INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AGILITY PUBLIC WAREHOUSING COMPANY K.S.C.

Claimant

and

REPUBLIC OF IRAQ

Respondent

ICSID Case No. ARB/17/7

DECISION ON JURISDICTION

Members of the Tribunal
Mr. Cavinder Bull SC, President
Mr. John Beechey CBE
Professor Sean Murphy

Secretary of the Tribunal
Ms. Geraldine Fischer

Date of dispatch to the Parties: 9 July 2019

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TABLE OF COMMONLY USED ABBREVIATIONS/DEFINED TERMS

1964 Protocol	Protocol between the Governments of the State of Kuwait and the Republic of Iraq on the Promotion of the Movement of Capital and Investments between the two Countries, signed on 25 October 1964
2007 Loan Transaction	Agility's initial investment of USD 250 million to fund Korek's license fee payment in 2007
2011 Equity Transaction	The transaction between Agility, Orange, and Korek whereby Agility and Orange acquired an indirect stake in Korek from Korek's Iraqi shareholders
2015 BIT	Agreement Between the Government of the State of Kuwait and the Government of the Republic of Iraq for Reciprocal Promotion and Protection of Investments, which entered into force on 4 February 2015
Agility or Claimant	Agility Public Warehousing Company K.S.C., a company incorporated under the laws of the State of Kuwait
Alcazar	Alcazar Capital Partners, Agility's wholly-owned subsidiary
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
CMC	The Iraqi Communications and Media Commission, a body responsible for mobile telephone regulation and licensing
CMC Order	The decision of the CMC dated 2 July 2014, which provided that the 2011 Equity Transaction was void
Hearing on Jurisdiction	Hearing on Preliminary Objections *Ratione Temporis* held on 24 and 25 April 2019
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

ICSID or the Centre	International Centre for Settlement of Investment Disputes
Iraq or Respondent	The Republic of Iraq
IH	International Holdings Limited, incorporated in the DIFC to serve as IT Ltd's common holding company
IT Ltd	Iraq Telecom Limited, a company owned by Agility and Orange as a joint venture vehicle
Korek	Korek Telecom Company LLC, an Iraqi telecommunications company incorporated in August 2000
KRG	The Kurdistan Regional Government of Iraq
KRG Guarantee	A guarantee issued by the KRG for the benefit of Agility in connection with its investment in Korek in 2007
Orange or France Telecom	Orange S.A., a multinational telecommunications company incorporated in the Republic of France, (formerly France Télécom S.A.)
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

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

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

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

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

5. This dispute relates to the Claimant's alleged investment in an Iraqi telecommunications joint venture. The Claimant alleges that the Respondent breached its substantive obligations under the 2015 BIT; the Protocol between the Governments of the State of Kuwait and the Republic of Iraq on the Promotion of the Movement of Capital and Investments between the two Countries, signed on 25 October 1964 and which entered into force on 7 June 1966 (the "**1964 Protocol**"); and customary international law.

II. PROCEDURAL HISTORY

6. On 9 February 2017, ICSID received a request for arbitration dated 8 February 2017 from the Claimant against Iraq (the "**Request for Arbitration**").

7. On 24 February 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute

an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

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

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

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

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

12. On 14 February 2018, the Tribunal issued Procedural Order No. 1 governing procedural matters, which provides, *inter alia*, that the 2006 Arbitration Rules are applicable; English is the procedural language; and London, U.K. is the place of proceeding.

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

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

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

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

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

For the Claimant:

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

For the Respondent:

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

Court Reporter:

Ms. Diana Burden	Diana Burden Reporting

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

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

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

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

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

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

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

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

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

27. On 12 April 2019, further to the Parties' agreement and Procedural Order No. 3, the Respondent submitted Exhibits R-001 through R-003; Legal Authorities RL-056 through RL-062; and revised Legal Authorities RL-042 and CL-138.

28. On 15 April 2019, further to the Parties' agreement and Procedural Order No. 3, the Claimant submitted Legal Authority CL-194. Also on the basis of the Parties' agreement, the Claimant submitted Exhibit C-102 on 18 April 2016.

29. On 24 and 25 April 2019, a Hearing on Preliminary Objections *Ratione Temporis* was held at the International Dispute Resolution Centre in London, U.K. (the "**Hearing on Jurisdiction**"). In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following individuals were present at the Hearing on Jurisdiction:

For the Claimant:

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

For the Respondent:

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

Court Reporters:

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

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

31. The Parties filed their costs submissions on 20 May 2019.

III. FACTUAL BACKGROUND

32. For the purposes of this Decision, the Tribunal sets out below a brief summary of the factual background. The summary focuses primarily on the facts pleaded by the Claimant in its Memorial, as the Respondent indicated at the Bifurcation Hearing that, for the purposes of its Objections to Jurisdiction *Ratione Temporis* (and without prejudice to its ability to contest the Claimant's presentation of the facts at a later stage of the proceedings, should the Respondent's objection not prevail in whole or in part), the Respondent is prepared to accept the facts as pleaded by the Claimant in the Request for Arbitration and the Claimant's Memorial.[1] This was also confirmed by the Respondent at the Hearing on Jurisdiction.[2]

33. The Tribunal makes no determinations in relation to the merits of the Parties' assertions of fact at this stage.

A. THE CLAIMANT'S INVESTMENT

34. In March 2004, the Coalition Provisional Authority of Iraq established the Iraqi Communications and Media Commission (the "**CMC**"), an administrative institution responsible for licensing and regulating telecommunications, broadcasting, information services, and other media in Iraq.[3]

35. In 2007, the Claimant entered into an investment in the Iraqi telecommunications sector through Korek Telecom Company LLC ("**Korek**").[4] Korek is an Iraqi limited liability company incorporated in August 2000 with the Registration Directorate of Companies of the Kurdistan Regional Government in the Republic of Iraq (the "**KRG**").[5] Korek was awarded a nationwide mobile telecommunications license by the CMC in 2007.[6]

[1] Bifurcation Hearing, Tr. 72:4–73:5.
[2] Hearing on Jurisdiction, Day 2, Tr. 40:18-20.
[3] Cl. Mem., ¶ 23.
[4] Cl. Mem., ¶ 27.
[5] Cl. Mem., ¶ 28.
[6] Cl. Mem., ¶ 29.

36. The Claimant's 2007 investment was structured as a convertible senior promissory note (the "**2007 Loan Transaction**"), extended to Korek by the Claimant's wholly owned subsidiary, Alcazar Capital Partners ("**Alcazar**").[7]

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

38. By late 2010, Korek required further financial support. The Claimant therefore entered into a joint venture with Orange S.A. ("**Orange**" or "**France Telecom**"), a telecommunications company incorporated in the Republic of France, to invest further in Korek. As part of the investment, which was only implemented in July 2011 (the "**2011 Equity Transaction**"), it was agreed that the Claimant and Orange would acquire an indirect stake of approximately 44% in Korek from Korek's Iraqi shareholders (the "**Iraqi Shareholders**").[9]

39. Upon obtaining the CMC's consent for the 2011 Equity Transaction, the Iraqi shareholders transferred their entire shareholding in Korek to a newly established holding company, International Holdings Limited ("**IH**"), incorporated in the Dubai International Financial Centre (the "**DIFC**"), to serve as the joint venture's common holding company through which the parties to the joint venture would hold their respective investments. Furthermore, Iraq Telecom Limited ("**IT Ltd**"), a private company incorporated in the DIFC, was established as a joint venture vehicle between the Claimant and Orange. Korek International (Management) Ltd. ("**CS Ltd**"), a private company incorporated in the Cayman Islands, was established as a joint venture vehicle for the Iraqi Shareholders.[10]

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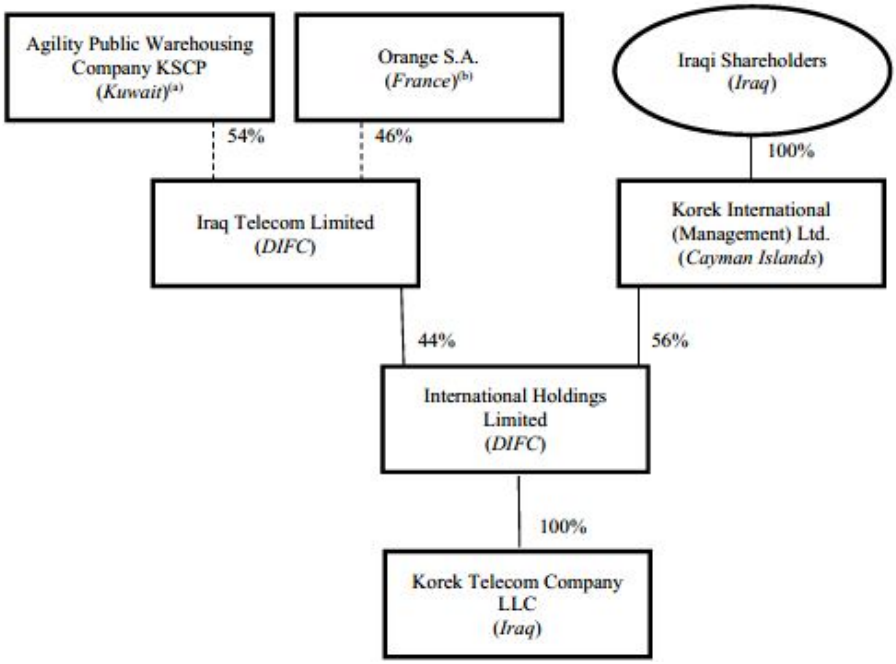
[7] Convertible Loan Agreement between Korek and Alcazar dated 11 September 2007, Exhibit C-004; Korek Telecom Convertible Senior Promissory Note dated 11 September 2007, Exhibit C-006.

[8] KRG Guarantee, Exhibit C-007.

[9] Cl. Mem., ¶¶ 34-35.

[10] Cl. Mem., ¶ 41.

40. The group's structure following implementation of the 2011 Equity Transaction in July 2011 is set out in the diagram below:[11]



41. A Shareholders' Agreement dated 10 March 2011 governed the relationship between IH, Korek, CS Ltd, IT Ltd and Sirwan Barzani, one of the Iraqi Shareholders. Under the Shareholders' Agreement, IT Ltd had a call option which permitted it to acquire further shares in IH, such that it could gain an aggregate shareholding of 51% in IH (the "**Call Option**").[12]

42. Between 2011 and 2013, Korek expanded and developed its network throughout Iraq.[13]

B. THE CMC ORDER

43. On 10 December 2013, the CMC sent Korek a letter stating that the CMC could not verify whether Korek had met the requirements imposed by the CMC for the 2011 Equity

[11] Cl. Mem., ¶ 45.

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

[13] Cl. Mem., ¶ 55.

Transaction. The CMC requested Korek to provide it with the reasons for Korek's apparent failure to meet such requirements within a week of the letter.[14]

44. Korek's Iraqi Shareholders did not respond to the CMC's 10 December 2013 letter within the deadline imposed by the CMC. According to the Claimant, Korek's Iraqi Shareholders were colluding with the CMC and they deliberately let the deadline lapse.[15]

45. On 16 January 2014, the CMC sent a further letter to Korek, stating that the one-week deadline set out in the CMC's 10 December 2013 letter had expired. The CMC also gave Korek one final week to provide its reasons for not fulfilling the conditions applied to the 2011 Equity Transaction imposed by the CMC.[16]

46. On 22 January 2014, Korek responded to the CMC's letters, disputing that it had failed to fulfil any conditions applicable to the 2011 Equity Transaction.[17] Following Korek's submission of the 22 January 2014 letter, it heard no more from the CMC on this issue for six months.[18]

47. On 29 May 2014, Orange publicly declared its intention to exercise the Call Option.[19]

48. Twelve days later, on 10 June 2014, the CMC sent a third letter to Korek. The CMC contended that Korek was no longer an Iraqi company and it sought to impose an enhanced regulatory fee on Korek. The CMC calculated that Korek owed at least USD 43,536,000 as of the second half of 2013 and that additional fees would be required in due course.[20]

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

[15] Cl. Mem., ¶ 60.

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

[17] Letter from Korek to the CMC dated 22 January 2014, Exhibit C-031.

[18] Cl. Mem., ¶ 64.

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

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

According to the Claimant, this step was taken as a means to dissuade Orange from exercising the Call Option.[21]

49. On 2 July 2014, the CMC sent a further letter to Korek stating that the CMC had made a final decision to consider "the partnership, desired between [Korek] and the foreign French company France Telecom/Agility, as void, null and invalid." It ordered Korek to "reinstate the status as it was on [13 March 2011], take the procedures to revoke and terminate any contracts assigning shares in [Korek's] capital that were concluded after [13 March 2011], prove this revocation in the legal entries with the companies registrar and provide [the CMC] with a new statement proving the return of shares to their original owners" (the "**CMC Order**").[22]

50. According to the Claimant, the effect of the implementation of the CMC Order would be to strip the Claimant and Orange of their shares in IH and return those shares to the Iraqi Shareholders.[23]

51. The Claimant further alleges that the CMC colluded with the Iraqi Shareholders in issuing the CMC Order to ensure that Orange's exercise of the Call Option would be frustrated so as to prevent the Claimant and Orange from taking majority control of Korek.[24]

C. ATTEMPTS BY THE CLAIMANT TO APPEAL AGAINST THE CMC ORDER

52. On 17 July 2014, Korek filed an appeal against the CMC Order to the CMC Appeals Board.[25] The Claimant asserts that the appeal was filed on the Claimant's and Orange's insistence and that at that point in time, the Claimant had not yet discovered the alleged collusion between Korek and the CMC.[26]

[21] Cl. Mem., ¶ 65.
[22] CMC Order, Exhibit C-037.
[23] Cl. Mem., ¶ 71.
[24] Cl. Mem., ¶ 72.
[25] Appeal with a suspension order submitted by Korek to the CMC Appeals Board dated 17 July 2014, Exhibit C-038.
[26] Cl. Mem., ¶ 88.

53. On 18 August 2014, the CMC Appeals Board rejected Korek's appeal, stating that "it was decided to reject the appeal and approve the appealed decision No. Q/4/5332 dated 02/07/2014 ordering revocation of the partnership between Korek company and the foreign company France Telecom/Agility and depositing the decision with the Commission's CEO in order to execute it."[27]

54. Following the CMC Appeals Board's decision, the CMC sent a letter dated 4 September 2014 to Korek. In the letter, the CMC ordered Korek to "invalidate the partnership between [Korek] and the foreign partner, France Telecom / Agility, because the partnership between [Korek] and the foreign partner, France Telecom / Agility, is deemed null and void due to the failure to fulfil the suspension conditions that [Korek] previously committed to fulfilling in full."[28] The CMC further ordered Korek, within fifteen days of its letter, to "reinstate the status it was on (13/03/2011); take all actions necessary to annul and invalidate the contracts transferring the shares in [Korek's] capital, which were concluded after (13/03/2011); record this invalidation in the legal entries with the Companies Registrar; and provide [the CMC] with a new statement proving that the shares have been returned to their original owners."[29]

55. On 22 September 2014, the Claimant and Orange wrote to the CMC directly, protesting that they had been given no notice of the proceedings, they were never party to the proceedings before the CMC nor were they consulted or given an opportunity to be heard by the CMC.[30]

56. The CMC did not respond directly to the Claimant's and Orange's 22 September 2014 letter. Instead, at a meeting between Korek and the CMC on 16 October 2014, the CMC reiterated to Korek its position that the "partnership" had to be terminated or else Korek's license would be at risk.[31]

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[27] Decision of the CMC Appeals Board dated 18 August 2014, Exhibit C-039, p. 2.

[28] Letter from the CMC to Korek dated 4 September 2014, Exhibit C-040.

[29] *Ibid*.

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

[31] Minutes of meeting between the CMC and Korek held on 16 October 2014, Exhibit C-046.

57. On 25 September 2014, the Claimant wrote to the Iraqi Minister of Telecommunications. Among other things, it asserted that the CMC Order was "absolutely invalid" and the procedures before the CMC Board of Appeals "were carried out in the absence of France Telcom/Agility." The Claimant requested that the Minister reverse the CMC Order.[32] The Minister did not respond to the letter.

58. On 2 November 2014, the CMC wrote a letter to Korek, stating that "[Korek] is a company licensed by [the CMC], that there is a contractual link between [the CMC] and [Korek], which consists of the concluded licensing contract, and that there is no relationship between [the CMC] and France Telecom / Agility. Accordingly, … [the CMC] has nothing to do with the correspondence sent by the foreign partner / France Telecom." The CMC also repeated its "final finding … that the partnership must be invalidated." [33]

59. In a further letter to Korek dated 12 November 2014, the CMC declared "the partnership … void, null and invalid", giving Korek fifteen days to "take the actions necessary to annul and invalidate the contracts pertaining to relinquishment of the shares in [Korek's] capital after 13/3/2011, record this invalidation in the legal entries with the Companies Registrar, and provide [the CMC] with an updated statement proving that the shares have been returned to their original owners." [34]

60. On 1 December 2014, IT Ltd (on behalf of the Claimant and Orange) sent a letter to the CMC, stating that the "CMC never addressed any of the Foreign Investors directly and never gave them a chance to present their case to the CMC", and that "after the issuance of the CMC decision, the Foreign Investors formally approached the CMC in order to address the allegations made against them but the CMC did not even acknowledge receipt of the letter except by responding to Korek again and stating that the CMC refuses to meet with the Foreign Investors since [the] CMC has no contractual relationship with them."[35] IT Ltd ended the letter by stating that "[IT Ltd] (and the Foreign Investors) shall take all necessary

[32] Letter from Agility to the Iraqi Minister of Telecommunications dated 25 September 2014, Exhibit C-044.
[33] Letter from the CMC to Korek dated 2 November 2014, Exhibit C-051.
[34] Letter from the CMC to Korek dated 12 November 2014, Exhibit C-057.
[35] Letter from IT Ltd to the CMC dated 1 December 2014, Exhibit C-061.

steps to protect [its] position should the CMC seek to take any steps to implement the CMC Decision" and that "[IT Ltd] reserve[s] any right or remedy [it] may have now, or in the future in connection with this matter, including as regards any claim against the CMC and/or the Republic of Iraq."[36]

61. The CMC did not respond directly to IT Ltd. Instead, on 16 December 2014, the CMC wrote to Korek, enclosing IT Ltd's 1 December 2014 letter. The CMC's 16 December 2014 letter noted that the CMC had no "contractual link or obligation" towards IT Ltd and once again demanded that Korek "fully commit to implementing the [CMC's] decisions."[37]

D. THE IRAQI PARLIAMENT'S RECOMMENDATION

62. On 25 October 2014, the Claimant submitted a complaint to the Iraqi Council of Representatives (the "**Council**").[38] The Claimant protested the CMC Order on the basis that it was "fundamentally flawed and based on unsupported and incorrect allegations" and reserved its rights "as regards any claim against the CMC."[39]

63. On 23 November 2014, the President of the Iraqi Parliament issued an order forming a special investigative committee to investigate the Claimant's complaint (the "**Parliamentary Committee**").[40]

64. Whilst the Parliamentary Committee was conducting its investigations, the Council ordered that the execution of the CMC Order be suspended and instructed the CMC accordingly on 28 October 2014.[41]

[36] Letter from IT Ltd to the CMC dated 1 December 2014, Exhibit C-061.

