.

⁷⁴ Application, para. 31.

⁷⁵ Application, para. 31.

⁷⁶ Application, para. 31.

⁷⁷ Request for Arbitration, page f.

⁷⁸ Application, para. 33.

*register the land and authenticate it with the name of the owner of the land [...] or to compensate with the market price of this land*⁷⁹. Indeed, for Respondent:

*“[...] the 1982 Al-Taef Agreement sets out procedures in Kuwait that needed to be followed in order for Saudi citizens holding land in the Kuwaiti part of the Neutral Zone to have their property rights over that land recognized under Kuwaiti law. As a Kuwaiti national, these provisions of the Al-Taef Agreement would not have applied to Mr. Al-Otaibi or his brother”*⁸⁰.

51. Respondent further adds that:

*“as provided by Article 2 of the 1982 Al-Taef Agreement, ‘no further application shall be considered after this period [i.e. the three-month period ending 1st September 1982] for any reason’. Therefore this provision makes clear that the right of Saudi citizens to have property rights in the Kuwaiti area of the Neutral Zone recognized under Kuwaiti law would be lost if the right was not invoked within the deadline set out by the 1982 Al-Taef Agreement (i.e. within three months from 1st September 1982) and proved in accordance with the procedures established therein”*⁸¹.

52. As to the judgement of the administrative court mentioned in Claimant’s Request for Arbitration, Respondent explains that Mr. Al-Otaibi appealed it⁸². This appeal was registered in the Kuwait Court of Appeal on March 19, 2015, as per the judgement rendered by this Court⁸³ (page 4).

53. Respondent adds that *“on 29 January 2018, the Court of Appeal rejected Mr. Al-Otaibi’s appeal”*⁸⁴, on the grounds that:

- a. *“Mr. Al-Otaibi’s request to obtain a Kuwaiti ownership instrument over the land was unfounded [...] for failure to comply with the various provisions of the international agreements and Kuwaiti implementing law concerning the Neutral Zone”*⁸⁵; and that
- b. *“the Saudi instrument dated 2 September 1971 brought by Mr. Al-Otaibi as a basis for his petition was later that 26 July 1966, the date of entry into force of the 1965 Agreement,*

⁷⁹ Request for Arbitration, page f.

⁸⁰ Application, para. 34.

⁸¹ Application, para. 35.

⁸² Application, para. 42.

⁸³ Exhibit R1.

⁸⁴ Application, para. 43.

⁸⁵ Application, para. 43.

after which date the Land had become Kuwaiti territory and part of the State properties”⁸⁶.

54. The judgement of the Kuwaiti Court of Appeals submitted by Respondent mentions that “*the representative of the government has submitted a file which included a copy of the Decision of the Council of Ministers No. 1434 of the year 2010 on the transfer of the authority to the follow-up of the implementation of the agreements of the divided area to the Ministry of Foreign Affairs*”⁸⁷ (page 6).
55. With respect to the merits of the case, the judgement of the Court of appeal held that: “*the committee has concluded to reject the appellant’s request that the deed of the land mentioned above which was purchased from the Saudi citizen is the instrument which has the date of 11/7/1391 Hijri [September 2, 1971] which is later than the date 7/4/1386 Hijri [July 26, 1966], the date of ratification of the treaty between State of Kuwait and Kingdom of Saudi Arabia. That is after that land became part of Kuwait’s territory, and part of the State properties and it is located in a non-planned area as mentioned in the expert’s report*”⁸⁸ (page 9).
56. With respect to these Kuwaiti court proceedings, Respondent further alleges that:
- “*Mr. Al-Otaibi appealed the judgement of the Court of Appeal to the Court of Cassation on 4 March 2018. No decision has yet been rendered*”⁸⁹.
57. For Respondent, “*as the Kuwaiti courts have ruled that, pursuant to Kuwaiti law, Mr. Al-Otaibi does not have property rights over the Land, it is self-evident that Mr. Al-Otaibi could not have transferred any such rights to Claimant*”⁹⁰, “*although Claimant argues that the courts of Kuwait were wrong not to recognize Mr. Al-Otaibi’s claimed ownership of the Land [...]*”⁹¹.
58. As to the expropriation claim, Respondent concludes that it “*is manifestly without legal merit*”⁹².

⁸⁶ Application, para. 43.

⁸⁷ Exhibit R1.

⁸⁸ Exhibit R1.

⁸⁹ Application, para. 44.

⁹⁰ Application, para. 6.

⁹¹ Application, para. 9.

⁹² Application, para. 7.

59. With respect to the Request for Arbitration, Respondent concludes that “*all of Claimant’s claims should be summarily dismissed under Rules 41(5) and 41(6) as they are manifestly without legal merit, and Respondent should be awarded all the costs it has incurred in connection with this Arbitration, including Respondent’s legal fees*”⁹³.

B. The Claimant’s Observations on the Respondent’s Application

1. Jurisdiction

60. With respect to Respondent’s objection that the alleged condition precedent of Article 10 BIT would not have been complied with, Claimant provides the following precisions in its Observations dated September 30, 2018, called “*Statement of Claim*” by Claimant (the “*Observations*”):
- a. “*on 15 January 2011, the Claimant sent a letter to Mr. Faisal Bandar Al-Otaibi inviting him to take all legal procedures in the state of Kuwait on behalf of the Claimant and for his interests pursuant to item 5 of the joint venture agreement and in accordance with the articles stated in the Agreement for the promotion and reciprocal protection of investments between the state of Egypt and Kuwait 2011 as a preliminary approach in order to submit request for arbitration before ICSID [...] to inform them with the claimant’s intention to go to arbitration before ICSID (c-9)*”⁹⁴.
 - b. Claimant’s purpose was to “*convince the State of Kuwait to back down from its illegal refusal to register our land in the State of Kuwait, based on our deed of ownership dated 2/9/1971 and our joint venture agreement dated 15/5/2009 (c-1, c-2 & c-5) [...]*”⁹⁵.
 - c. According to Claimant, “*Mr. Faisal Al-Otaibi as he is our representative before the State of Kuwait sent many complaints to the Prince of the State of Kuwait [...] in which it was clearly stated our intention to solve the disputes by arbitration before ICSID if it is not solved by the State (c-8.1), see the last line of the letter of 8/12/2014 [...]*”⁹⁶.

⁹³ Application, para. 65.

⁹⁴ Observations, page 5.

⁹⁵ Observations, page 16.

⁹⁶ Observations, page 16.

- d. Claimant added that “[i]n addition to the above-mentioned letter [...], our agent, Mr. Faisal Bander Al-Otaibi, sent two letters on behalf of himself and heirs and on behalf of the Claimant and for its interest dated 10 April 2016 [...] to the Director General of the Municipality requesting to register the land [...] or otherwise the arbitration proceedings will be taken before ICSID [...] (c-8.2)”⁹⁷.
- e. Claimant submitted exhibit C8 which entails in particular a letter as to the Land from Mr. Faisal Al-Otaibi’s Kuwaiti lawyer dated December 8, 2014 requesting the Amir of Kuwait to “instruct the competent authority to discuss my request by issuing a Kuwaiti ownership document [...]”⁹⁸, but this letter does not mention arbitration proceedings⁹⁹.
- f. Arbitration proceedings are however mentioned in a letter as to the Land (submitted by Claimant as exhibit C8) dated April 10, 2016 from Mr. Faisal Al-Otaibi to the Kuwaiti Municipality which reads as follows: “We ask your attention to [...] inform the competent authority to issue the Kuwaiti title instrument or resorting to arbitration”¹⁰⁰. Claimant insisted, during the hearing¹⁰¹, on the information stated in this letter dated April 10, 2016 as to the signing person: “Faisal Bandar Marzouq Al-Otaibi, in his capacity as an agent for the partners and the heirs”¹⁰². As per an acknowledgement of receipt dated April 12, 2016¹⁰³, the Kuwaiti Municipality received the April 10, 2016 request on April 11, 2016.
61. For Claimant¹⁰⁴, the letter dated January 15, 2011 to Mr. Faisal Al-Otaibi¹⁰⁵, and the two letters to the Kuwaiti authorities dated December 8, 2014¹⁰⁶ and April 10, 2016¹⁰⁷, demonstrate the compliance with the requirements of “article 10(2)(3)”¹⁰⁸ BIT, being noted that Mr. Al-Otaibi, who would have had the duty to act “on behalf of the purchaser”¹⁰⁹ pursuant to wording of the JVA, was expressly acting “as an agent for the partners and the heirs”¹¹⁰, as mentioned in the

⁹⁷ Observations, pages 16-17.

⁹⁸ Exhibit C8.

⁹⁹ Exhibit C8.

¹⁰⁰ Exhibit C8.

¹⁰¹ Hearing Transcript of December 14, 2018 (“Hearing Transcript”), page 69 (lines 22-23).

¹⁰² Exhibit C8.

¹⁰³ Exhibit C8.

¹⁰⁴ Observations, page 17.

¹⁰⁵ Exhibit C9.

¹⁰⁶ Exhibit C8.

¹⁰⁷ Exhibit C8.

