INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

MAKAE EUROPE SARL

v.

KINGDOM OF SAUDI ARABIA

(ICSID CASE NO. ARB/17/42)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated August 30, 2021.

Meg Kinnear
Secretary-General

Washington, D.C., August 30, 2021

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MAKAE EUROPE SARL

Claimant

and

KINGDOM OF SAUDI ARABIA

Respondent

ICSID Case No. ARB/17/42

AWARD

Members of the Tribunal
Prof. John R. Crook, President of the Tribunal
Dr. Karim Hafez, Arbitrator
Ms. Vera van Houtte, Arbitrator

Secretary of the Tribunal
Ms. Jara Mínguez Almeida

Date of dispatch to the Parties: August 30, 2021

REPRESENTATION OF THE PARTIES

Representing MAKAE Europe SARL:

Ms. Catherine Amirfar
Ms. Natalie L. Reid
Ms. Ina C. Popova
Ms. Julianne J. Marley
Ms. Aasiya F. M. Glover
Ms. Sol Czerwonko
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
United States of America

and

Ms. Fanny Gauthier
Debevoise & Plimpton LLP
4 place de l'Opéra
75002 Paris
France

Representing the Kingdom of Saudi Arabia:

Ms. Ank Santens
Mr. Jonathan Abi Rached
Ms. Hala Redwan
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020-1095
United States of America

and

Ms. Abby Cohen Smutny
Mr. Chad Farrell
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005
United States of America

and

Mr. Samy Markbaoui
Ms. Anaïs Harlé
White & Case LLP
19, Place Vendôme
75001 Paris
France

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Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	Agreement between the Government of the Kingdom of Saudi Arabia and the Government of the French Republic Concerning the Encouragement and Reciprocal Protection of Investments which entered into force on March 18, 2004
CL-[#]	Claimant's Legal Authority
C-[#]	Claimant's Exhibit
Cl. Mem.	Claimant's Memorial on the Merits dated December 19, 2018
Cl. PHS	Claimant's Post Hearing Submission dated April 28, 2021
Cl. C-Mem.	Claimant's Counter Memorial on Jurisdiction dated January 10, 2020
Cl. Rej.	Claimant's Rejoinder on Jurisdiction dated September 9, 2020
Cl. Costs Sub.	Claimant's Submission on Costs dated May 12, 2021
Hearing	Hearing on Jurisdiction held from February 22 to 26, 2021

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent's Exhibit
Resp. Mem.	Respondent's Memorial on Jurisdiction dated September 6, 2019
Resp. PHS	Respondent's Post Hearing Submission dated April 28, 2021
Resp. Reply	Respondent's Reply on Jurisdiction dated May 22, 2020
Resp. Costs Sub.	Respondent's Submission on Costs dated May 12, 2021
RL-[#]	Respondent's Legal Authority
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on May 4, 2018

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between the Government of the Kingdom of Saudi Arabia and the Government of the French Republic Concerning the Encouragement and Reciprocal Protection of Investments which entered into force on March 18, 2004 (the "BIT" or the "Treaty") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "ICSID Convention").

2. The claimant is MAKAE Europe SARL ("MAKAE Europe" or the "Claimant"), a French limited liability company (*société à responsabilité limitée*) established on January 10, 2000 and registered with the Commercial and Companies Register of the Commercial Court in Créteil, France on April 7, 2000 under registration number 429 176 431 R.C.S. CRETEIL[1] as a company incorporated under the laws of France. Mr. Muhammad Ayed Khamis Alenezi is the founder, general manager (*gérant*), and Authorized Representative of MAKAE Europe.[2]

3. The respondent is the Kingdom of Saudi Arabia ("Kingdom" or the "Respondent").

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

5. This dispute relates to the Claimant's allegations that, beginning in 2001 and continuing thereafter, the Respondent took a variety of measures that injured the Claimant's investment in various retail and restaurant businesses in the Kingdom of Saudi Arabia in breach of multiple obligations under the Treaty. *Inter alia*, the Claimant alleges that these measures culminated in the effective destruction and indirect expropriation of its investment in breach of the Treaty.

[1] Cl. Mem. para. 14.

[2] Cl. Mem. para. 14.

II. PROCEDURAL HISTORY

6. On October 17, 2017, ICSID received a request for arbitration dated October 17, 2017 from MAKAE Europe against the Kingdom (the "Request").

7. On November 8, 2017, the Secretary-General of ICSID registered the Request, as supplemented by the Claimant on November 3, 2017, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.

9. The Tribunal is composed of Professor John Crook, a national of the United States of America, President, appointed by agreement of the Parties; Ms. Vera van Houtte, a national of Belgium, appointed by the Claimant; and Dr. Karim Hafez, a national of Egypt, appointed by the Respondent.

10. On May 4, 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Jara Mínguez Almeida, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on June 25, 2018 by teleconference.

12. Following the first session, on July 3, 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable

Arbitration Rules would be those in effect from April 10, 2006 and that the procedural language would be English. Procedural Order No. 1 also sets out the agreed schedule for the proceedings, including alternative schedules should bifurcation be asked and the proceedings be bifurcated (or not).

13. On September 6, 2018, the Claimant filed a Request for Provisional Measures, together with Exhibits C-023A and C-023B (resubmitted) and Exhibits C-034 through C-051; Legal Authorities CL-005 through CL-032; and the Expert Report of Mr. Ian Edge dated September 6, 2018.

14. Following exchanges between the Parties, on September 25, 2018, the Tribunal set forth the procedural timetable concerning the Request for Provisional Measures; by agreement of the Parties, the procedural timetable was modified on October 8, 2018. In accordance with this timetable, the Parties made the following submissions:

    a) On September 28, 2018, the Respondent filed a Response to the Claimant's Request for Provisional Measures, together with Exhibits R-003 (resubmitted) and R-009 through R-038; and Legal Authorities RL-001 through RL-011.

    b) On October 18, 2018, the Claimant filed a Reply on Provisional Measures together with Exhibits C-052 through C-058; Legal Authorities CL-033 through CL-041; and the Second Expert Report of Mr. Ian Edge dated October 18, 2018.

    c) On November 7, 2018, the Respondent filed a Rejoinder on Provisional Measures, together with Exhibits R-003 (resubmitted), R-017 (resubmitted) and R-039 through R-056; and Legal Authorities RL-012 through RL-014.

15. On November 1, 2018, the Tribunal adopted the Parties' agreed adjusted procedural calendar modifying the deadlines set out in Annex A of Procedural Order No. 1 and confirmed its availability for the new dates for the hearing on the merits in the alternative agendas.

16. Between November 5, 2018 and December 11, 2018, the Parties sent several updates to the Tribunal concerning developments in the proceedings being held in the Kingdom that gave

rise to the Request for Provisional Measures. By letter dated December 14, 2018, the Claimant confirmed having received a decision in these proceedings which changed the circumstances that gave rise to its Request for Provisional Measures. In its letter, the Claimant stated that "[o]n this basis, [the Claimant] does not ask the Tribunal to take any action on its Request […]. If that situation changes, [the Claimant] will apprise the Tribunal immediately."

17. Pursuant to the procedural calendar established in Procedural Order No. 1, on December 19, 2018, the Claimant filed a Memorial on the Merits ("Memorial on the Merits"), together with Exhibits C-062 through C-363; Legal Authorities CL-042 through CL-119; the Witness Statement of Mr. Muhammad Ayed Khamis Alenezi dated December 19, 2018; and the Expert Report of Mr. Robert Sherwin dated December 19, 2018.

18. On February 15, 2019, the Respondent filed a Statement of Jurisdictional Objections and Request for Bifurcation, together with Exhibits R-013 (resubmitted) and R-063 through R-088; and Legal Authorities RL-015 through RL-066.

19. On March 29, 2019, the Claimant filed an Opposition to the Respondent's Request for Bifurcation, together with Legal Authorities CL-120 through CL-129.

20. On April 19, 2019, the Respondent filed a Reply on Request for Bifurcation together with Legal Authorities RL-038 (resubmitted) and RL-067 through RL-75.

21. The Claimant filed a Rejoinder on Request for Bifurcation together with Legal Authorities CL-130 through CL-135 on May 10, 2019.

22. On June 5, 2019, the Tribunal issued a decision partially granting the Respondent's request to address the objections to jurisdiction as a preliminary question (the "Decision on Bifurcation").[3] The Tribunal decided to address the Respondent's objections concerning jurisdiction *ratione personae* and jurisdiction *ratione materiae* as preliminary questions. It joined the Respondent's objection to jurisdiction *ratione temporis* and several other

[3] Decision on Bifurcation dated June 5, 2019 (Annex A).

objections which the Respondent did not ask to have determined as preliminary questions to the merits.

23. In accordance with the applicable schedule, on September 7, 2019, the Respondent filed a Memorial on Jurisdiction (the "Memorial"), together with Exhibits R-089 through R-150; Exhibits R-063, R-065, R-068, R-071, R-081, R-087 and R-088 (resubmitted); Legal Authorities RL-076 through RL-113; the Legal Opinion of Professor François-Xavier Lucas dated September 5, 2019; and the Legal Opinion of Mr. Fahad Al Arfaj dated September 6, 2019.

24. On January 10, 2020, the Claimant filed a Counter-Memorial on Jurisdiction (the "Counter-Memorial), together with Exhibits C-364 to C-444 and Exhibits C-001, C-022, C-026, C-080 and C-100 (resubmitted); Legal Authorities CL-136 to CL-275; Second Witness Statement of Mr. Muhammad Ayed Khamis Alenezi dated January 10, 2020; the Legal Opinion of Professor Bruno Dondero dated January 10, 2020; and the Expert Report of Dr. Ali Almihdar dated January 10, 2020.

25. On March 3, 2020, the Respondent filed a request to amend the agreed procedural schedule to add a document production process addressing seventeen categories of requested documents. After reviewing the Parties' positions - the Claimant's opposition of March 16, 2020, and the Respondent's e-mail of March 17, 2020 –, the Tribunal denied the request on March 30, 2020.

26. On May 22, 2020, the Respondent filed a Reply on Preliminary Objections (the "Reply") and a separate Application for Security for Costs ("the Application"). The Application requested the Tribunal to order the Respondent to post security in the amount of USD 8.5 million, plus the Respondent's share of the estimated costs of arbitration, to secure "any award of costs that the Tribunal may make in favor of Respondent in its award […] on Respondent's bifurcated preliminary objections" and to do so within 15 days, under pain of discontinuance of the claim in case of non-compliance.[4] The Reply and Application were accompanied by Exhibits R-156 to R-212; Exhibits R-66, R-67, R-87, R-88, R-115, R-151,

[4] Decision on Security for Costs dated November 19, 2020 (Annex B).

and R-152 (resubmitted); Legal Authorities RL-115 to RL-190; Legal Authorities RL-38, RL-71, and RL-95 (resubmitted); the Second Legal Opinion of Mr. Fahad N. Al Arfaj dated May 22, 2020; and the Second Legal Opinion of Professor François-Xavier Lucas dated May 22, 2020.

27. On May 29, 2020, after all supporting documents to the Application were uploaded to Box and made available to the Claimant and the Tribunal, the Tribunal invited the Claimant's comments on the procedure and schedule to address the Application.

28. On June 4, 2020, in accordance with the Tribunal's directions, the Claimant informed the Tribunal that the Parties had agreed a briefing schedule to address the Application. The Respondent confirmed the Parties' agreement on June 5, 2020. By email dated June 8, 2020, the Tribunal informed the Parties that it approved the Parties' agreed briefing schedule for the Application.

29. On July 2, 2020, the Claimant filed its Opposition to the Application together with Exhibits C-445 and C-446 and Legal Authorities CL-276 to CL-299.

30. On July 17, 2020, the Respondent filed its Reply on Security for Costs together with Exhibits R-213 to R-215, Legal Authorities RL-191 to RL-210 and Legal Authorities RL-38, RL-175, and RL-184 (resubmitted).

31. On July 31, 2020, the Claimant filed its Rejoinder on Security for Costs together with Legal Authorities CL-300 to CL-309.

32. On September 9, 2020, the Claimant filed a Rejoinder on Preliminary Objections to Jurisdiction together with Exhibits C-447 to C-500; Legal Authorities CL-310 to CL-338; Legal Authority CL-218 (resubmitted); the Expert Rebuttal Report of Mr. Robert Sherwin, dated September 9, 2020; the Second Expert Report by Dr. Ali Almihdar, dated September 9, 2020; and the Second Expert Report of Professor Bruno Dondero dated September 8, 2020.

33. On November 19, 2020, the Tribunal issued a decision on Security for Costs denying the Application.

34. On December 17, 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference. After the meeting, by letter dated December 21, 2020, the Tribunal provided the Parties with directions concerning the organization of the hearing on Jurisdiction and invited them to further confer on certain matters.