[37] Letter from the CMC to Korek dated 16 December 2014, Exhibit C-065.

[38] *See* Resolutions of the Parliamentary Committee dated 11 January 2015, Exhibit C-067.

[39] Letter from Agility to the CMC dated 29 October 2014, Exhibit C-049.

[40] Resolutions of the Parliamentary Committee dated 11 January 2015, Exhibit C-067.

[41] Letter from the Iraqi Council of Representatives to the CMC dated 28 October 2014, Exhibit C-048.

65. The CMC did not follow the Council's orders and continued to demand that Korek implement the CMC Order.[42] On 30 November 2014, the Council wrote to the CMC to repeat its demand that the CMC halt the execution of the CMC Order.[43]

66. On 1 December 2014, the Council further wrote to the Kurdistan Companies Registrar, ordering that all "procedures associated with invalidating the partnership between Korek Telecom and France Telecom Agility [be halted] pending completion of the work of the Parliamentary Investigative Committee."[44]

67. On 11 January 2015, the Parliamentary Committee "found that the [CMC] had no authority to terminate the partnership contract between the partners (Korek and France Telecom Agility)" and recommended "[o]bligating the [CMC] to cancel [the CMC Order]."[45] The CMC did not comply with the Parliamentary Committee's recommendation.

E. THE IRAQI COURTS' REJECTION OF KOREK'S APPEAL AGAINST THE CMC ORDER AND IT LTD'S APPLICATION TO BE JOINED TO THE APPEAL

68. On 16 October 2014, Korek filed a claim with the Iraqi Administrative Court, seeking judicial review of the CMC Order (the "**Administrative Court Proceedings**").[46]

69. On 15 December 2014, the Claimant's shareholder, Mr. Majid Hilal Abdul-Hussein, filed an application to join the Administrative Court Proceedings.[47] This application was eventually rejected by the Administrative Court on 28 July 2015.[48]

[42] *See* paragraph 58 above.

[43] Letter from the Iraqi Council of Representatives Services and Reconstruction Committee to the CMC dated 30 November 2014, Exhibit C-060.

[44] Letter from the Iraqi Council of Representatives Services and Reconstruction Committee to the Kurdistan Companies Registrar dated 1 December 2014, Exhibit C-062.

[45] Resolutions of the Parliamentary Committee dated 11 January 2015, Exhibit C-067.

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

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

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

70. On 16 February 2015, IT Ltd submitted an application to join the Administrative Court Proceedings ("**IT Ltd's Joinder Application**").[49] On 18 January 2016, the Administrative Court denied IT Ltd standing in the Administrative Court Proceedings and rejected its application to join. The Administrative Court provided no written opinion and provided its ruling orally.[50]

71. On 25 January 2016, the Administrative Court dismissed Korek's claim for lack of jurisdiction.[51] The Administrative Court held that "the matter is not within the jurisdiction of the Administrative Court."[52]

72. On 21 February 2016, Korek filed an appeal to the Iraqi Supreme Administrative Court against the Administrative Court's decision.[53] On 18 January 2018, the Iraqi Supreme Administrative Court denied Korek's appeal.[54]

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

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

74. On 17 May 2016, the Claimant wrote to the CMC to ask for clarification of the CMC's order to "reinstate the status as it was on 13 March 2011," and for guidance on how to implement such an order.[55] As the CMC did not respond to the Claimant's 17 May 2016 letter, the Claimant repeated its enquiries in another letter to the CMC dated 15 June 2016.[56]

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[49] Submission of IT Ltd to the Administrative Court dated 16 February 2015, Exhibit C-064.

[50] *See* email exchange between Mr. Louis Abou Charaf of Korek and Mr. Deepak Jain of Agility between 19 and 23 January 2016, Exhibit C-073.

[51] Decision of the Administrative Court dated 25 January 2016, Exhibit C-074.

[52] *Ibid*.

[53] Submission of Korek to the Iraqi Supreme Administrative Court dated 21 February 2016, Exhibit C-075.

[54] Decision of Iraqi Supreme Administrative Court dated 18 January 2018, Exhibit C-101.

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

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

75. The CMC did not respond to the Claimant's 15 June 2016 Letter. Accordingly, on 24 October 2016, the Claimant wrote to the CMC, pointing out the impossibility of "reinstat[ing] the status as it was on 13 March 2011" and requesting clarity on the terms of the CMC Order. The 24 October 2016 letter also set out the Claimant's interpretation that the CMC Order required the "reinstatement of a guarantee by the Government of Kurdistan in the Republic of Iraq to Alcazar for the USD 250 million convertible senior promissory note."[57]

76. As the CMC still did not respond to the Claimant's letters, the Claimant attempted to implement the CMC Order without any regulatory assistance or guidance by the CMC. By way of a letter dated 20 June 2017 to Korek and the Iraqi Shareholders, the Claimant pointed out, *inter alia*, that in order to implement the CMC Order, the KRG Guarantee that existed as part of the 2007 Loan Transaction would have to be reinstated.[58]

77. On 21 July 2017, Korek responded to the Claimant's 20 July 2017 letter, stating that the Claimant's letter was "inappropriate and untimely."[59]

78. On 2 August 2007, the Claimant wrote to Korek again, urging Korek to work with the Claimant to take steps to implement the CMC Order.[60] According to the Claimant, Korek again rejected its request for cooperation.[61]

79. In light of Korek's refusal to take steps to implement the CMC Order, the Claimant wrote to the KRG on 22 August 2017. In its letter, the Claimant stated that "it appears that, pursuant to the CMC Order, in order to 'reinstate the status as it was on 13/3/2011,'—in addition to the foreign shareholders returning their shares to Korek's original Iraqi

[57] Letter from Agility to the CMC dated 24 October 2016, Exhibit C-080.
[58] Letter from Agility to Korek and the Iraqi Shareholders dated 20 June 2017, Exhibit C-083.
[59] Letter from Korek to Agility dated 21 July 2017, Exhibit C-085.
[60] Letter from Agility to Korek and the Iraqi Shareholders dated 2 August 2017, Exhibit C-087.
[61] Cl. Mem., ¶ 120.

shareholders—Korek must reinstate Alcazar's Convertible Note and the Government of Kurdistan must reinstate the attendant Guarantee."[62]

80. As the KRG did not respond to the Claimant's 22 August 2017 letter, the Claimant wrote to the KRG again on 10 December 2017, stating that it still had not received a response and reserving all of its rights in respect of the KRG Guarantee.[63] The KRG did not respond.[64]

IV. JURISDICTION RATIONE TEMPORIS

81. The Tribunal has carefully reviewed and considered the Parties' submissions on the question of jurisdiction *ratione temporis*. For the purposes of framing the Tribunal's analysis and findings, the Tribunal has outlined the Parties' main arguments below. Naturally, it is not meant to serve as an exhaustive review of the Parties' submissions on the application at issue, but as a summary of the arguments that are relevant to the Tribunal's analysis and findings. Regardless, the Tribunal has carefully considered all of the submissions made by the Parties, whether in writing or made orally during the Hearing on Jurisdiction.

A. THE TEMPORAL SCOPE OF ARTICLE 10(1) OF THE 2015 BIT

(1) The Parties' Positions

a. The Respondent's Position

82. According to the Respondent, the Parties agree that Article 10 of the 2015 BIT contains Iraq's offer to arbitrate certain disputes. Article 10 of the 2015 BIT provides in part:

> *1. Disputes arising between a Contracting Party and an investor of the other Contracting Party in respect of an investment of the latter*

[62] Letter from Agility to the Kurdistan Regional Government dated 22 August 2017, Exhibit C-088.
[63] Letter from Agility to the Kurdistan Regional Government dated 10 December 2017, Exhibit C-091.
[64] Cl. Mem., ¶ 120.

> *in the territory of the former shall, as far as possible be settled amicably through consultations or reconciliation.*
>
> *2. If such disputes cannot be settled within a period of 180 one hundred eighty days from the date at which either party to the dispute requested amicable settlement by serving written notice to the other party after exhausting means of internal consideration, the dispute shall be submitted for resolution, at the choice of the investor party to the dispute, by one of the following means:*
>
> *(a) in accordance with any applicable, previously agreed dispute settlement procedures;*
>
> *(b) local courts;*
>
> *(c) international arbitration in accordance with the following paragraphs of this Article.*[65]

83. The Respondent submits that neither the text nor context of this provision of the 2015 BIT indicates that it applies to disputes arising before the treaty entered into force on 4 February 2015.[66] Further, the Respondent contends that nothing in the 2015 BIT text establishes that the Contracting Parties intended to displace a relevant rule of international law applicable to relations between Iraq and Kuwait, which is the general rule on non-retroactivity of treaties enshrined in Article 28 of the Vienna Convention on the Law of Treaties ("**VCLT**").[67] Finally, the Respondent maintains that no supplementary means of interpretation indicates that the 2015 BIT applies to disputes arising before the treaty entered into force.

(i) *Text and Context of Article 10(1) of the 2015 BIT*

84. In order to interpret Article 10(1) of the 2015 BIT, the Respondent turns to Article 31 of the VCLT, which provides, in paragraph 1, that: "[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

[65] 2015 BIT (as published in the *Kuwaiti Gazette*) (CL-047), Art. 10(1); Hearing on Jurisdiction, Day 1, Tr. 12:10-20.
[66] Resp. Mem. on Jurisdiction, ¶¶ 11-13. Resp. Opening Statement, slide 6.
[67] Resp. Mem. on Jurisdiction, ¶¶ 11-12.

context and in the light of its object and purpose."[68] The Respondent affirms that a State's consent to adjudication must be clear and unequivocal, a premise confirmed by numerous prior investment tribunals.[69]

85. The Respondent asserts that the ordinary meaning of the phrase "disputes arising" (and the Claimant's other translation "disputes which arise") in Article 10(1) of the 2015 BIT excludes disputes that had already arisen prior to the date upon which the 2015 BIT came into force, a proposition supported by prior tribunals considering similar language.[70] The Respondent similarly relies on the context and purpose of the Treaty—specifically the Treaty's defined terms "investors" and "investments", the scope of the 2015 BIT addressed in Article 2, the Treaty's forward-looking substantive obligations and preambular language and the creation in Article 10 of investor-State dispute resolution (which did not previously exist between Iraq and Kuwait)—to show the intent that only disputes arising after entry into force of the 2015 BIT would be covered by its dispute resolution clause.[71]

86. With respect to the Claimant's expert, the Respondent submits that Dr. Jonathan Owens' function is merely to translate from the original Arabic text, while the Tribunal's mandate is to interpret that language in accordance with the VCLT.[72] The Respondent underscores

[68] Hearing on Jurisdiction, Day 1, Tr. 13:9-14 (citing VCLT (CL-089), Art. 31).

[69] Hearing on Jurisdiction, Day 1 Tr. 13:15-25; Resp. Opening Statement, slide 10 (citing, *e.g. Société Générale, in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008 ("*Société Générale v. Dominican Republic*") (CL-081), ¶ 82; *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011 (extracts) ("*ABCI v. Tunisia*") (RL-001), ¶ 173; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 ("*Plama v. Bulgaria*") (RL-049), ¶ 198; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (RL-037), ¶ 175; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013 (RL-042), ¶ 21; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013 (CL-029), ¶ 254).

[70] Resp. Mem. on Jurisdiction, ¶ 12 (citing *Impregilo S.p.A. v. Islamic Republic of Pakista*n, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 ("*Impregilo v. Pakistan*") (RL-007); *ABCI v. Tunisia* (RL-001); *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015 ("*Ping An v. Belgium*") (RL-016). Resp. Opening Statement, slide 7.

[71] Resp. Opening Statement, slides 12-16.

[72] Hearing on Jurisdiction, Day 1, Tr. 21:3-10; Resp. Opening Statement, slides 21-22.

that Dr. Owens' translation ("disputes arising/that arise")[73] endorses the Parties' agreed translation of Article 10(1), while asserting that the expert exceeded his mandate when suggesting how the Tribunal should interpret the translated text.[74]

(ii) *Rule of International Law on Non-Retroactivity of Treaties*

87. In order to further inform the Tribunal's interpretation of Article 10(1) of the 2015 BIT, the Respondent points to paragraph 3(c) of Article 31 of the VCLT, which provides that there shall be taken into account, together with the context, "[a]ny relevant rules of international law applicable in the relations between the parties."[75] In that regard, the Respondent emphasizes Article 28 of the VCLT on the non-retroactivity of treaties. For the Respondent, this constitutes an applicable rule of treaty law against which Article 10(1) of the 2015 BIT must be interpreted, whereby such text should not be read to apply to disputes preceding entry into force of the 2015 BIT unless an intent to do so is expressed in the text, which is not the case.

88. Thus, contrary to the Claimant's argument that dispute resolution provisions in treaties apply retroactively unless expressly limited, the Respondent emphasises that a treaty's silence regarding past disputes does not mean consent to investment arbitration over those disputes.[76] Indeed, the Respondent asserts that the Claimant's suggestion is exactly the opposite of both the international law rule that international adjudication must always be consent-based and may not be presumed and the rule on non-retroactivity of treaties reflected in Article 28 of the VCLT.[77]

[73] Owens Report, ¶ 49.

[74] Hearing on Jurisdiction, Day 1, Tr. 21:11-25; 25:22-25; Resp. Opening Statement, slides 23-25.

[75] Hearing on Jurisdiction, Day 1, Tr. 13:9-14 (citing VCLT (CL-089), Art. 31).

[76] Resp. Reply on Jurisdiction, ¶ 27; Hearing on Jurisdiction, Day 1, Tr. 41:2-7; Resp. Opening Statement, slides 6, 38-58 (referencing *Case of the Mavrommatis Palestine Concessions (Greece v. U.K.)*, PCIJ Series A, No. 2, Collection of Judgments, Judgment No. 2: Objection to the Jurisdiction of the Court, 30 August 1924 ("*Mavrommatis*") (CL-128); *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, UNCITRAL, Interim Award, 1 December 2008 ("*Chevron v. Ecuador*") (CL-100)).

[77] Resp. Reply on Jurisdiction, ¶¶ 38 *et seq*.; Hearing on Jurisdiction, Day 1, Tr. 42:1–46:20; Resp. Opening Statement, slides 40-44.

89. In particular, the Respondent attacks the Claimant's reliance on the pre-VCLT 1924 *Mavrommatis* judgment of the Permanent Court of International Justice ("**PCIJ**"), which in *dictum* stated that "jurisdiction based on an international agreement embraces all disputes referred to it after its establishment."[78] For the Respondent, *Mavrommatis* was factually distinct; the Court essentially treated the parties in that case as having expressed a clear intent to submit pre-existing disputes to adjudication[79] and, ultimately, it did not actually apply the provisions of the Mandate retrospectively to address a prior dispute.[80] Moreover, the Respondent asserts that previous investment tribunals have rejected the use of the *Mavrommatis dictum* in this context.[81] Among other things, the Respondent contends that *Chevron v. Ecuador* does not support the Claimant's position (even if one were to consider prior investment cases as precedent) as the text relied upon in that case is distinct from Article 10(1) and, in any event, was also merely *dictum*, since (like *Mavrommatis*) that tribunal also did not apply the BIT provisions to a prior dispute.[82]

90. The Respondent refutes the Claimant's proposition that the 2015 BIT's dispute-resolution provision was meant to enforce pre-existing substantive obligations, whether in the form of other treaties or customary international law.[83] The Respondent submits that the 2015 BIT text does not support the Claimant's argument as there is no umbrella clause nor an applicable law clause in the 2015 BIT, and further notes that prior ICSID tribunals contradict this theory. Moreover, the Respondent highlights that there are no identified precursor treaty obligations for this Tribunal to enforce as the Respondent asserts that the

[78] *Mavrommatis* (CL-128), p. 35.

[79] Hearing on Jurisdiction, Day 1, Tr. 48:4–51:3; Resp. Opening Statement, slide 45.

[80] Resp. Opening Statement, slide 46.

[81] Resp. Reply on Jurisdiction, ¶¶ 38 *et seq.* Hearing on Jurisdiction, Day 1, Tr. 51:4-8; Resp. Opening Statement, slides 45-49 (citing *Walter BAU AG v. Thailand*, UNCITRAL, Award, 1 July 2009 ("*Walter Bau v. Thailand*") (RL-020), ¶¶ 1.1-1.5; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (RL-048), ¶¶ 467-468; *Ping An v. Belgium* (RL-016), ¶¶ 200-202; *Tradex Hellas S.A. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996 ("*Tradex v. Albania*") (RL-018), ¶ D.6.10).

[82] Resp. Reply on Jurisdiction, ¶¶ 63 *et seq*.; Hearing on Jurisdiction, Day 1, Tr. 51:22–55:3; Resp. Opening Statement, slides 51-57.

[83] Resp. Reply on Jurisdiction, ¶¶ 75-77; Hearing on Jurisdiction, Day 1, Tr. 55:16–66:9; Resp. Opening Statement, slides 58-68.

