International Court of Arbitration of the
International Chamber of Commerce
Case No. 25830/AYZ/ELU

In the matter of an arbitration under

The Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, 5 June 1981

and

The ICC Arbitration Rules in force as from 1 March 2017

-between-

QATAR PHARMA FOR PHARMACEUTICAL INDUSTRIES, W.L.L. AND DR. AHMED BIN MOHAMMAD AL HAIE AL SULAITI

CLAIMANTS

-and-

THE KINGDOM OF SAUDI ARABIA

RESPONDENT

FINAL AWARD

THE ARBITRAL TRIBUNAL

Dr. Charles Poncet (Arbitrator)
Professor Nassib G. Ziadé (Arbitrator)
Professor Juan Fernández-Armesto (Presiding Arbitrator)

THE ADMINISTRATIVE SECRETARY

Ms. Sofia de Sampaio Jalles

23 October 2024

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LIST OF ACRONYMS AND ABBREVIATIONS

Actual Value	Qatar Pharma's business value after the Measures
Administrative Costs	Fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court
Al Qima	Al Qima Transport, Shipping and Storage
Al Sulaiti Holding	Al Sulaiti Holding Company
Al-Ula Declaration	Al-Ula Declaration, 5 January 2021, UN Treaty No. 56786
ARSIWA	ILC's Articles on Responsibility of States for Internationally Wrongful Acts
Art(s).	Articles
Banaja	Banaja & Partners
Basic Rule	Art. 17 of the OIC Agreement
Boom Waste Certificates	Certificates issued by a specialized contractor upon the destruction of the products in Qatar
But-for Value	Value that Qatar Pharma's total business would have reached, but for the Measures
C I	Claimants' Statement of Claim, dated 17 June 2021
C II	Claimants' Reply and Statement of Defense on Jurisdiction, dated 7 November 2022
C III	Claimants' Rejoinder on Jurisdiction, dated 6 April 2023
CER-1 and **CER-3**	First and Second Expert Reports of Mr. Kiran Sequeira and Mr. Bryan d'Aguiar
CER-2	Expert Report of Dr. Kristian Coates Ulrichsen
CHT	Closing Hearing transcript
Claimants	Qatar Pharma and Dr. Al Sulaiti
Closing Hearing	Virtual oral rebuttals
Costs	Costs of the arbitration fixed by the Tribunal
Court	International Court of Arbitration of the ICC
CPHB	Claimants' Post-Hearing Brief
CWS-1, CWS-6, CWS-10	First, Second and Third Witness Statements of Mr. Mohamed Antar
CWS-2, CWS-5, CWS-7	First, Second and Third Witness Statements of Mr. Yasser Kotb
CWS-3, CWS-8	First and Second Witness Statements of Dr. Al Sulaiti
CWS-4, CWS-9	First and Second Witness Statements of Mr. Abdul Haliem Jaffar
Dammam Warehouse	Warehouse No. 29 in Dammam
Deloitte	Deloitte Professional Services (DIFC) Limited
Disputed Letters	Letters sent by QEMS to Saudi authorities
Documents	Documents allegedly placed under seal in the Claimants' facilities in Saudi Arabia

Dr. Al Sulaiti	Dr. Ahmed Bin Mohammad Al Haie Al Sulaiti
EBITDA	Earnings before interest, taxes, depreciation, and amortisation
EV/EBITDA	Enterprise Value relative to EBITDA
FET	Fair and equitable treatment
FPS	Full protection and security
GCC	Gulf Cooperation Council
GHC or **SGH**	Gulf Health Council or Secretariat General of Health
Hearing	Evidentiary hearing held from 22 May to 2 June 2023
HT, Day [x], p. [x], l. [x]	Hearing transcript, Day, page, line
ICC	International Chamber of Commerce
ICC Rules	Arbitration Rules of the ICC in force as from 1 March 2017
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
Initial Approval	First step for the obtainment of a Scientific Office Licence
IPO	Initial public offering
Jeddah Warehouse	Warehouse No. 53 in Jeddah
Law of Commercial Agencies	Law which establishes the necessary requisites to operate as a commercial agent in Saudi Arabia
Legal Costs	Reasonable legal and other costs incurred by the Parties for the arbitration
Licence	Second step for the obtainment of a Scientific Office Licence
Measures	The severance of diplomatic and consular relations between Saudi Arabia and Qatar, including closure of land, air and sea borders with Qatar, and order that all Qatari citizens abandon the country
Mechanism Implementing the Riyadh Agreement	Mechanism which reiterated the commitments under the Riyadh Agreement and established the GCC members' rights in case of non-compliance
Member States	Member States of the OIC
MFN	Most-favoured nation clause
Mr. Al Qahtani	Mr. Ali bin Saad bin Saad Al Qahtani
Mr. Al-Amari	Mr. Abdul Karim bin Abdul Rahman bin Saeed Al-Amari
Notice of Arbitration	Notice of Arbitration filed by Claimants, dated 28 March 2019
NUPCO	Saudi National Company for the Unified Purchase of Medicines, Devices and Medical Supplies
Official Statement	Statement published by the Saudi Ministry of Foreign Affairs regarding the adoption of the Measures
OIC	Organisation of the Islamic Conference