35. On February 17, 2021 the Tribunal issued Procedural Order No. 2 concerning the organization of the Hearing.

36. A Hearing on Jurisdiction was held from February 22, 2021 to February 26, 2021 by video conference ("Hearing on Jurisdiction"). In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following individuals were present at the Hearing on Jurisdiction:

For the Claimant:

Ms. Catherine Amirfar	Debevoise & Plimpton LLP
Ms. Ina C. Popova	Debevoise & Plimpton LLP
Ms. Julianne J. Marley	Debevoise & Plimpton LLP
Ms. Aasiya F. M. Glover	Debevoise & Plimpton LLP
Ms. Fanny Gauthier	Debevoise & Plimpton LLP
Ms. Sol Czerwonko	Debevoise & Plimpton LLP
Mr. Robert U. Hess	Debevoise & Plimpton LLP
Ms. Céline Lefebvre	Debevoise & Plimpton LLP
Mr. Muhammad Ayed Khamis Alenezi	MAKAE Europe SARL

For the Respondent:

Ms. Abby Cohen Smutny	White & Case
Ms. Ank Santens	White & Case
Mr. Michael Garcia	White & Case
Mr. Samy Markbaoui	White & Case
Mr. Chad Farrell	White & Case
Ms. Anais Harle	White & Case
Mr. Jonathan Abi Rached	White & Case
Ms. Hala Redwan	White & Case
Mr. Abdulaziz Al-Duhaim	Ministry of Commerce
Mr. Bader Abdulmohsen Al-Haddab	Ministry of Commerce
Mr. Ibrahim Alnahd	Ministry of Commerce
Mr. Ahmed Al-Mansour	Ministry of Commerce
Mr. Ahmed Abdelhamid	Ministry of Commerce
Mr. Ahmed Almoqhem	Ministry of Commerce

Court Reporters:

Mr. David Kasdan	B&B Reporters
Ms. Dawn Larson	B&B Reporters

Interpreters:

Mr. Samy Bouayad
Mr. Adnane Ettayebi
Ms. Sarah Rossi
Ms. Gabrielle Baudry-Delanghe
Mr. Manuel Malherbe

37. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Mr. Muhammad Ayed Khamis Alenezi	Witness
Prof. Bruno Dondero	Expert
Dr. Ali Almihdar	Expert
Mr. Robert Sherwin	Expert

On behalf of the Respondent:

Mr. Fahad Alarfaj	Expert
Prof. François-Xavier Lucas	Expert

38. On March 1, 2021, the Tribunal issued Procedural Order No. 3 concerning the post-hearing deadlines that had been decided at the end of the Hearing on Jurisdiction after consultation with the Parties.

39. The Parties filed simultaneous post-hearing submissions on April 28, 2021.

40. The Parties filed their submissions on costs on May 12, 2021

41. The proceeding was closed on August 30, 2021.

III. FACTUAL BACKGROUND

42. The Claimant is a French limited liability company (*société à responsabilité limitée*) established in January 2000[5] that avers that it controlled an extensive retail and restaurant business in the Kingdom of Saudi Arabia that brought "popular international brands to consumers in the Kingdom."[6] The investment in the Kingdom was part of a network of similar retail and restaurant establishments in several Gulf States developed by Mr. Muhammad Ayed Khamis Alenezi, a national of Kuwait and the Claimant's founder, general manager (*gérant*), and Authorized Representative.[7] Mr. Alenezi owns 49% of the Claimant; his two sons Youssof and Ayed own respectively 26% and 25%.[8] Both were minor children in 2000 when the Claimant was created.

43. The Claimant states that it was established in France by Mr. Alenezi "to spearhead the strategic expansion and coordinated operation of a retail and restaurant business bringing popular international brands to consumers in the Kingdom of Saudi Arabia […] and throughout the Gulf."[9]

44. The retail and restaurant business in the Kingdom was carried on by MAKAE Trading Establishment, a corporation incorporated in the Kingdom. Mr. Alenezi owned 100% of the shares in MAKAE Trading Establishment.[10]

45. According to the Clamant, by mid-2000, the business of MAKAE Trading Establishment in the Kingdom was going well and was poised for great success:

> *Through its local Saudi affiliate, MAKAE secured the necessary approvals to operate its outlets in cities across the Kingdom, signed leases with malls eager to fill their floors with the brand-focused stores that would attract and retain customers, hired scores of employees, and opened dozens of stores. By mid-2001, MAKAE had entered into agreements with a significant number of international*

[5] Cl. Mem. para. 14.
[6] Cl. Mem. para. 2.
[7] Cl. Mem. para. 14.
[8] Cl. Mem. para. 14.
[9] Cl. Mem. para. 2.
[10] Alenezi 1st WS para. 8.

> *brands to secure exclusive licensing rights for MAKAE, including at least 60 that specifically included rights in the Saudi market* […][11]

46. However, beginning in August 2001, in a series of events that are at issue in the merits of the claim, MAKAE Trading Establishment's business in Saudi Arabia took a serious turn for the worse. On August 16, 2001, representatives of the Respondent's Ministry of Commerce and Industry acted to close its stores and restaurants in the Kingdom. Thereafter, the Claimant alleges, the Ministry of Commerce and Industry:

> *on its own authority and through directing or enlisting other Saudi organs—systematically dismantled MAKAE's operations in the Kingdom: twice closing its stores, denying licenses and registrations, blocking imports, seizing and selling inventory, detaining and threatening employees, subjecting the local MAKAE entity and its senior personnel to trumped-up allegations pursued through inquiries and sham proceedings conducted by Ministry officials, severing its business and banking relationships, and deliberately destroying the goodwill the business had developed.*[12]

47. Mr. Alenezi unsuccessfully sought relief, *inter alia* through Saudi Arabia's Board of Grievances. The Claimant states that the Board, "confirmed that there was no valid justification for the Ministry's actions, ordered the stores re-opened, and overturned the denials of licenses and registrations."[13] However, the Board's orders were not honored, and MAKAE Trading Establishment was unable to resume operations. The Claimant states that "[b]y the end of 2005, with MAKAE unable to monetize the valuable licensing, franchise, and distribution rights in its brands portfolio, its investment was rendered essentially worthless."[14]

48. The Claimant contends that, in addition to the measures directed against MAKAE Trading Establishment, Mr. Alenezi personally was made the subject of "a campaign of persecution." *Inter alia*, the Claimant alleges that Mr. Alenezi has been:

[11] Cl. Mem. para. 3.

[12] Cl. Mem. para. 5.

[13] Cl. Mem. para. 5.

[14] Cl. Mem. para. 5.

> *[s]tranded in Saudi Arabia for the last 12 years separated from his family, his reputation and his finances have been destroyed, as the Ministry pursued untrue and inflammatory accusations against him, imposed a fine and a prison sentence in farcical proceedings of which he had no notice, publicly shamed him, detained him at the border, and then imprisoned him without notice or an opportunity to challenge the basis for his detention.*[15]

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

49. The Claimant maintains that the course of events briefly described above resulted in multiple violations of the BIT by the Respondent. In particular, the Respondent is alleged to have:

-- violated the obligation to accord fair and equitable treatment under Article 2(1) of the Treaty;[16]

-- breached the non-impairment obligation under Article 2(2);[17]

-- expropriated the investment through "a complete destruction of value for which it has never compensated MAKAE" contrary to its obligation under Article 4(2);[18]

-- failed to provide full and complete protection and security contrary to Article 4(1);[19] and

-- breached the national treatment and most-favored-nation treatment requirements of Article 3(1) and 3(2) of the Treaty.[20]

50. The Claimant accordingly seeks compensation for its losses attributed to the Respondent's conduct plus pre-award interest, together calculated as of the date of its Memorial to have totaled USD 570.6 million.[21]

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[15] Cl. Mem. para. 6.
[16] Cl. Mem. para. 8.
[17] Cl. Mem. para. 9.
[18] Cl. Mem. para. 10.
[19] Cl. Mem. para. 11.
[20] Cl. Mem. para. 12.
[21] Cl. Mem. para. 278.

51. The Respondent denies that it has violated the Treaty or that any compensation is due.

V. JURISDICTION

52. As noted, the Respondent lodged preliminary objections to jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis;* it also identified several other objections that it did not regard as appropriate for preliminary determination. In its June 2019 Decision on Bifurcation, the Tribunal decided to address the Respondent's objections concerning jurisdiction *ratione personae* and *ratione materiae* as preliminary questions. The Respondent's objection to jurisdiction *ratione temporis* and the other objections it identified were joined to the merits.[22]

A. THE PARTIES' POSITIONS

The relevant treaty provisions

53. The Parties dispute whether the Claimant satisfies the Treaty's definition of "investor." As relevant here, Article 1(2) of the Treaty defines "investor" as:

> *toute personne morale constituée sur le territoire de l'une des Parties contractantes, conformément à la législation de celle-ci, y possédant son siège social* […].[23]

(1) The Respondent's Position

a. First Jurisdictional Objection: absence of jurisdiction *ratione personae*

54. The Respondent maintains that the Claimant does not qualify as an investor for purposes of the Treaty and advances two lines of argument. It first contends that the Claimant is not constituted in conformity with French law and is in fact a "fictitious" company as that concept is known in French law. Second, the Respondent maintains that the Claimant does not have its *siège social* in France.

[22] *Supra*, para. 22.

[23] In the Claimant's translation: "any legal entity constituted on the territory of one Contracting Party in accordance with its laws, and having its head office on the territory of that Party […]." Cl. Mem. para. 104.

(i) Constitution in accordance with French Law

55. Citing the opinion of Professor François-Xavier Lucas, its expert on French law, the Respondent contends that the Claimant does not satisfy the requirements of Article 1832 of the French Civil Code and was not constituted in accordance with French law. The Respondent and Professor Lucas emphasize three factors in this regard: the absence of *affectio societatis*, that is, the legally required intention of the Claimant's incorporators (Mr. Alenezi and his two minor sons) to "become partners and behave as such;"[24] the "absence of any corporate life"[25] evidenced by failure to convene shareholders' meetings and to prepare and file required annual accounts; and "the absence of a common enterprise,"[26] contending that the Claimant's evidence did not prove that it actually carried on real economic activity.[27]

56. The Respondent and its expert therefore conclude that a French judge confronted by the Claimant's circumstances "would infer from this that the Company is fictitious, and had been so from the moment of its constitution and, of course, even more so since 2002."[28] A company subject to being found fictitious for failure to comply with required elements of the French Civil Code would not, in the Respondent's submission, be constituted in accordance with French law.[29]

57. The Respondent dismisses as irrelevant the Claimant's contrary arguments that a fictitious SARL retains legal personality and can bring litigation in French courts, and that corporate registration is conclusive proof that a company was constituted in accordance with French law. As to the first argument, the fact that a fictitious company can bring litigation does not remedy the deficiencies that render it fictitious. As to the second, the Respondent urges that constitution and registration are legally distinct under French law. The fact of registration – which the Respondent characterizes as an essentially ministerial act – does

[24] Day 3 p. 580:6-7 (Prof. Lucas).
[25] Day 3 p. 581:17 (Prof. Lucas).
[26] Day 3 p. 582:7-10 (Prof. Lucas).
[27] Day 3 pp. 585:22-587:5 (Prof Lucas).
[28] Day 3 p. 587:9-12 (Prof. Lucas).
[29] Resp. PHS paras. 13-14.

not satisfy the Treaty's requirement that an entity be constituted in accordance with French law. [30]

(ii) Claimant had no Siège Social in France

58. In its second line of argument, the Respondent maintains that the Claimant did not show that its *siège social* was in France as Article 1(2) of the Treaty requires. For the Respondent, the term *siège social* and the corresponding term in the equally authentic Arabic text of the Treaty (*maqar ra'issi*) must be interpreted in accordance with the interpretive principles of Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).[31] The relevant principles include (a) that terms must be understood to have the same meaning in both of a treaty's authentic languages, and (b) *effet utile*.

59. As to (a), the Respondent understands *siège social* to have one or another of two generally accepted meanings: either to mean "registered office" or to mean "the place of management of the company, the company's head office." However, the Respondent understands the term used in the equally authentic Arabic language version of the Treaty (*maqar ra'issi*) to convey only a single meaning, the idea of "head office." As Article 33(3) of the VCLT requires that both of the equally authentic texts of a treaty have the same meaning, the only common meaning in the French and Arabic texts is "place of management" or "head office."[32]

60. The Respondent contends that the Parties' treaty practice confirms its understanding, citing the terminology used in the Kingdom's other treaties concluded in English and Arabic, where *maqar ra'issi* is translated as "head office", as well as France's English language translation of its model bilateral investment treaty, which also translates *siège social* as "head office."[33]

61. The Respondent next draws upon the interpretive principle of *effet utile,* highlighting the Treaty's separate requirements that a claimant both be constituted in accordance with

[30] Resp. PHS paras. 15-18.

[31] RL-16, *Vienna Convention on the Law of Treaties,* 1155 U.N.T.S. 331, May 23, 1963 ("VCLT").

[32] Resp. Mem., paras. 43-45.

[33] Resp. PHS paras. 25-27.

French law *and* have its *siège social* in France. The Respondent views these as distinct requirements that must be interpreted so as to give meaning to both. It contends in this regard that being constituted in accordance with French law entails compliance with specified legal formalities, including establishing a registered office. However, if, as the Claimant contends, *siège social* means only having a registered office in France, the Treaty's separate requirement of constitution in accordance with French law has no significance, contrary to the principle that each of a treaty's terms must be understood to have meaning.[34]

62. Hence, the requirement that the Claimant have its *siège social* in France necessarily involves more than merely having a registered office. That something more, in the Respondent's view, is that the Claimant must show that it had its place of effective management in France.[35] The Respondent dismisses the Claimant's argument that other investment tribunals have interpreted *siège social* to mean registered office, contending that the cited decisions follow from specific factors not presented here.[36] The Respondent also finds support for its position in Article 9 of the ILC's Draft Articles on Diplomatic Protection, which provides that where a company controlled by foreign nationals does not have substantial business in the State of incorporation, its nationality is that of the State where the seat of effective management is located.[37]

63. The Respondent maintains that MAKAE Europe never had a place of effective management in France, arguing that the evidence shows that legally-required elements of corporate governance, such as the convening of shareholders' assemblies, were not observed. In the Respondent's view, the evidence is not sufficient to prove that MAKAE Europe "ever had an office in France from which the company could be managed."[38]

[34] Resp. PHS para. 27.
[35] Resp. PHS paras. 28-29.
[36] Resp. PHS paras. 30-31.
[37] Resp. PHS para. 33.
[38] Resp. PHS paras. 35-36.