1964 Protocol terminated in 1981 and the two Arab League Investment Agreements are not part of this case.[84]

(iii) *Supplementary Means of Interpretation*

91. If the meaning of Article 10(1) of the 2015 BIT is still ambiguous, the Respondent acknowledges that the Tribunal may then have recourse to supplementary means of interpretation that are set out in Article 32 of the VCLT.[85] The Respondent confirms, however, that there are no *travaux préparatoires* for the 2015 BIT in its possession and it maintains that the recommendation of the Iraqi Parliament cannot be considered a part of the negotiating history of the 2015 BIT. Further, the Respondent reiterates that the circumstances surrounding the 2015 BIT's conclusion, notably the first use of investor-State arbitration between the two States, confirm that the investor-State dispute mechanism was only meant to extend to future disputes.[86] Moreover, the Respondent argues that third-party treaty practice is not conclusive, as only four of seven of Iraq's BITs contained clauses expressly excluding prior disputes and no review of Kuwait's treaty practice was undertaken by the Claimant; therefore, statistically, these factors are insufficient to substantiate the Claimant's proposition that exclusion clauses were employed consistently by Iraq when desired.[87] The Respondent further submits that, while recognizing that prior decisions are not precedent, the Claimant has not been able to show a single prior case that would support its interpretation of the text used in Article 10(1).[88]

(iv) *Most-Favoured-Nation Provision*

92. The Respondent submits that the Most-Favoured-Nation ("**MFN**") clause does not create temporal jurisdiction for several reasons.[89] First, the Iraq-France bilateral investment treaty

[84] Resp. Reply on Jurisdiction, ¶¶ 78-79; Hearing on Jurisdiction, Day 1, Tr. 55:24–56:12; Resp. Opening Statement, slides 68-73.

[85] Hearing on Jurisdiction, Day 1, Tr. 26:1-8; Resp. Opening Statement, slide 26.

[86] Hearing Day 1, Tr. 26:1–29:8.

[87] Resp. Reply on Jurisdiction, ¶ 23. Hearing on Jurisdiction, Day 1, Tr. 32:2–33:3; Resp. Opening Statement, slides 30-32.

[88] Hearing on Jurisdiction, Day 1, Tr. 36:1-21; Resp. Opening Statement, slides 33-37.

[89] Resp. Opening Statement, slides 74 *et seq*.

that Claimant seeks to invoke is still not in force. In addition, the 2015 BIT's MFN text does not apply to "all matters" and does not expressly include dispute resolution. Furthermore, the Respondent submits that to claim through a treaty, one must be under the treaty. In other words, to access the MFN clause, the party must first establish jurisdiction under the 2015 BIT in the first place. However, there is no temporal jurisdiction here.[90] Moreover, the Respondent highlights that the Claimant pleads the MFN clause as a basis for jurisdiction only in a footnote in its Counter-Memorial on Jurisdiction, which Respondent considers procedurally improper.[91]

b. The Claimant's Position

93. The Claimant agrees that Article 10 of the 2015 BIT contains Iraq's consent to arbitrate disputes with Kuwaiti investors, which it argues applies to pre-existing disputes.[92] In the Claimant's view, the scope of Article 10(1) of the 2015 BIT is a question of fact for the Tribunal. If the Tribunal were to determine that the arbitration agreement is silent with respect to its application to pre-existing disputes, then the Claimant argues the Tribunal would still have jurisdiction under the *Mavrommatis* principle that presumes consent to arbitration absent an explicit restriction on the temporal scope of consent.[93]

94. Furthermore, the Claimant submits that the 2015 BIT's dispute resolution clause permits the enforcement of Iraq's substantive obligations that existed at the time of the asserted wrongdoing, as Article 10 provides for arbitration of "disputes" without restricting the

[90] Hearing on Jurisdiction, Day 1, Tr. 68:20–74:17; Resp. Opening Statement, slides 76-87 (citing, *inter alia*, *Plama v. Bulgaria* (RL-049), ¶¶ 198, 200; *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("*Tecmed v. Mexico*") (CL-086), ¶ 69; *ABCI v. Tunisia* (RL-001), ¶ 174; *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (RL-057), ¶ 138; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concussing and Dissenting Opinion of Arbitrator Stern, 21 June 2011 (RL-060), ¶¶ 47, 51, 58; *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, Award on Jurisdiction, 18 July 2013 (RL-017), ¶ 397; *Société Générale v. Dominican Republic* (CL-081), ¶ 41; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 (RL-061), ¶ 145; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Dissent of Arbitrator Boisson de Chazournes, 3 July 2013 (RL-042), ¶¶ 5, 40; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 ("*Maffezini v. Spain*") (CL-106), ¶¶ 63).

[91] Hearing on Jurisdiction, Day 1, Tr. 67:1–68:2, 74:18-22.

[92] Cl. C-M on Jurisdiction, ¶ 10; Cl. Rej. on Jurisdiction, ¶ 14; Cl. Opening Statement, slides 3-4.

[93] Cl. Rej. on Jurisdiction, ¶ 42; Hearing on Jurisdiction, Day 1, Tr. 130:6–132:13.

reference to the BIT's protections. According to the Claimant, Iraq's substantive obligations include customary international law and other international treaty obligations, including the 1964 Protocol that Claimant denies terminated in 1981.[94]

(i) *Text and Context of Article 10(1) of the 2015 BIT*

95. The Claimant emphasises that the only authentic language of the 2015 BIT is Arabic, not English, so only the Arabic meaning of the text can be considered when determining the ordinary meaning under Article 31(1) of the VCLT.[95]

96. According to the Claimant, the Claimant's expert, Dr. Owens, provides the only evidence on the record of the "ordinary meaning" of the original Arabic text, and he states that the text has no inherent time reference, so it could encompass disputes that were existing at the time the 2015 BIT entered into force.[96] Indeed, the Claimant highlights that the Respondent chose not to cross-examine Dr. Owens, leaving an unchallenged record.[97] As the Respondent only provides analysis of the unofficial English translation of the 2015 BIT and fails to challenge the Claimant's expert, the Claimant asserts that its construction of the authentic Arabic text is correct: that Iraq expressly consented to arbitrate disputes whenever they arise.[98] The Claimant similarly explains that the 2015 BIT Arabic text on its face applies to existing disputes, which makes this case distinguishable from the text at issue in *Ping An v. Belgium*.[99]

(ii) *Presumption Applying Dispute Resolution Clauses to All Disputes*

97. In the Claimant's submission, if the 2015 BIT text is ambiguous, the Tribunal should apply the *Mavrommatis* presumption that "a treaty applies to all disputes, whenever they arise, unless it explicitly restricts the temporal scope of consent."[100] Contrary to the Respondent's

[94] Cl. C-M on Jurisdiction, ¶¶ 42-57; Cl. Rej. on Jurisdiction, ¶¶ 56 *et seq*.

[95] Hearing on Jurisdiction, Day 1, Tr. 136:3-23.

[96] Hearing on Jurisdiction, Day 1, Tr. 137:12–143:17.

[97] Hearing on Jurisdiction, Day 1, Tr. 146:13–147:13.

[98] Cl. Rej. on Jurisdiction, ¶ 4.

[99] Hearing on Jurisdiction, Day 1, Tr. 196:10-23 (citing *Ping An v. Belgium* (RL-016)).

[100] Hearing on Jurisdiction, Day 1, Tr. 156:22 *et seq*.; Cl. Rej. on Jurisdiction, ¶ 8 (citing *Nordzucker AG v. Republic of Poland*, Partial Award, 10 December 2008 ("*Nordzucker v. Poland*") (CL-121); *Tradex v. Albania* (RL-018)).

arguments that *Mavrommatis* is inapplicable *dictum*, the Claimant submits that the concept of *dicta* is irrelevant as legal precedent is not binding.[101] Moreover, the Claimant notes that *Mavrommatis* has also been cited approvingly by modern commentators and practitioners.[102] Additionally, the Claimant also notes that this principle was supported by other international decisions.[103] The Claimant distinguishes the cases upon which Respondent relies, because they address the non-retroactivity of substantive obligations, as opposed to the application of the dispute resolution mechanism to pre-existing disputes, or they deal with treaties containing express exclusion clauses.[104]

(iii) *Supplementary Means of Interpretation*

98. Like the Respondent, the Claimant submits that if the text is ambiguous, which the Claimant contends that it is not, the Tribunal can have recourse to the rule set forth in VCLT Article 32 to review supplementary materials.[105] On this point, the Claimant

[101] Hearing on Jurisdiction Day 1, Tr. 157:13–158:4.

[102] Cl. Rej. on Jurisdiction, ¶ 43 (citing V. Heiskanen, "*Entretemps*: Is There a Distinction Between Jurisdiction Ratione Temporis and Substantive Protection Ratione Temporis?", in *Jurisdiction in Investment Treaty Arbitration* (2018) (CL-173), p. 306; Z. Douglas, *The International Law of Investment Claims* (2009) (excerpts) (CL-176), pp. 336-337; Y. Banifatemi (ed.), *Jurisdiction in Investment Treaty Arbitration* (2018) (excerpts) (CL-151), pp. 362-363; N. Rubins and B. Love, "The Scope of Application of International Investment Agreements: I. *Ratione Temporis*", in *International Investment Law* (2015) (CL-161), pp. 481, 490; C. Schreuer, *The ICSID Convention, A Commentary* (2009) (excerpts) (CL-147), pp. 95-96; S. Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors' and Jurisdiction *Ratione Temporis*", in 4 *The Law and Practice of International Courts and Tribunals* (2005) (CL-167), p. 57); Hearing on Jurisdiction, Day 1, Tr. 159:12–168:6.

[103] Cl. Rej. on Jurisdiction; ¶ 48 (citing *Ambatielos Case (Greece v. United Kingdom)*, ICJ Judgment, 1 July 1952 (CL-139), p. 40; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, ICJ Judgment, 11 July 1996 ("*Ambatielos*") (CL-143), ¶ 34; *Nordzucker v. Poland* (CL-121), ¶¶ 111-112; *Chevron v. Ecuador* (CL-100), ¶ 267; *Tradex v. Albania* (RL-018), ¶ D.6.25); Hearing on Jurisdiction, Day 1, Tr. 172:8–174:16.

[104] Cl. Rej. on Jurisdiction, ¶ 45 (distinguishing *Impregilo v. Pakista*n (RL-007), *M.C.I. Power Group* a*nd New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 ("*M.C.I. v. Ecuador*") (RL-013) and *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 ("*EuroGas v. Slovakia*") (RL-005); Hearing on Jurisdiction, Day 1, Tr. 180–192 (distinguishing also *ABCI v. Tunisia* (RL-001), *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (CL-041) and *Walter Bau v. Thailand* (RL-020)).

[105] Hearing on Jurisdiction, Day 1, Tr. 145:6-20.

underscores that the Respondent, despite having negotiated the 2015 BIT, has not found any *travaux préparatoires*, other documents or witnesses supporting its interpretation.[106]

99. As background to the circumstances surrounding the 2015 BIT's conclusion, the Claimant emphasises that the 2015 BIT was negotiated when Iraq needed foreign investment. It undertook a coordinated approached to its BITs, including to avoid splitting claims between the 1964 Protocol and the 2015 BIT. [107] The Claimant then reviews Iraq's treaty practice, which prior ICSID tribunals have found relevant, to show that four out of six other treaties negotiated by Iraq have expressly excluded consent to arbitrate pre-existing disputes.[108]

(iv) *Most-Favoured-Nation Provision*

100. According to the Claimant, as confirmed by prior tribunals, the 2015 BIT's broad MFN clause in Article 5 can be used to import the dispute resolutions provision from the Iraq-France BIT in which Iraq consented to arbitration with French investors regarding "[a]ny investment disputes."[109] The Claimant dismisses the suggestion that the Iraq-France BIT is not yet in force, contending that, in fact, it entered into force on 24 October 2016 as evidenced by its publication in the Official Gazette.[110]

[106] Cl. Rej. on Jurisdiction, ¶ 24; Hearing on Jurisdiction, Day 1, Tr. 145:6-20.

[107] Hearing on Jurisdiction, Day 1, Tr. 147:19–149:21.

[108] Cl. Rej. on Jurisdiction, ¶ 25; Hearing on Jurisdiction, Day 1, Tr. 150:13–152:2 (citing *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and ARB/12/40, Decision on Jurisdiction, 24 February 2014 (CL-149), ¶ 195; *Plama v. Bulgaria* (RL-049), ¶ 195).

[109] Cl. Rej. on Jurisdiction, ¶¶ 50 (citing *Maffezini v. Spain* (CL-106)) and 54.

[110] Cl. Rej. on Jurisdiction, ¶ 55; Hearing Day 1, Tr. 199:25–200:8.

(2) The Tribunal's Analysis

101. Article 10(1) of the 2015 BIT provides for the resolution of "[d]isputes arising between a Contracting Party and an investor of the other Contracting Party in respect of an investment of the latter in the territory of the former."[111]

102. The Parties differ on their interpretation of Article 10(1). The Claimant submits that Article 10(1) applies to disputes that pre-date the 2015 BIT's entry into force,[112] while the Respondent submits that Article 10(1) does not apply to disputes that pre-date the entry into force of the 2015 BIT.[113]

103. It is undisputed between the Parties that, as a general principle, a treaty is to 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 (Article 31(1) of the VCLT). Further, it is undisputed that there shall be taken into account, together with context, any relevant rules of international law applicable in the relations between the parties (Article 31(3)(c) of the VCLT). Finally, where the interpretation according to Article 31 of the VCLT leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning (Article 32 of the VCLT).

a. Ordinary Meaning of Article 10(1) of the 2015 BIT

104. In ascertaining the ordinary meaning of Article 10(1) of the 2015 BIT, the Claimant submits that the Tribunal must look to the 2015 BIT's authentic language, Arabic.[114] The Tribunal notes that the Respondent does not dispute that the Tribunal must look to the

[111] 2015 BIT (as published in the *Kuwaiti Gazette*) (CL-047).

[112] Cl. C-M on Jurisdiction, ¶ 10; Cl. Rej. on Jurisdiction, ¶ 14; Cl. Opening Statement, slides 3-4.

[113] Resp. Mem. on Jurisdiction, ¶¶ 11-13; Resp. Opening Statement, slide 6.

[114] Cl. C-M on Jurisdiction, ¶ 12.

authentic language of the 2015 BIT. Rather, the Respondent's objection is that the Claimant's expert's translation of the authentic Arabic text adds nothing to the English translations already before the Tribunal.[115]

105. The Tribunal finds merit in the Claimant's submission that the Tribunal must look to the 2015 BIT's authentic language of Arabic to interpret the ordinary meaning of the 2015 BIT. The Tribunal finds support for this proposition from *Tradex v. Albania*, where the tribunal expressed caution in interpreting the Albania-Greece BIT solely on the basis of the English translation of the BIT. That tribunal determined that it was appropriate to conduct additional examination "as the [tribunal's] evaluation of the wording of Art. 8 [of the Albania-Greece BIT] is based on its translation into English, which, though it is not challenged by either Party and neither Party has relied on the text in the Albanian language, may not in all nuances be identical with the text in the Albanian language."[116]

106. The Claimant has adduced the evidence of Dr. Jonathan Owens, who is a Professor of Arabic linguistics. Dr. Owens' report focuses mainly on the interpretation of "the key phrase, المنازعات التي تنشأ"[117] in Article 10(1), which Dr. Owens interprets as "Disputes arising/that arise."[118] Dr. Owens' Expert Report goes on to explain that the phrase "disputes which arise … has no inherent time reference."[119] Ultimately, Dr. Owens concludes that Article 10(1) "certainly is not restricted to future disputes" and "should encompass all disputes that arise, irrespective of timing."[120]

107. The Respondent has not put forth any evidence to rebut Dr. Owens' evidence and has chosen not to cross-examine Dr. Owens. The Respondent says that there was no need to do so, as Dr. Owen's interpretation itself shows that the 2015 BIT is forward looking.[121] Further, the Respondent contends that "[t]he ordinary meaning of that term, in the context

[115] Resp. Reply on Jurisdiction, ¶ 14.
[116] *Tradex v. Albania* (RL-018), ¶ D.6.14.
[117] Owens Report, ¶ 54.
[118] Owens Report, ¶ 49.
[119] Owens Report, ¶ 54.
[120] Owens Report, ¶ 7.
[121] Hearing on Jurisdiction, Day 1, Tr. 19:16–20:21.

of the 2015 BIT as a whole and applying international law principles of treaty interpretation, is a matter for the Tribunal to decide"[122] and that Dr. Owens "is stepping beyond his mandate."[123]

108. In contrast, the Claimant submits that the Tribunal therefore only has before it one construction of the ordinary meaning of Article 10 of the 2015 BIT and "[o]n that basis alone, the Tribunal should find that Claimant's interpretation is correct."[124]

109. Having considered both Parties' arguments, the Tribunal does not consider Dr. Owens to be overstepping his mandate as an expert witness. The Tribunal accepts that there is only one authentic text of the 2015 BIT and this is the Arabic text. Since the Tribunal members are not native speakers of the Arabic language, it is not unreasonable for evidence from a linguistic expert to be adduced.

110. Having considered Dr Owens' evidence with care and in the absence of any challenge to the substance of his evidence on the point, the Tribunal accepts Dr. Owens' explanation that the words translated as "disputes arising/that arise" in Article 10(1) do not contain any temporal scope in the original Arabic language. As such, Dr. Owens' explanation means that those words cannot be viewed as solely prospective in nature. In other words, Dr. Owens' interpretation neutralises any argument that the words "disputes arising" means only disputes arising after the 2015 BIT has entered into force.

111. However, that is not the end of the analysis. Dr. Owens goes on to assert that therefore "disputes arising/that arise" "is to be understood as any situation in which a dispute has arisen or will arise between a Contracting Party and an investor in respect of an investment."[125] The Tribunal considers the latter conclusion problematic, as it is not clear to the Tribunal from Dr. Owens' Report that such conclusion is borne out of the analysis in his Report.

[122] Resp. Reply on Jurisdiction, ¶ 16.

[123] Hearing on Jurisdiction, Day 1, Tr. 25:22–25.

[124] Cl. Rej. on Jurisdiction, ¶ 4.

[125] Owens Report, ¶ 54.

112. At paragraph 49 of his Report, Dr. Owens first translates "المنازعات التي تنشأ" as "Disputes arising/that arise." At paragraph 54 of his Report, he states that this phrase "has no inherent time reference." This is problematic for the Claimant. While there may be no inherent time reference, there is nothing in the language of Article 10 to say that it applies to pre-existing disputes either. According to Dr. Owens, the words "Disputes arising/that arise" do not import a concept of time. It is therefore not entirely clear to the Tribunal how Dr. Owens reaches his conclusion that "المنازعات التي تنشأ" or "Disputes arising/that arise" "is to be understood as any situation in which a dispute has arisen or will arise between a Contracting Party and an investor in respect of an investment." Whilst the language used may be inconsistent with an interpretation that Article 10 refers solely to disputes arising after the 2015 BIT came into force, that is quite a different matter from saying that the language of Article 10 makes it clear that it applies to both pre-existing disputes and disputes arising after the 2015 BIT came into force. Rather, it appears that the original text simply references "disputes arising/that arise" without expressly addressing, one way or the other, that only pre-existing disputes are covered, that only disputes arising after the 2015 BIT came into force are covered, or that both types of disputes are covered. Resolution of that issue must be found somewhere other than in the ordinary meaning of "disputes arising/that arise."