¹⁰⁸ Observations, page 17.

¹⁰⁹ Exhibit C5.

¹¹⁰ Exhibit C8.

April 10, 2016 letter. “*In addition, the case [...] before the instant court of Kuwait (appendix c-4) was submitted conforming to article no 10 of the convention [i.e. the BIT]*”¹¹¹.

2. Legal basis for Claimant’s claim, including expropriation

62. In its Observations, Claimant provides a list of legal provisions which it considers to be “*its legal basis for its claim against the State of Kuwait*”¹¹²:
- a. Article 1(1)(b), (c) and (e) BIT to allege that the definition of investment is met (Claimant “*invested its money in the purchase of 5% of the entire plot of land [...] in the establishment of touristic and residential buildings*”¹¹³);
 - b. Article 1(3) BIT (definition of investment proceeds “*which relates to the Claimant investment revenues and profits that have been lost due to the expropriation [...] and not enabling the owner (the Claimant) to exercise its investment activity as an owner to benefit from its revenues*”¹¹⁴);
 - c. Article 1(5) BIT to allege that “*the land subject of this case is located in the territory of the State of Kuwait after the signing of the Al-Taef Convention*”¹¹⁵;
 - d. Article 2(2) BIT which provides that the contracting states have the duty to provide the investments and the activities linked to them with the necessary permissions, approvals and authorisations¹¹⁶;
 - e. Article 3(1), (3), (4), (5), (6) and (7) BIT aiming at the protection of investments (non-discrimination, right of recourse to courts, no discriminatory restriction as to purchase of products necessary or useful for production, no performance requirements which are not justified by public interest, no expropriation breaching principles of international law, full compliance with commitments to which Kuwait is a party)¹¹⁷.

¹¹¹ Observations, page 17.

¹¹² Observations, page 8.

¹¹³ Observations, page 9.

¹¹⁴ Observations, page 9.

¹¹⁵ Observations, page 9.

¹¹⁶ Observations, pages 9-10.

¹¹⁷ Observations, pages 10-11.

63. With respect to these BIT provisions, Claimant explains that “*the State of Kuwait has breached all its obligations under the preceding articles, obstructed the exercise of the claimant’s investments, expropriated its land and did not enable it to register its ownership in government departments [...]*”¹¹⁸.
64. Claimant also alleges that the most-favored nation clause, provided for in Article 5 BIT, setting forth a “*no less favorable treatment accorded [by a Contracting State] in comparable circumstances to investments made by its own investors, or by investors of any third state*”, was “*violated [...] when it [Kuwait] granted both Saudi and Kuwaiti citizens full compensation for the expropriation of their lands*”¹¹⁹.
65. Claimant also provides details as to the legal basis for its expropriation claim as expressed in its Request for Arbitration¹²⁰. It relies in particular on:
- a. Article 7(3) BIT, providing that the term “expropriation” also includes the interference of a Contracting State with an enterprise in which an investor belonging to the other Contracting State has a majority or important share¹²¹; and on
 - b. Article 7(4) BIT which provides that the term “expropriation” includes “*other similar procedures having the same effect of seizing the property or expropriating it*”¹²².
66. Claimant provides details as to the clauses of the JVA dealing with the rights allegedly expropriated:
- “*In this agreement, the Claimant (the second party) purchased 5% of the Kuwaiti land owned by the first party for an amount of \$20 million [...] to invest in this land to establish such constructions and touristic resorts and to obtain 10% of all profits gained from land and constructions (item 1,3 of the agreement c-5)*”¹²³; and

¹¹⁸ Observations, page 11.

¹¹⁹ Observations, page 11.

¹²⁰ Request for Arbitration, page f.

¹²¹ Observations, page 13.

¹²² Observations, page 13.

¹²³ Observations, pages 4 and 23.

- *“In this agreement, the first party committed to guarantee the transfer of the land and the share of the ownership of the land to the Claimant and to issue a deed from the State of Kuwait in the name of the Claimant [...] (item 5 of the agreement c-5)”¹²⁴.*

67. With respect to the Saudi deed of ownership adduced in evidence by Claimant¹²⁵, it adds, in its Observations, that:

- a. *“Mr. Faisal Bandar Al-Otaibi and his brother are the heirs of the late Bandar Al-Otaibi (c-2), who had purchased this land from Mr. Abdullah bin Abdelhady Akshan (Saudi nationality) on 2/9/1971 by virtue of a legal deed issued by the judge of Qaisoumia court in the Kingdom of Saudi Arabia (c-1). [...] Mr. Abdullah bin Abdelhady Akshan (Saudi nationality) was the owner of the land under the title deed issued by King Saud in the year 1900 and the Royal Decree of 1965 in accordance with the content to the judgment of Qaisoumia Court (c-1).[...] And no one claims otherwise. Therefore, the sequence of ownership of this land until it reached the plaintiff is true and no doubt of that”¹²⁶.*
- b. Claimant also argues that the Saudi deed *“has been legally issued and has been ratified and approved by the Saudi court and stamped and ratified by the Kingdom of Saudi Arabia [...], and there is no other judgements, laws or decisions in Saudi Arabia ignoring or denying this deed”¹²⁷. Claimant also explains that “transferring of sovereignty does not mean that the owner of the land has lost ownership”¹²⁸.*

68. For Claimant, the Kuwaiti authorities’ refusal to grant title to the Land to Mr. Al-Otaibi is based on two grounds:

- a. pursuant to the meeting *“minutes of the final report of the Studying Committee Concerning the Claims and Allegations of Kuwaiti Citizens in Zour and Wafra areas no 6/2011”¹²⁹, referred to in the judgement of the Kuwaiti administrative court¹³⁰ (“c-4 p4 para 2[3]”¹³¹), the ground for refusing to grant a Kuwaiti title to the Land to Mr. Faisal Al-Otaibi was as*

¹²⁴ Observations, page 4.

¹²⁵ Exhibit C1.

¹²⁶ Observations, pages 23 and 24.

¹²⁷ Observations, page 5.

¹²⁸ Observations, page 24.

¹²⁹ Observations, page 19.

¹³⁰ Exhibit C4.

¹³¹ Observations, page 19.

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follows: “*article 2 of the Al-Taef Agreement (c-6) [...] stipulated that the government of Kuwait shall open the registration of requests [...] starting from the first of September 1982 for a period of 3 months [...], further requests shall not be considered for any reason*”¹³².

- b. Pursuant to the judgement rendered by the Kuwaiti Court of Appeal¹³³ (“*p8 para 2 & p9*”¹³⁴) as to the Land, and pursuant to the minutes of the final report of the Studying Committee Concerning the Claims and Allegations of Kuwaiti Citizens in Zour and Wafra areas no 6/2011¹³⁵ (“*c-11 p4 para 1&3*”¹³⁶), “*the instrument issued for the land mentioned in the case of Mr. Faisal Bandr Al-Otaibi was issued on 2/9/1971, after 8/6/1966 the date of ratification of the partition agreement*”¹³⁷.

69. Claimant relies on the following reasoning to conclude that the grounds put forward by the Kuwaiti authorities to refuse to issue a Kuwaiti title for the Land on the basis of the Saudi deed is “*an injustice committed by the Respondent*”¹³⁸:

- a. “*The Saudi Court cannot issue a deed of ownership of a land not located in the Kingdom of Saudi Arabia, as well as for the ratification issued by the Saudi Government*”¹³⁹.
- b. Notwithstanding the transfer of sovereignty to Kuwait, Kuwait must comply with the ownership rights (“*under these two international conventions [the 1965 Agreement and the Al-Taef Convention], this land was transferred to the Kuwaiti state bearing its obligations which are the ownership of Mr. Faisal Bandar Al-Otaibi*”¹⁴⁰).
- c. “*The Kingdom of Saudi Arabia’s government and courts said that Mr. Faisal Bandar Al-Otaibi is the owner of this land [...], and no other owner put his hand on it*”¹⁴¹.

¹³² Observations, page 20.

¹³³ Exhibit R1.

¹³⁴ Observations, page 20.

¹³⁵ Exhibit C11.

¹³⁶ Observations, page 20.

¹³⁷ Observations, page 20.

¹³⁸ Observations, page 21.

¹³⁹ Observations, page 22.

¹⁴⁰ Observations, page 22.

¹⁴¹ Observations, page 22.

- d. Claimant refers, in its Observations¹⁴², to two decisions¹⁴³ of the Kuwaiti Council of Ministers: The first one, dated October 16, 1983 states that engineering measures of the State of Kuwait “*will eventually result in the expropriation of all residential and non-residential areas in the old villages of Al-Wafra and Al-Zour*”¹⁴⁴; the second one, dated May 29, 1995, was about the issuance of “*documents of real estate ownership of Saudi citizens*”¹⁴⁵.
- e. Claimant cites a Kuwaiti court case:
- i. Claimant describes the case as follows: it is about a “*final and binding judgement which has been issued by the Kuwaiti court in favor of Mr. Juman Salim Al-Dosari who holds a title deed from the Saudi government dated 9/3/1388 A.H. for the year of 1968 in the same area as the Claimant land*”¹⁴⁶. Claimant further adds that Mr. Al-Dosari’s land was purchased from a “*Saudi person during year 1968, after the signing of the 1966 Agreement*”¹⁴⁷.