Instead, if MAKAE Europe had a place of effective management, it was in Kuwait, not France.[39]

64. Third, the Respondent contends that the Claimant is not a covered investor because, even if a registered office satisfies the Treaty's *siège social* requirement, a claimant must nevertheless maintain attributes of nationality and connection with its home State. The Respondent insists that the Claimant failed to do so, and in particular had no office or other connection with France when the arbitration was commenced.[40]

b. Second Jurisdictional Objection: absence of jurisdiction *ratione materiae*

(i) There was no covered investment

65. In addition to denying that the Claimant is a qualifying investor under the Treaty, the Respondent maintains that there was no covered investment. It first contends in this regard that the Claimant did not own or control an investment in the Kingdom, and second, that if it did, its control would have been in violation of Saudi Law.

66. During the proceedings, the Claimant made clear that it did not assert any ownership interest in the investment and predicated its case on its control. Accordingly, the Parties' arguments on the Respondent's first objection focused on the Claimant's contention that it controlled the investment.

67. For the Respondent, the ordinary meaning of control conveys notions such as power, mastery or domination of the investment, all necessarily extending to issues such as a business's financing and operation. Further, control cannot be proved by testimonial evidence alone, but must also be confirmed by contemporaneous documentary evidence. [41]

68. In addition, for the Respondent, the concept of control "presupposes the claimant's expectation of an economic return from the investment."[42] The Respondent observes in this regard that "control usually lies with the owner," and that in prior cases finding control

[39] Resp. PHS para. 37.
[40] Resp. PHS para. 41.
[41] Resp. PHS para. 43 and fn 96.
[42] Resp. PHS para. 44.

absent ownership, other factors such as voting or contractual rights provided alternative mechanisms of contro1.[43] The Respondent disputes the Claimant's reliance on the NAFTA case of *S.D. Myers v Canada*, contending, *inter alia*, that the evidence in that case showed the pervasive exercise of control by the claimant in a situation where the claimant and the investment shared common ownership. [44]

69. The Respondent rejects the arguments of the Claimant and its expert Mr. Sherwin that in the restaurant and retail businesses, control over brand and product acquisition confers control over an investment. Citing a celebrated restaurant as a hypothetical illustration, the Respondent observes that, while a chef's cuisine may be key to the restaurant's value, the owner nevertheless controls it through exercise of ultimate decision-making power over matters such as financing and the commitment of resources.[45]

70. The Respondent insists that the Claimant here did not exercise control over the investment. Instead, "Mr. Alenezi and his Gulf entities (MAKAE International, Top Ten, and MAKAE Trading Establishment), who together owned the Saudi business, controlled its day-to-day operation and made all the key decisions concerning the business […]."[46] The Respondent points out that the Claimant had no involvement in either the funding or daily operations of the investment; the Respondent also disputes Mr. Alenezi's testimony that the Claimant expected at some future time to receive a percentage of the profits of other MAKAE companies.[47]

71. Accepting for purposes of argument the Claimant's contention that determining strategy might amount to control, the Respondent concludes that the evidence did not show that MAKAE Europe had anything more than a business facilitation role and did not determine strategy for the MAKAE Group or the investment. The Respondent emphasizes in this regard the absence of documentary evidence showing that the Claimant directed strategy,

[43] Resp. PHS para. 45.
[44] Resp. PHS paras. 46-47.
[45] Resp. PHS para. 48.
[46] Resp. PHS para. 50.
[47] Resp. PHS para. 51.

as well as evidence showing that the duties of the Claimant's two employees in France involved placing orders and other limited administrative tasks, not strategy.[48]

72. Pointing out that the Claimant was inactive by the end of 2002, the Respondent rejects the Claimant's reliance on brand agreements concluded in 2005 and 2006 as evidence that the Claimant was "the hub" of the MAKAE companies' retail business. For the Respondent the reality is that the investment was controlled by Mr. Alenezi and his company in Kuwait, MAKAE International, not by the Claimant.[49]

(ii) The Claimant's control of the investment would violate Saudi law

73. In the Respondent's view, the Claimant's claimed control of the investment in Saudi Arabia would violate the host country's legislation, in particular the Foreign Capital Investment Law of 1979 and its similar successor, the Foreign Investment Law of 2000. The Respondent emphasizes that the Claimant, a French company, is owned by three Kuwaiti nationals, which in the Respondent's view make it a foreign investor contrary to the applicable Saudi legislation.[50]

74. The Respondent first disputes the Claimant's contention that the investment was authorized because its owners (Mr. Alenezi and his sons) are Kuwaitis entitled to the same treatment as Saudi nationals under the Gulf Cooperation Council (GCC) legal regime. It contends that the Claimant's argument distorts the relevant provision of the GCC Unified Economic Agreement (1981). The Respondent understands the 1981 Agreement to be "an agreement to agree" in the future on implementing principles to be applied in specified areas. It is not an immediately applicable guarantee of equal treatment of all GCC nationals in all respects.[51]

75. The Respondent rejects in this regard the Claimant's contention that a 2003 ruling in Mr. Alenezi's favor by the Saudi Arabia's Board of Grievances shows that the Kingdom's judges directly applied the 1981 GCC Agreement and did so "on the basis of guidance from

[48] Resp. PHS para. 52.
[49] Resp. PHS paras. 53-55.
[50] Resp. PHS paras. 56-57.
[51] Resp. PHS para. 60.

the GCC Secretary-General." In the Respondent's understanding, the 2003 ruling involved application of the then-existing GCC Retail Trade Rules to Mr. Alenezi individually as a GCC national. It was not a finding that the Agreement operated directly to allow GCC nationals to invest in retail trade in Saudi Arabia.[52] The Respondent adds that the Board of Grievances was not aware of any investment by the Claimant in Mr. Alenezi's business in the Kingdom, urging that the Board's decision is irrelevant on that ground as well.[53]

76. Second, the Respondent maintains that the Claimant (as opposed to Mr. Alenezi) does not qualify for exemption under the implementing rules in the retail sector, the GCC Retail Trade Rules. These apply only where natural persons who are GCC citizens control a retail business in the Kingdom, while the Claimant is registered in France and is not a GCC citizen.[54] The principle of equal treatment reflected in the 1981 treaty as implemented in the Retail Trade Rules applies only to GCC natural persons and to legal persons fully owned by GCC citizens. In the Respondent's view, this "presuppose[s] that the legal person is a GCC-registered entity,"[55] but the Claimant is French.

77. The Respondent also refers to the Claimant's claim to have contributed to the investment the time, effort and expertise of Mr. Alenezi (acting as Claimant's *gérant*) and of the Claimant's two employees. In the Respondent's view, this constituted a contribution of foreign capital that is subject to the requirements of the 2000 Foreign Investment Law under the broad scope of the Law's broad definition. The Respondent argues in this regard that the prohibitions of the law are not limited to those who own assets in the Kingdom, but extends as well to those who control them.[56]

78. The Respondent adds that, because the Claimant did not comply with the Foreign Investment Law by controlling the investment without satisfying the applicable legal requirements, it also violated the Kingdom's anti-concealment legislation.[57]

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[52] *Idem.*

[53] Resp. PHS para. 65.

[54] 2nd Alarfaj Legal Opinion, paras. 58-59.

[55] Resp. PHS para. 61.

[56] Resp. PHS paras. 62-63.

[57] Resp. PHS para. 64.

(iii) The Claimant never invested in the Kingdom

79. Finally, the Respondent maintains that the Claimant did not itself "make" the investment, which it understands to be a requirement under the Treaty, pointing to the Treaty's language referring to "investments made."

80. In the Respondent's understanding, the Treaty requires some form of active relationship between an investor and the investment that involves the commitment of resources in anticipation of an economic return. There is no such relationship here, as the evidence does not show that the Claimant contributed resources or expected any financial return.[58] The Respondent disputes the Claimant's arguments that the activities of its two French employees contributed to the investment, or that Mr. Alenezi made the required contribution acting in his role as the Claimant's *gérant*. It also contends that there is no evidence, aside from Mr. Alenezi's testimony at the hearing, which it disputes, that the Claimant had any expectation of economic return from the investment.[59]

81. The Respondent rejects the Claimant's argument that this objection was waived because it was not raised at an earlier stage of the proceedings, arguing that an ICSID Tribunal is bound to ascertain its jurisdiction at any stage, so long as a party arguing in favor of jurisdiction has full opportunity to respond if an objection is raised.[60]

(2) The Claimant's Position

82. The Claimant maintains that it is a protected investor with a protected investment, and that the Tribunal has jurisdiction.

a. First Jurisdictional Objection: absence of jurisdiction *ratione personae*

(i) The Claimant is a protected investor

83. The Claimant urges that it is a legal entity constituted as a limited liability company (SARL) in France in accordance with French law, and so is "*constituée sur le territoire de l'une des Parties*" as the Treaty requires. For the Claimant, the meaning of this requirement

[58] Resp. PHS paras. 68-70.
[59] Resp. PHS paras. 70-73.
[60] Resp. PHS para. 67.

is a question of treaty interpretation. Under the normal canons of interpretation, the ordinary meaning of the Treaty's requirement is simply that the Claimant is a legal person constituted in the territory of France.[61] It points to the evidence of both Parties' French law experts to the effect that the Claimant was and remains a French SARL that was legally constituted as a matter of French law when its articles of association were signed. The Claimant was subsequently registered on the French Companies Register, thereby acquiring enduring legal personality and demonstrating that the competent French authorities found that it met the relevant legal requirements. [62]

84. The Claimant dismisses the Respondent's contrary argument that a French court might find it to be "fictitious" because of factors such as a lack of corporate activity such as the convening of meetings of shareholders. It contends that fictitiousness under French law is irrelevant to whether a company was properly constituted and has continuing legal personality. Fictitiousness is instead a narrow feature of French insolvency law that does not affect an entity's existence or legal personality but can sometimes operate to pierce the corporate veil and expand creditors' rights. It has no bearing on whether the entity was constituted in France as the Treaty requires.[63]

85. Noting the very few identified cases in which French courts have considered and applied the doctrine of fictitiousness, the Claimant observes that, even if the doctrine is thought to be relevant, the Respondent has a heavy burden to show that the Claimant is fictitious.[64] It has not met this burden and cannot do so.

86. In the Claimant's view, a French judge would consider multiple factors in assessing a claim of fictitiousness. Hence, the Respondent's contention that a single factor, the supposed lack of common intent by Mr. Alenezi and his sons to run a company at all, does not show fictitiousness. In any case, Mr. Alenezi's testimony, and the physical reality of the Claimant – with written articles of association, premises, employees, suppliers, and several years of

[61] Cl. PHS para. 8.
[62] Cl. PHS paras. 4-6.
[63] Cl. PHS paras. 7, 9-11.
[64] Cl. PHS para. 13.

operation – disprove the claim that the Claimant had no existence.[65] In this regard, the Claimant urges that the Respondent's attacks on the sufficiency of the documentary evidence do not overcome the evidence that is in the record. This shows that the Claimant did in fact operate as intended and in a manner that the Claimant's expert, Mr. Sherwin found consistent with its expected role in the group of Mr. Alenezi's companies.[66]

87. The Claimant observes that the opinion of the Respondent's French law expert, Professor Lucas, regarding the Claimant's supposed lack of corporate activity was based on facts he was instructed to assume and on his assumption that French rules of civil procedure dictated that he should ignore Mr. Alenezi's testimony. When asked for his opinion regarding the facts as the Claimant understood them, he testified that the requirements for fictitiousness would not be met and that the Tribunal could find that Article 1(2) of the Treaty was satisfied.[67] Professor Lucas also observed that a company in the Claimant's position retained the capacity to seek damages, even if it was otherwise not able to conduct business.[68]

88. Accordingly, the Claimant concludes that it meets the Treaty's requirement that a claimant be a French entity constituted in conformity with French law.

(ii) The Claimant's siège social is in France

89. As to the Treaty's requirement that a claimant's *siège social* be located in the territory of a Party, the Claimant argues that *siège social* is an international law concept the application of which is informed by relevant national law. Here, both Parties' French law experts agreed that under French law, the *siège social* of an SARL is presumed to be that indicated in its articles of association. Accordingly, the Claimant's *siège social* is as indicated in its articles of association and registered by the French authorities at an address in Saint-Maur-des-Fossés in the Paris suburbs. The Claimant views this as dispositive, urging that under

[65] Cl. PHS paras. 14-15.
[66] Cl. PHS para. 16.
[67] Cl. PHS paras. 17-18.
[68] Cl. PHS para. 19.