113. In short, Dr. Owens' evidence on the Arabic text of Article 10(1) of the 2015 BIT neutralises any argument that "disputes arising" can only mean disputes arising after the 2015 BIT came into force, but does not conclusively demonstrate, one way or the other, whether "disputes arising" would cover pre-existing disputes.

b. Context and Object/Purpose of the 2015 BIT

114. The Tribunal turns to interpret Article 10(1) "in [its] context and in light of its object and purpose."[126] The Tribunal does so by first examining the other provisions of the 2015 BIT.

[126] VCLT (CL-089), Art. 31.

115. First, Articles 2 and 10(1) of the 2015 BIT make express reference to "investor" and "investment."[127] The Respondent submits that because the terms "investor" and "investment" are defined terms in Article 1 of the 2015 BIT, one cannot simply view the 2015 BIT as retroactively applying to disputes arising prior to its entry into force. Until the 2015 BIT enters into force, there is no "investor" or "investment" as defined by the 2015 BIT.[128]

116. Second, the word "shall" is used in Articles 2, 3(1), 3(2), 7(1)(a), 10(2), 16 and 17 of the 2015 BIT.[129] According to the Respondent, the word "shall" denotes a forward-looking action and therefore excludes the retrospective application of the 2015 BIT's jurisdictional provisions.[130]

117. Third, the Preamble of the 2015 BIT and the Explanatory Memorandum to the 2015 BIT both contain terms, which the Respondent says are forward-looking as well. The Preamble states that the treaty is "[f]or the purpose of promoting and expanding economic cooperation",[131] whilst the Explanatory Memorandum records a desire by the parties to the 2015 BIT "to create favourable conditions" and to "increase prosperity in both countries."[132]

118. The second and third arguments made by the Respondent are not persuasive. The Respondent puts too much emphasis on the use of the word "shall" and the words of the Preamble and Explanatory Memorandum of the 2015 BIT. The Tribunal is reluctant to give any significant weight to such wording in deciding whether pre-BIT disputes are covered by the 2015 BIT.

119. The Respondent's first argument, however, is not entirely without merit. There is some force in the argument that the terms "investor" and "investment" are defined in the 2015 BIT in a particular way so that such an "investor" or "investment" would not exist pre-BIT.

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[127] Resp. Opening Statement, slide 12; Hearing on Jurisdiction, Day 1, Tr. 15:6-13.

[128] Hearing on Jurisdiction, Day 1, Tr. 15:21–16:7.

[129] Resp. Opening Statement, slides 13-14.

[130] Resp. Reply on Jurisdiction, ¶ 18.

[131] 2015 BIT (as published in the *Iraqi Gazette*) (CL-048), p. 2.

[132] 2015 BIT (as published in the *Kuwaiti Gazette*) (CL-047), p. 3.

For example, it is noted that the definition of "investment" differs from that found in the 1964 Protocol and that there is no definition therein of "investor." On the other hand, the definitions of "investor" and "investment" appearing in the 2015 BIT are commonly used in contemporary BITs and are broader than definitions used in earlier BITs. It is thus possible to say that Kuwait and Iraq, the parties to the 2015 BIT, might have intended to apply investor-State arbitration under the 2015 BIT to prior disputes regulated by narrower definitions (and substantive standards) in earlier treaties or customary international law.

c. Rule of International Law on the Non-Retroactivity of Treaties

120. Paragraph 3(c) of Article 31 of the VCLT provides that there shall be taken into account, together with the context, "[a]ny relevant rules of international law applicable in the relations between the parties."[133] Article 28 of the VCLT sets forth one such rule, providing: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."[134]

121. The Claimant argues that there is no need to apply such a rule, as the 2015 BIT is clear by its terms that Article 10(1) expressly provides for resolution of investment disputes arising at any time. As noted above, however, the Tribunal does not regard the language of Article 10(1), even in Arabic, as definitive in this respect. Further, as also discussed above, the Tribunal views aspects of the language of the 2015 BIT, read in context, as potentially indicating that it was intended to address disputes arising only after entry into force of the treaty, although this, too, is not determinative of the issue.

122. In applying this general rule, the Claimant maintains that it precludes retroactive application of only the "substantive" standards of the 2015 BIT, but does not affect the "procedural" ability under Article 10 to bring an investor-State arbitration for disputes arising before entry into force of the 2015 BIT, so long as the substantive standards in force

[133] Hearing on Jurisdiction, Day 1, Tr. 13:9-14 (citing VCLT (CL-089), Art. 31).
[134] VCLT (CL-089), Art. 28.

at the time the acts occurred are applied. For the Claimant, if approached in this way, there is no "retroactive" application of the 2015 BIT, given that the dispute before this Tribunal was filed after the BIT entered into force.

123. In contrast, the Respondent argues that the VCLT Article 28 rule precludes retroactive application of the 2015 BIT as a whole, saying there is no basis for drawing the "procedural/substantive" distinction made by the Claimant. For the Respondent, this is especially the case given that, prior to 2015, there did not exist investor-State arbitration between Kuwait and Iraq. Further, the Respondent emphasizes that, in light of such a general rule, any consent by Iraq to investor-State arbitration for disputes arising before the entry into force of the 2015 BIT must be express, clear and unequivocal, which it is not in this case.

124. The Tribunal notes that VCLT Article 28 makes no distinction with respect to the "procedural" and "substantive" provisions of a treaty. Rather, it provides that a treaty's provisions do not bind a party in relation to any act or fact, which took place, or any situation which ceased to exist, before the date of the entry into force of the treaty. Normally, the effect of this general rule is that, if a treaty creates a dispute settlement process that addresses substantive rights arising under that treaty, then there is no jurisdiction to address acts or facts that predate entry into force of the treaty and, hence, no jurisdiction to address a dispute that arose from such acts or facts.[135] This effect is sometimes described as a "non-retroactive" application of the compromissory clause of the treaty to acts or facts that predate entry into force[136] and at other times described as the compromissory clause only allowing for disputes that relate to violations of the treaty at hand, which in turn could not have occurred prior to the treaty's entry into force.

125. In either event, the effect of the rule set forth in VCLT Article 28 (sometimes referred to as a "principle" or "presumption") is that a treaty creating a dispute settlement process that addresses substantive rights arising under that treaty is presumed not to apply to disputes

[135] *See Ambatielos* (CL-139), p. 28.

[136] Adherents to this view typically see no difference for retroactivity purposes between "procedural" and "substantive" clauses of a treaty, or alternatively view a compromissory clause as "substantive."

arising prior to that treaty,[137] unless a contrary intent of the parties can be discerned either from the text or purpose of the treaty. As such, the Tribunal finds that it can have no jurisdiction over any dispute that arose prior to 4 February 2015, the date of entry into force of the 2015 BIT, unless a contrary intent of Iraq and Kuwait can be discerned from the text or purpose of the treaty.

126. There is no express text in the 2015 BIT indicating an intent to set aside the effect of the general rule on the non-retroactivity of treaties, so that the 2015 BIT applies to disputes arising before its entry into force, nor is there any text from which such an intent can be implied. In *Chevron v. Ecuador*, the tribunal found that there was a general rule of non-retroactivity that applies to treaties and, further, that such a rule applied to both "substantive" and "procedural" provisions of a BIT (hence, it was no different for provisions dealing with the resolution of disputes).[138] But the tribunal concluded that the general rule could be overturned implicitly by a provision stating that the BIT "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter."[139] According to the *Chevron* tribunal, such a provision meant that the BIT protected investments prior to entry into force of the BIT and hence any dispute concerning a denial of such protection fell within its jurisdiction.[140] In the present case, the Claimant has not argued that a similar provision in the 2015 BIT (Article 2) creates such

[137] *See, e.g., Impregilo v. Pakistan* (RL-007), ¶ 300 (finding that language of "any dispute arising" and "the absence of specific provision for retroactivity … infers that disputes that may have arisen before entry into force of the BIT are not covered…"); *MCI Power v. Ecuador* (RL-013), ¶ 61 (finding that the "silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties."); *Paushok v. Mongolia* (RL-048), ¶¶ 443, 467 (finding that language of "disputes … arising" "should not be interpreted as granting [the tribunal] jurisdiction concerning disputes which arose after entry into force but which are based on actions that have occurred before such entry into force, except for the particular situation of continuing or composite acts"); *ABCI v. Tunisia* (RL-001), ¶¶ 169, 171 ("Dans le contexte du TBI, le Tribunal est d'avis que « arising » se rattache aux différends nés après son entrée en vigueur, c'est-à-dire dans l'avenir par rapport à la date de son entrée en vigueur," and "cette conclusion s'impose aussi à la lumière des principes de droit international concernant l'effet non rétroactif des traités, ainsi que l'établit l'article 28 de la Convention de Vienne sur le droit des traités …").

[138] *Chevron v. Ecuador* (CL-100), ¶¶ 170-173 ("…[t]he principle of non-retroactivity is not different for provisions in treaties dealing with the resolution of disputes, and in particular jurisdictional clauses contained therein"), 174 ("[n]one of the investment jurisprudence cited by the Parties establishes a different approach"), and 175 ("…in line with the *Ambatielos* case…, the Tribunal finds that the BIT, including its jurisdictional provisions, cannot apply retroactively unless such an intention can be established in the BIT or otherwise").

[139] *Chevron v. Ecuador* (CL-100), ¶ 188.

[140] *Chevron v. Ecuador* (CL-100), ¶ 265.

an implication, nor have other tribunals interpreted such a provision to have such an implication.[141] In any event, the *Chevron* tribunal's position in this regard was not actually applied in that case, as the tribunal determined that the conduct at issue and the dispute before it both arose after the entry into force of the BIT.[142] This Tribunal does not consider that any of the provisions of the 2015 BIT implicitly overturn the effect of the general rule set forth in VCLT Article 28.

127. In the *Mavrommatis* case, the PCIJ considered whether the Mandate for Palestine granted by the Council of the League of Nations, which entered into force in 1923 and which granted jurisdiction to the Court over disputes between the United Kingdom and any other Member of the League relating to the Mandate, encompassed disputes arising prior to 1923. The Court stated: "The Court is of the opinion that, in case of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment."[143] While the Claimant has sought to argue that this general language reflects a "*Mavrommatis* presumption" in treaty law, such that Article 10(1) of the 2015 BIT should be deemed to encompass disputes arising prior to its entry into force (in the absence of any express exclusion), the Tribunal is not persuaded that such a presumption operates in the context of interpreting the temporal application of a dispute resolution provision of a BIT.

128. First, the PCIJ itself concluded in *Mavrommatis* that the breach before it continued to exist after entry into force of the Mandate, such that the above statement by the PCIJ was not germane to its disposition of the case.[144] Second, *Mavrommatis* was a situation where the objective in adopting the dispute resolution provision of the Mandate for Palestine, as well as Protocol XII of the Treaty of Lausanne (which contained substantive standards for

[141] *See, e.g., Walter Bau v. Thailand* (RL-020), ¶ 9.68 ("Whilst Article 8 makes it clear that the Treaty applies to 'investments' made before entry into force of the 2002 Treaty, that does not mean that investors can claim damages retrospectively for matters which had given rise to disputes prior to that date"); *Ping An v. Belgium* (RL-016), ¶ 226 ("…the common provision in Article 10(2) that the 2009 BIT applies to all investments, made before or after its entry into force, does not assist in any way on the question of the effect of a dispute arising before entry into force").

[142] *Chevron v. Ecuador* (CL-100), ¶¶ 268-269 ("In the present case, however, the Claimants base their claims on post-BIT conduct" and "[i]n any event, the Tribunal concludes that the present dispute has arisen after the entry into force of the BIT").

[143] *Mavrommatis* (CL-128), p. 35.

[144] *Ibid.* ("…this breach, no matter on what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it").

addressing Ottoman-era concessions), was in part for the purpose of addressing disputes that had arisen during the United Kingdom's occupation, and subsequent administration, of Palestine prior to the entry into force of either the Mandate or Protocol XII.[145] As such, there was a specific objective of the relevant treaties demonstrating an intent that they be applied to prior disputes.

129. Third, *Mavrommatis* has been viewed as a situation where the dispute resolution clause was not attached to the substantive clauses of the treaty, but instead, it simply provided for the general submission of a category of disputes between two or more States to an international court.[146] In contrast, during the lead-up to adoption of Article 28 of the VCLT, the International Law Commission's rapporteur for the topic, Sir Humphrey Waldock, noted that:

> *when a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit* ratione temporis *the application of the jurisdictional clause. The reason is that the "disputes" with which the clause is concerned are* ex hypothesi *limited to "disputes" regarding the interpretation and application of the substantive provisions of the treaty which … do not normally extend to matters occurring before the treaty came into force.*[147]

130. Thus, a treaty where the dispute resolution clause is attached to the substantive clauses of the treaty presents a different situation from that of the *Mavrommatis* case.[148] For investor-State arbitration, the dispute resolution article in a BIT providing for investor-State arbitration appears generally to be viewed as attached to the substantive provisions of the

[145] As the Court noted with respect to the protocol, it "was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII [is] that its effects extend to legal situations dating from a time previous to its own existence": *Mavrommatis* (CL-128), p. 34.

[146] *See* United Nations, *Yearbook of the International Law Commission 1966: Vol. II, Documents of the second part of the seventeenth session and of the eighteenth session, including the reports of the Commission to the General Assembly* (excerpts) (CL-113), p. 212, ¶ (2) (1966 ILC commentary to what became VCLT Article 28).

[147] United Nations, *Yearbook of the International Law Commission 1964: Vol. II, Documents of the sixteenth session, including the report of the Commission to the General Assembly* (excerpts) (CL-112), p. 11, ¶ (4). The Commission agreed with this distinction: United Nations, *Yearbook of the International Law Commission 1966: Vol. II, Documents of the second part of the seventeenth session and of the eighteenth session, including the reports of the Commission to the General Assembly* (excerpts), p. 212, ¶ (2).

[148] *Ibid.*

BIT, particularly when introducing procedures for a new form of international litigation that did not exist prior to entry into force of the BIT. For example, the tribunal in *Paushok v. Mongolia*, when considering the effect of "disputes … arising" in the dispute resolution article of a BIT that entered into force in 2006 concluded:

> *While it is true that there is no temporal restriction to the word "disputes" in Article 6 of the Treaty, this is no reason to give that Article an extensive interpretation which takes it well beyond the general scope of the Treaty. … The Contracting Parties cannot be assumed to have allowed a situation whereby an investor could, after the entry into force of the Treaty, simply manufacture a dispute with a Contracting Party concerning events which would have occurred, say in 1955, and an arbitral tribunal would have jurisdiction to rule on such events. Such an interpretation appears to the Tribunal to be far beyond what could have been the intention of the Contracting States when they entered into the Treaty.*[149]

131. As the tribunal in *Ping An v. Belgium* noted: "If (which is doubtful) the *Mavrommatis* case stands for a principle that there is a presumption that the jurisdiction of a tribunal extends to disputes which arose prior to its establishment, such a principle finds almost no support in investor-State arbitration."[150] Indeed, investor-State tribunals have virtually never used investor-State dispute resolution procedures established by a BIT either to apply retroactively the "substantive" provisions of the BIT to acts or facts occurring prior to entry into force of the treaty, or to pass upon the lawfulness of such acts or facts based on other sources of law.

132. One area where there is limited precedent for the dispute resolution procedures in a BIT to be used for disputes arising prior to entry into force of that BIT concerns the situation of successive BITs. In *Jan de Nul v. Egypt*, there existed a BIT with investor-State dispute resolution and then a successor BIT also with investor-State dispute resolution; the tribunal viewed itself as empowered to use the dispute resolution procedure of the latter BIT for interpreting violations arising under the earlier BIT.[151] A variation on this limited precedent

[149] *Paushok v. Mongolia* (RL-048), ¶ 468.

[150] *Ping An v. Belgium* (RL-016), ¶ 184.

[151] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 ("*Jan de Nul v. Egypt*") (RL-010), ¶¶ 117, 137.

concerns a BIT that contains various substantive standards but limited investor-State dispute resolution, which is then amended to allow for broader investor-State dispute resolution regarding those same standards. The tribunal in *Nordzucker v. Poland*[152] regarded itself as empowered in such a situation to address violations of the BIT that occurred prior to the BIT's amendment.[153]

133. In the case before this Tribunal, however, there are no successive BITs (or an amended BIT) providing for investor-State dispute resolution, and thus no basis for construing an intention by the parties to the 2015 BIT, as in *Jan de Nul*, to set aside the effect of the general rule on non-retroactivity of treaties. To the contrary, if the Claimant is correct that the 1964 Protocol remained in force until the entry into force of the 2015 BIT, then it should be noted that the 1964 Protocol did not provide for investor-State arbitration. Rather, it provided for State-to-State arbitration for any dispute arising out of the interpretation or application of that Protocol.[154] Moreover, by its terms, if the 1964 Protocol terminated in 2015, then its provisions continue to be applied to investments created during its life, "until the rights related to them are liquidated," for a period not to exceed twenty years from the termination of the Protocol.[155] As such, rather than suggesting an intent by the parties to enable use of the dispute resolution provisions of the 2015 BIT for alleged violations of the Protocol, the Protocol appears to contemplate continued protection—under the dispute resolution provisions of that Protocol—of investments created during the time that the Protocol was in force.[156]

134. Writers have taken somewhat differing views with respect to the issue of the effect of the general rule set forth in VCLT Article 28 upon dispute resolution provisions contained in

[152] *See Nordzucker v. Poland* (CL-121), ¶ 110.

[153] The Parties in this case also referred to the findings in *Tradex v. Albania* (RL-0018). That case concerned whether a 1993 Albanian national law on foreign investment should be interpreted to constitute consent to submit to ICSID disputes that had arisen before the entry into force of the law. As such, the case did not involve interpretation of whether a dispute resolution clause *in a treaty* should apply to disputes arising prior to entry into force of the treaty. Further, the tribunal found salient various aspects of the national law as demonstrating an intent to include disputes arising before enactment of the law, aspects that are not present in this case.

[154] 1964 Protocol (CL-067), Art. 7.

[155] 1964 Protocol (CL-067), Art. 8.

[156] For a comparable situation, *see Walter Bau v. Thailand*, ¶¶ 9.5, 9.67-9.69.