In this respect, the judgment of the Kuwaiti “*Primary Court*”¹⁴⁸ dated November 14, 2011 submitted by Claimant with its Observations, held that: “*Nasser Salim Nasser Ali Al-Dosari, Kuwaiti Nationality, owned a property [...] in Al-Zour area in the petitioned neutral zone between Kuwait and Saudi Arabia under the original instrument [...] registered No. 114/m on 9/3/1388 A.H. purchased from Salem Fnkhori bin Mohammed Alkatheri (Saudi nationality)*”¹⁴⁹ (pages 1-2), and “*it’s proved to the court that [...] the dispute is over an empty land located [...] in Al-Zour area, which plaintiffs own in common under a deed of title issued by the Saudi Sharia Court No. 114m.s.67, which was expropriated for the Neutral Zone between the State of Kuwait and the Kingdom of Saudi Arabia, [...] which is*

¹⁴² Observations, page 22.

¹⁴³ Exhibits C12 and C13.

¹⁴⁴ Exhibits C12.

¹⁴⁵ Exhibits C13.

¹⁴⁶ Observations, page 22.

¹⁴⁷ Observations, page 22.

¹⁴⁸ Claimant’s list of documents adduced in evidence under Exhibit C10, describes this document as “*Ruling of the primary court on the right of Al-Dosari in compensation*”, even though the translation describes it as a judgment of the “*Supreme Court*”.

¹⁴⁹ Exhibit C10.

*estimated at KD 45,000 (forty five thousand Kuwaiti Dinars)*¹⁵⁰ (page 4 of translation).

- ii. In its judgment, the Kuwaiti “Primary Court” “ruled: [...] *Second: obligating the second plaintiff [Kuwaiti Ministry of Finance] to grant the plaintiffs an amount of KD 45,000 (forty five Kuwaiti Dinars)*”¹⁵¹ (page 5 of translation).
- iii. On February 28, 2012, the Kuwaiti Court of Appeal rejected the appeals filed against the decision of November 14, 2011 of the “Primary Court”¹⁵².
- iv. On June 26, 2013, the Kuwaiti Cassation Court rejected an appeal filed against the February 28, 2012 decision of the Court of Appeal¹⁵³.
- v. As to the grounds relied on by the Kuwaiti courts to indemnify Mr. Al-Dosari for the expropriated land, Claimant contends that they “ruled that the dates contained in the Al-Taef Agreement had no law to govern and could not be invoked”¹⁵⁴.

In this respect, as the Kuwaiti authorities objected that Mr. Al-Dosari’s claim should be held inadmissible since it would have been untimely, the Kuwaiti Court of Appeal held, in its February 28, 2012 decision, that “*the law does not specify special dates for the claims to be observed*”¹⁵⁵ (page 11 of translation). It shall be noted that the Kuwaiti Court of Cassation did not address this issue in its June 26, 2013 decision.

- vi. With respect to the Al-Dosari case, Claimant concludes that the two decisions “*are contradictory, one of them against Mr. [...] Al-Otaibi and another to the favor of Mr. [...] Al-Dosari*”¹⁵⁶, even though they “*speak of the same subject and respond to the same objections raised from the State of Kuwait*”¹⁵⁷.

¹⁵⁰ Exhibit C10.

¹⁵¹ Exhibit C10.

¹⁵² Exhibit C10.

¹⁵³ Exhibit C10.

¹⁵⁴ Observations, page 23.

¹⁵⁵ Exhibit C10.

¹⁵⁶ Observations, page 23.

¹⁵⁷ Observations, page 23.

70. Claimant, in its Observations, confirms Respondent’s allegation whereby the dispute with the State of Kuwait as to the Land is now “*before the Court of Cassation in the State of Kuwait*”¹⁵⁸, and adds that the decisions rendered so far are “*not final and binding neither on Mr. Faisal Bandar Al-Otaibi [...]*”¹⁵⁹.
71. Claimant explains that Mr. Faisal Al-Otaibi did not follow the specific procedure for registration of ownership provided for in Article 2 of the Al-Taef Convention for two reasons:
- a. Because the size of the Land excluded such procedure: The application for the registration of ownership by Kuwait was open for “*land that does not exceed 2500 square meters only*”¹⁶⁰ pursuant to Article 2 of the Al-Taef Convention, while “*Mr. Faisal Bandar Al-Otaibi’s property is 800,000 square meters*”¹⁶¹.
 - b. Because the date of the property deed (1971) as to the Land excluded the procedure provided for by the Al-Taef Agreement: The registration of ownership by Kuwait was open for “*land that have officially fixed date before 26 July 1966*”¹⁶² (Article 2 of the Al-Taef Convention).
72. Claimant summarizes its money award claim as follows: “*The Claimant seeks that the Tribunal issues a judgement against the Respondent to pay an amount of 320 million US dollars to remedy all related damages occurred to the Claimant for losing its profit and for all expenditures on feasibility studies, experts reports, administrative fees, litigation and arbitration fees*”¹⁶³.
73. With respect to the compensation of damages related to expropriation of the 5% of the Land specifically, Almasryia argues that “*Claimant owned 5% of the land which equal to 4 millions meter. Claimant seeks the appointment of an expert to evaluate the market price of the land in order to compensate Claimant*”¹⁶⁴.

¹⁵⁸ Observations, page 20.

¹⁵⁹ Observations, page 20.

¹⁶⁰ Observations, page 21.

¹⁶¹ Observations, page 21.

¹⁶² Observations, page 21.

¹⁶³ Observations, pages 24 and 25.

¹⁶⁴ Observations, page 24.

74. Claimant’s prayer for relief, as contained in its Observations, is as follows:

“First: Accept the Claimant’s claim in form and subject.

Second: The rejection of the objection submitted by Respondent on 3 September 2018 in form and in subject matter.

Third: Determining the right of the Claimant to ownership of the land.

Fourth: Appointment of an expert to assess the value of the disputed land [...].

Fifth: order the Respondent to pay an amount of 320 millions US dollars to remedy all related damages occurred to the Claimant for losing its profit and for all expenditures on feasibility studies, experts reports, administrative fees, litigation and arbitration fees”¹⁶⁵.

IV. LEGAL REASONING

A. Scope and standard of Rule 41(5)

75. Rule 41(5) provides that:

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

76. Previous ICSID tribunals have considered Rule 41(5)’s expedited procedure and commented upon the rules and the standard to be applied under the provision. The Parties refer to these interpretations in this arbitration¹⁶⁶, and there is no reason not to regard the decisions of prior ICSID tribunals as highly relevant and material to its consideration of the Application. This is

¹⁶⁵ Observations, page 25.

¹⁶⁶ Application, paras 20-26; Hearing Transcript, page 54 (line 25), page 55 (lines 1-4), page 56 (lines 18-25), page 57 (lines 1-4).

also the opinion expressed in the award of the majority of the Tribunal¹⁶⁷.

77. As provided for by Rule 41(5), the party raising a Rule 41(5) objection must “*specify as precisely as possible the basis for the objection*”. The objection shall be dismissed if “*Respondent has not satisfied the applicable standard of proof in regard of its [...] objections under Rule 41(5)*”¹⁶⁸.
78. Several ICSID tribunals have found that “*manifest,*” as used in Rule 41(5), is equivalent to “*obvious*” or “*clearly revealed to the eye, mind or judgment*”¹⁶⁹. Under Rule 41(5), the respondent must establish its objection “*clearly and obviously, with relative ease and despatch*”¹⁷⁰. The Rule is intended to capture cases which are clearly and unequivocally unmeritorious¹⁷¹, and as such, the standard that a respondent must meet under Rule 41(5) is very demanding and rigorous¹⁷².
79. “*Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts*”¹⁷³. “*It would in principle be inappropriate to consider and resolve novel issues of law in a summary fashion, which would inevitably limit the Parties’ opportunity to be heard and the Tribunal’s opportunity to reflect*”¹⁷⁴. Claimant relies on a similar rule: “*Rule 41(5) should not by any means lead to affect negatively the duty of the Tribunal in maintaining the due process*”¹⁷⁵.
80. In considering the scope of a Rule 41(5) objection (*i.e.*, the scope of the phrase “*without legal merit*”), ICSID tribunals have found that objections should be based on legal impediments to claims, rather than factual ones¹⁷⁶. Given the preliminary nature of the proceeding, a tribunal considering a Rule 41(5) application may not be in a position to decide upon disputed facts¹⁷⁷.

¹⁶⁷ Award, III.B.

¹⁶⁸ *PNG v. Papua New Guinea*, para. 92.

¹⁶⁹ *Trans-Global*, para. 83; *Global Trading Resource Corp. v. Ukraine (“Global Trading”)*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 35.

¹⁷⁰ *Trans-Global*, para. 88; *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela (“Brandes Investment”)*, ICSID Case No. ARB/08/3, Decision on the Respondent’s objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, para. 63; *Global Trading*, Para. 35.