French law, no particular level of business activity is required and that a French company retains its *siège social* until it is dissolved.[69]

90. For the Claimant, its activities in France proved the correctness of the French law presumption that its *siège social* is at its registered seat. Citing Mr. Alenezi's testimony, the Claimant urges that it conducted substantial business from its French office.[70]

91. The Claimant dismisses the Respondent's argument that the interpretive principle of *effet utile* requires that the Treaty be interpreted to impose an additional requirement in determining *siège social,* such that the seat must also be the place of an enterprise's effective management. It views this argument as logically flawed, urging that the Treaty imposes separate and distinct requirements under international law (having the *siège social* in the territory of a Party) and under domestic law (being constituted under the law of that Party). The Respondent's argument wrongly conflates these distinct requirements.[71] In any case, the Claimant would meet an "effective management" test, which investment tribunals have found to be easily met even in situations involving little economic activity. Here, the evidence shows that the Claimant carried on substantial activities in France and was managed in France.[72]

92. The Claimant rejects as "misguided" the Respondent's contention that its *siège social* was in Kuwait or Saudi Arabia, urging that the physical location of an entity's manager or *gérant* is irrelevant. Moreover, in this case, Mr. Alenezi remains in Saudi Arabia due to the Respondent's unlawful actions against the Claimant.[73] The Claimant also finds contradictory the Respondent's argument that it was a "sham" and "fictitious," as under French law, a company must have a *siège social* in order to be declared fictitious.[74]

93. Finally, the Claimant disputes the Respondent's contention that it lost its status as a French company – and its legal capacity to initiate this arbitration – after it ceased operations and

[69] Cl. PHS paras. 20-21.
[70] Cl. PHS para. 22.
[71] Cl. PHS para. 24.
[72] Cl. PHS para. 25.
[73] Cl. PHS para. 26.
[74] Cl. PHS para. 27.

closed its office in France. The Claimant points out that it continues to exist as a French SARL and that its *siège social* accordingly remains in France. The Claimant distinguishes the majority opinion in *CEAC v. Montenegro* cited by the Respondent as factually unrelated to this case, recalling that it retains a registered office and that it conducted substantial business in France before the office was forced to close. [75]

94. The Claimant rejects as "nonsensical, even perverse" the Respondent's argument that it lacks capacity to bring its claim because it did not continuously engage in business activity prior to doing so. It urges that its operations in France were brought to a halt by the Respondent's misconduct; the Respondent should not benefit from a "heads I win, tails you lose" argument allowing it to invoke the consequences of its own misconduct as a bar to jurisdiction. The Treaty does not require continuous business activity to establish jurisdiction, and the pernicious effect of the Respondent's argument shows why one cannot read in this extratextual requirement. Citing *Barcelona Traction* and the views of both Parties' French law experts, the Claimant insists that it retains full capacity to assert its legal claims. [76]

b. Second Jurisdictional Objection: absence of jurisdiction *ratione materiae*

(i) The Claimant controlled the investment

95. In the Claimant's understanding, the Parties agree "that (*i*) *de facto* control satisfies Article 1(1); (*ii*) the 'Treaty does not define' or limit control; (*iii*) international law also does not define control; and (*iv*) consistent with the VCLT, the 'ordinary meaning' of 'control' is functional: to influence, have power over, direct, supervise, command, master, dominate, or watch over, another."[77]

96. The Claimant rejects the Respondent's contention that *de facto* control requires proof that a claimant has some legal interest in the investment and an expectation of revenues or some other financial benefit. It believes that an economic benefit requirement would be met in this situation in any case, citing Mr. Alenezi's testimony that the Claimant eventually

[75] Cl. PHS para. 28.
[76] Cl. PHS paras. 29-30.
[77] Cl. PHS para. 31.

expected to receive royalties from other MAKAE companies as a percentage of the services and the brands used in their operations. However, the Claimant denies that it is necessary to show a legal or financial interest to establish *de facto* control, arguing that the Respondent's position incorrectly conflates *de facto* and *de jure* control.[78]

97. The Respondent's argument is said to disregard the Treaty's explicit distinction between ownership and control as alternative bases for jurisdiction. For the Claimant, the ordinary meaning of control does not entail any requirement of a legal interest or expectation of profit or contribution of capital, and such an additional requirement cannot be read into the Treaty. The claim that *de facto* control requires some legal interest also conflicts with multiple tribunals' conclusions that "control" is a broad and flexible concept and that control in fact is sufficient.[79] Citing the evidence of its expert witness Mr. Sherwin, the Claimant adds that the Respondent's position is inconsistent with industry practice, observing that in some groups of companies, a small entity that does not own other companies in the group may nevertheless exercise control by providing the group's strategic direction.[80]

98. The Claimant disputes the relevance of the cases cited by the Respondent in support of its arguments, noting that in *Thunderbird v. Mexico* and *Vacuum Salt v. Ghana*, the entities alleging control both had ownership interests in the entity involved. Hence, the issue of control without ownership did not arise. In *S.D. Myers v. Canada*, the same family owned all of the relevant entities, a situation similar to that presented here. Moreover, the *Myers* tribunal found *de facto* control based on the testimony of the claimant's executive.[81]

99. Citing the evidence of Mr. Alenezi and Mr. Sherwin, the Claimant urges that in the restaurant and retail businesses, brand and product acquisition strategies play a crucial role and are the central drivers of a business's activities and value. Control over these matters therefore entails control of the business, although such control may be indirect and perhaps not exclusive. The fact that other entities in a corporate family may carry out operational

[78] Cl. PHS para. 32.
[79] Cl. PHS para. 33.
[80] Cl. PHS para. 34.
[81] Cl. PHS para. 35.

functions does not alter the central importance of brand and product selection in controlling the corporate family's fortunes. Operational functions such as funding, marketing, daily management, human resources and the like exist to carry out decisions made elsewhere, and do not show control. The Claimant points to the analysis in *Vacuum Salt*, where the tribunal considered whether an individual with important operational functions who was alleged to exercise control actually was able to steer and affect the fortunes of the enterprise, finding that he could not. The Claimant submits that here it could do so because of its central role in selecting and acquiring products and brands.[82]

100. The Claimant emphasizes the distinction between a company's strategy and the various operations involved in carrying out that strategy, a distinction said to refute the Respondent's arguments comparing the relative size and operational capacity of the Claimant with other larger MAKAE companies. The Claimant recalls in this regard Mr. Alenezi's testimony that other MAKAE companies' operational activities were determined by the Claimant's strategic activities "which it directed from the day it was constituted."[83]

101. The Claimant denies that proof of *de facto* control involves some different or heightened standard of proof, urging that the documentary and testimonial evidence in the record demonstrates its control of the investment. It cites evidence regarding the activities of its *gérant*, Mr. Alenezi and of its two employees said to show the Claimant's physical existence and operations in France and to disprove the Respondent's denials.[84] The Claimant refers to Mr. Alenezi's testimony that he assigned responsibility for managing all of MAKAE's authorized brands to the Claimant's two employees; that Ms. Lemercier handled brand relationships and joined him in brand negotiations; and that Mr. Tibari "directed brand relationships and strategy." The Claimant also rejects the Respondent's contention that the two employees' work experience and initial titles were inconsistent with their claimed management roles. [85]

[82] Cl. PHS paras. 37-39.
[83] Cl. PHS para. 40.
[84] Cl. PHS paras. 41-43.
[85] Cl. PHS para. 44.

102. The Claimant insists that it was the only entity with a strategic role in the MAKAE group of companies, and that it performed this role from the day it was constituted until it was destroyed. In this regard, the Claimant urges that the fact that it was in a "ramp up" phase did not mean that it did not control the investment. The Claimant views as irrelevant the facts that Mr. Alenezi paid its expenses or that it did not have a written strategic plan, citing the testimony of Mr. Sherwin and Mr. Alenezi that private retail businesses frequently do not create such documents.[86]

103. The Claimant denies that MAKAE International, Mr. Alenezi's much larger operating company in Kuwait, controlled brand and product selection. It disputes the significance of evidence cited by the Respondent, such as documents signed by Mr. Alenezi as "Chairman & Managing Director" (the title he used as head of the MAKAE Group) and not as the Claimant's *gérant*, and documents originating from MAKAE International directing action by the Claimant's employees. The Claimant also recalls Mr. Alenezi's explanation that brand agreements were signed by MAKAE International and Top Ten (both Kuwaiti entities), and not by MAKAE Europe, in order to acquire rights in GCC countries.[87]

104. The Claimant also denies that Mr. Alenezi personally, and not the Claimant, controlled the investment. It refers to Mr. Alenezi's testimony to the effect that in making brand and product selection decisions, he acted as MAKAE Europe's *gérant*, as one of several hats he concurrently wore as the owner and manager of every entity in the MAKAE group of companies. In this regard, "his brand and product acquisition strategies cannot be separated from the entity he used to direct that strategy."[88] Further, after the Claimant ceased operations in France in 2002, "Mr. Alenezi continued to act on MAKAE Europe's behalf, as he had always done, to pursue the company's strategic function, negotiating new opportunities with investors in Saudi Arabia […]."[89]

[86] Cl. PHS para. 48.
[87] Cl. PHS para. 46.
[88] Cl. PHS para. 47.
[89] Cl. PHS para. 49.

(ii) The Claimant's control was in accordance with Saudi law

105. The Claimant maintains that it controlled the investment in Saudi Arabia and claims no ownership. In this regard, it understands both Parties' experts on Saudi law to agree that the Foreign Investment Law does not govern control, a term that does not appear in the Law or its implementing regulations. Further, as the Anti-Concealment Law applies to conduct violating the Foreign Investment Law, it is not relevant where there is no violation of the Foreign Investment Law.[90]

106. The Claimant rejects the Respondent's Saudi law expert's conclusion that it is subject to the Foreign Investment Law, noting that the expert cited no authority for his opinion. Further, he based his analysis and conclusion on an inaccurate text of the law obtained from an unknown source that omitted key words, rather than using an accurate text readily available from an official government source. And, he cited no authority for his contention that transfers of intangible skills and knowledge are a form of investment covered by the law.[91]

107. In the Claimant's view, even if it owned the investment, its actions did not violate Saudi Arabia's legislation. It points to the Investment Law's definition of "Foreign Investors," which are defined as entities "whose partners are not all Saudi" and urges that both Parties' experts agree that GCC citizens are treated as Saudi citizens for this purpose. As it is undisputed that Mr. Alenezi and his sons are GCC nationals, the Investment Law does not apply to the Claimant's investment. The Claimant disputes the Respondent's contrary argument that it is a French national for purposes of the Investment Law, arguing that the Respondent's expert relied upon an inaccurate text of the law in formulating this argument, and that the expert acknowledged at the hearing that ownership, not place of incorporation, is controlling.[92]

108. Finally, the Claimant rejects the Respondent's argument that the GCC framework of national treatment for GCC nationals had to be implemented through regulations,

[90] Cl. PHS para. 50.

[91] Cl. PHS paras. 51-53.

[92] Cl. PHS paras. 54-56.

maintaining that the 1981 GCC agreement had direct application. In any event, by 2000, the principle of equal treatment of GCC citizens was secured inside the Kingdom by a 1996 Council of Ministers Resolution adopting the GCC's Retail Rules, which confirmed national treatment of GCC nationals in the retail sector. The Claimant emphasizes in this regard the 2003 decision by the Kingdom's Board of Grievances in an appeal by Mr. Alenezi, in which it decided, concerning the investment at issue in this case, that Mr. Alenezi was entitled to treatment in the retail sector as a Saudi national.[93]

B. THE TRIBUNAL'S ANALYSIS

109. At this stage, the Tribunal must decide whether it has jurisdiction under the Treaty to proceed to the merits of the Claimant's claims. There can only be jurisdiction if the claims fall within the limits of the Respondent's consent to jurisdiction reflected in Article 1 of the Treaty. *Inter alia*, there must be a qualifying investor. There must be a covered investment. The investment must be owned or controlled by the investor. Such ownership or control must be in conformity with the Respondent's legislation. If any of these requirements is not met, the claim is not within the scope of the Respondent's consent to jurisdiction, and the Tribunal cannot proceed.

110. The Respondent raises multiple objections to jurisdiction. It contends that the Claimant is not a qualifying investor, that it does not control the investment, that its claimed control was not in conformity with the Respondent's legislation, and that, indeed, the Claimant did not make an investment within the meaning of the Treaty. In their written pleadings and at the Hearing, the Parties have devoted vigorous advocacy to each of the Respondent's objections. Should the Respondent prevail on any one of them, the Tribunal can go no further and the case must be dismissed for lack of jurisdiction.

111. A decision by the Tribunal accepting any one of the Respondent's several objections to jurisdiction means that the case cannot go forward. Such a decision also makes it unnecessary for the Tribunal to decide other disputed jurisdictional issues. In the interests

[93] Cl. PHS paras. 57-58.

of judicial economy, the Tribunal has chosen to address first the Respondent's objection that the Claimant did not control the investment.

112. Article 1(1) of the Treaty states: "*Le terme 'investissement' désigne tous les avoirs de toute nature, tels que les biens, droits et revenus, détenus ou contrôlés par un investisseur de l'une des Parties contractantes sur le territoire de l'autre Partie contractante* […]"[94] (emphasis added).

113. The Claimant contends that it satisfies Article 1(1) because at relevant times, it controlled an investment in the Kingdom of Saudi Arabia. It confirms in this regard that it does not have any ownership interest in the investment, and instead predicates its claim to jurisdiction solely on its *de facto* control: "[f]or the record, it has never been disputed that MAKAE has no ownership interest in any of MAKAE Trading Establishment, MAKAE International, or Top Ten. That fact has no effect on the jurisdiction of this Tribunal; this Treaty does not require ownership."[95]

114. The Respondent denies that Article 1(1) is satisfied, disputing the Claimant's contention that it controlled an investment in the Kingdom.

115. As the *Perenco* tribunal observed, there is an "absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise."[96] The Parties agree that international law does not define "control," and that the meaning of the Treaty requirement must be determined in accordance with the customary international law rules of treaty interpretation. They also agree that these are reflected in Article 31 of the VCLT, which emphasizes the ordinary meaning of a treaty's terms in their context.[97]

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[94] C-017 ("The term 'investment' shall refer to all assets of any nature, such as property, rights and returns, owned or controlled by an investor of one of the Contracting Parties in the territory of the other Contracting Party […].")

[95] Cl. C-Mem. para. 88.

[96] CL-246, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability of September 12, 2014 ("***Perenco***"), para. 522.

[97] Under VCLT Article. 31(1), "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Under Article 31(2), "The context for the purpose of the interpretation of a treaty shall comprise […] the text, including its preamble and annexes […]."