BITs.[157] Such views sometimes take into account the specific text and purposes of particular treaties, including the possibility of successive BITs, but sometimes simply make broad statements without providing detailed analysis of the relevant issues and associated case law. In any event, the Tribunal does not find anything in such writings that alter the analysis indicated above.

135. In conclusion, in light of the general rule of international law on the non-retroactivity of treaties, the Tribunal finds that it has no jurisdiction over any dispute that arose prior to 4 February 2015, the date of entry into force of the 2015 BIT. There are four claims which the Claimant says arose after that date. However, before turning to those claims, the Tribunal addresses arguments advanced with respect to supplementary means of interpretation and relating to the MFN provision in the 2015 BIT.

d. Supplementary Means of Interpretation

136. The Tribunal has considered whether, under Article 32 of the VCLT, supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, would be of assistance.

137. In the present case, no preparatory works of the 2015 BIT were before the Tribunal, though the Tribunal does not consider that this was due to a lack of effort by the Parties to locate such works. On 15 November 2018, the Claimant's counsel wrote to the Respondent's counsel to request production by the Respondent of the *travaux préparatoires* relating to

[157] *See, e.g.*, N. Gallus, "Article 28 of the Vienna Convention on the Law of Treaties and Investment Treaty Decisions", in 31(2) *ICSID Review* (2016), p. 295, available at: https://academic.oup.com/icsidreview/article/31/2/290/2198155 ("Claimants before investment treaty tribunals have often argued that the rule against retroactivity was overridden by the treaty but these arguments have been universally rejected, at least in the publicly available awards"); Z. Douglas, "When Does an Investment Treaty Claim Arise? An Excursus on the Anatomy of the Cause of Action", in *Investment Treaty Arbitration* (2018) (RL-038), p. 346 ("The scope of the consent in the majority of investment treaties is thus defined as 'any' or 'all' disputes relating to an investment. It is conceivable in this situation that the investor might rely on" customary international law to pursue a claim for damage caused prior to entry into force of the treaty); V. Heiskanen, "*Entretemps*: Is There a Distinction Between Jurisdiction Ratione Temporis and Substantive Protection Ratione Temporis?", in *Jurisdiction in Investment Treaty Arbitration* (2018) (CL-173), pp. 309-310 ("…if the treaty does not create any novel substantive obligations but simply requires that the State parties comply with customary international law standards, or even if it creates novel obligations but also confirms the applicability of customary international law and the existing claim in question is based on customary international law, and assuming further that the treaty does not specifically exclude existing claims, the tribunal may properly deal with such existing claims or disputes").

the 1964 Protocol and the 2015 BIT.[158] By way of a letter dated 21 November 2018, the Respondent's counsel wrote to the Claimant's counsel stating that the Respondent "is willing to make enquiries as to whether such documents exist and, if so, to discuss the possibility of disclosing them to Agility."[159] On 19 March 2019, the Respondent's counsel informed the Claimant's counsel that no formal preparatory works exist with respect to the 1964 Protocol and the 2015 BIT. As regards the 2015 BIT, whilst the Respondent at the time of the negotiation was provided with hard copies of previous drafts of the 2015 BIT, it has not been possible for the Respondent to locate copies of these drafts.[160]

138. The Tribunal also notes that the Claimant sought to rely on (i) an explanatory memorandum by the Kuwaiti Council of Ministers[161] summarising the 2015 BIT's terms; and (ii) a resolution by the Iraqi Parliamentary Committee dated 11 January 2015[162] to make the point that Article 10(1) has no temporal scope, because neither of these documents imposes any temporal restrictions on the disputes which may be submitted to arbitration.

139. The Tribunal does not consider that either document adds anything to what Article 10(1) or the general provisions of the 2015 BIT themselves already state. The fact that these documents did not refer expressly to the temporal scope of the 2015 BIT does not assist the Tribunal, one way or the other, as to whether Article 10(1) of the 2015 BIT applies to pre-existing disputes.

140. As part of the analysis under Article 32 of the VCLT, the Claimant also submitted that the Tribunal should take into account BITs negotiated by Iraq with third States:

[158] Letter from the Claimant's counsel to the Respondent's counsel dated 15 November 2018, Exhibit R-001

[159] Letter from the Respondent's counsel to the Claimant's counsel dated 21 November 2018, Exhibit R-002.

[160] Letter from the Respondent's counsel to the Claimant's counsel dated 19 March 2019, Exhibit R-003.

[161] Council of Minister of the State of Kuwait, Explanatory Memorandum Concerning the Proposed Law Approving the Agreement Between the Government of the State of Kuwait and the Government of the Republic of Iraq on the Encouragement and Mutual Protection of Investment (CL-036); Cl. C-M on Jurisdiction, ¶¶ 19-20.

[162] Resolutions of the Parliamentary Committee dated 11 January 2015, Exhibit C-067); Cl. C-M on Jurisdiction, ¶ 21.

a. Iraq has seven BITs, including the 2015 BIT. Out of these seven BITs, four expressly exclude pre-existing disputes. These four BITs were also signed within a few years of each other and the 2015 BIT.[163]

b. Four of Iraq's BITs, including the 2015 BIT, were signed by the Chairman of Iraq's National Investment Authority. Of these four BITs, only the 2015 BIT does not expressly exclude pre-existing disputes.[164]

141. The Claimant's submission is that the above context shows a pattern whereby Iraq would adopt language expressly to exclude pre-existing disputes from the ambit of its treaties when it wished to do so, the implication being that a treaty which does not contain such exclusion must be interpreted to cover pre-existing disputes.[165]

142. On the other hand, the Respondent submits that the Claimant's submission does not take into account treaties signed by Kuwait. The Respondent's main submission is that the majority of Kuwait's treaties do not explicitly address pre-existing disputes.[166] As such, the Claimant's argument that the parties to the 2015 BIT would have expressly excluded pre-existing disputes, had they intended to do so, is unsustainable in the Respondent's view.[167]

143. On balance, the Tribunal considers it difficult to make any judgment based on Iraq's treaty practice.

144. First, the number of treaties signed by Iraq is very small. This makes it more difficult to draw any particular conclusions about a pattern of practice from these treaties.

145. Second, the objective before the Tribunal is to ascertain the intent of both Iraq and Kuwait in adopting Article 10 of the 2015 BIT. Evidence of this kind should address the intent of both parties, not just one of them.

[163] Cl. Rej. on Jurisdiction, ¶ 25.
[164] Cl. Opening Statement, slide 17.
[165] Hearing on Jurisdiction, Day 1, Tr. 152:17–153:6.
[166] Resp. Reply on Jurisdiction, ¶ 23.
[167] Hearing on Jurisdiction, Day 1, Tr. 32:24–33:17.

146. Third, it was not possible to provide the Tribunal with the preparatory works of the treaties that contained articles expressly excluding pre-existing disputes. Such articles could have been included by the third party to these other BITs, rather than by Iraq, thereby evincing a view by that third party and not by Iraq. The Tribunal also recognises that each treaty is unique and is the product of negotiations by the parties to it. Given the lack of evidence on the negotiations for these other treaties, the Tribunal is left to speculate what took place and why.

147. Finally, drawing an implication of the kind urged by the Claimant presents risks, as a clause expressly excluding prior disputes can be viewed as simply incorporating, out of an abundance of caution, a rule that would exist in any event under treaty law.[168]

148. In the circumstances, the Tribunal gains little assistance from the terms found in Iraq's other BITs.

e. Most-Favoured-Nation Provision

149. Having decided that the scope of Article 10(1) of the 2015 BIT does not include disputes which arose before the 2015 BIT's entry into force, the Tribunal now turns to the issue of whether the 2015 BIT's MFN clause can be used to import a more favourable dispute resolution provision from other BITs to which Iraq is a party.

150. As a preliminary point, the Tribunal notes that the Claimant first mentioned this argument in a footnote in its Counter-Memorial on Jurisdiction,[169] though this argument was subsequently developed more fully in its Rejoinder on Jurisdiction.[170] Whilst this is regrettable, the Tribunal does not consider the Respondent prejudiced as a result. The Respondent had opportunities to address the Claimant's arguments on the MFN clause both in its Reply on Jurisdiction[171] and at the Hearing on Jurisdiction.[172] The Tribunal is

[168] *See Walter Bau v. Thailand* (RL-020), ¶ 9.70; *Ping An v. Belgium* (RL 016), ¶ 142.
[169] Cl. C-M on Jurisdiction, ¶ 11, fn. 5.
[170] Cl. Rej. on Jurisdiction, ¶¶ 50-55.
[171] Respondent's Reply on Jurisdiction, ¶ 25, fn. 45.
[172] Hearing on Jurisdiction, Day 1, Tr. 67:1–74:22; Hearing on Jurisdiction, Day 2, Tr. 27:11–29:11.

therefore justified in considering both Parties' arguments on the applicability of the MFN clause.

151. Article 5 of the 2015 BIT provides that:

> *Each Contracting Party shall accord the investors of the other Contracting Party treatment no less favourable than the treatment it accords in similar circumstances to investors unaffiliated to either Contracting Party with respect to incorporation, possession, expansion, administration, disposition, operation, sale and any other disposition of investments in its territory.*[173]

152. In *Maffezini v. Spain*,[174] the tribunal determined that the claimant could rely on the MFN provision in the Argentina-Spain BIT to import a more favourable dispute resolution clause from the Spain-Chile BIT. The MFN provision in the Argentina-Spain BIT provides that "[i]n all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country." Under the Argentina-Spain BIT, an investor had to wait 18 months before commencing arbitration proceedings whereas under the Spain-Chile BIT, an investor only had to wait 6 months. The investor viewed the import of the 6-month waiting period from the Spain-Chile BIT to the Argentina-Spain BIT as a more favourable term.

153. Several other tribunals have declined to apply *Maffezini*. In these cases, the tribunals have expressed the view that an MFN provision cannot be used to import dispute resolution provisions from other treaties to create jurisdiction when none exists. For instance:

a. In *Tecmed v. Mexico*, the claimant sought to use the MFN clause in the Mexico-Spain BIT to incorporate a clause under the Mexico-Austria BIT allowing the retroactive application of the Mexico-Austria BIT to disputes pre-dating the Mexico-Spain BIT. The tribunal rejected the claimant's argument, finding that

> *matters relating to the application over time of the [Mexico-Spain BIT], which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core*

[173] 2015 BIT (as published in the *Kuwaiti Gazette*) (CL-047).

[174] *Maffezini v. Spain* (CL-106).

> *of matters that must be deemed to be specifically negotiated by the Contracting Parties…Their application cannot therefore be impaired by the principle contained in the most favored nation clause.*[175]

b. In *Plama v. Bulgaria*, the tribunal declined to follow the *Maffezini* decision, finding that "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[176]

c. In *Salini v. Jordan*, the tribunal sought to distinguish the *Maffezini* decision, finding, *inter alia*, that the MFN clause in the Italy-Jordan BIT before it did not include any provision extending its scope of application to dispute settlement. Unlike the MFN clause in the Argentina-Spain BIT examined in *Maffezini*, the MFN clause in the Italy-Jordan BIT does not envisage "all rights or all matters covered by the agreement." Further, the claimants submitted nothing from which it might be established that the common intention of the parties was to have the MFN clause apply to dispute settlement.[177]

154. Having examined the above cases, the Tribunal is not persuaded that the holding in *Maffezini* is applicable to the present case. First, the factual matrix in *Maffezini* is inapposite to the present case. In *Maffezini*, the issue was not whether the tribunal had jurisdiction over the dispute. Instead, the issue before the tribunal was whether the claim was admissible before the tribunal by virtue of the waiting time before the commencement of arbitration being shortened. In contrast, the Claimant in the present case is trying to import a dispute resolution clause to create the Tribunal's jurisdiction over the dispute.

155. In the Tribunal's view, in the absence of an express provision stating otherwise, a generic MFN clause cannot be used to create jurisdiction where none exists. Unless the MFN clause

[175] *Tecmed v. Mexico* (CL-086), ¶ 69.

[176] *Plama v. Bulgaria* (RL-049), ¶ 223.

[177] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004 (RL-051), ¶ 118.

specifically refers to dispute resolution clauses, the better view is that MFN clauses are intended to incorporate substantive standards from other treaties that provide greater protection of investors and investments, not dispute resolution clauses. Matters of procedure or jurisdiction are specifically negotiated by the parties to each treaty and the inclusion of an MFN clause cannot easily be said to be intended to import other procedures or jurisdiction unless expressly called for by the parties.

f. Conclusion

156. In light of the above analysis, the Tribunal concludes that its jurisdiction under Article 10 of the 2015 BIT is limited to disputes which arose only after the entry into force of the 2015 BIT.

B. THE DATE ON WHICH THE DISPUTE OR DISPUTES AROSE

(1) The Parties' Positions

a. The Respondent's Position

157. According to the Respondent, the Parties agree that to determine *ratione temporis* jurisdiction, the Tribunal must inquire when the dispute arose.[178]

(i) *Definition of "Dispute"*

158. The Respondent submits that the Parties agree on the definition of "dispute", which is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[179] The Respondent contends, however, that the definition of dispute does not require the "triple-identity test" as with *lis pendens*.[180] Moreover, the Respondent underscores that a dispute is not the mere occurrence of an additional fact or omission, nor

[178] Resp. Opening Statement, slide 98.

[179] Resp. Opening Statement, slide 92 (citing *EuroGas v. Slovakia* (RL-005)); Hearing on Jurisdiction, Day 1, Tr. 77:2-10.

[180] Hearing on Jurisdiction, Day 1, Tr. 77:11-17; Resp. Reply on Jurisdiction, ¶¶ 89, 111.

does it require the articulation of all legal arguments. Similarly, the Respondent argues that the discovery or occurrence of subsequent facts does not give rise to a new dispute.[181]

(ii) *The "Dispute"*

159. According to the Respondent, the dispute arose before the 2015 BIT entered into force on 4 February 2015.[182] The Respondent submits that the Claimant itself recognized that a "dispute ha[d] arisen" about the CMC Order by September 2014.[183] Moreover, the Respondent contends that the acts or omissions of the Respondent relating to the CMC Order after 2014, including the Respondent's failure to resolve the dispute, do not give rise to new, separate disputes.[184]

160. In addition, the Respondent argues that the Claimant's "discovery" of alleged collusion neither "crystalized" the pre-existing CMC order dispute, nor "transformed" it into a new dispute.[185] The Respondent asserts that the Claimant's multiple letters to various State entities and officials over the subsequent months, which occurred before the 2015 BIT entered into force, plainly sought to escalate the dispute, and investment tribunals have recognized that a dispute has arisen under international law based on correspondence even less explicit or voluminous than the record here.[186]

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[181] Resp. Opening Statement, slides 96-98 (citing *Phosphates in Morocco (Italy v. France)*, ICJ Judgment, 14 June 1938 ("*Phosphates*") (RL-015) p. 24; *Case Concerning Legality of Use of Force (Yugoslavia v. Belgium)*, ICJ Order, 2 June 1999 (RL-046), ¶¶ 28-29; *Case Concerning Certain Property (Liechtenstein v. Germany)*, ICJ Judgment, 10 February 2005 (RL-035), ¶¶ 18, 51; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005 ("*Lucchetti v. Peru*") (RL-008), ¶¶ 50, 53; *Jan de Nul v. Egypt* (RL-010), ¶ 126; *M.C.I. v. Ecuador* (RL-013), ¶ 65; Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Limited and others, High Court of the Republic of Singapore Case No. 492/2016, Judgment, 14 August 2017 ("*Lesotho v. Swissbourgh*") (CL-117), ¶ 177; *EuroGas v. Slovakia* (RL-005), ¶ 453; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 ("*ATA Construction v. Jordan*") (CL-010), ¶¶ 100, 102, 115).

[182] Resp. Opening Statement, slides 100-124.

[183] Resp. Mem. on Jurisdiction, ¶ 22 (citing Cl. Mem., ¶ 91); Resp. Reply on Jurisdiction, ¶¶ 85-96. Resp. Opening Statement, slides 125-126.

[184] Resp. Reply on Jurisdiction, ¶ 8.

[185] Resp. Reply on Jurisdiction, ¶¶ 97-111.

[186] Resp. Mem. on Jurisdiction, ¶¶ 23-26.

161. Similarly, regarding the Claimant's denial of justice claim, the Respondent submits that the failure to resolve a 2014 dispute does not create a new dispute.[187] By the same token, in the Respondent's view, the Claimant's implementation claims regarding the 2017 "failure to act" after the CMC Order does not create a new dispute.[188]

(iii) *Composite Breach*

162. With regard to the Claimant's argument on "composite breach", the Respondent argues that this theory has no factual or legal basis and cannot cure the Tribunal's lack of jurisdiction.[189] The Respondent asserts that, as a preliminary matter, it is simply too late—and fundamentally unfair—for the Claimant to bring an entirely different claim at this stage.[190] In any event, the acts of which the Claimant complains are neither elements of a composite act nor a continuing breach.[191] The Respondent contends that regardless of the Claimant's characterization of the events at issue here as composite acts or continuing breaches or some combination of the two, it simply cannot overcome the fundamental principle of intertemporal law.[192]

b. The Claimant's Position

163. Even if the Tribunal were to find that its jurisdiction was limited to disputes that arose after the 2015 BIT entered into force, the Claimant contends that the Tribunal would still have jurisdiction as it has pled disputes that post-date the entry into force of the 2015 BIT.[193]

[187] Resp. Reply on Jurisdiction, ¶¶ 120-122.

[188] Resp. Opening Statement, slides 150 *et seq*.; Resp. Reply on Jurisdiction, ¶¶ 113-119.

[189] Resp. Reply on Jurisdiction, ¶¶ 133-148.

[190] Resp. Reply on Jurisdiction, ¶133. Resp. Mem. On Jurisdiction, ¶ 54; Bifurcation Hearing, Tr. 67:4-23; Resp. Reply on Jurisdiction, ¶ 133.

[191] Resp. Reply on Jurisdiction, ¶¶ 134-142.

[192] Resp. Reply on Jurisdiction, ¶¶ 143-148.

[193] Hearing on Jurisdiction, Day 1, Tr. 202:23 *et seq*.