¹⁷¹ *Brandes Investment*, Para. 62.

¹⁷² *Trans-Global*, Para. 88; *Brandes Investment*, Para. 63; *Global Trading*, para. 35.

¹⁷³ *PNG v. Papua New Guinea*, para. 89.

¹⁷⁴ *PNG v. Papua New Guinea*, para. 94.

¹⁷⁵ Hearing Transcript, page 59 (lines 5-7).

¹⁷⁶ *Trans-Global*, para. 97.

¹⁷⁷ *Trans-Global*, para. 97.

81. Further, as the Respondent’s Rule 41(5) objections concern both matters of jurisdiction and merits, it shall be noted that Rule 41(5) allows for objections related both to jurisdiction and the merits of the case¹⁷⁸. Nonetheless, the very demanding standard of proof outlined above applies no less to jurisdictional than other matters¹⁷⁹.
82. Also, “given the potentially decisive nature of an Article 41(5) objection [...], it is appropriate that claimant’s Request for Arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favor of the claimant”¹⁸⁰. “It would therefore be a grave injustice if a claimant was wrongly driven from the judgement seat by a final award under Art. 41(5), with no opportunity to develop and present its case under the written and oral procedures prescribed by Rules 29, 31 and 32”¹⁸¹.

B. The Respondent’s Objections

83. Considering the Parties’ written and oral submissions on the Application, the Respondent has not satisfied the applicable standard of proof in respect of its objections under Rule 41(5) – i.e. that of “*manifest*” lack of legal merit. As such, the Respondent’s Application had to be dismissed.
84. As outlined above, the Respondent’s objections concern, inter alia, the interpretation of both Kuwaiti domestic legislation, the BIT and other international treaties. Since Respondent contends that Claimant would not have been represented by Mr. Faisal Al-Otaibi before the Kuwaiti authorities, the Respondent’s objections also call for a factual analysis of whether we can exclude that Mr. Faisal Al-Otaibi acted on behalf of Claimant before the Kuwaiti authorities. Such factual analysis shall also determine whether we can exclude any act(s) amounting to the expropriation of rights of Claimant. None of these matters is appropriate for resolution under Rule 41(5).

¹⁷⁸ *Brandes Investment*, Para. 55; *Global Trading*, para. 30.

¹⁷⁹ *PNG v. Papua New Guinea*, para. 91.

¹⁸⁰ *RSM Production Corporation v. Grenada*, para. 6.1.3.

¹⁸¹ *Trans-Global*, para. 92.

85. The factual circumstances of this case are relatively unusual, and Respondent’s objections raise novel issues of law with respect to the BIT, in particular with respect to Art. 10 BIT, the 1965 Agreement and the Al-Taef Convention, which have never been applied so far. Consistent with this, Respondent did not refer to any decision issued by an international court or arbitral tribunal applying these three international instruments to a claim for compensation of damages caused by the alleged expropriation of rights. It is inappropriate to consider and resolve novel issues of law in a summary fashion, which would inevitably limit the Parties’ opportunity to be heard and the Tribunal’s opportunity to reflect. That is particularly true where those issues are disputed and potentially complex. The ICSID tribunal in *PNG v. Papua New Guinea* also faced a Rule 41(5) objection where the tribunal had to apply the host state’s legislation and international conventions, and the parties also disagreed as to the interpretation and application of these legislation and conventions: The tribunal held that interpretation of domestic legislation and international conventions “*in a summary Rule 41(5) procedure would be inappropriate*”¹⁸².
86. Despite *PNG v. Papua New Guinea*, and even though the Award of the majority of the Tribunal¹⁸³ cites a case where an ICSID tribunal held that a Rule 41(5) summary procedure is not intended to address complicated, difficult or unsettled issues of law, the Award¹⁸⁴ goes through a long and complex interpretation of the wording of Art. 10 BIT, of the presumed purpose of this provision, of previous awards (which lacked uniformity) applying similar provisions, and even has to expressly “*disagree with the views expressed in the cases referred to by the Claimant*”¹⁸⁵, to come to its conclusion that Art. 10 BIT would provide for mandatory prior consultations between the investor and Kuwait. As in *PNG v. Papua New Guinea*, “*doing so in a summary Rule 41(5) procedure [is] inappropriate*”¹⁸⁶.
87. Furthermore, the Award presents a contradiction: While it cites a previous arbitral tribunal case holding that a Rule 41(5) summary procedure is not intended to address unsettled issues of law, it implicitly admits that the issue in connection with Art. 10 BIT is unsettled since the award has to express, in its rather long reasoning, the majority of the Tribunal’s disagreement with the ICSID cases cited by Claimant.

¹⁸² *PNG v. Papua New Guinea*, para. 95.

¹⁸³ Award, par. 32.

¹⁸⁴ Award, par. 37 to 43.

¹⁸⁵ Award, par. 43.

¹⁸⁶ *PNG v. Papua New Guinea*, para. 95.

88. Further, Respondent, except for previous ICSID cases holding that prior consultations were mandatory under certain investment treaties other than the BIT, never raised the complex reasoning used in the Award by the majority of the Tribunal, being highlighted that: As provided for by Rule 41(5), the party raising a Rule 41(5) objection must “*specify as precisely as possible the basis for the objection*”, and the objection shall be dismissed if “*Respondent has not satisfied the applicable standard of proof in regard of its [...] objections under Rule 41(5)*”¹⁸⁷. Consequently, since Respondent did not raise the complex sequence of arguments used in the Award to conclude that consultations would be mandatory under Art. 10 BIT, its objection in this regard had to be dismissed.
89. Also, the Award¹⁸⁸ goes through a complicated, and barely understandable, interpretation of Art. 7 BIT, which has never been applied so far, and of various ICSID cases, to assert that exclusively a “*property title*”¹⁸⁹ can be subject to expropriation (while the wording itself of Art. 7 BIT has, *prima facie* at least, a larger scope as to the rights protected, since it provides *e.g.* that “*investments [...] shall not be subject to nationalisation, expropriation*” and that the “*majority or substantial interest in [an] investment*” can be subject expropriation).
90. The fact that Respondent’s objections raise novel issues of law, which cannot be decided upon within the frame of Rule 41(5) proceedings, and the fact that Respondent did not raise the arguments developed by the majority of the Tribunal, are not the only reasons which should have led to the dismissal of its objections. Additional reasons are exposed hereafter.

1. Jurisdiction

91. Art. 10 BIT does not expressly provide that the lack of prior notification of a claim would prevent the investor from initiating ICSID arbitration.
92. In this respect, it shall be noted that Respondent, with the purpose to demonstrate that Article 10 BIT would provide for a mandatory six-month “cooling-off period”, considered necessary to list cases¹⁹⁰ in which the mandatory nature of a negotiation period prior to arbitration was recognized, but which relate to investment treaties signed by Argentina, Turkmenistan,

¹⁸⁷ PNG v. Papua New Guinea, para. 92.

¹⁸⁸ Award, par. 52 to 56.

¹⁸⁹ Award, par. 55.

¹⁹⁰ Application, para 54.

Ecuador and Turkey, and not by Kuwait and Egypt. It is Respondent’s only reasoning as to the allegedly mandatory notification and six-month “cooling-off period”. Respondent fails to compare, for interpretation purposes, the wording of Article 10 BIT with the wording of the alleged similar clauses of the other treaties cited by Respondent, the wording of these clauses being different from the wording of Article 10(2) BIT. Respondent thus fails to demonstrate that Article 10 BIT would be “*obviously*” (as required by Rule 41(5)) mandatory. Respondent does not put forward any other reason why the wording of Article 10 BIT would make it mandatory for Claimant to notify its claim to Kuwait, and then to wait six months before initiating legal proceedings versus Kuwait.

93. The Award of the majority of the Tribunal agrees implicitly, but clearly, that the wording of Art. 10 BIT does not provide *per se* that the lack of prior consultations would prevent the investor from initiating ICSID arbitration. Indeed, the Award¹⁹¹, to reach its conclusion as to the mandatory nature of consultations, goes through a complex interpretation of the wording of Art. 10 BIT, of the presumed purpose of this provision, and of previous awards (which lacked uniformity) applying similar provisions.

94. Claimant relied¹⁹², during the December 14, 2018 hearing, on *SGS v. Pakistan*¹⁹³ and *Biwater Gauff v. Tanzania*¹⁹⁴, in which ICSID arbitral tribunals held that consultation mechanisms provided for in the applicable bilateral investment treaties were not mandatory. As quoted by Claimant during the hearing¹⁹⁵, the ICSID tribunal in *Gauff v. Tanzania* explained the rationale of the non-mandatory nature of the considered “cooling-off period”:

“Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;

- forcing the claimant to recommence an arbitration started too soon, even if the six-month

¹⁹¹ Award, par. 37 to 43.

¹⁹² Hearing Transcript, page 77 (lines 9-25) and page 78 (lines 1-10).

¹⁹³ *SGS Société Générale de Surveillance SA. v. Islamic Republic of Pakistan* (“*SGS v. Pakistan*”), ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 184.