116. Citing standard dictionary definitions, both Parties offered similar conceptions of the ordinary meaning of the term "control." In the Claimant's view, "consistent with the VCLT, the 'ordinary meaning' of 'control' is functional: to influence, have power over, direct, supervise, command, master, dominate, or watch over, another."[98] For the Respondent, "[t]he Parties agree that the ordinary meaning of the term control is as is found in the dictionary definition, and that the definition of control of a business is to exercise 'restraining or directing influence over' that business or to have 'power,' 'mastery,' 'direction,' or 'domination' over it."[99]

117. Referring to several of the same prior awards,[100] the Parties agree that the Treaty's control requirement can be satisfied by proof of *de facto* control. In the Claimant's understanding, "[t]he Parties agree that (i) *de facto* control satisfies Article 1(1)."[101] The Respondent agrees, observing that "[s]ome tribunals have observed that whether an investor controls an investment may be assessed as a matter of fact."[102]

a. Establishing *de facto* control

118. The Tribunal agrees that for purposes of the Treaty, control can be *de facto*. Further, given the nature of *de facto* control, a tribunal must assess claims of such control on the basis of the facts and evidence involved in the particular situation. However, while the Parties agree that control can be *de facto* and that determining *de facto* control is fact-based, they disagree regarding two issues: (a) the character or weight of the evidence required to prove *de facto* control, and (b) whether a claimant must demonstrate that it has decision-making

[98] Cl. PHS para. 31.

[99] Resp. PHS para. 43.

[100] RL-85, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award of January 26, 2006 ("***Thunderbird***"), para. 106 ("[i]nterpreted in accordance with its ordinary meaning, control can be exercised in various manners […] a showing of effective or "*de facto*" control is, in the Tribunal's view, sufficient"); CL-104, *Bernard Friedrich Arnd Rüdiger von Pezold et. al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award of July 28, 2015 ("***von Pezold***"), para. 324 ("Control of a company may be factual or effective ("*de facto*") as well as legal[.]"); RL-75, *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Award of March 22, 2019 ("***Italba***"), para. 254 ("determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis").

[101] Cl. PHS para. 31.

[102] Resp. Mem. para. 89.

authority over the allegedly controlled investment, combined with some form of ownership or other economic interest involving an expectation of financial return.

119. *The nature of the evidence: the Respondent's position.* As to the first issue, the Respondent maintains that proof of *de facto* control "cannot be established without reliable evidence […] testimony alone is not sufficient, but some contemporaneous document evidencing control is needed."[103] The Respondent cites several tribunal awards said to show the rigorous character of the evidence needed to prove *de facto* control, and in particular, that "absent legal control deriving from ownership rights or other legal means, control over an asset can be established only through tangible evidence of such factual control."[104]

- The Respondent points out that the *B-Mex v. Mexico* tribunal's finding of control was based on the "converging testimony by multiple witnesses," reinforced by contemporaneous documents, including notarized minutes of shareholder meetings and several agreements.[105]

- It recalls that in *Italba v. Uruguay*, "the claimant failed to establish that it controlled the investment as the evidence presented made no actual references to the claimant."[106] It notes the *Italba* tribunal's detailed assessment of the evidence in the case, including its conclusion that "for certain allegations there was no evidence in the record," while on other issues the only evidence was the statements of two individuals that the tribunal found insufficient to prove control.[107]

- The Respondent cites the tribunal's assessment in *Thunderbird v. Mexico* that proof of *de facto* control "must be established beyond any reasonable doubt,"[108] a standard that

[103] Resp. PHS para. 43 fn 96.
[104] Resp. Reply. para. 183.
[105] Resp. Reply para. 187.
[106] Resp. Mem. para. 94.
[107] Resp. Reply para. 186.
[108] Resp. Mem. para. 92, quoting *Thunderbird*, (RL-85), para. 107

unusually could be met in that case where the record included both witness testimony and extensive documentary evidence.[109]

- In support of its view that proof of *de facto* control must be "exacting", the Respondent recalls *Vacuum Salt v. Ghana's*[110] observation that "a total absence of [ownership interest] virtually preclude[s] the existence of […] control."[111]

120. *The Claimant's position.* The Claimant denies that proof of *de facto* control requires any different standard or heightened weight of evidence, emphasizing the absence of support for the Respondent's contention in the plain meaning of the Treaty's text.

121. In the Claimant's view, the more exacting standards of proof that the Respondent finds in the *Vacuum Salt* and *Thunderbird* awards – that a showing of *de facto* control "should be exacting," or even "established beyond a reasonable doubt"— involve "a standard of proof rarely, if ever, used outside the criminal context in certain domestic legal systems, and far more demanding that the preponderance-of-the-evidence or balance-of-probabilities standard generally applied in international arbitration."[112] The Claimant denies the relevance of the *Vacuum Salt* Award, urging that the issue there was whether there was "foreign control" for purposes of Article 25 of the ICSID Convention, not the existence of *de facto* control for purposes of jurisdiction under an investment treaty.[113]

b. Required evidence: Tribunal's analysis and decision

122. The Tribunal sees no basis in the Treaty's language or any other relevant factors that would justify deviating from the normal principles dealing with proof of disputed facts in international investment arbitration. As the *von Pezold* tribunal observed, "[i]n general, the standard of proof applied in international arbitration is that a claim must be proven on the 'balance of probabilities' […] [t]he Tribunal does not consider there is any reason to depart

[109] Resp. Reply para. 187.

[110] RL-17, *Vacuum Salt Products Ltd v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award of February 16, 1994, ("***Vacuum Salt***") para. 53.

[111] Resp. Mem. para. 89, quoting *Vacuum Salt*, (RL-17), para. 44.

[112] Cl. C-Mem. para. 97 (footnotes omitted).

[113] Cl. C-Mem. para. 100.

from standard practice and both Parties must prove their claims on the balance of probabilities."[114]

123. However, the Tribunal also recalls that under Rule 34 of the ICSID Arbitration Rules applicable in this case, it is the judge of the probative value of any evidence adduced. Given the fact-intensive nature of determining *de facto* control, as the *B-Mex* tribunal observed, such determinations "will typically, and logically, present a greater evidentiary challenge."[115] As will be considered *infra*, the evidence in this case presents particular challenges of assessment.

c. Elements of *de facto* control

124. The second disputed issue bearing upon proof of *de facto* control is *whether* a claimant must show that it has decision-making authority combined with some form of economic interest.

125. *The Respondent's Position.* The Respondent maintains that *de facto* control requires that a claimant exercise decision-making authority over key aspects of an investment and have some ownership, expectation of revenues, or comparable economic interest in the investment. For the Respondent, "a person lacking the power to determine the key decisions relating to a business cannot be said to control that business."[116] Further, "[t]he jurisprudence is clear that control also presupposes the claimant's expectation of an economic return from the investment."[117]

126. The Respondent refers to prior awards that in its view show that claimants must have both powers of direction and economic interests in an investment in order to prove control. It cites, *inter alia*:

- *Thunderbird v. Mexico*: The Respondent highlights that the claimant in *Thunderbird* owned approximately 40% of each of the three entities whose control was at issue,

[114] CL-104, *von Pezold Award*, paras. 177-178.

[115] CL-145, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated July 19, 2019 ("***B-Mex Partial Award***"), para. 220.

[116] Resp. PHS para. 43.

[117] Resp. PHS para. 44.

and "had the ability to exercise a significant influence" on the entities' decision-making and "was […] the consistent driving force behind" the endeavor in Mexico.[118] The evidence of control "included evidence establishing that Thunderbird held a minority share interest in that business, in addition to evidence showing that it also had entered into multiple agreements with the other stakeholders entitling it to control the operation of the business."[119]

- *Aguas del Tunari*: The Respondent points to the *Aguas del Tunari* tribunal's assessment that an entity "may be said to control another entity […] if that entity possesses the legal capacity to control the other entity."[120] Further, an entity's "legal capacity [to control another] is to be ascertained with reference to the percentage of shares held."[121]

- *von Pezold: v. Zimbabwe*: The Respondent notes that the tribunal's finding of control "was informed by" evidence showing that the claimants held a 50% shareholding interest in the business and had entered into a management agreement with the remaining shareholders.[122]

- *B-Mex v. Mexico*: The Respondent observes that the *B-Mex* tribunal found control of a business where the claimants held a significant minority shareholding interest that enabled them to veto any proposed shareholder resolutions, and had also entered into multiple agreements with the other stakeholders allowing them to recoup the business' monthly net profit.[123]

- In *Vacuum Salt*,[124] a case involving assessing "foreign control" under the ICSID Convention, the Respondent points to the tribunal's assessment that "the smaller the

[118] Resp. Reply para. 197, quoting *Thunderbird* para. 107.
[119] Resp. PHS para. 45.
[120] Resp. Mem. para. 86, fn 246.
[121] Resp. Mem. para. 86, fn 247.
[122] Resp. PHS para. 45.
[123] Resp. PHS para. 45.
[124] RL-17, *Vacuum Salt Award* para. 43.

percentage of voting shares held by the asserted source of […] control, the more one must look to other elements bearing on that issue."[125]

127. *The Claimant's position.* The Claimant denies that proof of indirect control requires some legal interest in the investment and an expectation of revenues or other similar economic interest. As to the second element – an expectation of economic return – the Claimant maintains that it expected eventually to receive royalties from other MAKAE companies for its services.[126] More fundamentally, however, the Claimant denies that proof of *de facto* control requires some legal interest in the investment. In the Claimant's view, this contention conflicts with the ordinary meaning of control, erases the Treaty's recognition of ownership or control of an investment as alternative bases of jurisdiction, and disregards "a long line of tribunal decisions" holding that control "can be exercised in different ways beyond a 'legal interest'."[127]

128. Citing the evidence of its expert Mr. Sherwin, the Claimant urges that in modern corporate practice, a group of companies may include an entity that does not have ownership interests in other companies in the group or formal powers of direction, but that nevertheless makes strategic decisions that steer the direction of, and indeed control, the group. The Claimant submits that it served this function in the MAKAE group of companies and, in particular, in respect of the investment in the Kingdom of Saudi Arabia.

129. The Claimant, citing the evidence of Mr. Alenezi and Mr. Sherwin, emphasizes what it sees as the critical role of brand acquisition and product selection in the investment's retail apparel and restaurant businesses in the Kingdom of Saudi Arabia. For the Claimant:

> *[I]n the fashion retail and restaurant industries,* de facto *control manifests in control over the brand and product acquisition strategies: 'the core set of strategies that drive the overall business.' As Mr. Sherwin and Mr. Alenezi both explained, the entity 'that puts together the product and brand-acquisition strategy in these industries would be the primary driver of value for the overall group' and 'determine[s] what other things will be done by the*

[125] Resp. Mem. para. 89, fn 255.

[126] Cl. PHS para. 32.

[127] Cl. PHS para. 33.

> *company, what they will do in terms of setting up the stores, how they will engage in selling and marketing.'*[128]

130. The Claimant acknowledges that other entities in the MAKAE Group actually carried out the group's retail and restaurant operations in the Kingdom of Saudi Arabia, but insists that "[f]inding that one entity directs the value of the business does not negate other entities' control over operational decisions […] If an entity 'drive[s] the overall strategy' and 'determine[s] what other things will be done by the company,' it controls the investment."[129] In this regard,

> *[I]n the retail sector, issues of funding, revenues, day-to-day management of retail stores, human resources, marketing, employees, and payments are* not *determinative of control. As Mr. Sherwin testified, these operational concerns are the results of choices about how to structure the operations of a group of retail companies; they are not evidence of strategic decision-making about business value.*[130]

131. The Claimant disputes the Respondent's reliance on the *Thunderbird* and *Vacuum Salt* awards, noting, *inter alia*, that in both, the claimant owned interests in the relevant entity, so the question of control without ownership was not presented.[131] The Claimant cites as the more correct approach to determining *de facto* control the award in *S.D. Myers v. Canada*,[132] where the tribunal found that the US claimant satisfied NAFTA's jurisdictional requirement of direct or indirect control of the Canadian company at issue on the basis of an executive's testimony. "Recognizing the fact-specific nature of the question, the tribunal did not ask for evidence of an expectation of revenues but credited the testimony of claimant's executive, who testified that 'he exercised control on behalf of the Claimant entity.'"[133]

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[128] Cl. PHS para. 37 (footnotes omitted).

[129] Cl. PHS para. 38.

[130] Cl. PHS para. 39 (footnotes omitted).

[131] Cl. PHS para. 35.

[132] RL-78, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award dated November 13, 2000 ("***Myers Award***"), paras. 228-232.

[133] Cl. PHS para. 35.

d. Proof of *de facto* control: the Tribunal's analysis and decision

132. The Tribunal does not accept the Respondent's contention that proof of *de facto* control requires a claimant to demonstrate some ownership or other form of economic interest in an investment. The Treaty clearly establishes ownership or control as alternative bases of jurisdiction. The contention that control requires ownership or other form of economic interest disregards this distinction, and conflicts with the ordinary meaning of the Treaty's words.

133. The Claimant's contention that there can be *de facto* control in circumstances where the allegedly controlling entity does not have clear powers of direction or supervision over another controlled entity poses more difficult issues.

134. The heart of the Claimant's case for *de facto* control is its contention that in situations such as the MAKAE retail and restaurant businesses in the Kingdom of Saudi Arabia, brand and product acquisition drive a retailer's overall strategy, making the Claimant's activities in France "critical to the success of the entire group, including the Saudi entity."[134] Hence, the Claimant contends, the role of MAKAE Europe SARL in identifying the brands and products to be offered to customers in Saudi Arabia gave it *de facto* control of the investment.

135. The Tribunal's task is to interpret the words of the Treaty: what does it mean for an investment to be "controlled"? The Tribunal accepts that the conception of control advanced by the Claimant, while unusual in the context of international investment law, does correspond to some of the ordinary dictionary meanings of "control" advanced by the Parties. There can be *de facto* control where the evidence establishes that a small and specialized component of a corporate family performs a role or roles that determine the overall character and direction of an enterprise.