(i) *Definition of "Dispute"*

164. The Claimant submits that there are two questions to be answered in this context that the Respondent conflates: first, what is a dispute and when does it arise, and second, what distinguishes one dispute from another?[194]

165. The Claimant agrees with the Respondent on the definition of a dispute. However, the Claimant disagrees with Respondent's attempt to conflate this issue with the question of separate disputes by relying on *Lucchetti v. Peru*, which has been heavily criticized.[195] In the Claimant's view, the triple-identity test and the *lis pendens* test, used by the *RDC v. Guatemala* tribunal, could guide the Tribunal in distinguishing different disputes.[196]

(ii) *The "Disputes"*

166. The Claimant submits that, in general, the Respondent mischaracterizes all the Claimant's claims as a single dispute that arose in 2014.[197] The Claimant asserts that it has three independent disputes that crystallised after the 2015 BIT entered into force.[198]

167. First, the dispute relating to Iraq's denial of justice occurred no earlier than 2016. At the Hearing on Jurisdiction, the Claimant articulated that the dispute was the procedural impropriety of the Iraqi courts in denying IT Ltd standing to be heard as an interested party, which took place no earlier than 18 January 2016, and denying jurisdiction over Korek's claim, which occurred no earlier than 25 January 2016.[199]

168. Second, the Respondent's failure to implement the CMC Order, including the KRG's refusal to reinstate the KRG Guarantee in favour of the Claimant's subsidiary, also

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[194] Hearing on Jurisdiction, Day 1, Tr. 203:21–204:8.

[195] Hearing on Jurisdiction, Day 1, Tr. 204:12-15; 207:22 *et seq*. (citing *Lucchetti v. Peru* (RL-008); *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 ("*RDC v. Guatemala*") (CL-125); *ABCI v. Tunisia* (RL-001); *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (CL-150); *Jan de Nul v. Egypt* (RL-010); *Lesotho v. Swissbourgh* (CL-117)).

[196] Hearing on Jurisdiction, Day 1, Tr. 212:23–213:6; Cl. Opening Statement, slide 114 (citing *RDC v. Guatemala* (CL-125), ¶ 131).

[197] Observations on Bifurcation, ¶¶ 14-29.

[198] Cl. Opening Statement, slides 130-160.

[199] Cl. Responses to Tribunal Questions, p. 19.

occurred no earlier than 2016. The Claimant specified at the Hearing on Jurisdiction that the dispute arose on 10 December 2017 after it became clear that the KRG was not going to implement its part of the CMC Order and the Claimant articulated its position to the KRG and CMC, which was aggravated by the Iraqi Kurdistan Directorate General of Registration of Companies decision on 19 March 2019 to partially implement the CMC Order.[200]

169. Third, the Claimant submits that the dispute relating to Iraq's collusion with the Iraqi Shareholders to take the Claimant's investment could not have arisen until the Claimant became aware of the collusion, which was no earlier than 30 April 2018.[201]

(iii) *Composite Breach*

170. Moreover, in the alternative, the Claimant submits that the Tribunal should exercise jurisdiction *ratione temporis* over the Respondent's composite breach of the fair and equitable treatment, full protection and security and expropriation obligations. The Claimant contends that a composite act cannot materialize until the last of the necessary acts to establish the composite breach occurs, which the Claimant asserts crystalized after the 2015 BIT's entry into force.[202]

171. The Claimant asserts that the following acts comprise the composite breach:

> *1. The CMC Order harmed Agility's investment by ordering that Agility lose its indirect equity rights.*
>
> *2. The inconsistent directives of the Iraqi Parliament, KRG and other administrative agencies regarding the legality and enforceability of the CMC Order compounded the harm.*
>
> *3. Iraq failed to implement or failed to provide guidance on how to implement the CMC Order, effecting an indirect expropriation*

[200] Cl. Responses to Tribunal Questions, p. 17.

[201] Cl. C-M on Jurisdiction, ¶¶ 67-106; Cl. Rej. on Jurisdiction, ¶¶ 74-94; Cl. Opening Statement, slides 131-166; Cl. Mem., ¶¶ 184, 187; Cl. Responses to Tribunal Questions, p. 20.

[202] Cl. C-M on Jurisdiction, ¶¶ 107 *et seq.*; Cl. Rejoinder on Jurisdiction, ¶¶ 95-100; Cl. Opening Statement, slides 167-174.

without compensation and violating Iraq's FET and FPS obligations, crystallizing the composite breach.

4. *The later-discovered collusion was itself a breach and explained why an order was issued with which Iraq may have never intended full compliance.*

5. *The March 2019 Decision implementing only part of the Order completed a direct expropriation of Agility's investment.*[203]

(2) The Tribunal's Analysis

a. Definition of "Dispute"

172. The Parties are in agreement that the starting point for the Tribunal's analysis is the definition of "dispute" established in *Mavrommatis*, namely "a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons."[204]

173. However, the Parties differ on when the dispute or disputes in the present case arose. In essence, the Respondent's position is that a dispute had arisen in respect of the CMC Order prior to the BIT's entry into force and any further disputes identified by the Claimant subsequently are not new and separate disputes.[205]

174. The Claimant, on the other hand, submits that there are three disputes which occurred after the 2015 BIT's entry into force, namely: (i) the Iraqi Administrative Court's denial of justice to the Claimant; (ii) the Respondent's failure to implement the CMC Order; and (iii) the Respondent's collusion with Korek's Iraqi Shareholders.[206] Further and in the alternative, the Claimant asserts that there was a composite breach of the Respondent's obligations, which is an aggregate of each of the acts or omissions by the Respondent both before and after the 2015 BIT's entry into force.[207]

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[203] Cl. Responses to Tribunal Questions, p. 28.

[204] Resp. Mem. on Jurisdiction, ¶ 14; Cl. C-M on Jurisdiction, ¶ 59; *Mavrommatis* (CL-128), p. 11.

[205] Resp. Reply on Jurisdiction, ¶¶ 7-9.

[206] Cl. C-M on Jurisdiction, ¶ 5.

[207] Cl. C-M on Jurisdiction, ¶ 7.

175. In the present case, the 2015 BIT entered into force on 4 February 2015. Any dispute which arose prior to 4 February 2015 would be outside the Tribunal's jurisdiction.

176. The Parties have advanced different tests for evaluating whether two disputes are separate. The Respondent submits that the Tribunal should follow *Lucchetti v. Peru*,[208] where the tribunal applied the test of "whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute" and whether the disputes before and after the relevant date had the "same origin or source."[209]

177. The Claimant submits that the test in *Lucchetti* is widely criticised and should not be applied by the Tribunal.[210] Instead, the Claimant invited the Tribunal to apply the "triple identity test", or "subject matter" test, in *RDC v. Guatemala*,[211] where the Tribunal found guidance from the holding in *Benvenuti v. Congo* that "there could only be a case of *lis pendens* where there was ***identity of the parties, object and cause of action*** in the proceedings pending before both tribunals."

178. Having considered the Parties' submissions and examined the authorities, the Tribunal does not find the test in *Lucchetti* instructive.

179. At the outset, it is not clear to the Tribunal what the *Lucchetti* test actually entails. At paragraph 50 of *Lucchetti*, the tribunal held that it "must examine the facts that gave rise to the [subsequent] dispute and those that culminated in the [earlier] dispute, seeking to determine in each instance whether and to what extent the ***subject matter or facts*** that were the ***real cause of the disputes*** differ from or are identical to the other." The tribunal then concludes that "whether the focus is on the ***'real causes' of the dispute or on its 'subject matter'***, it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute".[212] Applying

[208] Resp. Mem. on Jurisdiction, ¶ 31.

[209] *Lucchetti v. Peru* (RL-008), ¶ 53.

[210] Cl. C-M on Jurisdiction, ¶ 70.

[211] *RDC v. Guatemala* (CL-125), ¶ 131 (quoting *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, p. 340, ¶ 1.14) (emphasis added).

[212] *Lucchetti v. Peru* (RL-008), ¶ 50 (emphasis added).

this test, that tribunal concluded that the earlier and subsequent disputes "have the same origin or source."[213] Given the different terms used by the *Lucchetti* tribunal interchangeably, it is not clear to the Tribunal whether the test in *Lucchetti* is a "subject matter" test, or a "cause of action" test. It certainly cannot be that both tests are the same; disputes with the same subject matter may not necessarily give rise to the same cause of action.

180. The difficulty faced by the Tribunal in distilling what the *Lucchetti* test comprises is echoed in the Judgment of the Singapore High Court in *Lesotho v. Swissbourgh*, in which the Court comments that "[i]t is not clear whether the tribunal in *Lucchetti v Peru* was invoking at [50] one test or multiple tests for the distinctness of the dispute." The Court then cites a commentary by John P. Gaffney, which questioned the tribunal's interchanging use of "real causes", "subject matter" and "origin or source" and pointing out that these terms may not have the same meaning.[214]

181. Consequently, the Tribunal considers the "identity of the parties, object and cause of action" test encapsulated in *RDC v. Guatemala*, although in that instance addressing *lis pendens*, to be a clearer way of determining whether the two disputes are separate. The Tribunal agrees with the Court's reasoning in *Swissbourgh* that the "cause of action" test, rather than a subject matter test, "would clearly differentiate the facts that *are background to the dispute* from the facts that are *core to the claim*."[215] This distinction would certainly not be possible if one were to apply the *Lucchetti* test, as almost every dispute arising in the same case would have the same origin or source. Accordingly, the Tribunal prefers the "cause of action" test.

b. The Denial of Justice "Dispute"

182. In the Claimant's Memorial, the Claimant identifies several instances of denial of justice, namely: (i) the CMC's failure to notify the Claimant and Orange of its concerns leading up

[213] *Lucchetti v. Peru* (RL-008), ¶ 53.
[214] *Lesotho v. Swissbourgh* (CL-117), ¶ 128.
[215] *Lesotho v. Swissbourgh* (CL-117), ¶ 130 (emphasis in original).

to the CMC Order, and then of the CMC Order itself;[216] (ii) the CMC's failure to provide the Claimant the opportunity to contest the CMC Order or to be heard in subsequent judicial process;[217] (iii) the Respondent's prevention of the Claimant's participation in the Administrative Court's review of the CMC Order;[218] (iv) the Iraqi Supreme Administrative Court's delay in deciding IT Ltd's appeal against the Administrative Court's dismissal of IT Ltd's Joinder Application;[219] and (v) the inconsistent orders issued by various arms of the Iraqi Government.[220]

183. The Tribunal notes that any denial of justice claim based on the CMC's failure to notify the Claimant and Orange of its concerns leading up to the CMC Order and the CMC's failure to provide the Claimant the opportunity to contest the CMC Order, would have crystalized at least by 2 November 2014, before the entry into force of the 2015 BIT. The Claimant had written to the CMC on 22 September 2014 to complain that it had not been notified of the matters being considered by the CMC nor afforded an opportunity to be heard by the CMC.[221] On 2 November 2014, the CMC wrote to Korek to say that the CMC had nothing to do with the correspondence sent by "the foreign partner" because it did not have a contractual relationship with, *inter alia*, the Claimant.[222] Such disputes, arising before the 2015 BIT entered into force, are outside this Tribunal's jurisdiction.

184. In any event, the Claimant in its Counter-Memorial on Jurisdiction focuses its submission on the dispute arising from the Respondent's prevention of the Claimant's participation in the Administrative Court's review of the CMC Order, submitting as such:

> *Agility has pled a distinct dispute that occurred post-New BIT relating to the Iraqi courts' denial of justice to Agility. To state the obvious,* ***a dispute relating to the Iraqi courts' denial of justice to Agility could not have occurred before the Iraqi courts actually***

[216] Cl. Mem., ¶ 172.
[217] Cl. Mem., ¶ 173.
[218] Cl. Mem., ¶¶ 174-175.
[219] Cl. Mem., ¶ 176.
[220] Cl. Mem., ¶ 177.
[221] Letter from Agility and Orange to the CMC dated 22 September 2014, Exhibit C-042.
[222] Letter from the CMC to Korek dated 2 November 2014, Exhibit C-051.

> ***denied Agility justice, which took place no earlier than 2016****. That is because there cannot be "a disagreement on a point of law or fact" "relat[ing] to clearly identified issues between the parties" until the facts have transpired.* [223]

185. In the Claimant's Rejoinder on Jurisdiction, the Claimant then limits its denial of justice claim, submitting that:

> *The denial of justice in this case is two-fold.* ***First****, by a court decision of 18 January 2016—two years after the New BIT entered into force—the Iraqi courts denied Agility's subsidiary's right to intervene to challenge the CMC Order.* ***Second****, Korek challenged the CMC Order on its merits as being invalid. The Iraqi courts dismissed that challenge on 25 January 2016,* ***without ever looking at whether the CMC Order was valid or not****. It simply threw out the case on the basis that it had no jurisdiction to even consider the question. Those actions of the Iraqi courts are the denials of justice here, which could obviously not have taken place until the facts actually transpired in 2016, and until Claimant exhausted its local remedies (at the earliest, in January 2016 when the Administrative Court denied IT Ltd standing to participate and rejected its application to join) and Korek exhausted its local remedies (in 2018, when the Supreme Administrative Court denied its appeal, two years after its submission).* [224]

186. The Claimant's argument was repeated at the Hearing on Jurisdiction where the Claimant's counsel summarised the Claimant's denial of justice claim in the following manner:

> *[T]he denial of justice claim, to be absolutely clear, is not that the courts did not engage in a substantive analysis and they got the substantive analysis wrong. That is not our denial of justice claim.* ***Our denial of justice claim is twofold. First, that they did not allow that -- the courts, the Iraqi courts, did not allow IT Limited to challenge the CMC Order at all. They did not allow IT Limited to intervene in the proceedings and have standing before the courts and, in that context, to be heard at all.***
>
> *The second is that they denied Korek's challenge of the CMC Order by denying jurisdiction over Korek's claims. You can see that that is exactly how we have articulated our denial of justice claim and this*

[223] Cl. C-M on Jurisdiction, ¶ 79 (emphasis added).

[224] Cl. Rej. on Jurisdiction, ¶ 75 (emphasis in original).

> *is just an excerpt of a bit of that from paragraphs 174 and 175 of Claimant's memorial.*[225]
>
> …
>
> ***The first wrong that the courts -- the first element of the improper conduct was denying IT Limited's standing to be heard as an interested party.*** *I thought I made that crystal clear yesterday.* ***The second was denying jurisdiction over Korek's claims.***[226]

187. Based on the Claimant's submissions, the Tribunal can only draw the conclusion that faced with the challenge to jurisdiction *ratione temporis*, the Claimant is now only pursuing two denial of justice claims. The first is that the Claimant was denied justice because the Administrative Court rejected IT Ltd's Joinder Application. The second is that the Administrative Court "denied Korek's challenge of the CMC Order by denying jurisdiction over Korek's claims."

188. The Tribunal notes that the latter claim is not set out in the Claimant's Memorial. It was also treated very briefly by the Claimant in its subsequent submissions. As such, the Tribunal is unable to give any meaningful consideration to this second part of the Claimant's denial of justice claim. If the Claimant intends to pursue this claim, it would have to be added to the Claimant's written submissions on the merits, not just to the Claimant's submissions in response to the Respondent's jurisdiction *ratione temporis* challenge. It would also have to be pleaded with sufficient particularity. If that is done, the Respondent will then have the opportunity to consider and react to it as the Respondent sees fit. Nothing further can be said about this second claim at this stage.

189. That leaves only one denial of justice claim that the Tribunal needs to consider. This is the claim that the Claimant was denied justice because the Administrative Court rejected IT Ltd's Joinder Application.

190. In respect of this claim, the Respondent's main objection is that the dispute over the Claimant's inability to mount a direct challenge to the CMC Order had already arisen by

[225] Hearing on Jurisdiction, Day 1, Tr. 232:3-20 (emphasis added).

[226] Hearing on Jurisdiction, Day 2, Tr. 80:15-20 (emphasis added).

2014, before the 2015 BIT entered into force.[227] The Respondent's objection is premised on the fact that prior to the commencement of the Administrative Court Proceedings, the CMC had already made it clear (in letters and meetings with Korek) that the CMC would not participate in discussions with the Claimant, because there is no relationship between the CMC and the Claimant.[228] Instead, the CMC communicated directly with Korek because there was a "contractual link" [229] between the CMC, which was the regulator, and Korek, the regulated entity. The Respondent says that the Claimant's complaint that it was not heard as part of the CMC process is the same complaint it makes when it says that its subsidiary, IT Ltd, was not heard in the Iraqi Administrative Court Proceedings. Both were a denial of standing by organs of the Iraqi State.[230]

191. The Tribunal has considered the correspondence carefully:

a. On 22 September 2014, the Claimant and Orange wrote to the CMC, protesting that they were not given notice of the CMC proceedings, were never party to the CMC proceedings, and were never consulted or given an opportunity to be heard. The letter ends with the Claimant requesting a meeting with the CMC.[231]

b. On 25 September 2014, the Claimant wrote to the Iraqi Minister of Telecommunications. Among other things, it complained that the procedures before the CMC Board of Appeals "were carried out in the absence of France Telecom / Agility."[232] The Minister did not respond to the letter.

c. On 2 November 2014, the CMC wrote to Korek and stated that Korek is a company licenced by the CMC, that there is a contractual link between the CMC and Korek because of the concluded licensing contract and that there is no relationship between the CMC and the Claimant. The letter stated that "there is no need or basis

[227] Resp. Mem. On Jurisdiction, ¶ 38.
[228] Letter from the CMC to Korek dated 2 November 2014, Exhibit C-051.
[229] Letter from the CMC to Korek dated 2 November 2014, Exhibit C-051.
[230] Resp. Reply on Jurisdiction, ¶¶ 120-132.
[231] Letter from Agility and Orange to the CMC dated 22 September 2014, Exhibit C-042.
[232] Letter from Agility to the Iraqi Minister of Telecommunications dated 25 September 2014, Exhibit C-044.

to involve the foreign partner in the contractual obligations between [the CMC] and [Korek]."[233]

d. On 1 December 2014, IT Ltd (on behalf of the Claimant and Orange) sent a letter to the CMC stating that the "CMC never addressed any of the Foreign Investors directly and never gave them a chance to present their case to the CMC," and that "after the issuance of the CMC decision, the Foreign Investors formally approached the CMC in order to address the allegations made against them but the CMC did not even acknowledge receipt of the letter except by responding to Korek again and stating that the CMC refuses to meet with the Foreign Investors since CMC has no contractual relationship with them."[234]

192. The correspondence makes it clear that the Claimant had complained that it had been denied an opportunity to he heard by the CMC in relation to the making of the CMC Order. It is also clear that the CMC's position, albeit expressed to Korek and not directly to the Claimant, was that the Claimant should not be heard in the CMC proceedings. Thus, there was a dispute between the Claimant and the CMC. The content of that dispute was whether the CMC was required to give notice to the Claimant and to hear from the Claimant before making any substantive decision concerning Korek.