¹⁹⁴ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (“*Biwater Gauff v. Tanzania*”), ICSID Case No. ARB/05/22, Award, 18 July 2008, paras 343-347.

¹⁹⁵ Hearing Transcript, page 78 (lines 1-10).

period has elapsed by the time the Arbitral Tribunal considers the matter”¹⁹⁶.

95. Respondent has not denied that negotiations would be futile, or settlement impossible. On the contrary, Respondent has adopted the view that Claimant’s claims are abusive:

“We submit that this case is one that proves that the system is being clearly abused by Claimants that file frivolous claims. We ask you to send a strong message that this abusive use of the investor state dispute settlement system will not be tolerated”¹⁹⁷.

96. Thus, Respondent not only fails to demonstrate that Article 10 BIT would be “*obviously*” (as required by Rule 41(5)) a mandatory consultation mechanism, but it also does not contend and does not demonstrate, with the high standard required by Rule 41(5), that negotiations would not be futile and that a settlement would not be impossible. Further, by arguing that, with the initiation of arbitral proceedings, the “*system is clearly abused by Claimant*”¹⁹⁸, Respondent considers implicitly, but clearly, that consultations would be deprived of any chance of success.

97. The Award of the majority of the Tribunal does not address the issue, raised by Claimant, of the futility of consultations. This failure to comply with due process requirements, which is detrimental to Claimant, is all the more serious as the Award¹⁹⁹ contains an entire sequence of reasoning supporting Respondent’s views as to the mandatory nature of consultations, while this sequence of arguments has not been raised by Respondent.

98. In addition to its arguments whereby Art. 10 BIT would not provide for any mandatory consultation mechanism, and whereby such consultations would be obviously futile and a settlement impossible in the present case, Claimant maintained, during the hearing²⁰⁰, that it nevertheless had complied with the six-month “cooling-off period”. Claimant relies on item 5 of the JVA to contend²⁰¹ that Mr. Faisal Al-Otaibi was empowered to represent it before the Kuwaiti authorities for formalities to be carried out in compliance with the JVA (Exhibit C5), it relies²⁰² on a letter dated January 15, 2011 (Exhibit C9) to allege that it gave instructions to Mr. Al-Otaibi to inform Kuwait of its intention to initiate arbitral proceedings “*before*

¹⁹⁶ *Biwater Gauff v. Tanzania*, para. 343.

¹⁹⁷ Hearing Transcript, page 123 (lines 15-19)

¹⁹⁸ Hearing Transcript, page 123 (lines 15-19)

¹⁹⁹ Award, par. 37 to 43.

²⁰⁰ Hearing Transcript, page 78 (lines 17-25).

²⁰¹ Observations, pages 5 and 16.

²⁰² Observations, page 5 and 16 ; Hearing Transcript, page 78 (lines 19-20).

ICSID²⁰³, and it invokes²⁰⁴ a letter dated April 10, 2016 (Exhibit C8) from Mr. Faisal Al-Otaibi “*in his capacity as an agent for the partners*”²⁰⁵, to the Kuwaiti authorities informing them of an “*arbitration*”²⁰⁶.

99. Respondent does not explain how one could exclude, “*obviously*” as required by Rule 41(5), already at this early stage of the arbitral proceedings, the fact alleged by Claimant whereby Mr. Al-Otaibi would have acted in the name of Claimant, being reminded that Claimant is entitled to submit further allegations and evidence at a later stage of the proceedings and that it declared at the end of the December 14, 2018 hearing, its intention to adduce other documents in evidence²⁰⁷.
100. From a legal perspective, Respondent denies that Mr. Faisal Al-Otaibi would have represented Claimant before Kuwaiti authorities to inform them of Claimant’s intent to initiate arbitration against Kuwait. However, Claimant does not mention any private international law provision, or case law, designating the law applicable to representation, and it fails to allege the legal provision(s) which, to its opinion, would exclude valid representation powers. Thus, by failing to mention which legal provision, or case law, would exclude, “*obviously*” as required by Rule 41(5), that Mr. Faisal Al-Otaibi would have had valid representation powers and would have validly acted on behalf of Claimant, Respondent “*has not satisfied the applicable standard of proof in regard of its [...] objections under Rule 41(5)*”²⁰⁸, and, pursuant to *PNG v. Papua New Guinea*²⁰⁹, its objection as to Art. 10 BIT must be dismissed for this additional reason.
101. Like Respondent’s reasoning, the Award fails to state which private international law provisions and which substantive law provisions would lead to the conclusion that Claimant would not have been validly represented by Mr. Al-Otaibi for the notification of Claimant’s claim to Respondent. Concluding, despite this significant legal deficiency, that “*there is a legal impediment which goes to the jurisdiction of the Tribunal*”²¹⁰, breaches Rule 41(5) which requires that the reason for a summary dismissal must be “*obvious*”: a legal argument cannot be obvious if the applicable legal provisions are unknown. Further, the Award’s reasoning, by failing to conclude that Respondent “*has not satisfied the applicable standard of proof in*

²⁰³ Exhibit C9.

²⁰⁴ Hearing Transcript, page 69 (lines 13-23).

²⁰⁵ Exhibit C8.

²⁰⁶ Exhibit C8.

²⁰⁷ Hearing Transcript, p. 125 (lines 13-19), page 126 (lines 5-11).

²⁰⁸ *PNG v. Papua New Guinea*, para. 92.

²⁰⁹ *PNG v. Papua New Guinea*, para. 92.

²¹⁰ Award, par. 47.

*regard of its [...] objections under Rule 41(5)*²¹¹ with respect to the representation issue, breaches another requirement of Rule 41(5).

102. And the Award does not comply with due process requirements in connection with this representation issue. Indeed it concludes that it “*is manifest, clear and obvious*”²¹² that no exhibits support Claimant’s allegations as to representation, while Claimant declared at the end of the December 14, 2018 hearing, its intention to adduce other documents in evidence²¹³. The Tribunal can certainly not decide in advance that the exhibits, whose content is not known to the Tribunal, and which Claimant intends to adduce in evidence, do not support Claimant’s allegations. This is also a breach of Rule 41(5), since it is “*a grave injustice if a claimant was wrongly driven from the judgment seat by a final award under Art. 41(5), with no opportunity to develop and present its case under the written and oral procedures prescribed by Rules 29, 31 and 32*”²¹⁴.
103. Consequently, Respondent’s objection as to Art. 10 BIT had to be dismissed as it fails to demonstrate that, “*obviously*” (as required by Rule 41(5)), Art. 10 BIT would be a mandatory consultation mechanism, that consultations would not be futile, and that Claimant was not validly represented by Mr. Al-Otaibi.

2. Alleged expropriation

104. With respect to Respondent’s argument whereby Claimant would not be the owner of the Land, the interpretation of the 1964 Agreement and of the Al-Taef Convention are central, since Respondent considers that Mr. Faisal Al-Otaibi would have never been the owner of that Land and could consequently not have transferred the ownership of this Land to Claimant because the 1964 Agreement would have transferred sovereignty over the Land from Saudi Arabia to Kuwait in 1965 (while Claimant considers that sovereignty over the Land would have been transferred after 1971, which is the year of the deed of the Saudi Court which would prove that Mr. Faisal Al-Otaibi’s father became the owner of the Land). Each of the following reasons

²¹¹ *PNG v. Papua New Guinea*, para. 92.

²¹² Award, par. 47.

²¹³ Hearing Transcript, p. 125 (lines 13-19), page 126 (lines 5-11).

²¹⁴ *Trans-Global*, para. 92.

excludes that the interpretation of the 1965 Agreement and the Al-Taef Convention be carried out within the frame of a Rule 41(5) objection:

- a. The interpretation of the 1964 Agreement and of the Al-Taef Convention is a complex novel issue of law, and “*Rule 41(5) is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law*”²¹⁵, because “*it would in principle be inappropriate to consider and resolve novel issues of law in a summary fashion, which would inevitably limit the Parties’ opportunity to be heard and the Tribunal’s opportunity to reflect*”²¹⁶. This is one of the arguments Claimant relied on: “*Rule 41(5) should not by any means lead to affect negatively the duty of the Tribunal in maintaining the due process*”²¹⁷.

- b. Respondent first explained that “*the purported sale of the Land to Mr. Al-Otaibi’s father and issuance of the Saudi instrument in 1971 occurred more than six years after the Land had already become Kuwaiti territory pursuant to the 1965 Agreement*”²¹⁸. Respondent changed its argument when it explained later, during the December 14, 2018 hearing, that the demarcation between the two countries in the former neutral zone was agreed-upon in 1969 only. Indeed, as then argued by Respondent, “*the 1965 treaty did establish the division of the neutral zone. It called for the demarcation to be carried out pursuant to a procedure. The procedure was carried out, and confirmed in a supplementary agreement which was signed at Kuwait on 18th December 1969*”²¹⁹. Respondent did not submit the text of the “*supplementary agreement*” to the Tribunal and did not state the date of its entry into force. Further, it failed itself to present an univocal position as to the date when sovereignty on the Land was transferred to Kuwait, and, moreover, Claimant expresses a third position with a sovereignty transfer after 1971. Consequently and obviously, the requirement according to which “*Rule 41(5) is not intended to resolve [...] difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law*”²²⁰ is not complied with.