OIC Agreement	Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, dated 5 June 1981
P(p).	Page(s)
Parties	Claimants and Respondent
PCA	Permanent Court of Arbitration
Permits	Permits under Art. 5 of the OIC Agreement
Pharmaceutical Law	Saudi Law of Pharmaceutical Institutions and Products
Pharmacists	Mr. Al Qahtani and Mr. Al-Amari
PO	Procedural Order
QAR	Qatari Riyal
Qatar Pharma	Qatar Pharma for Pharmaceutical Industries, W.L.L.
QEMS	Qatar Pharmaceutical Solutions Establishment
Quartet	Saudi Arabia, Egypt, the UAE and Bahrain
R I	Respondent's Statement of Defence and Objections to Jurisdiction, dated 18 April 2022
R II	Respondent's Statement of Rejoinder and Reply on Jurisdiction, dated 7 March 2023
Request for Interim Measures	Claimants' request for immediate access to the Documents
RER-1 and **RER-2**	First and Second Expert Reports of Dr. Richard Hern
RER-3	Expert Report of Ambassador Simon Paul Collis CMG
Respondent, Saudi Arabia or **the Kingdom**	The Kingdom of Saudi Arabia
Riyadh Agreement	First Riyadh Agreement signed on 23 and 24 November 2013
Riyadh Agreements	Three agreements signed by the GCC States regarding security threats faced by the Gulf Region
Riyadh Warehouse	Warehouse leased by Qatar Pharma in Riyadh
Royal Decree	Decree issued by His Majesty the King of Saudi Arabia by means of which the Measures were adopted
RPHB	Respondent's Post-Hearing Brief
RPO	Respondent's Statement of Preliminary Objections and Request for Bifurcation
RWS-1 and **RWS-13**	First and Second Witness Statements of Dr. Mohammed Dahhas
RWS-2 and **RWS-9**	First and Second Witness Statements of Mr. Ali Bin Saad Al Qahtani
RWS-3 and **RWS-11**	First and Second Witness Statements of Mr. Abdul Karim Al-Amari
RWS-4	Witness Statement of Mr. Abdulla Al-Zahrani
RWS-5 and **RWS-12**	First and Second Witness Statements of Dr. Abdulla Al-Ahmari