193. The question that the Tribunal has to decide is whether this is the same dispute as that which arises from the Iraqi Administrative Court's refusal to hear the Claimant's subsidiary before determining the challenge to the CMC Order in the Administrative Court. The Tribunal is of the view that it is not the same dispute.

194. To revisit the test in *Mavrommatis*, a "dispute" arises where there exists "a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons."[235] The Tribunal is of the view that the legal issue that had been raised prior to the entry into force of the 2015 BIT was whether the Claimant had standing to be heard in the CMC

[233] Letter from the CMC to Korek dated 2 November 2014, Exhibit C-051.
[234] Letter from IT Ltd to the CMC dated 1 December 2014, Exhibit C-061.
[235] *Mavrommatis* (CL-128), p. 11.

proceedings. That was quite a different legal issue from whether the Claimant's subsidiary had standing in the Iraqi Administrative Court.

195. The former would be influenced by the CMC's argument that it had no relationship with the Claimant. In the Tribunal's view, this is not an unusual position for a regulator to take. The CMC issued licences and regulated licensees, whilst Korek was a licensee. Their relationship was one of regulator and regulated entity. The CMC described it as a "contractual relationship." In that context, it appears to the Tribunal that what the CMC was saying was that the CMC could only deal with a licensee but not with an entity which was not a licensee and which was not regulated by the CMC. The Claimant did not come within the CMC's purview.

196. In taking that position, the CMC was not saying that there was no other forum of which the Claimant could avail itself. The CMC certainly did not use any language to suggest that it was speaking on behalf of the entire Iraqi Government, including its courts. Instead, the CMC's letter of 2 November 2014 made it very clear that the CMC was only saying that the Claimant could not participate in the CMC's own proceedings. It did not purport to deny the Claimant access to any other forum.

197. On the other hand, the situation in the Iraqi Administrative Court is different. There, the legal issue is whether the Claimant's subsidiary has standing before that Court. There is no reason for the Tribunal to think that that issue would be determined by the narrow reasoning that the CMC expressed in its letter of 2 November 2014. The Court is not a regulator limited to dealing only with those to which it has issued licensees (certainly, no evidence to that effect was placed before the Tribunal). In the end, whilst it is quite understandable for a regulator to limit itself to dealing with the regulated entity, access to the courts of a country are not necessarily limited in that way. Different legal considerations would apply to the two situations; one relates to the access of an entity that is not a licensee before a regulator, whilst the other relates to the access of an entity to the courts of law.

198. To put it another way, the legal wrong that was complained of pre-entry into force of the 2015 BIT was a different legal wrong from that which is now complained of post-entry into force of the BIT. One was an allegation of legal wrong by the CMC acting as a

regulator. The other allegation is of a legal wrong by the Administrative Court acting as a court of law.

199. In coming to this conclusion, the Tribunal finds the reasoning in the decision of the Singapore High Court in *Lesotho v. Swissbourgh* to be of assistance.

200. In *Swissbourgh*, various organs of Lesotho implemented measures between 1991 and 1995 which allegedly hindered Swissbourgh from exercising its mining rights under Swissbourgh's mining leases. These included the Commissioner of Mines' cancellation of the leases, the Military Council's order which, *inter alia*, required Swissbourgh to vacate the lease areas, the legislature which enacted legislation permitting the expropriation of the lease and the domestic courts' determination that one of the leases was void *ad initio*.[236] In 2009, Swissbourgh submitted the dispute to arbitration under the auspices of the Southern African Development Community ("**SADC**"), of which Lesotho is a member.

201. In 2012, the SADC was shuttered after Lesotho and other States Parties to the SADC Treaty voted to do so. This took place before Swissbourgh's claim before the SADC claim could be heard.

202. Thereafter, Swissbourgh commenced arbitration against Lesotho before the Permanent Court of Arbitration under Annex 1 to a Protocol on Finance and Investment, which allowed investors to commence international arbitration against signatory states if the dispute arose after 16 April 2010. Swissbourgh alleged that Lesotho had breached its obligations under the SADC Treaty by contributing to, or facilitating, the shuttering of the SADC. The majority of the tribunal rendered an award in favour of Swissbourgh. Dissatisfied, Lesotho applied to set aside the award in the Singapore High Court. Lesotho argued that the tribunal lacked jurisdiction to decide the dispute arising from the shuttering of the SADC as the real dispute was the underlying expropriation claim and that claim arose before the Protocol on Finance and Investment's entry into force.

203. The Singapore High Court dismissed Lesotho's application, holding that the dispute regarding the shuttering of the SADC was different from the underlying expropriation

[236] *Lesotho v. Swissbourgh* (CL-117), ¶¶ 177(c).

dispute as they "did not involve the same legal conflict." The Court also found that the two disputes "involved different conduct, *ie*, different acts of alleged wrongdoing, by different actors."[237]

204. In the same way, the issue of standing before the CMC, a regulator, does not involve the same legal conflict as the issue of standing before the Iraqi Administrative Court. The act of the CMC in declining to hear the Claimant is of a different character from the act of the Iraqi Administrative Court not hearing the Claimant's subsidiary. The former is a decision by a regulator (*i.e.*, the CMC) to only deal directly with the regulated body (*i.e.*, Korek). The latter is a matter of access to justice in a local court.

205. These are also two different legal wrongs that are being alleged, one a matter of access to proceedings concerning a contractual licence and the other a matter of access to the judicial system. Certainly, the alleged legal wrongs involve different actors.

206. The Tribunal also finds the reasoning in *Jan de Nul v. Egypt* to be of assistance.

207. In *Jan de Nul*, a dispute between the claimants and the Suez Canal Authority, a public agency established under Egyptian law, had been submitted to the Egyptian Administrative Court of Ismaïlia from 1993. The court proceedings were still pending at the time that the Belgo-Luxembourg Economic Union-Egypt BIT entered into force in 2002. On 22 May 2003, the Administrative Court of Ismaïlia rendered its decision, rejecting the claimant's claims. On 23 December 2003, the claimants commenced investor-State arbitration against Egypt, claiming, *inter alia*, that Egypt "has failed to promptly repair the resulting damages by adequate compensation and that all its organs have constantly disregarded the Claimants' rights to a just remedy." [238]

208. Egypt contested the tribunal's jurisdiction, alleging that the dispute arose prior to the Belgo-Luxembourg Economic Union-Egypt BIT's entry into force. The claimant resisted the application, submitting that "the dispute submitted to the Tribunal – which is different

[237] *Ibid.*

[238] *Jan de Nul v. Egypt* (RL-010), ¶ 34.

from the one submitted to the Administrative Court of Ismaïlia – arose after the judgment of that court was handed down, and therefore after the entry into force of the [Belgo-Luxembourg Economic Union-Egypt] BIT."[239]

209. The tribunal held that "[t]he intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute" and that the original dispute between the claimant and Suez Canal Authority crystallized into a new dispute when the Administrative Court of Ismaïlia rendered its decision.[240]

210. In the present case, the Iraqi Administrative Court was a "new actor" in much the same way. Prior to the matter going to the Iraqi Administrative Court, it was the CMC which was denying access to CMC proceedings. The CMC was not speaking for any other organ of the Iraqi State and certainly did not speak for the courts. Thus, when the Iraqi Administrative Court entered the scene, it was a new actor operating on different legal principles. This gave rise to a different dispute.

211. The Respondent places reliance on the decisions in *Lucchetti v. Peru,*[241] *EuroGas v. Slovakia,*[242] *ATA Construction v. Jordan*[243] and the *Phosphates in Morocco* case.[244] However, the Tribunal finds these cases to be distinguishable and thus of little assistance to our present case.

212. In *Lucchetti v. Peru,* the Municipality of Lima annulled permits granted to the claimants for their pasta factory. The claimants brought a suit in the Peruvian courts challenging the annulment and obtained a favourable judgment in 1998, following which, another municipality issued the claimants a construction and operating license for their pasta

[239] *Jan de Nul v. Egypt* (RL-010), ¶ 57(iii).
[240] *Jan de Nul v. Egypt* (RL-010), ¶ 128.
[241] Resp. Mem. on Jurisdiction, ¶ 40; *Lucchetti v. Peru* (RL-008).
[242] Resp. Mem. on Jurisdiction, ¶ 42; *EuroGas v. Slovakia* (RL-005).
[243] Resp. Reply on Jurisdiction, ¶ 130; *ATA Construction v. Jordan* (CL-010).
[244] Resp. Mem. on Jurisdiction, ¶ 39; *Phosphates* (RL-015).

factory. However, after the Peru-Chile BIT entered into force in 2001, the Municipality of Lima revoked the operating license through the issuance of two decrees.

213. The claimants alleged that the 2001 decrees gave rise to a new dispute falling within the scope of the treaty, while Peru argued that the parties' dispute "had fully crystallized before the entry into force of the BIT and, while it continued beyond that date, the later events did not generate a new dispute but merely continued the earlier dispute", and the "subject-matter" of the 1997–1998 dispute was the same as that relating to the 2001 decrees.[245] The *Lucchetti* tribunal agreed with Peru, finding that even though the 2001 decrees had been issued after the Peru-Chile BIT entered into force, "the disputes have the same origin or source" and the adoption of the 2001 decrees "and their challenge by Claimants merely continued the earlier dispute."[246]

214. The Tribunal does not consider the facts in *Lucchetti* to be similar to the present case. In *Lucchetti*, it was the same municipality, *i.e*. the Municipality of Lima, which carried out the illegal acts both before and after the Peru-Chile BIT's entry into force. In contrast, the present case involves the Iraqi Administrative Courts carrying out the alleged illegal act after the 2015 BIT's entry into force. This is a different entity from the one which purportedly carried out the alleged illegal act prior to the 2015 BIT's entry into force, *i.e*. the CMC.

215. In *EuroGas v. Slovakia*, the District Mining Office in Spišská Nová Ves, Slovakia, reassigned the mining rights held by a Slovak entity named Rozmin in 2005, causing Rozmin to lose its investment. Rozmin challenged the reassignment before the Slovak Court, which rendered decisions reversing the reassignment. In 2012, despite the Slovak Court's decisions, the District Mining Office again reassigned the rights. EuroGas, an investor in Rozmin, therefore commenced arbitration under the Canada-Slovakia BIT (which applied to disputes that had arisen after 14 March 2009). Slovakia objected to the tribunal's jurisdiction *ratione temporis*, arguing that the 2005 reassignment, the 2012 reassignment, and the decisions of the Slovak courts all constituted the same dispute which

[245] *Lucchetti v. Peru* (RL-008), ¶¶ 39, 41.
[246] *Lucchetti v. Peru* (RL-008), ¶ 53.

took place prior to the Canada-Slovakia BIT's entry into force. The majority of the tribunal in *EuroGas* found that the 2012 decisions "cannot be considered the source of a new dispute; rather, they were a refusal to resolve the ongoing dispute, which arose from the alleged breach in 2005."[247]

216. The Tribunal also considers the facts of *EuroGas* to be dissimilar to the present case. In *EuroGas*, the investor obtained justice through the Slovak courts only to be subjected to the same reassignment by the same District Mining Office. Clearly, the disputes which arose prior to and after the Canada-Slovakia BIT's entry into force were exactly the same disputes—an expropriation by the same actor, the District Mining Office. However, that is not the case here, as the Iraqi Administrative Court had not adjudicated, prior to the 2015 BIT's entry into force, on the issue of whether or not IT Ltd had standing before the Court.

217. In *ATA Construction v. Jordan*, the claimant submitted its dispute with a company which was majority owned by Jordan to International Federation of Consulting Engineers (FIDIC) arbitration proceedings. The claimant obtained a favourable final award in 2003. In 2003, the Jordanian Court of Appeal annulled the final award and in 2007, the Jordanian Court of Appeal's decision was upheld by the Jordanian Court of Cassation. A year later, in 2008, the claimant commenced an ICSID arbitration against Jordan pursuant to the Jordan-Turkey BIT, which entered into force on 23 January 2006. The claimant submitted that the 2007 Jordanian Court of Cassation decision "crystallised" the investment treaty dispute and gave rise to a new denial of justice claim which is not based on liability for the underlying dispute which was first submitted to the FIDIC arbitration proceedings.[248]

218. The tribunal in *ATA Construction* rejected the claimant's attempt to present the denial of justice claim as an independent violation of the BIT. The tribunal held that the denial of justice claim was part of the original dispute which was submitted to arbitration. The latter originated before the entry into force of the BIT and therefore the tribunal had no jurisdiction over the former.[249]

[247] *EuroGas v. Slovakia* (RL-005) ¶ 456.
[248] *ATA Construction v. Jordan* (CL-010), ¶ 67.
[249] *ATA Construction v. Jordan* (CL-010), ¶ 103.

219. The Tribunal does not find that *ATA Construction* is of assistance. *ATA Construction* concerned a claimant which was trying to bring a dispute determined in a final award under the purview of the dispute resolution procedures of the Jordan-Turkey BIT, which came into force in 2006. The claimant did so by arguing that the 2007 decision of the Jordanian Court of Cassation to uphold the 2003 Jordanian Court of Appeal's annulment of the award was the act denying the claimant justice. The present case is different. The decision of the Iraqi Administrative Court, which forms the subject matter of the Claimant's denial of justice claims, was made on 25 January 2016, after the 2105 BIT's entry into force, and there were no other judicial or arbitral decisions prior to the Iraqi Administrative Court's decision.

220. In *Phosphates in Morocco*, the Morocco Mines Department took steps in 1925 which resulted in the Italian investor losing its investment. This took place prior to the parties' declarations accepting the PCIJ's compulsory jurisdiction over disputes with each other in 1931 ("**France-Italy Declarations**"). Thereafter, various Italian-French communications occurred trying to address the matter, which culminated in a note from the French Ministry of Foreign Affairs to the Italian embassy dated 28 January 1933 and a letter by the Ministry to the investor's representative. The note and the letter confirmed that there was no appeal against the decision of the Morocco Mines Department.

221. The investor commenced an action in the PCIJ against Morocco pursuant to the provisions of the France-Italy Declarations in respect of the steps taken by the Morocco Mines Department in 1925 and the unavailability of methods of redress as articulated in the 28 January 1933 letter and note. The PCIJ held that "the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist" and "exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it."[250] The Court therefore dismissed the case as falling outside its temporal jurisdiction.

[250] *Phosphates* (RL-015), p. 28.

222. In the Tribunal's view, *Phosphates in Morocco* is not instructive. The lack of an appeal process in *Phosphates in Morocco* started before the France-Italy Declarations' entry into force and continued to exist after the Declarations. The fact that there was a note and a letter by the French Ministry of Foreign Affairs after the France-Italy Declarations confirming the lack of an appeal mechanism did not present a change in situation or a new development. It merely articulated the same position that had existed previously.

223. In light of the above, the Tribunal finds that the dispute with the CMC was a different dispute from that concerning the Iraqi Administrative Court's decision not to allow the Claimant's subsidiary to participate in its proceedings. The latter arose after the 2015 BIT came into force. As such, the Respondent's objection to jurisdiction *ratione temporis* over this particular claim of denial of justice fails.

224. The Tribunal also notes that the Respondent argued that the Claimant was not denied an opportunity to be heard by the Administrative Court, as the Claimant was heavily involved in the drafting of Korek's letters and submissions and made its own submissions through IT Ltd.[251] However, the Tribunal considers this argument to be beside the point with respect to the issue of jurisdiction *ratione temporis*. Being involved in the preparation of another party's submissions is quite different from having the right to advance one's own arguments. In any case, this argument is not in the nature of a jurisdictional objection and the Tribunal must leave the merits to another day.

c. The "Dispute" Arising from the Respondent's Failure to Implement the CMC Order

225. The Claimant's allegation regarding the Respondent's failure to implement the CMC Order relates principally to the KRG's refusal to reinstate the KRG Guarantee, which it issued as a part of the 2007 Loan Transaction and prior to the 2011 Equity Transaction. Under the KRG Guarantee, the KRG undertook to "finally and irrevocably, jointly and severally with Korek Telecom, guarantee towards [Alcazar], until full and final payment of the loan, in

[251] Cl. Mem., ¶ 33.

principal and interest, by Korek Telecom, the payment of such loan upon [Alcazar's] first demand."[252]

226. Based on the Tribunal's review of the correspondence between the Claimant on one hand, and the CMC, Korek and the KRG on the other, the Tribunal considers that the dispute regarding the Respondent's failure to implement the CMC Order only arose after the 2015 BIT entered into force.

227. In 2014, the correspondence from the Claimant, Orange, IT Ltd and Korek evidences a dispute regarding the legality of the CMC Order.[253] Protests against the legality of the CMC Order are the antithesis of a request for the implementation of the CMC Order. The record shows that it was only after the Iraqi Administrative Court's dismissal of Korek's claim in the Administrative Court Proceedings and denial of standing for IT Ltd to be heard as an interested party in the Administrative Court Proceedings that the Claimant started to attempt to implement the CMC Order.

228. It was only on 17 May 2016, after the 2015 BIT entered into force, that the Claimant wrote to the CMC to clarify the CMC Order.[254] This was the first letter from the Claimant seeking the CMC's guidance as to how to implement the CMC Order. As the CMC did not respond to that letter, the Claimant repeated its queries in another letter to the CMC dated 15 June 2016.[255] The Tribunal notes that these letters do not refer to the KRG Guarantee.

229. As the CMC still did not reply, the Claimant wrote to the CMC again on 24 October 2016 to point out the impossibility of "reinstat[ing] the status as it was on 13 March 2011" and requesting clarity on the terms of the CMC Order.[256] The 24 October 2016 letter also set out the Claimant's interpretation that the CMC Order required the "reinstatement of a guarantee by the Government of Kurdistan in the Republic of Iraq to Alcazar for the USD 250 million convertible senior promissory note." This was the first time that any

[252] KRG Guarantee, Exhibit C-007.

[253] This correspondence is set forth in paragraphs 52 to 61 above.

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

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

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

correspondence involving the Claimant contained a reference to the KRG Guarantee, and it was clearly well after the entry into force of the 2015 BIT.