²¹⁵ *PNG v. Papua New Guinea*, para. 89.

²¹⁶ *PNG v. Papua New Guinea*, para. 94.

²¹⁷ Hearing Transcript, page 59 (lines 5-7).

²¹⁸ Application, para. 37.

²¹⁹ Hearing Transcript, p. 95 (lines 19-23).

²²⁰ *PNG v. Papua New Guinea*, para. 89.

- c. Both Claimant²²¹ and Respondent²²² alleged, in their briefs, that Mr. Faisal Al-Otaibi and his co-heir appealed the judgement of the Kuwaiti Court of Appeals before the Kuwaiti Court of Cassation and that no decision had been rendered. Both Claimant²²³ and Respondent²²⁴ confirmed, during the December 14, 2018 hearing, that the Kuwaiti Court of Cassation had not rendered any decision. Because of the pending proceedings before the Kuwaiti Court of Cassation, Claimant argues that “*the judgements are not yet final or binding*”²²⁵. The reality is that Respondent fails to demonstrate that Mr. Faisal Al-Otaibi’s ownership is, “*obviously*” as required by Rule 41(5), excluded: Of course, nobody can exclude that the Kuwaiti Court of Cassation renders a decision in favor of Mr. Al-Otaibi (and Respondent did not allege that such decision would be excluded).

105. With respect to the Saudi deed itself, and the various owners of the Land over time, Respondent fails to give any explanations as to the following arguments raised by Claimant:

- a. For Claimant, the Saudi deed “*has been legally issued and has been ratified and approved by the Saudi court and stamped and ratified by the Kingdom of Saudi Arabia [...], and there is no other judgements, laws or decisions in Saudi Arabia ignoring or denying this deed*”²²⁶. The mere existence of the 1971 deed issued by the Saudi Court as to the ownership of the Land renders Respondent’s position in this regard troubling: Respondent fails to explain why a Saudi Court would have issued an ownership deed in 1971 if, as contended by Respondent, the Land would have been located in 1971 on the Kuwaiti territory (what Respondent also failed to demonstrate pursuant to the requirements of Rule 41(5), as explained *supra*). Respondent thus fails, for this additional reason, to demonstrate that, “*obviously*” as required by Rule 41(5), the deed should be totally disregarded by the Tribunal.

- b. Respondent does not deny that, in the Al-Dosari case, as alleged by Claimant:

- i. A “*final and binding judgement which has been issued by the Kuwaiti court in favor of Mr. Juman Salim Al-Dosari who holds a title deed from the Saudi government dated 9/3/1388 A.H. for the year of 1968 in the same area as the*

²²¹ Observations, page 20.

²²² Application, para. 44.

²²³ Hearing Transcript, p. 71 (lines 15-22).

²²⁴ Hearing Transcript, p. 20 (lines 16-18).

²²⁵ Hearing Transcript, p. 71 (lines 21-22).

²²⁶ Observations, page 5.

*Claimant land*²²⁷; and

- ii. Mr. Al-Dosari's land was purchased from a "Saudi person during year 1968, after the signing of the 1966 Agreement"²²⁸.

Actually, as exposed *supra*, the Kuwaiti Courts entered a final decision recognizing Mr. Al-Dosari's ownership, and indemnifying Mr. Al-Dosari for the expropriated land, even though his ownership deed had been issued by Saudi Arabia after the 1965 Agreement. This case, in conjunction with the lack of explanation on the part of Respondent, is troubling, since the Kuwaiti Courts recognized Mr. Al-Dosari's ownership in apparently similar circumstances as in Mr. Faisal Al-Otaibi's case, while the same Kuwaiti Courts, so far, rejected Mr. Faisal Al-Otaibi's claims. Mr. Al-Dosari's case, and the absence of any explanations from Respondent in this regard, is an additional reason preventing Respondent from demonstrating, "obviously" as required by Rule 41(5), that Mr. Faisal Al-Otaibi's ownership over the Land would be excluded.

- c. As to the owners of the Land over time, Claimant alleged that:

*"Mr. Faisal Bandar Al-Otaibi and his brother are the heirs of the late Bandar Al-Otaibi (c-2), who had purchased this land from Mr. Abdullah bin Abdelhady Akshan (Saudi nationality) on 2/9/1971 by virtue of a legal deed issued by the judge of Qaisoumia court in the Kingdom of Saudi Arabia (c-1). [...] Mr. Abdullah bin Abdelhady Akshan (Saudi nationality) was the owner of the land under the title deed issued by King Saud in the year 1900 and the Royal Decree of 1965 in accordance with the content to the judgment of Qaisoumia Court (c-1).[...] Therefore, the sequence of ownership of this land until it reached the plaintiff is true and no doubt of that"*²²⁹.

Even though Claimant alleged, and referred to exhibits it adduced before the Tribunal, the sequence of owners of the Land since 1900, Respondent fails to give any explanations as to this sequence, except that the Land would have been located in 1971 on the Kuwaiti territory what would prevent Claimant from relying on the Saudi deed (Respondent failed to demonstrate, pursuant to the requirements of Rule 41(5), that the Land would have been located in 1971 on the Kuwaiti territory, as explained *supra*). In particular, Respondent

²²⁷ Observations, page 22.

²²⁸ Observations, page 22.

²²⁹ Observations, pages 23 and 24.

fails to give any explanations as to the 2009 document, issued by the “*State of Kuwait, Ministry of Justice, Legal Authentication Department, Division of Estate*”²³⁰, stating that “*in accordance with Succession Limitation no. 1572/2004 + Deeds issued by the Sharia Courts no. 412 – 11/7/1391 + draft drawing as per the Deeds no. 412 dated 11/7/1391 A.H., heirs of Bander Marzouq Hazem Al-Otaibi: Faisal Bander Marzouq Hazem Al-Otaibi [...]: 50%; Khalid Bander Marzouq Hazem Al.Otaibi [...]: 50%*”²³¹, being reminded that the reference “*no. 412 – 11/7/1391*” matches with the 1971 Saudi deed Claimant relies on. In other words, even though Exhibit C2 is a document issued in 2009 by a Kuwaiti authority stating that, as alleged by Claimant, Mr. Faisal Al-Otaibi and his brother (in their capacity as their father’s heirs) would be the owners of the Land, Respondent does not explain why this document should be disregarded: There is a significant material inconsistency between Respondent’s position and a document issued by its own administration adduced in evidence by Claimant, without any explanations on the part of Respondent. The lack of explanations on the part of Respondent as to this document issued by its administration is an obvious and serious hurdle to the Rule 41(5) objection, what could render Respondent’s objection abusive (this issue of abuse of right may remain undecided since Claimant does not raise it). At the very least, the lack of allegations and arguments on the part of Kuwait as to Exhibit C2 prevents Respondent from demonstrating that, “*obviously*” as required by Rule 41(5), Mr. Faisal Al-Otaibi’s ownership over the Land would be excluded.

The Award of the majority of the Tribunal simply ignores exhibit C2. It ignores a relevant document relied upon and validly adduced in evidence by Claimant²³², which is issued by Respondent’s own administration and which *prima facie* confirms the validity of the 1971 Saudi deed and the ownership of the Land by Mr. Faisal Al-Otaibi and his brother. There is an obvious and significant contradiction between exhibit C2 and the statement in the Award that “*Claimant has not provided evidence that such title [issued by Saudi Arabia in favor of a Kuwaiti national] has been recognized or registered by any Kuwaiti authority*”²³³. Should the Award have not ignored Exhibit C2, it would have come to the conclusion that, by failing to give any explanations as to Exhibit C2, Respondent did not demonstrate that, “*obviously*” as required by Rule 41(5), Mr. Faisal Al-Otaibi’s ownership

²³⁰ Exhibit C2

²³¹ Exhibit C2.

²³² Observations, pages 16, 23 and 24.

²³³ Award, par. 57.

of the Land would be excluded. The Award not only breaches Rule 41(5): By ignoring a relevant piece of evidence relied upon by Claimant, the Award comes to a conclusion detrimental to Claimant, and thus fails to comply with due process requirements. The majority of the Tribunal failed to comply with the most basic and important duty of arbitral tribunals, *i.e.* to consider and discuss all the relevant exhibits validly adduced in evidence.

- d. As to the current owner of the Land, Claimant alleged that “*no other owner put his hand on it*”²³⁴. Even though Respondent²³⁵ considers itself as the owner of the Land, it actually failed to provide any property title. Since Respondent does not prove to be the legitimate owner of the Land, we cannot consider that, “*obviously*” as required by Rule 41(5), Claimant’s claims would have to be dismissed in a summary way.