RWS-6 and RWS-10	First and Second Witness Statements of Mr. Munif Al-Otaibi
RWS-7	Witness Statement of Mr. Abdalla Al-Asfor
RWS-8	Affidavit of Mr. Mohammed Ibrahim al-Subeehy
RWS-14	Witness Statement of Mr. Sufian Banaja
SABB	Saudi Arabian British Bank
Salwa Crossing	Qatar's land border with Saudi Arabia at Abu Samra
SAR	Saudi Riyal
Saudi Arabia-Austria BIT	Agreement between the Republic of Austria and the Kingdom of Saudi-Arabia concerning the Encouragement and Reciprocal Protection of Investments
Saudi EBITDA	2016 EBITDA obtained by Qatar Pharma in Saudi Arabia
Sale Contract	Contract for the sale of goods executed between Qatar Pharma and Al Sulaiti Holding on 30 December 2017
Scientific Office	Scientific office established by Qatar Pharma in Saudi Arabia
Scientific Office Licence	Licence issued by the SFDA for a term of five years
Seals	Seals placed by the SFDA on the Riyadh Warehouse
Seizure Order	Order issued by the SFDA pursuant to which QEMS was obliged to "maintain and avoid disposal or destruction" of products until it was permitted to do so
SFDA	Saudi Food and Drug Authority
Supplementary Riyadh Agreement	Top secret treaty which focused on the GCC States' security commitments
UAE	United Arab Emirates
Umbrella Clause	Art. 8(2) of the Saudi Arabia-Austria BIT
UNCITRAL	United Nations Commission on International Trade Law
Unified Agreement	1980 Unified Agreement for the Investment of Arab Capital in Arab States
USD	United States Dollars
Valuation Date	Date when the compensation is valued, which in the Tribunal's decision is 5 June 2017
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
Warehouses	Dammam Warehouse, Jeddah Warehouse and Riyadh Warehouse
ZATCA	Zakat, Tax and Customs Authority

I. PERSONS INVOLVED IN THE ARBITRATION

1. CLAIMANTS

1. Claimant Qatar Pharma for Pharmaceutical Industries, W.L.L. ["**Qatar Pharma**"] is a pharmaceutical company founded in 2006. It is a With Limited Liability company established under the laws of Qatar and registered with the Qatar Ministry of Economy and Commerce. Qatar Pharma's business address is:

   Qatar Pharma for Pharmaceutical Industries, W.L.L.
   P.O. Box 41119
   Doha, Qatar

2. Claimant Dr. Ahmed Bin Mohammad Al Haie Al Sulaiti ["**Dr. Al Sulaiti**"], a natural person who is a citizen and resident of Qatar, is the chairman and majority owner of Qatar Pharma. His contact details are:

   New Salata
   Area No. 40, Street No. 970, Building No. 23
   Doha, Qatar

3. Qatar Pharma and Dr. Al Sulaiti shall jointly be referred to as "**Claimants**".

4. Claimants are represented in these proceedings by:

   Mr. Kevin Walsh
   Ms. Kiera S. Gans
   Ms. Elena Rizzo
   Mr. Joshua Wan
   Ms. Erin Collins
   Ms. Alice Adu Gyamfi
   DLA PIPER LLP (US)
   1251 Avenue of the Americas
   New York, New York 10020
   United States of America

   Mr. Ricardo Alarcón
   DLA PIPER MEXICO, S.C.
   Paseo de los Tamarindos No. 400 A, Piso 31
   Col. Bosques de las Lomas
   Mexico City 5120
   Mexico
   Email: qatarpharmaarbitration@us.dlapiper.com

   Dr. Ioannis Konstantinidis
   Qatar University
   PO Box 2713, Building I09, Office B335
   Doha, Qatar
   Email: ioannis.konstantinidis@sciencespo.fr

2. RESPONDENT

5. The Respondent is the Kingdom of Saudi Arabia [the "**Kingdom**", "**Saudi Arabia**" or "**Respondent**"], a sovereign State, which has indicated the following contact details:

Director of Legal Department
Ministry of Foreign Affairs
P.O. Box 55937
55937, Riyadh
Kingdom of Saudi Arabia

6. Respondent is represented in these proceedings by:

Dr. Christopher Harris KC
Mr. Mark Wassouf
Mr. Matthew Watson
Mr. Cameron Miles
Mr. Calum Mulderrig
3 Verulam Buildings Gray's Inn,
London, WC1R 5NT
United Kingdom
Email: Counsel.QP.KSA@3VB.com

Mr. Khalid Al-Thebity
Ms. Lama Al Mogren
Greenberg Traurig Khalid Al-Thebity Law Firm
King Fahad Road
Sky Towers – 8th Floor
11372, Riyadh
Saudi Arabia
Email: k.althebity@althebitylaw.com

Ms. Lucinda Orr
Enyo Law LLP
1 Tudor St
London, EC4Y 0AH
United Kingdom
Email: QP-KSA@enyolaw.com

7. Claimants and Respondent shall jointly be referred to as the "**Parties**".

3. THE ARBITRAL TRIBUNAL

8. On 28 March 2019 Claimants appointed Dr. Charles Poncet as arbitrator. Dr. Poncet's contact details are the following:

Dr. Charles Poncet, M.C.L.
Rue Bovy-Lysberg 2
Case postale 5824
1211 Geneva 11

Switzerland
Email: charles@poncet.law

9. On 27 May 2019 Respondent appointed Professor Nassib G. Ziadé as arbitrator. Professor Ziadé's contact details are the following:

Professor Nassib G. Ziadé
Suite 701, Park Plaza
Building 247 Road 1704 Diplomatic Area 317
Manama
Kingdom of Bahrain
Email: nziade@ziadearbitration.com

10. The Parties agreed on a procedure for the appointment of the presiding arbitrator, which in August 2020 resulted in the appointment of Professor Juan Fernández-Armesto, whose contact details are as follows:

Professor Juan Fernández-Armesto
Armesto & Asociados
General Pardiñas 102, 8° izda.
28006 Madrid
Spain
Email: jfa@jfarmesto.com

4. ADMINISTRATION

11. The Parties agreed that the arbitration would be administered in accordance with the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce in force as from 1 March 2017 [the "**ICC Rules**" of the "**Court**" of the "**ICC**"].

12. Ms. Stella Leptourgou headed the team in charge of the case management:

Ms. Stella Leptourgou (Counsel)
Mr. Avishai Azriel (Deputy Counsel)
33-43 avenue du Président Wilson,
75116 Paris
France
Email: ica5@iccwbo.org

5. ADMINISTRATIVE SECRETARY

13. With the consent of the Parties, the Arbitral Tribunal appointed Ms. Sofia de Sampaio Jalles as Administrative Secretary, whose contact details are as follows:

Ms. Sofia de Sampaio Jalles
Armesto & Asociados
General Pardiñas, 102, 8° izda.
28006 Madrid
Spain
Email: ssj@jfarmesto.com

II. PROCEDURAL HISTORY

14. By Notice of Arbitration dated 28 March 2019 ["**Notice of Arbitration**"], Claimants sought to initiate arbitration proceedings against the Kingdom of Saudi Arabia under the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference ["**OIC**"], of 5 June 1981 [the "**OIC Agreement**" or the "**Treaty**"].

1. THE TREATY

15. Art. 17 of the OIC Agreement provides that[1]:

> "1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures:
>
> 1. Conciliation
>
> a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. The parties concerned may request the Secretary General to choose the conciliator. The General Secretariat shall forward to the conciliator a copy of the conciliation agreement so that he may assume his duties.
>
> b) The task of the conciliator shall be confined to bringing the different view points closer and making proposals which may lead to a solution that may be acceptable to the parties concerned. The conciliator shall, within the period assigned for the completion of his task, submit a report thereon to be communicated to the parties concerned. This report shall have no legal authority before a court should the dispute be referred to it.
>
> 2. Arbitration
>
> a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.
>
> b) The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an

[1] **Doc. CLA-10.**

Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitration Tribunal.

c) The Arbitration Tribunal shall hold its first meeting at the time and place specified by the Umpire. Thereafter the Tribunal will decide on the venue and time of its meetings as well as other matters pertaining to its functions.

d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."

2. LANGUAGE, PLACE OF ARBITRATION AND APPLICABLE RULES

16. Pursuant to the Parties' agreement, the language of arbitration is English and the place of arbitration is London, United Kingdom[2].

17. The applicable procedural rules are the 2017 ICC Rules[3].

18. The Tribunal shall decide the issues in dispute in accordance with the OIC Agreement and international law. For the purposes of Art. 9 of the OIC Agreement, the Tribunal shall apply the laws and regulations in force in the host State[4].

3. CONSTITUTION OF THE ARBITRAL TRIBUNAL

19. On 5 April 2018 Dr. Al Sulaiti sent a letter to the Saudi Ministry of Foreign Affairs on his behalf and on behalf of Qatar Pharma, as a "formal notice of the existence of an investment dispute under the OIC Agreement and the KSA-Austria BIT"[5]. There is no evidence of a response by the Kingdom.

20. On 28 March 2019 Claimants filed a Notice of Arbitration pursuant to Art. 17 of the OIC Agreement[6] against the Kingdom, appointing Dr. Poncet as arbitrator.