230. As the CMC still did not respond to the Claimant's letters, the Claimant decided to implement the CMC Order without any regulatory assistance or guidance by the CMC. By way of a letter dated 20 June 2017 to Korek and the Iraqi Shareholders, the Claimant pointed out, *inter alia*, that in order to implement the CMC Order, the KRG Guarantee would have to be reinstated.[257]

231. On 21 July 2017, Korek responded to the Claimant's 20 July 2017 letter. In the letter, Korek took the view that the letter was inappropriate and untimely.[258] On 2 August 2007, the Claimant wrote to Korek again, urging Korek to work with the Claimant to take steps to implement the CMC Order.[259] However, Korek again rejected the Claimant's request for cooperation.[260]

232. The Claimant therefore wrote to the KRG on 22 August 2017. In its letter, the Claimant stated that "it appears that, pursuant to the CMC Order, in order to 'reinstate the status as it was on 13/3/2011,'—in addition to the foreign shareholders returning their shares to Korek's original Iraqi shareholders—Korek must reinstate Alcazar's Convertible Note and the Government of Kurdistan must reinstate the attendant Guarantee."[261]

233. As the KRG did not respond to the Claimant's 22 August 2017 letter, the Claimant wrote to the KRG again on 10 December 2017, stating that it still had not received a response and reserving all of its rights in respect of the KRG Guarantee.[262] Still, the Claimant received no response from the KRG.[263]

[257] Letter from Agility to Korek and the Iraqi Shareholders dated 20 June 2017, Exhibit C-083.
[258] Letter from Korek to Agility dated 21 July 2017, Exhibit C-085.
[259] Letter from Agility to Korek and the Iraqi Shareholders dated 2 August 2017, Exhibit C-087.
[260] Cl. Mem., ¶ 120.
[261] Letter from Agility to the Kurdistan Regional Government dated 22 August 2017, Exhibit C-088.
[262] Letter from Agility to the Kurdistan Regional Government dated 10 December 2017, Exhibit C-091.
[263] Cl. Mem., ¶ 186.

234. This correspondence shows that the issue of implementation of the CMC Order and specifically the reinstatement of the KRG Guarantee only arose after the 2015 BIT entered into force on 4 February 2015.

235. The Respondent's position is that "Agility's letter requesting reinstatement of the KRG Guarantee clearly has the same cause and origin as the fact that the KRG Guarantee had not been reinstated, which in turn has the same cause and origin as the CMC Order itself."[264] The Respondent's argument presupposes that a dispute had arisen from the fact that the KRG Guarantee had not been reinstated. The Tribunal disagrees with this proposition.

236. A dispute only arises when parties take opposing positions on the same issue. That is the essence of a dispute. Whilst facts which subsequently found a party's position in a dispute may exist long before the matter is put in issue, it cannot be said that there is a dispute between parties until they take opposing positions in respect of those facts. In the present case, the Parties only took opposing positions about the implementation of the CMC Order after the Claimant tried to implement the CMC Order from 17 May 2016 onwards.

237. It is true that the Parties were in a dispute prior to 17 May 2016, but that was a different dispute concerning the validity and the merits of the CMC Order. It was in essence a challenge by the Claimant to the CMC Order. By contrast, the dispute that arose after 17 May 2016 was premised on the validity of the CMC Order, and instead was a dispute about the implementation of the CMC Order. The two disputes are different.

238. In light of the above, the Tribunal finds that it has temporal jurisdiction in respect of the claim concerning an alleged failure to implement the CMC Order.

d. The Collusion "Dispute"

239. The crux of the Claimant's collusion "dispute" is that the CMC Order was procured by collusion between the CMC and the Iraqi Shareholders, that the Claimant only "learned long after the [2015] BIT's entry into force" about the collusion, and therefore there was

[264] Resp. Reply on Jurisdiction, ¶ 114.

only a dispute about such collusion arising after the BIT's entry into force. The Claimant therefore seeks redress for the unfair and inequitable treatment arising out of Iraq's collusion with Korek's Iraqi Shareholders.[265]

240. As far as temporal jurisdiction is concerned, there are a number of problems with this claim.

241. First, the Claimant has not produced any authority in support of its proposition that a dispute arises only at the time of the discovery of additional facts that shed light on the nature or extent of a dispute. Such authority would have been of assistance to the Tribunal but without it, the precise legal basis for such an argument remains unclear.

242. Second, even if the Tribunal were to accept such a proposition, there is no evidence before the Tribunal regarding what elements of the collusion were known (or unknown) to the Claimant prior to the 2015 BIT's entry into force. This lack of clarity makes it difficult for the Tribunal to conclude that all the elements of the collusion did not exist prior to the entry into force of the 2015 BIT.

243. Third, the essence of the claim is that the CMC and the Iraqi Shareholders colluded to cause the expropriation of the Claimant's assets. However, the alleged expropriation occurred prior to the 2015 BIT at the time of the CMC Order. In that sense, the collusion claim adds nothing new to the expropriation claim, other than helping to explain the motivation of the alleged expropriation. In other words, the collusion "dispute" is not actually a new dispute; at best, information about the alleged collusion is simply an explanation for why the dispute concerning expropriation arose in 2014.

244. The Tribunal must emphasise that it is not discounting the possibility that information about the alleged collusion could be relevant to the two disputes discussed above that arose after the 2015 BIT's entry into force. The Claimant is free to adduce evidence of such collusion if it is relevant to the claims over which the Tribunal has temporal jurisdiction. However, the collusion claim is not itself a new dispute over which the Tribunal has temporal jurisdiction.

[265] Cl. C-M, ¶¶ 62-64.

245. In light of the above, the Tribunal finds that it does not have jurisdiction over the collusion dispute.

e. The Composite Breach Claim

246. In its Observations on the Respondent's Request for Bifurcation, the Claimant raises a new claim, namely that the Respondent committed a composite breach of its obligations of fair and equitable treatment, full protection and security and expropriation without compensation, through acts committed both before and after the entry into force of the 2015 BIT.[266] The Claimant identifies the following acts as constituting the alleged composite breach:

a. the CMC Order;

b. the contradictory positions taken by Parliament and other administrative agencies relating to the enforceability of the CMC Order;

c. the refusal to engage with the Claimant or its representative or admit them to the Iraqi courts;

d. the refusal to reinstate and honour the KRG Guarantee; and

e. the collusion with the Iraqi Shareholders underpinning this scheme.[267]

247. For the Claimant, while the acts occurred both before and after entry into force of the 2015 BIT, the composite breach only crystallised after entry into force, and therefore constitutes a dispute falling with in the Tribunal's temporal jurisdiction.

248. In its submissions, the Respondent raises a preliminary point that the Claimant's composite breach claim should have been brought in its Request for Arbitration and Memorial. The

[266] Observations on Bifurcation, ¶¶ 39 *et seq.*; Cl. C-M on Jurisdiction, ¶¶ 107 *et seq*.
[267] Cl. C-M on Jurisdiction, ¶ 109.

argument is that it would be unfair for the Claimant to bring an entirely different claim at this stage.[268]

249. In response, the Claimant submits that it had pleaded a composite breach claim in its Memorial. Specially, the Claimant refers to the following sentences in the Memorial:[269]

a. "In assessing whether an expropriation has taken place, all relevant governmental acts affecting the investment must be considered cumulatively";[270] and

b. "The series of actions taken by Iraq against Agility are, at first glance, seemingly peculiar and disconnected. Yet, when the motivations behind the CMC Order are considered, the story begins to make sense."[271]

250. It is clear to the Tribunal that the composite breach claim was not pleaded in the Claimant's Memorial. Whilst the Claimant pointed to two sentences in the Memorial which made oblique references to a need to consider all of the Respondent's acts cumulatively, an examination of the context in which these statements were made reveals that the Claimant's intention was not to plead a composite claim. With regard to the statement at sub-paragraph (a) above, the Claimant was simply distilling the test for assessing whether an expropriation has taken place. As for sub-paragraph (b), the statement was made in the context of the Claimant's collusion claim. The Claimant was making the point that there must have been collusion between the CMC and the Iraqi Shareholders, as the CMC Order had the effect of preserving the Iraqi Shareholders' controlling stake in Korek.

251. The fact that the Claimant's composite breach claim has not been pleaded in the Claimant's Memorial necessarily means that the claim has not been placed before the Tribunal. The Tribunal's decision on jurisdiction can only be made on the basis of claims raised by the Claimant in its Memorial, and not claims that the Claimant raises belatedly in response to

[268] Resp. Reply on Jurisdiction, ¶ 133.
[269] Cl. C-M on Jurisdiction, ¶ 118.
[270] Cl. Mem., ¶ 205.
[271] Cl. Mem., ¶ 161.

the Respondent's objections to jurisdiction. As such, the Tribunal has to limit its decision on jurisdiction only to the pleaded claims.

252. In any case, even if the Tribunal were to overlook the fact that the composite breach claim is not properly pleaded, the Tribunal does not find that there is a true composite breach claim.

253. The Tribunal finds instructive the definition of a composite breach set out in *Société Générale v. Dominican Republic*, where the tribunal states:

> *While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court. As noted in Article 15 of the Articles on State Responsibility, the series of actions or omissions must be defined in the aggregate as wrongful and when taken together it "is sufficient to constitute the wrongful act". But of course the latter determination can only be made when the obligation is in force.*[272]

254. In the present case, the Tribunal finds that the acts identified by the Claimant as constituting the composite breach already individually form the basis for claims of the breach of international law. For instance, the claims concerning the refusal to engage with the Claimant and the refusal to reinstate the KRG Guarantee are each independent claims of breach (and were pleaded as such in the Claimant's Memorial); neither of them is reliant upon other acts in order cumulatively to constitute a breach of international law.

255. As the tribunal in *Société Générale* recognised, a composite breach is comprised of "situations in which ***each act considered in isolation will not result in a breach of a treaty obligation***, but if considered as a part of a series of acts leading in the same direction they

[272] *Société Générale v. Dominican Republic* (CL-081), ¶ 91.

could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force" (emphasis added). However, this is clearly not the case here. The acts identified by the Claimant are not acts which occur over a period of time and which led to a single breach occurring at the time of the last act.

256. To be clear, the Tribunal is not denying jurisdiction over all of the acts identified by the Claimant as part of its composite breach claim. As explained above, the Tribunal considers that it has temporal jurisdiction over the Claimant's denial of justice claim and its claim concerning the failure to implement the CMC Order.

257. In light of the above, the Tribunal finds that it does not have jurisdiction over the Claimant's composite breach claim.

f. The New "Dispute"

258. At the Hearing on Jurisdiction, the Claimant presented an issue concerning IT Ltd's shareholding in Korek which might be viewed as constituting a new dispute. The Claimant had apparently learned a week before the Hearing on Jurisdiction that the Companies Registrar in Kurdistan had re-registered IH's entire interest in Korek and had done so in a configuration of the Iraqi Shareholders.[273]

259. The Tribunal can see that this new dispute would relate to some of the claims raised by the Claimant. However, the Tribunal's decision on jurisdiction can only be made on the basis of claims raised by the Claimant in its Memorial. If the Claimant intends to pursue a new claim arising from these new facts, it will have to plead the claim properly. Until the Claimant does so, the Tribunal is constrained to limit its decision to the matters that are properly before it at present. The Tribunal therefore expresses no view over whether it has jurisdiction over this new issue.

[273] Hearing on Jurisdiction, Day 1, Tr. 127:18–129:16.

V. COSTS

A. THE PARTIES' POSITIONS

(1) The Respondent's Position

260. The Respondent submits that the Claimant should reimburse the Respondent's costs for this phase in the proceedings, both because Iraq prevailed on bifurcation and because it believes it will prevail on its objection to jurisdiction *ratione temporis*. Interest should be calculated as of 31 October 2018, the date of issuance of Procedural Order No. 2, in order to put the Respondent in a position in which it would have been, had the Tribunal not held over its decision on costs as to bifurcation until a later date. Even if the Respondent's objection were to only succeed in part, it would still be entitled to costs if it succeeds on the core of its position.[274]

261. The Respondent also submits that it is entitled to costs, because the Claimant's conduct needlessly complicated the proceedings.[275]

262. The Respondent submits that its costs are reasonable.[276] The Respondent's breakdown of its fees and costs are as follows:[277]

DESCRIPTION	AMOUNT (USD)
PROFESSIONAL FEES	
Attorneys' Fees	
Debevoise & Plimpton LLP	1,020,000.00
Stephenson Harwood Middle East LLP	30,600.00

[274] Resp. Submission on Costs, ¶¶ 10, 16.
[275] Resp. Submission on Costs, ¶ 12.
[276] Resp. Submission on Costs, ¶ 12.
[277] Resp. Submission on Costs, Annex.

TOTAL ATTORNEYS' FEES	**1,050,600.00**
TOTAL PROFESSIONAL FEES	**1,050,600.00**
COSTS AND DISBURSEMENTS	
Debevoise & Plimpton LLP	125,528.06
Stephenson Harwood Middle East LLP	4,400.00
TOTAL ADMINISTRATIVE COSTS	**129,928.06**
ICSID Advance Payments	299,932.00
TOTAL ARBITRATION COSTS	**299,932.00**
TOTAL COSTS AND FEES	**1,180,528.06**

263. The Respondent also submitted a further breakdown of its fees and costs for each of the Hearing on Bifurcation and the Hearing on Jurisdiction:[278]

Phase	Legal Fees	Costs	Total
Preliminary Objections, Request for Bifurcation, Hearing on Bifurcation	$530,200.00	$52,784.71	$582,984.71
Reply, Hearing on Jurisdiction, Costs Submissions	$520,400.00	$77,143.35	$597,543.3
Total	**$1,050,600.00**	**$129,928.06**	**$1,180,528.06**

[278] Resp. Submission on Costs, ¶ 22.

(2) The Claimant's Position

264. The Claimant submits that it should be awarded its attorneys' fees and other costs associated with addressing the Respondent's challenge to jurisdiction *ratione temporis*, including its share of the Tribunal's and ICSID's fees and expenses, its expert's fees and expenses and other related costs.[279]

265. In addition to an award of costs, the Claimant asks the Tribunal to award it interest until the date of payment on any sums awarded. [280]

266. The Claimant claims reimbursement of the following costs: [281]

DESCRIPTION	AMOUNT (USD)
PROFESSIONAL FEES	
Attorneys' Fees	
Gibson, Dunn & Crutcher LLP	2,134,313.24
Kirkland & Ellis International LLP	171,967.75
Meysan Partners	79,943.55
TOTAL ATTORNEYS' FEES	**2,386,224.54**
Expert Fees	

[279] Cl. Statement on Costs, ¶ 2.

[280] Cl. Statement on Costs, ¶ 2.

[281] Cl. Statement on Costs, Tables A and B.

Dr. Jonathan Owens	30,331.00
TOTAL EXPERT FEES	**30,331.00**
TOTAL PROFESSIONAL FEES	**2,416,555.54**
COSTS	
ADMINISTRATIVE COSTS	
Gibson, Dunn & Crutcher LLP	100,982.17
Kirkland & Ellis International LLP	28,249.51
Meysan Partners	69,162.72
TOTAL ADMINISTRATIVE COSTS	**198,394.40**
ARBITRATION COSTS	300,000
TOTAL ARBITRATION COSTS	**300,000**
TOTAL COSTS	**498,394.40**

B. THE TRIBUNAL'S DECISION

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

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

268. This provision allows the Tribunal discretion in deciding the costs of the arbitration and the Parties' fees and costs.

269. The Tribunal also accepts the Respondent's submission on the general rule that a prevailing party should be reimbursed the costs it incurred in defending itself in ICSID proceedings. The Tribunal finds the explanation by the tribunal in *Gemplus v. Mexico* instructive:

> *This general approach is consistent with the recent practice of other arbitral tribunals in investment treaty arbitrations (including ICSID), which take as their starting-point the general principle that the successful party should have its reasonable costs paid by the unsuccessful party, in accordance with the general position in other forms of transnational commercial arbitration.*[282]

270. With regard to the bifurcation application, the Respondent prevailed on the application and subsequently succeeded in part in its jurisdictional challenge. Thus, the Respondent should be awarded its costs of the bifurcation application. The Tribunal considers the Respondents' total fees and costs of USD 582,984.71 for that application to be reasonable. The Tribunal therefore orders that the Claimant bear the Respondent's fees and costs of USD 582,984.71. For the same reasons, the Tribunal orders that the Claimant bear the full amount of the Tribunal's fees and expenses and direct expenses of USD 58,670.20 incurred in respect of the Bifurcation phase.

271. The Tribunal is, however, not inclined to order that interest on the Respondent's fees and costs be calculated as of 31 October 2018, the date of issuance of Procedural Order No. 2. The Tribunal had considered it more expeditious to deal with the fees and costs of the Bifurcation and Jurisdiction phases together, as is common practice in ICSID arbitrations. There is no reason for the Claimant to be penalised by having to pay interest as a result of a decision of the Tribunal based on standard practice.

272. On the jurisdictional objections, the Respondent has largely prevailed. Notably, the Respondent has succeeded in its argument that the Tribunal has no jurisdiction over claims arising before the entry into force of the 2015 BIT. Both Parties spent substantial time

[282] *Gemplus S.A., SLP S.A. Gemplus Industrial S.A. de C.V. v. United Mexican States* and *Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010 (RL-072), ¶ 17.22.

dealing with this argument. Thereafter, the Respondent succeeded in two out of four of its objections to the claims that the Claimant said arose after 4 February 2015. Taking into account the extent of the Respondent's success, the Tribunal is of the view that the Respondent should be entitled to receive half of its fees and costs for this phase. Thus, the Claimant should pay the Respondent a sum of USD 298,771.65. For the same reasons, the Tribunal orders that the Claimant bear half of the Respondent's half-share of the Tribunal's fees and expenses and direct expenses. In other words, the Respondent will bear one quarter and the Claimant three quarters of the Tribunal's fees and expenses and direct expenses of USD 125,949.77 for the Jurisdiction phase.

273. The Tribunal is not persuaded by the Respondent's submission that the Claimant's conduct needlessly complicated the proceedings and significantly increased the costs that the Respondent had to incur in response. Each Party was entitled to put its best foot forward and respond to the other Party's case. It appears to the Tribunal that that is all that has happened in this case. As such, the Tribunal declines to order costs against the Claimant for its conduct.

VI. DECISION

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

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

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

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

(4) The Claimant shall pay the Respondent costs of USD 582,984.71 and the fees and expenses of the Tribunal and direct expenses of USD 58,670.20 incurred in respect of the Respondent's Application for Bifurcation.

(5) The Claimant shall pay the Respondent costs of USD 298,771.65 and the fees and expenses of the Tribunal and direct expenses of USD 94,462.33 incurred in respect of the Respondent's Preliminary Objections to Jurisdiction *Ratione Temporis*.

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

Mr. John Beechey CBE
Arbitrator

Professor Sean Murphy
Arbitrator

Mr. Cavinder Bull SC
President of the Tribunal