106. With respect to the clauses of the JVA, Claimant alleges that:

- “*In this agreement, the Claimant (the second party) purchased 5% of the Kuwaiti land owned by the first party for an amount of \$20 million [...] to invest in this land to establish such constructions and touristic resorts and to obtain 10% of all profits gained from land and constructions (item 1,3 of the agreement c-5)*”²³⁶; and
- “*In this agreement, the first party [Mr. Al-Otaibi and his brother] committed to guarantee the transfer of the land and the share of the ownership of the land to the Claimant and to issue a deed from the State of Kuwait in the name of the Claimant [...] (item 5 of the agreement c-5)*”²³⁷.

107. In its money award claim, Claimant also refers to the following alleged rights: rights on 5% of the Land (and to the necessity to appoint an expert to assess the value of the Land)²³⁸, right to part of the profits of the joint venture. Further, Claimant refers to costs for feasibility studies, expert reports and administrative fees allegedly settled²³⁹.

²³⁴ Observations, page 22.

²³⁵ Hearing Transcript, page 84 (lines 8-11).

²³⁶ Observations, pages 4 and 23.

²³⁷ Observations, page 4.

²³⁸ Observations, page 24.

²³⁹ Observations, page 25.

108. With respect to the Land, the profits and the costs, Claimant described Respondent’s behaviour as follows: “*my ownership right was not recognized and I was prevented from exercising my investments, from carrying them out*”²⁴⁰. More specifically, as to the Land, Claimant summarized its position by qualifying Respondent’s behaviour of “*denial of facilitating to get our ownership deed*”²⁴¹.
109. As to the JVA, Respondent strangely focused exclusively on the issue of ownership of the Land, and not on the other rights alleged by Claimant. Indeed:
- During the December 14, 2018 hearing, as to the ownership of the land, counsels to Respondent relied once again on Respondent’s one and only legal argument: “*there cannot be any expropriation of Claimant’s property rights when not even Mr. Al-Otaibi, who allegedly sold part of the land to Claimant, has property rights over the land under Kuwaiti law*”²⁴².
 - However, at the end of the December 14, 2018 hearing only, which was the last opportunity for the parties to present their arguments as to the Application, after a member of the Tribunal asked a question as to the Kuwaiti Real Estate Registration Law²⁴³ while none of the Parties had previously mentioned this law, Respondent relied for the first time on a second argument which it had not raised before (to try to demonstrate that Claimant would not be the owner of the Land): under “*Article 7 of that law [Kuwaiti Real Estate Registration Law,] [...] ownership of real property is effective upon registration of that property*”²⁴⁴. Respondent however failed to provide to the Tribunal a copy of the considered Kuwaiti Real Estate Registration Law, along with a translation thereof into English. Respondent merely cites one of the decisions rendered by Kuwaiti Courts as to the Land²⁴⁵ which allegedly would provide an exact translation of an exact excerpt of the Real Estate Registration Law. The established rule is that Respondent’s demonstration must be “*obvious*” for the purpose of Rule 41(5): One can of course not dismiss Claimant’s case on the basis of one mere article of a Kuwaiti law allegedly reproduced with accuracy in a decision of the Courts of

²⁴⁰ Hearing Transcript, page 113 (lines 22-25), page 114 (line 1).

²⁴¹ Hearing Transcript, page 111 (lines 7-8).

²⁴² Hearing Transcript, page 124 (lines 1-4).

²⁴³ Hearing Transcript, page 84 (lines 13-25).

²⁴⁴ Hearing Transcript, page 96 (lines 17-19).

²⁴⁵ Exhibit C4, page 14.

Kuwait, all the more since this decision is contested by Claimant and currently subject to pending appeal proceedings before the Kuwaiti Court of Cassation. The Tribunal should have been able to verify the accuracy of the text of this Kuwaiti law by relying on the full text of this law which the Respondent did not adduce in evidence. Also, since Respondent failed to submit the full text of the law it relied on for the first time at the end of the December 14, 2018 hearing, which was the last opportunity for the Parties to express their views on the Rule 41(5) objection, Claimant was practically prevented from commenting on Respondent's argument as to the Real Estate Registration Law.

- Further, even if Respondent argues that ownership of 5% of the Land could not have been transferred to Claimant because Mr. Al-Otaibi and his brother would not own the Land (which Respondent fails to demonstrate as exposed *supra*, in particular because exhibit C2 seems *prima facie* to prove that Mr. Al-Otaibi and his brother have been the owner of the Land), and because ownership would not have been registered by Respondent's own real estate registry pursuant to the Real Estate Registration Law, Respondent did not deny that the JVA would be proper *per se* to grant to Claimant the right to claim the Land and to obtain the registration of the Land. Since Exhibit C2 states *prima facie* (and it is not denied by Respondent) that Mr. Al-Otaibi and his brother have owned the Land, the Tribunal cannot exclude (Respondent does not even allege such exclusion) that the JVA would be proper to provide to Claimant the rights it claims as to the land: the right to claim it and the right to obtain the registration of its alleged ownership.
- The Award holds that the JVA "*cannot be the basis of a property title*"²⁴⁶. There is no other arguments as to property rights. In particular, the Award does not state, in its expeditious reasoning, which private international law statute and which substantive law provisions would apply. Moreover, Respondent itself did not raise the argument that the JVA "*cannot be the basis of a property title*". This is a breach of Rule 41(5) since a Rule 41(5) objection must be dismissed if "*Respondent has not satisfied the applicable standard of proof in regard of its [...] objections under Rule 41(5)*"²⁴⁷: In other words, under Rule 41(5), an arbitral tribunal is barred from substituting the respondent's deficient Rule 41(5) objections with the tribunal's own views.

²⁴⁶ Award, par. 56.

²⁴⁷ *PNG v. Papua New Guinea*, para. 92.

The same reasoning applies to the issue of the Kuwaiti Real Estate Registration Law: It is a member of the Tribunal who told the Parties about the application of this law and not Respondent, and Respondent failed to provide a full copy of this law with a translation thereof. Consequently, “Respondent has not satisfied the applicable standard of proof in regard of its [...] objections under Rule 41(5)”²⁴⁸, and thus Respondent’s objection as to the ownership of the Land must be dismissed. Further, the Award fails to mention a part of the provision of the Real Estate Registration Law it refers to. Indeed, Art. 7 par. 3 of this law (as mentioned in the translation of the judgement contested before the Kuwaiti Court of Cassation) provides that “the unregistered act shall have on effects but the personal obligations among the concerned persons”²⁴⁹, which means, *prima facie* at least, that Claimant would still have all the rights arising under the JVA, including the right to obtain the recognition of its property rights, even though Kuwait would illegally, as argued by Claimant, refuse to register the ownership of the seller (*i.e.* of Mr. Faisal Al-Otaibi and his brother). Claimant is *prima facie* likely to have the right to the recognition of its ownership, and its case cannot be dismissed since the lack of property rights is not rendered “obvious” by Respondent, as required by Rule 41(5). We come incidentally to the conclusion that the Award mistakenly mixes up the right to obtain the recognition of property rights with the ownership itself, to deny any rights to property to Claimant.

- Regarding the additional rights claimed by Claimant: Respondent did not deny, in its Application or during the December 14, 2018 hearing, that the JVA would give Claimant the contractual rights it alleges, in particular with respect to the recognition of ownership of Land, to the share of the real estate project and to the profits (once again, Respondent’s objection as to the alleged expropriated rights focused exclusively on “property rights”²⁵⁰).
- Consequently, Respondent fails to demonstrate that, “obviously” as required by Rule 41(5), Claimant would not be the owner of the Land. In addition, Respondent fails to contend, and thus to demonstrate, that Claimant would not hold the other rights it

²⁴⁸ PNG v. Papua New Guinea, para. 92.

²⁴⁹ Exhibit C4, page 14.

²⁵⁰ Hearing Transcript, page 124 (lines 1-4).

alleges, such as the right to the registration of its alleged ownership, the right to a share of the real estate project and the right to the profits deriving from the JVA, since Respondent opted to remain silent as to these additional rights alleged by Claimant.

- Like Respondent, the Award ignores the allegations of Claimant as to its right to the registration of its alleged ownership, as to the right to a share of the real estate project and as to the right to the profits deriving from the JVA, even though they could *prima facie* be subject to expropriation under Art. 7 BIT. Ignoring these relevant arguments raised by Claimant is an additional breach of due process requirements.

110. Respondent alleged that Claimant would have acknowledged that Mr. Al-Otaibi would not be the owner of the Land: *“the fact remains, and is fully acknowledged by Claimant, that those [Kuwaiti] courts have ruled against Mr. Al-Otaibi and found that his claim of ownership is unfounded”*²⁵¹. Counsel to Respondent repeated, at the end of the December 14, 2018 hearing, that: *“there cannot be any expropriation of Claimant’s property rights when not even Mr. Al-Otaibi who allegedly sold part of the land to Claimant, has property rights over the land under Kuwaiti law, as acknowledged by Claimant in its written briefs and at this hearing”*²⁵².