136. In this regard, Mr. Sherwin pointed to several major international concerns in consumer, fashion and luxury goods businesses where a small entity within a much larger corporate family fundamentally shapes the definition, direction, and activities of the larger family.

[134] 2nd Sherwin Expert Report para. 9.

These small entities exercise significant direction over much larger corporate assemblages by identifying suppliers or goods, identifying rapidly evolving customer tastes, or by themselves designing products that lead or respond to developing tastes and trends. Mr. Sherwin identified as relevant examples, *inter alia*, the central roles of a 700-person design team in the 176,000 person Inditex fashion retail business and Chanel S.A.'s internal design capabilities and brand development in the overall success of Chanel's brand.[135]

137. The Tribunal accepts that, in appropriate circumstances, the Claimant's core proposition may hold true. The question is whether the evidence here establishes to the necessary degree that the Claimant played this role in relation to its claimed investment in the Kingdom of Saudi Arabia. This requires close analysis of the evidence regarding the Claimant's characteristics and activities.

138. *Assessing the evidence: Mr. Sherwin and Mr. Alenezi.* Mr. Sherwin makes clear that he has no personal knowledge of the Claimant or its activities and bases his testimony regarding the Claimant on documents and information he was provided by counsel. He adds that "where I have relied on certain facts from the record in the course of my analysis, I have been instructed by counsel to accept the facts presented by Claimant as true."[136] Accordingly, Mr. Sherwin's testimony does not assist the Tribunal insofar as it concerns the nature and extent of the Claimant's actual activities.

139. The most important evidence supporting the Claimant's argument for *de facto* control is thus the testimony of Mr. Alenezi in his two substantial witness statements and in several hours of cross-examination and Tribunal questions at the Hearing.

140. Mr. Alenezi stated in this regard that the Claimant "handled development and execution of the broader retail strategy, including by acquiring brands, managing brand and purchasing strategy, and ordering products for the various Gulf markets, including Saudi Arabia."[137] These activities, he indicated, were

[135] 2nd Sherwin WS paras.16-17.

[136] 2nd Sherwin WS para. 3.

[137] 2nd Alenezi WS para. 21.

> *critical to the decision-making around the Gulf operations generally, and the investment in Saudi Arabia specifically. Two major components of this were planning the overall brand strategy in order to manage MAKAE's expansion and growth in different Gulf markets, and planning the acquisition strategy to sustain that growth. These elements are the heart of creating a successful retail enterprise. You could have all the other elements in place, such as great locations and staff, but the key to a successful retail business in the Gulf, especially in Saudi Arabia, was to have the right fashion brands—and in Saudi Arabia, that meant French and other European or American fashion brands. MAKAE, as a French company located in France, was a critical part of that strategy, since it gave companies who owned these international brands a critical level of comfort to do business with MAKAE, and on that basis, MAKAE built up a substantial international brand portfolio well-tailored to the Saudi retail market.*[138]

141. At the Hearing, Mr. Alenezi stated that, from the time the Claimant was constituted (presumably on January 10, 2000, when its articles of association were established[139]), it "took control over the MAKAE Group's general brand strategy to drive our further expansion plans."[140] He added in this regard:

> *A. [T]he function of MAKAE Europe, as we said, is a strategic function. It will manage the Local Entities in its capacity as the strategic pushing the--implementing the brand strategies to the companies in the Gulf, in the GCC. That is its aim, and it started Day 1. Of course it started Day 1.*[141]

142. Without wishing to impugn Mr. Alenezi's recollection or understanding of events that occurred many years ago, it is the case that he and his sons are the sole owners of the Claimant. He has a potentially substantial personal interest in the outcome of this arbitration, in which the Claimant seeks in its Memorial a pre-interest award of USD 156.4

[138] 2nd Alenezi WS para. 9.

[139] C-081, Articles of Association.

[140] Day 2 pp. 449:21 – 450:1 (Mr. Alenezi).

[141] Day 2 p. 448:10-15 (Mr. Alenezi).

million, calculated as of the date of that Memorial.[142] He owns 49% of the Claimant's shares, and his sons Youssof and Ayed own the remainder, 26% and 25% respectively.[143]

143. Given this situation, and the need for each ICSID claimant to present sufficient evidence to prove matters essential to its claim, the Tribunal has carefully considered the evidence of record in addition to Mr. Alenezi's testimony.

144. The Claimant did not offer witnesses other than Mr. Alenezi with personal knowledge of the activities said to show *de facto* control of the investment. Proof of the Claimant's case faces other challenges. Important events bearing on the claim of *de facto* control took place two decades ago, and the Claimant reports that efforts to recover or reconstitute bank statements and other missing documentation have not been successful. In this regard, Mr. Alenezi states that he has:

> *not been able to retrieve most of MAKAE's company records. In July 2002, right after Sylvie had left MAKAE, at my request she provided a full set of MAKAE's original company records to Ralf Christensen, a business colleague who was planning a trip to the Gulf and had agreed to bring me these documents* […] *[T]hese included MAKAE's bank documents, as well as legal and tax documents, labor documents, invoices, records of expenses, FedEx receipts and documents related to the Société des Centres Commerciaux, a business partner. Unfortunately, he never conveyed all of the documents to me in 2002, a fact which I did not discover until years later when I actually looked through them.*[144]

145. *The Claimant's premises.* The available documents show that the Claimant's physical presence in France was modest. From January 2000 until about July 2002, it leased a small pre-furnished office of just 17 square meters located in a business center in St. Maur des Fosses, in the south-eastern suburbs of Paris.[145] Although the size of the premises is not in

[142] Cl. Mem. para. 275. The Claimant's May 2021 Submission on Costs later described its claimed costs of almost USD 9.85 million as "less than 2.4% of the damages sought." Cl. Costs Sub. para. 16. This suggests that as of May 2021, the Claimant assessed its total claim to be on the order of USD 410 million. In its May 2021 Submission on Costs, the Respondent refers to "a claim estimated to be in excess of USD 1.5 billion in compensation." Resp. Costs Sub. para. 11. The basis for the Respondent's estimate is not indicated.

[143] 1st Alenezi WS para. 7.

[144] 2nd Alenezi WS para. 17 (footnote omitted).

[145] Exhibit C-384 (Lease of Rue de Rocroy office).

itself indicative of the control exercised from there, the Tribunal finds the modest scale of these premises difficult to reconcile with the Claimant's contention that, throughout this period, it was the nerve center of the extensive network of MAKAE retail and restaurant businesses in Saudi Arabia and throughout the Gulf capable of giving the international European and US partners of the MAKAE Group the "critical level of comfort" necessary to do business with it. The size and character of the premises seem more indicative of a modest European outpost created to assist with billing and payment issues, visit schedules, ocean shipping arrangements, and the like for MAKAE International and other MAKAE companies with business in Europe.

146. *The Claimant's employees: Ms. Lemercier.* The Claimant had at most just two employees in France. For the first fifteen months of its activities, there was just one, Ms. Sylvie Lemercier, a certified accountant. Ms. Lemercier previously worked part-time handling accounting and administration for a small cosmetic business and was the only person considered for her position by Mr. Alenezi.[146]

147. Ms. Lemercier's January 10, 2000 employment contract provided for a modest salary and described her position as "administrative and accounting manager."[147] Despite the title on her contract, at the Hearing, Mr. Alenezi stated that from January 2000 until April 2001, Ms. Lemercier managed the brand and product acquisition strategy for the entire MAKAE Group, and that during this fifteen-month period, "Sylvie was responsible for everything, all the brands we handled […] she handled everything."[148] He later reaffirmed this contention:

> *Q. But it's your testimony that from January 2000 until April 2001, Ms. Lemercier, by herself, was able to manage the brand and acquisition--product acquisition strategy for the MAKAE Group; correct?*
>
> *A. Yes. Correct.*[149]

[146] Day 2 p. 325:2-4 (Mr. Alenezi); *id*. at pp. 322:20-323:9.

[147] Exhibit C-382, Ms. Lemercier contract.

[148] Day 2, p. 481:1-3 (Mr. Alenezi).

[149] Day 2, p. 471:20-22; p. 472:1-3 (Mr. Alenezi).

148. However, the Tribunal was not directed to evidence in the record showing that Ms. Lemercier identified or initiated contacts with suppliers, identified products, or made decisions regarding product selection or ordering. Instead, the available evidence indicates that she managed the Claimant's small office, handled routine issues involving shipments and payments to vendors for the several MAKAE businesses in the Gulf, and answered routine questions from persons in MAKAE International and other MAKAE companies.[150] Only a portion of her activity concerned the businesses in the Kingdom of Saudi Arabia.[151] She also made hotel arrangements for Mr. Alenezi and accompanied him on visits to suppliers in order to provide French interpretation.

149. For some period in the latter months of 2001, Ms. Lemercier was absent from the office on maternity leave.[152] However, when asked about the absence of a key employee during this period, Mr. Alenezi did not recall her absence.[153]

150. *Mr. Tibari.* Ms. Lemercier was the Claimant's only employee in France for the first half of its roughly 30 months of operation. The second person, Mr. Youness Tibari, concluded a contract on March 31, 2001 for a position as "manager Europe Operations" on a document captioned "MAKAE International" (the principal MAKAE company, located in Kuwait) and signed by Mr. Alenezi's secretary on behalf of the "Chairman & MD." These were the titles used by Mr. Alenezi for his entities other than the Claimant, for which his title was *Gérant* ("Manager"). When questioned that Mr. Tibari's employment contract appeared to

[150] *E.g.*, Exhibit C-401 (arranging payment for architectural services for a mall in Bahrain); Exhibit C-402 (delay a decorator's trip to Bahrain); Exhibit C-398 (April 2001 fax from MAKAE International to Ms. Lemercier requesting shipping documents for three shipments that had arrived in Qatar); Exhibit C-399 (supplier's invoice for merchandise for boutique in Dubai).

[151] *E.g.*, Exhibit C-410 (Oct. 2001 e-mail to Mr. Boksmati regarding failure to pick up a summer delivery in a Saudi port; Ms. Lemercier notes lack of news, asking "Does Makae exist?"); Exhibit C-392 (September 2000 fax from Mr. Boksmati inquiring about dispatch of "Morgan decoration works of Al Naser Center); Exhibit C-395 (handwritten fax from Ms. Lemercier to "Azzan" asking "so what kind of meat is it possible to send in Middle East ?"); Exhibit C-396 (March 12, 2001 fax from Ms. Lemercier transmitting confirmation of a furniture shipment.)

[152] Exhibit C-411 (Pay slip for December 2001, showing maternity leave for the month); Exhibit C-410 (October 2001 e-mail).

[153] Day 2, p. 422:16-18; p. 423:4-15 (Mr. Alenezi).

be with MAKAE International, a Kuwaiti company, and not with the Claimant, Mr. Alenezi dismissed this as unimportant and "only convenience."[154]

151. Although somewhat larger than Ms. Lemercier's, Mr. Tibari's salary again appears modest for a person said to occupy a critical management position. Further, it appears that throughout his association with the Claimant, he did not reside in or near Paris but in Villefranche-sur-Cher, approximately 200 kilometers south of the Claimant's office.[155]

152. The evidence indicates that Mr. Tibari did have some direct contacts with suppliers. In cross-examination, Mr. Alenezi described his role in expansive terms:

> *Mr. Tibari was responsible for the strategic brand development, from the starting point to the end. The starting point is searching for the brands, approaching the brands and companies, discussing with them the possibility of MAKAE taking the exclusivity in the Middle East, and then organizing the orders and then all the rest of chain of responsibilities.*[156]

153. However, the documentary evidence suggests that Mr. Tibari had limited independent authority, instead generally acting under the direction of Mr. Alenezi or others in MAKAE International or other MAKAE companies. Thus, Mr. Tibari's July 1, 2001 e-mail to "Mr. Mohamed" at the e-mail address for MAKAE International in Kuwait asks the recipient to "please advise me on the order processing" for winter orders for several brands, concluding "I am awaiting for your instruction[s] as well as if you planned to send me in [G]reece or [G]ermany for other brands […]."[157] ("Mr. Mohamed" was likely Mr. Alenezi, although this is not stated in the document.) Regardless of the recipient's identity, the e-mail shows that Mr. Tibari could not place major orders without authorization and that the authorization was to come from someone at MAKAE International, not from MAKAE Europe.

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[154] Day 2 p. 401:8 (Mr. Alenezi).

[155] Day 2 p. 409:8-10 (Mr. Alenezi); Exhibit C-397 (April 13, 2001 Y. Tibari's fax to supplier asking for correspondence to be sent to him at his Villefranche-sur-Cher address).

[156] Day 2 p. 533:3-9 (Mr. Alenezi).

[157] Exhibit C-383.

154. The evidence also indicates that Ms. Lemercier and Mr. Tibari devoted substantial efforts to responding to routine suppliers' inquiries[158] or to routine requests or instructions from MAKAE International and other MAKAE companies, and not to providing any sort of independent strategic direction. Thus, for example, a June 2001 fax to Mr. Tibari from MAKAE International's Operations Manager instructs him to prepare to go to Hamburg "for ordering of S. oliver as discussed in my meeting with you." The message continues, "[w]e will send you the budget and details for ordering." [159] While the tenor of this message may have reflected the extent that Ms. Lemercier and Mr. Tibari were still in a learning phase and not yet familiar with Middle Eastern taste and fashion, it confirms that control over brand strategy had not shifted to MAKAE Europe as of June 2001.

155. Ms. Lemercier's and Mr. Tibari's limited authority and scope of action are spelled out in an eleven-page April 25, 2001 fax on MAKAE International letterhead addressed to "Sylvie/Younis" and defining their responsibilities. This fax does not show that either had a significant role in determining brands or products or otherwise determining the strategic direction of the investment in the Kingdom of Saudi Arabia. The fax, signed for Mr. Alenezi by his secretary, gave Ms. Lemercier and Mr. Tibari no control over ordering. It instead directed them to "set up appointment and plan schedule for main orders to be done by Divisional, Retail and Brand Managers concerned […]" and to "[a]ssist Divisional, Retail & Brand Managers in the ordering." It continued that "[i]t is strictly not permitted to make any order or reorder without the official approval of the concerned manager."[160]

156. As to marketing, Ms. Lemercier and Mr. Tibari were directed to "[o]btain all available marketing materials from suppliers and send to relevant managers." With regard to product development, they were to "[s]end details of fair [sic] in France and Europe to Chairman's office," and "[v]isit some selective fair." They were instructed to "use email more," "do not use mobile phone, unless it is very necessary and urgent," to "[u]se metro in general,"

[158] Exhibit C-146 (July 2, 2001 fax from Mr. Tibari responding to supplier's inquiry regarding a purchase of sunglasses and the amount pending).

[159] Exhibit C-142 (June 4, 2001 fax, from El Idrissi to Y. Tibari).

[160] Exhibit C-136 (April 25, 2001 fax from Mr. Alenezi to Sylvie Lemercier and Y. Tibari).

to immediately introduce a "punching machine" (evidently a time clock), and to "[r]educe the cost of the office in any possible ways."[161]

157. Read in its entirety, Mr. Alenezi's April 25, 2001 fax conveys the clear impression that Ms. Lemercier's and Mr. Tibari's duties were narrow and largely administrative. Its contents and tone ("use metro in general, reduce the cost of the office in any possible ways") are at variance with the idea that the Claimant's operation in France was at the center of developing new premium suppliers, taking the pulse of rapidly changing fashions, or otherwise providing strategic direction or critical services amounting to *de facto* control of the MAKAE interests in the Kingdom of Saudi Arabia.

158. *Mr. Alenezi's role.* The third person involved in the Claimant's activities was of course Mr. Alenezi, the Claimant's *gérant*. The record shows that he was active in developing and maintaining contacts with European suppliers, negotiating licenses and other contracts, and in following fashion trends. However, none of the MAKAE Group's licenses or contracts with suppliers were concluded by or in the name of MAKAE Europe SARL. The Claimant explained this on the basis that "the brand agreements were signed by MAKAE International and Top Ten because, by signing through a GCC entity, he could register the rights in GCC countries."[162] Nevertheless, the evidence does not show that Mr. Alenezi ever negotiated or contracted while holding himself out as the Claimant's *gérant*. Indeed, Mr. Alenezi acknowledged on cross-examination that there are no documents of record showing that he negotiated in his capacity as the Claimant's *gérant*.[163]

159. Even after the incorporation of MAKAE Europe, Mr. Alenezi appeared to prefer operating as Chairman and Managing Director of MAKAE International or of the entire MAKAE Group, rather than emphasizing his role in MAKAE Europe and pushing MAKAE Europe into the foreground. Yet, if MAKAE Europe was (or was to become) not only the hub of the group but its controlling entity, this should have been visible both internally and outside

[161] Exhibit C-136 (April 25, 2001 fax from Mr. Alenezi to Sylvie Lemercier and Y. Tibari).

[162] Cl. PHS para. 46.

[163] Day 2 p. 504:17-20 (Mr. Alenezi).

of the MAKAE Group. The Tribunal was not guided to a single document in support of the "vision" about which Mr. Alenezi testified.

160. In this regard, the record indicates that Mr. Alenezi did not pay particular attention, or give weight, to the Claimant's separate existence as a French company. In cross-examination, he was unaware of, and seemingly unconcerned about, his statutory obligations as *gérant* of the Claimant as a French company. He acknowledged that he did not call required annual shareholder meetings,[164] was "not aware of" the details of mandatory corporate filing requirements, leaving it "for Sylvie to do,"[165] and was "not aware of" statutory requirements to prepare annual financial statements, explaining again that "[t]his is part of Sylvie's job to do."[166]

161. Even if the Tribunal accepts that Mr. Alenezi's signatures on a number of documents as Chairman and Managing Director "evidence his informal role over the whole MAKAE group of companies" and that when acting for MAKAE International he did so as "Managing Director only",[167] the Tribunal remains at a loss for any documents showing that Mr. Alenezi also acted as *gérant* of MAKAE Europe. There are no documents showing that the control which he exercised over the group was MAKAE Europe's and not his own as the group's owner. It is difficult to give credence to Mr. Alenezi's denial that he personally controlled the investment and to his testimony that "his brand and product acquisition activities cannot be separated from the entity he used to direct that strategy,"[168] when there is not a single document showing that he acted -- either within the MAKAE Group or externally in his contacts with third parties -- on behalf and in the name of MAKAE Europe.

162. Instead, the evidence shows that the MAKAE group of companies is effectively an extension of Mr. Alenezi; indeed, as counsel explained at the Hearing, "the name

[164] Day 2 p. 345:9-15 (Mr. Alenezi).
[165] Day 2 p. 340:7, 12-13 (Mr. Alenezi).
[166] Day 2, p. 343:9 (Mr. Alenezi).
[167] Cl. PHS para. 46.
[168] Cl. PHS para. 47.

'MAKAE' stands for the initials of his name."[169] Mr. Alenezi holds large (generally 100%) interests in the multiple entities making up the group and emphasized in his evidence that he "wore the top managerial hat" in each of his companies.[170] In cross-examination, he emphasized the degree to which his companies operated as an integrated group: "It's the company. It is one group. It is complementing each other. It's the same company, same owner, same manager."[171]

163. Mr. Alenezi stated that as the dominant individual in each of his companies, he wore multiple "hats", changing from one to another as circumstances warranted, and sometimes wearing multiple hats, including when making strategic decisions for the group overall:

> *Q. So, your testimony here is that when making strategic decisions related to the Company's operations and overall business plan of MAKAE Group, you did this wearing your hat as gérant of MAKAE Europe?*
>
> *A. No. I have two hats in that case. In fact, I have five hats because I'm looking into overall direction and strategy of the whole group as a whole. So, I'm looking at everything in this context. We're talking about overall business plan. It means the overall business plan of MAKAE, MAKAE Group.*[172]

164. Had Mr. Alenezi visibly and consistently acted as the *gérant* of MAKAE Europe following its incorporation in 2000, and had he subsequently directed the MAKAE Group in that capacity (including consistent public use of his title and letterhead as *gérant* of MAKAE Europe in dealing with his own companies and their employees and with third parties such as the European and international brands) he might have more convincingly argued -- on the basis of Mr. Sherwin's theory -- that MAKAE Europe controlled the investment in Saudi Arabia after 2000. He did not do so. Instead, the evidence shows that Mr. Alenezi, as owner and manager of all of the companies in the MAKAE Group, directed the Group's fortunes, including the investment in Saudi Arabia, and not the Claimant.

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[169] Day 1 p. 21:20-21 (Ms. Amirfar).

[170] Day 2 p. 317:5-7 (Mr. Alenezi).

[171] Day 2 p. 371:12-17 (Mr. Alenezi); *Id*. p. 455:3-6 (Mr. Alenezi).

[172] Day 2 p. 498:5-15 (Mr. Alenezi).

165. In this regard, none of the documents produced concerning the post-2004 period refer to MAKAE Europe. They show only that business partners were prepared to work with MAKAE Trading and/or with Mr. Alenezi personally.[173] There is no indication of any plan or intention to transfer these contacts to MAKAE Europe, and Mr. Alenezi could not rely on his business partners' willingness to consent to any such future transfers.

166. Further, had Mr. Alenezi's intended to assign his contacts and know-how for branding and marketing to MAKAE Europe, or to use that know-how on behalf of MAKAE Europe to make it the controlling entity of the MAKAE Group, he would at least have kept MAKAE Europe administratively "alive" by not allowing its registration in the French Commercial Register to lapse. However, the evidence shows that on January 5, 2004, the clerk recorded termination of MAKAE Europe's activities at its registered address, and the next day entered into the Register a notice of termination, the company not having brought its situation into conformity with the law within three months as legally required.[174] Even if Mr. Alenezi's personal circumstances at the time prevented his travel to France, there was no reason why Ms Lemercier could not have handled the administrative formalities with the French registry, as she had done when MAKAE Europe was incorporated.

167. *The Tribunal's conclusions regarding* de facto *control.* Mr. Alenezi's testimony regarding his role as the controlling personality setting "overall direction and strategy for the whole group" of MAKAE companies is difficult to reconcile with the Claimant's contention that it exercised *de facto* control over the investment in the Kingdom of Saudi Arabia

168. While Mr. Alenezi may have had significant plans and ambitions for the Claimant's future, it was never more than a small component in his larger group of companies. During its roughly two-and-a-half years of operation in France, the Claimant was, at best, in a nascent state, as the Claimant indeed acknowledges: "by August 2001, when Saudi Arabia first shut down the stores, MAKAE Europe had not yet fully developed its operational funding,

[173] Exhibits C-207, C-208, C-212; Exhibits C- 215 to C-222; Exhibits C-225 to C-233.
[174] Exhibit C-214.

accounting, marketing, and human resources activities, or formalized consistent use of stationery, emails, and titles."[175]

169. The Tribunal is not persuaded of the Claimant's contention that Mr. Alenezi could not realize his vision for MAKAE Europe because the Respondent destroyed the MAKAE Group during the Claimant's 'ramp-up phase' and before it could mature in the way Mr. Alenezi envisaged. The Tribunal has not been pointed to evidence corroborating that a transfer to MAKAE Europe of Mr. Alenezi's responsibility for the MAKAE's Group's branding and strategic decision-making was being organized or would occur at any future time. Nor is there evidence confirming that "MAKAE Europe continued to control the investment until it was completely destroyed, by the end of 2005" or that Mr. Alenezi "continued to act on MAKAE Europe's behalf […] to pursue the company's strategic function, negotiating new opportunities with investors in Saudi Arabia […]."[176] The evidence shows that Mr. Alenezi continued to act, but not that he did so "on MAKAE Europe's behalf."

170. The Claimant might in the future have fulfilled the ambitions described by Mr. Alenezi and Mr. Sherwin. It might have become the creative control center of the MAKAE businesses in the Kingdom of Saudi Arabia and elsewhere. It did not do so. Instead, the evidence indicates that for the roughly two-and-a-half years the Claimant had a physical presence in France, its activities were modest and limited in scope and that it did not take over Mr. Alenezi's significant role in developing and managing relationships with premium brands or in determining brands and products for sale.

171. The Tribunal concludes that the evidence does not establish that the Claimant exercised *de facto* control over the investment at any relevant time. Accordingly, the requirements of Article 1(1) of the Treaty defining an investment are not met.

172. As indicated *supra*,[177] the Tribunal's decision that the Claimant has not proved that it controlled the claimed investment means that the Tribunal lacks jurisdiction and that its

[175] Cl PHS para.40.

[176] Cl. PHS para. 49.

[177] Para.111.

claim must be dismissed. Accordingly, it is not necessary or an efficient use of resources for the Tribunal to consider how it might rule upon the many other disputed jurisdictional issues. As the Tribunal lacks jurisdiction, no further decisions are required as to these.

VI. COSTS

A. THE CLAIMANT'S COSTS SUBMISSIONS

173. In its May 12, 2021 submission on costs, the Claimant contends that the Respondent should bear the costs of the arbitration and fully reimburse it for its costs.

174. Citing Article 61(2) of the ICSID Convention and investment treaty jurisprudence, the Claimant observes that the Tribunal has broad discretion to allocate costs. It submits that in doing so, the Tribunal should be guided by (a) the Parties' relative success on their claims and defenses, (b) their procedural conduct throughout the arbitration, and (c) the reasonableness of the claimed costs.[178]

175. *Relative Success on Claims and Defenses.* Concerning the first factor, the Claimant observes that "the general rule is that a prevailing party should be reimbursed the costs it incurred in defending itself,"[179] and that it "prevailed on all interim applications and expects to defeat Saudi Arabi's jurisdictional objections."[180] It maintains in this regard that it "is entitled to an award of costs if it prevails on the bifurcated preliminary objections to jurisdiction *ratione personae* and *ratione materiae*. Responding to [the two bifurcated] objections accounts for USD 7.7 million of [the Claimant's] costs."[181]

176. As to the several interim applications in the case, the Claimant contends that it prevailed in its request for provisional measures related to Mr. Alenezi's personal situation in Saudi Arabia, as it "ultimately prevailed in obtaining Saudi Arabia's representation that Mr. Alenezi would not be imprisoned by Saudi authorities without first presenting him with the

[178] Cl. Costs Sub. paras. 4-6.
[179] Cl. Costs Sub. para. 4.
[180] Cl. Costs Sub. II. A.
[181] Cl. Costs Sub. para. 7.

opportunity to pay" a disputed judgment. According to the Claimant, this representation allowed it to request the Tribunal to suspend further proceedings on the provisional measures request. The Claimant contends that the Respondent was recalcitrant in providing this assurance, leading to extensive and unnecessary proceedings resulting in "wasted costs" to the Claimant of USD 1 million. [182]

177. The Claimant next contends that it partially defeated the Respondent's request for bifurcation of four jurisdictional objections, as the Tribunal bifurcated only two while leaving the others for the merits. The Claimant accordingly seeks half of the costs it incurred in this phase, USD 205,796.00.[183]

178. Finally, the Claimant contends that it prevailed against both the Respondent's request for Security for Costs, accounting for USD 472,020.00 of its claimed costs, and the Respondent's request to add a document production process, amounting to an additional USD 64,298.00.[184]

179. *Conduct in the Proceedings.* Concerning the second factor, the Claimant maintains that the Respondent's conduct caused it to incur costs that were substantially higher than necessary. The Claimant cites the Respondent's document production request, which was rejected by the Tribunal and was made notwithstanding a prior agreement that such a process was unnecessary, as well as its request for security for costs, made three years after the case began.[185]

180. *Reasonableness of Claimed Costs.* The Claimant contends that its claimed costs of USD 9,847,897.00 are "eminently reasonable, both in the abstract and in the circumstances of this case,"[186] and exclude counsel and expert costs incurred in connection with the merits

[182] Cl Costs. Sub. para. 8.
[183] Cl. Costs Sub. para. 9.
[184] Cl. Costs Sub. paras. 10-11.
[185] Cl. Costs Sub. paras. 11-12.
[186] Cl. Costs Sub. para. 13.

phase.[187] The Claimant adds that the claimed costs are less than 2.4% of the damages sought.[188]

181. *Interest.* Finally, the Claimant contends that it should receive interest on any costs awarded and not promptly paid at the LIBOR rate at the date of award for six-month US dollar denominated deposits, compounded semi-annually.[189] In anticipation of the termination of LIBOR, the Claimant proposes that the Tribunal specify a fixed rate of 2.19%, equal to the LIBOR rate as of the notional date of May 11, 2021 plus two percent.[190]

182. Accordingly, the Claimant claims a total of USD 9,847,897.10 for its legal and other costs, including USD 350,000.00 in advances made to ICSID. Excluding the USD 350,000.00 in advances to ICSID (considered separately *infra*), these total USD 9,497,897.10, constituted as follows:

Attorney's fees:	USD 8,555,901.65
Witness and expert fees:	USD 552,445.15
Administrative costs:	USD 389,550.30
TOTAL:	USD 9,497,897.10

B. THE RESPONDENT'S COSTS SUBMISSIONS.

183. In its Submission on Costs, the Respondent contends that the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses.