111. Such *“acknowledgement”* by Claimant, as alleged by Respondent, is inconsistent with the majority of Claimant’s allegations as to this topic which is univocal, for example:

- In the Request for Arbitration: *“The Claimant - in accordance with this agreement [i.e. the JVA]- purchased and became the owner of 5% of the property of the whole land”*²⁵³.
- In Claimant’s Observations: *“Mr. Faisal Bandar Al-Otaibi and his brother are the heirs of the late Bandar Al-Otaibi (c-2), who had purchased this land from Mr. Abdullah bin Abdelhady Akshan (Saudi nationality) on 2/9/1971 by virtue of a legal deed issued by the judge of Qaisoumia court in the Kingdom of Saudi Arabia (c-1). [...] Mr. Abdullah bin Abdelhady Akshan (Saudi nationality) was the owner of the land under the title deed issued by King Saud in the year 1900 and the Royal Decree of 1965 in accordance with the content to the judgment of Qaisoumia Court (c-1).[...]”*

²⁵¹ Application, para. 9.

²⁵² Hearing Transcript, page 124 (lines 1-6).

²⁵³ Request for Arbitration, page e.

*And no one claims otherwise. Therefore, the sequence of ownership of this land until it reached the plaintiff is true and no doubt of that*²⁵⁴.

- During the December 14, 2018 hearing, Claimant alleged:
 - o *“The Kuwaiti Government does not want to recognise my ownership right and does not want to let me exercise my right to ownership”*²⁵⁵.
 - o *“So we have several aspects: it’s a denial of ownership and it’s a denial of my right to exercise this ownership”*²⁵⁶.
 - o *“the Respondent has the key in his hand whether to ratify this ownership or not. They refrain and preclude me from registering this established ownership”*²⁵⁷.

112. Thus, Claimant univocally alleges, with respect to the Land, *“my [its] ownership right”*²⁵⁸ and its right to *“registering this established ownership”*²⁵⁹. At the very least, Respondent fails to demonstrate that, *“obviously”* as required by Rule 41(5), Claimant would have admitted that itself and Mr. Al-Otaibi would not be and would not have been the owners of the Land.

113. Also, *“given the potentially decisive nature of an Article 41(5) objection [...], it is appropriate that claimant’s Request for Arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favor of the claimant”*²⁶⁰. Consequently, even if Claimant wrote in one instance that *“the Kuwaiti government prevented the Claimant from taking ownership of the land”*²⁶¹, and since the majority of Claimant’s allegations expressly mentions the ownership rights it would hold, one must exclude, for the purpose of the Rule 41(5) Application at least, that Claimant would have acknowledged not to have ownership rights.

²⁵⁴ Observations, pages 23 and 24.

²⁵⁵ Hearing Transcript, p. 112 (lines 8-10).

²⁵⁶ Hearing Transcript, p. 112 (lines 14-16).

²⁵⁷ Hearing Transcript, p. 115 (lines 3-4).

²⁵⁸ Hearing Transcript, p. 112 (lines 8-10).

²⁵⁹ Hearing Transcript, p. 115 (lines 3-4).

²⁶⁰ *RSM Production Corporation v. Grenada*, par 6.1.3.

²⁶¹ Observations, page 4.

114. Further, we could seriously wonder how one could reasonably argue that Claimant would have acknowledged a lack of ownership, when we consider the following additional elements:
- Claimant relied²⁶² on Exhibit C2, which is the 2009 document issued by Kuwait’s own administration stating, *prima facie* at least, that Mr. Faisal Al-Otaibi and his brother, as their father’s heirs, have inherited and have owned the Land;
 - The legal proceedings initiated before Kuwaiti courts are currently pending before the Kuwaiti Cassation Court, as admitted expressly by Respondent (and Claimant). Consequently it is simply false to contend, as Respondent alleged it, that it is a “*fact [...] that those [Kuwaiti] courts have ruled against Mr. Al-Otaibi and found that his claim of ownership is unfounded*”²⁶³.
115. Finally, for the first time at the end of the December 14, 2018 hearing²⁶⁴ only, Respondent argued that no acts performed by Kuwait would amount to expropriation.
116. Claimant answered that Respondent’s intent to expropriate its Land would have been expressed in Exhibit C12²⁶⁵, which is a 1983 letter from the Kuwaiti Council of Ministers to the Kuwaiti Minister of Public Works reading notably as follows: “*These [executive and engineering] measures will eventually results the expropriation of all residential and non-residential areas in the old villages of Al-Wafra and Al-Zour [...]*”²⁶⁶.
117. With respect to the act of expropriation, Claimant stated in its briefs and during the December 14, 2018 hearing, in particular:
- “*The Claimant and its partner was shocked when the government of the state of Kuwait inform them that it will neither register the land with their name nor compensate them [...] by this act the investment of the claimant in the state of Kuwait was totally destroyed*”²⁶⁷.
 - “*Illegal refusal to register our land in the State of Kuwait, based on our deed of ownership dated 2/9/1971 and our joint venture agreement dated 15/5/2009 (c-1, c-2 & c-5) [...]*”²⁶⁸.

²⁶² Observations, pages 16, 23 and 24.

²⁶³ Application, para. 9.

²⁶⁴ Hearing Transcript, page 98 (lines 5-10).

²⁶⁵ Hearing Transcript, page 110 (lines 6-16).

²⁶⁶ Exhibit C12.

²⁶⁷ Request for Arbitration, page f.

²⁶⁸ Observations, page 16.

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- “The exact act is their [Kuwait’s] denial of facilitating us to get our ownership deed, which goes under the word, or the statement in Article 7, or any other procedure has similar effect for precluding the investor to proceed with his investment in Kuwaiti territory”²⁶⁹.
- “My ownership right was not recognized and I was prevented from exercising my investments, from carrying them out”²⁷⁰.

118. Thus, Claimant contends that its alleged ownership of 5% of the Land is not “*recognized*” by the Kuwaiti authorities, and that the act of expropriation would be Kuwaiti’s “*denial*” to issue an ownership deed.

119. Article 7 BIT, as exposed by Claimant²⁷¹, is rather broad: it provides for indemnification in case of direct expropriation and in case of acts with similar effects as direct expropriation. Also, Respondent itself admitted that any right (and not only real estate ownership) can be subject to expropriation²⁷².

120. Respondent does not demonstrate, “*obviously*” as required by Rule 41(5), that expropriation shall be excluded when considering Kuwaiti administration’s refusal to recognize the alleged ownership of the Land. In particular, Respondent did not submit any case law which would exclude that a State’s refusal to recognize ownership of the claimant (directly, or indirectly by refusing to recognize the ownership of the person from which it purchased the real estate property) can never be considered as expropriation under Article 7 BIT. Consequently, it must be considered a novel issue of law, which cannot be dealt with at this stage of the proceedings: “*it would in principle be inappropriate to consider and resolve novel issues of law in a summary fashion, which would inevitably limit the Parties’ opportunity to be heard and the Tribunal’s opportunity to reflect*”²⁷³.

121. With respect to the other rights and expenses (“*50% of this joint venture*”²⁷⁴, “*10% of all profits*”²⁷⁵, “*the visibility study fees, expert inspection reports and marketing expenses*”²⁷⁶)

²⁶⁹ Hearing Transcript, page 111 (lines 7-12).

²⁷⁰ Hearing Transcript, page 113 (lines 24-25), page 114 (line 1).

²⁷¹ Observations, page 13.

²⁷² Application, para. 50.

²⁷³ *PNG v. Papua New Guinea*, para. 94.

²⁷⁴ Request for Arbitration, page e.

²⁷⁵ Observations, pages 4 and 23.

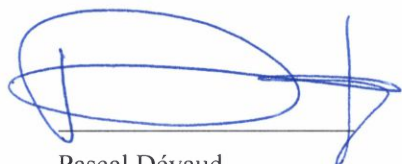
²⁷⁶ Request for Arbitration, page e.

alleged by Claimant, which considers to have been “*prevented from exercising my investments, from carrying them out*”²⁷⁷, Respondent does not demonstrate that, “*obviously*” as required by Rule 41(5), these alleged rights cannot have been expropriated. In fact, Respondent did not address these alleged rights at all. Considering that item 3 of the JVA seems *prima facie* to give the rights to a share of the joint venture and of the profits to Claimant, and mentions various costs and expenses incurred, one cannot hold that, “*obviously*” as required by Rule 41(5), Claimant’s claims as to the alleged expropriation of these rights would have to be dismissed in a summary fashion.

122. As such, the Respondent’s objection is unsuited for a Rule 41(5) Application. It does not involve application of undisputed or indisputable legal rules, but rather involves novel issues of interpretation and analysis. Also, material facts, evidence, legal provisions and case law are missing to consider Claimant’s objection as “*obviously*” (as required by Rule 41(5)) founded.

123. Essentially, all of the arguments raised by the Respondent’s objections involve disputed, and often complex, legal and factual issues which cannot properly be resolved within the expedited Rule 41(5) procedure. Since “*Respondent has not satisfied the applicable standard of proof in regard of its [...] objections under Rule 41(5)*”²⁷⁸, its Application must be dismissed.

124. Consequently, I dissent from the result reached by the majority of the Tribunal.



Pascal Dévaud

Arbitrator

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²⁷⁷ Hearing Transcript, page 113 (lines 24-25), page 114 (line 1).

²⁷⁸ *PNG v. Papua New Guinea*, para. 92.