184. Citing Article 61(2) of the ICSID Convention, Article 28(2) of the ICSID Arbitration Rules, and investment arbitration jurisprudence, the Respondent submits that the Tribunal

[187] Cl. Costs Sub. para. 15.
[188] Cl. Costs Sub. para. 16.
[189] Cl. Costs Sub. para. 18.
[190] Cl. Costs Sub. para. 19.

has broad discretion to allocate costs absent agreement otherwise by the parties. It observes that ICSID tribunals have often applied the principle of "loser pays," which it finds particularly appropriate where claims are dismissed for lack of jurisdiction and where a party makes an unfounded application for provisional measures.[191]

185. The Respondent urges the Tribunal to apply the "loser pays" principle in this case. It contends that the Claimant's claim of jurisdiction was fundamentally flawed,[192] and that its presentation of its claims and its unwarranted request for provisional measures "unnecessarily increased the complexity and costs of this arbitration."[193]

186. The Respondent urges in this regard that, notwithstanding the weakness of the Claimant's jurisdictional claim, it was obliged to mount a defense, given the allegations of serious misconduct and a claim estimated to exceed USD 1.5 billion.[194] The Respondent maintains that the Claimant's request for provisional measures was "entirely unnecessary," but caused it to incur costs of USD 1.4 million before the application was withdrawn.[195] It adds that the Claimant's conduct of its case needlessly complicated the issues in dispute and otherwise caused unnecessary effort and expense.[196]

187. The Respondent contends that its costs are reasonable in light of the amount claimed, the complexity of the case, and the Claimant's conduct of the case. It claims a total of USD 11,012,039.00, including USD 350,000.00 in advances on fees and costs paid to ICSID. Again excluding the USD 350,000.00 in advances to ICSID, these total USD 10,662,039.00, composed as follows:

Attorney's fees:	USD 10,093,500.00
Witness and expert fees:	USD 435,653.00
Administrative costs:	USD 132,886.00

[191] Resp. Costs Sub. paras. 4-7.
[192] Resp. Costs Sub. para. 9.
[193] Resp. Costs Sub. para. 10.
[194] Resp. Costs Sub. para. 11.
[195] Resp. Costs Sub. para. 12.
[196] Resp. Costs Sub. para. 13.

TOTAL:	USD 10,662,039.00

188. The Respondent also seeks interest on the claimed amounts if payment is not made within 30 days "at a rate of US dollar-denominated six-month LIBOR plus 2 compounded semi-annually" until the date of payment.[197]

C. THE TRIBUNAL'S DECISION ON COSTS

189. As the Parties observe, Article 61(2) of the ICSID Convention provides:

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

190. As the Parties agree, this provision gives the Tribunal broad discretion to allocate all costs of the arbitration between the Parties, including attorney's fees and other costs. Both Parties also urge that the Tribunal allocate costs on the same basis: the principle that the costs of the prevailing party should be paid by the losing party, frequently referred to as "costs follow the event."[198]

191. Thus, both Parties regard "costs follow the event" as appropriate in the circumstances of the case. The Tribunal agrees that this principle, which is increasingly being applied by tribunals in international investment cases,[199] provides an appropriate framework for allocating costs in this case. The Tribunal notes in this regard the proposed new ICSID Arbitration Rule 52, which would provide for a tribunal allocating costs to consider "the

[197] Resp. Costs Sub. para. 16.

[198] Cl. Costs Sub. para. 90; Resp. Costs Sub. paras. 7-9.

[199] Cl. Costs Sub. fns, 2-3 and cases cited; Resp. Costs Sub. para. 7.

outcome of the proceeding or any part of it," as well as the parties' conduct, the complexity of the issues, and the reasonableness of the costs claimed.[200]

192. In addition to advocating application of "costs follow the event," each Party advances arguments urging the Tribunal to allocate costs in its favor on account of conduct by the other Party said to be wasteful, unnecessary, or otherwise warranting an allocation more favorable to the complaining Party. The Tribunal is not persuaded. This has been a vigorously contested proceeding in which each Party was represented by capable and energetic counsel. Each Party was entitled to put forward what it regarded as its best case. Each did so, but at the same time each cooperated fully with the Tribunal's Orders and requests. The Tribunal does not see in either Party's actions any reason to modify application of "costs follow the event."

193. The Parties have also identified the reasonableness of the costs incurred as a relevant factor in apportioning costs. Both Parties have incurred and claimed quite substantial costs, reflecting the multiple issues in dispute and the intensity and energy each brought to the case. The amounts claimed by each Party are broadly similar, as are their staffing levels, expert's fees, and other expenditures. Particularly given the multiplicity of issues and the similarity of each Party's claimed costs, the Tribunal again sees no basis to modify application of "costs follow the event."

194. As explained *supra*, the Tribunal has decided that it does not have jurisdiction, because the Claimant does not satisfy the Treaty's requirement that it control the investment. Accordingly, the Respondent has prevailed on the central issue in the case. It should therefore be compensated for its costs, subject to adjustments involving certain costs related to preliminary issues on which it did not prevail.

195. The Respondent's total claim for its fees and costs for the arbitration is USD 11,012,039.00, including an advance to ICSID of USD 350,000.00 in respect of ICSID'S fees and costs. The amount advanced to ICSID is separately addressed *infra*. Deducting

[200] RL-188, ICSID, *Proposals for Amendment of the ICSID Rules*, Working Paper #4, February 2020, pp. 57–58, Arbitration Rule 52.

this amount, the Tribunal decides that the balance of USD 10,662,039.00 must be further adjusted as follows:

- Each Party incurred substantial costs in connection with the Claimant's request for provisional measures; the Respondent states that it incurred such costs of USD 1,408,070.00. The Respondent contends that the request was "entirely unnecessary"[201] and seeks full reimbursement of these costs. As matters developed, it ultimately was not necessary for the Tribunal to rule on the Claimant's request. However, Tribunal does not believe that it was unnecessary or unreasonable for the Claimant to make the request in the circumstances at the time. It accordingly decides that the Respondent should be compensated for half of its claimed costs, USD 704,035.00.

- Both Parties incurred costs in addressing the Respondent's request that the Tribunal bifurcate and decide as preliminary issues its objections to jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*. The Tribunal ordered bifurcation of the first two,[202] and has now decided the case in the Respondent's favor on the basis of the *ratione materiae* objection. The Claimant calculated its total costs in the bifurcation proceedings as USD 411,592.49.00, but claimed only half of this amount on the ground that it succeeded in only half of its objections to bifurcation.[203] The Respondent did not separately state its costs related to bifurcation, but the Tribunal views the Claimant's total as a reasonable indication of the Respondent's likely costs.

- The Respondent prevailed in the bifurcation proceeding to the extent that the Tribunal upheld two of its three objections. [204] As the third objection failed, the Respondent

[201] Resp. Costs Sub. para. 12.

[202] Decision on the Respondent's Request for Bifurcation, June 5, 2019.

[203] Cl. Costs Sub. para. 15.

[204] In calculating its success, the Claimant apparently includes the "Other Preliminary and Jurisdictional Objections" which the Respondent listed in its Statement of Jurisdictional Objections and Request for Bifurcation of February 15, 2019 (paras. 82-86). However, the Respondent did not seek bifurcation of these additional objections, and the Claimant did not deal with them in its Opposition and Rejoinder of Bifurcation, except to reinforce its argument that all of the Respondent's objections were intertwined with the merits. The Tribunal did not address the additional objections in its Decision on Bifurcation.

should not be compensated for the associated costs, which the Tribunal estimates to have been USD 137,000.00. The Respondent's reimbursed costs should be reduced by this amount.

- The Tribunal denied the Respondent's request for provisional measures requiring the Claimant to post security for a possible future award of costs. The Claimant calculated its costs in responding to the Respondent's request as USD 472,020.32. As the Claimant prevailed on this issue, the total awarded to the Respondent should be reduced by this amount.

- The Tribunal also denied the Respondent's request to add a documents production process to the agreed schedule. The Claimant calculated its costs in responding to this request to be USD 64,298.00. As the Claimant prevailed on this issue, the costs to be awarded to the Respondent should also be reduced by this amount.

196. Accordingly, the Respondent is awarded USD 9,284,686.00 in respect of its costs and expenses incurred in this case, calculated as follows: USD 10,662,039.00, minus USD 704,035.00, minus USD 137,000.00, minus USD 472,020.00, minus USD 64,298.00.

197. In addition, the Respondent claims USD 350,000.00 for its advance to ICSID in respect of the costs of the arbitration, including the Tribunal's fees and expenses, ICSID's administrative fees, and direct expenses. As the Respondent is the prevailing party in the arbitration, the Tribunal decides that it should also recover the full amount of its share of the costs of arbitration.

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

Arbitrators' fees and expenses	
Prof. John R. Crook	132,976.38
Dr. Karim Hafez	93,819.26
Ms. Vera van Houtte	95,175.42

ICSID's administrative fees	168,000.00
Direct expenses	97,344.76
Total	**587,315.82**

199. The above costs have been paid out of the advances made by the Parties in equal parts.[205] As a result, each Party's share of the costs of arbitration amounts to USD 293,657.91.

200. Accordingly, the Tribunal decides that the Claimant must pay to the Respondent the sum of USD 9,284,686.00 as compensation for the Respondent's legal fees and expenses, plus the amount of the expended portion of the Respondent's advance to ICSID USD 293,657.91, for a total of USD 9,578,343.91.

201. Both Parties asked the Tribunal to award compound interest, beginning to accrue if payment is not made within a thirty-day grace period. For its part, the Claimant noted the impending discontinuance of LIBOR, and accordingly suggested a rate equivalent to six-month US dollar LIBOR plus 2 determined as of a proxy date of May 11, 2021. This resulted in a suggested rate of 2.19%, compounded semi-annually.[206] The Respondent similarly proposed interest "at a rate of US dollar-denominated six-month LIBOR plus 2 compounded semi-annually running until the date of payment."[207]

202. The Tribunal notes the Parties' very similar requests that the Tribunal award interest at a rate reflecting six-month dollar-denominated LIBOR plus two, compounded semi-annually, with a thirty-day grace period. Given the Parties' requests and the impending discontinuance of LIBOR, the Tribunal decides to award interest at the fixed rate of 2.16% interest to begin to accrue on unpaid amounts thirty days after the date of the Tribunal's Award.

[205] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.
[206] Cl. PHS para. 19.
[207] Resp. PHS para. 16.

VII. AWARD

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

(a) To uphold the Kingdom of Saudi Arabia's objection to the Tribunal's jurisdiction on the ground that MAKAE Europe SARL does not control an investment in the Kingdom and therefore is not an investor for the purposes of Article 1 of the Treaty between the Government of the Kingdom of Saudi Arabia and the Government of the French Republic Concerning the Encouragement and Reciprocal Protection of Investments.

(b) To declare that the Tribunal has no jurisdiction to settle the dispute between the Parties.

(c) To order the Claimant to pay to the Respondent the sum of USD 9,284,686.00 in respect of the Respondent's legal and expert fees and expenses incurred in this arbitration, plus the Respondent's share of the costs of the arbitration, including the Tribunal's fees and expenses, ICSID's administrative fees, and direct expenses, in the amount of USD 293,657.91, for a total of USD 9,578,343.91.

(d) To order that interest shall begin to accrue on the amounts awarded to the Respondent if not paid within 30 days, at a rate of notionally 2.16% compounded semi-annually until the date of payment.

(e) All other requests for relief are dismissed.

Dr. Karim Hafez
Arbitrator

Date: 25.08.21

Ms. Vera van Houtte
Arbitrator

Date:

Prof. John R. Crook
President of the Tribunal

Date:

Dr. Karim Hafez
Arbitrator

Date:

Ms. Vera van Houtte
Arbitrator

Date: 19 August 2021

Prof. John R. Crook
President of the Tribunal

Date:

Dr. Karim Hafez
Arbitrator

Date:

Ms. Vera van Houtte
Arbitrator

Date:

John R. Crook

Prof. John R. Crook
President of the Tribunal

Date: August 19, 2021