21. On 27 May 2019 the Kingdom appointed Professor Ziadé as arbitrator, pursuant to Art. 17 of the OIC Agreement, reserving its position and objections on all issues[7].

22. In accordance with the OIC Agreement, the party-appointed arbitrators conferred and sought to agree on the identity of the presiding arbitrator.

23. On 6 November 2019 Claimants addressed the Secretary-General of the Permanent Court of Arbitration ["**PCA**"], explaining that the arbitrators had been unable to agree on the appointment of the presiding arbitrator within the term provided for in Art. 17(2)(b) of the OIC Agreement (as extended by the Parties) and requesting that the Secretary-General exercise his power under Art. 6(2) of the Arbitration Rules

[2] Terms of Appointment and Reference, paras. 62 and 63.
[3] Terms of Appointment and Reference, para. 54.
[4] Terms of Appointment and Reference, para. 53.
[5] Communication C 1 (Notice of Dispute), p. 3.
[6] Communication C 2 (Notice of Arbitration), para. 1.
[7] Communication R 1.

of the United Nations Commission on International Trade Law ["**UNCITRAL**"] to designate an appointing authority to appoint the presiding arbitrator[8].

24. In turn, on 1 December 2019 Respondent asked the OIC Secretary-General to exercise his role under Art. 17(2)(b) of the OIC Agreement and appoint the presiding arbitrator[9].

25. On 12 December 2019 the OIC confirmed that the OIC Secretary-General would exercise his powers to appoint the presiding arbitrator[10]. Accordingly, on 26 December 2019 the OIC Secretary-General sought the Parties' opinion regarding a list of potential candidates for presiding arbitrator. After the Parties failed to reach an agreement, he notified the Parties that if they failed to agree on a presiding arbitrator within a period of 30 days, he would "be obliged to proceed with the appointment of a presiding arbitrator as authorized"[11].

26. In light of the OIC Secretary-General's letter, the PCA invited Claimants to provide comments regarding the implications, if any, of such letter for Claimants' request that the PCA Secretary-General designate an appointing authority[12]. Claimants requested that the PCA hold in abeyance their request for an appointing authority[13].

27. The OIC Secretary-General's cabinet reached out to several potential candidates to serve as presiding arbitrator, asking them to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality and independence[14]; the responses were transmitted to the Parties[15].

28. On 19 March 2020 the OIC Secretary-General took note that the Parties had been unable to reach an agreement regarding the presiding arbitrator[16]. The OIC Secretary-General opened a final period for the Parties to continue direct negotiations regarding a presiding arbitrator; otherwise, he would proceed with the appointment of the presiding arbitrator[17]. In May 2020 the Parties agreed to extend the negotiation period until 1 June 2020, due to the COVID-19 pandemic[18].

29. On 10 June 2020 the Parties eventually agreed on a procedure for the selection of the presiding arbitrator, which they communicated to the co-arbitrators[19], as follows:

[8] Communication C 12a.
[9] Communication R 15, p. 2.
[10] Communication OIC 1.
[11] Communication OIC 2.
[12] Communication PCA 6.
[13] Communication PCA 7.
[14] Communications OIC 3, OIC 4, OIC 5, OIC 6 and OIC 7.
[15] Communication OIC 7.
[16] Communication OIC 9.
[17] Communication OIC 9.
[18] Communication OIC 10.
[19] Communications C 34 and R 29.

- Each Party should consult with the co-arbitrator whom it appointed about potential candidates for the presiding arbitrator and propose five candidates to the other Party, copying the co-arbitrators[20];

- The co-arbitrators would then jointly confirm the availability of the ten proposed individuals; if one or more of the individuals were not available, the Party proposing the said individual would be invited by the co-arbitrators to submit a further name or names, as the case may be; the co-arbitrators should endeavour to provide the completed list of ten arbitrator candidates simultaneously to the Parties by 19 June 2020;

- Each Party could consult with the co-arbitrator whom it appointed in relation to the names proposed and, within five calendar days, without the need for reasons, notify the co-arbitrators that it rejected up to a maximum of three candidates; each Party should communicate its rejections simultaneously to the two co-arbitrators at a pre-agreed time, without copying the other Party;

- The co-arbitrators should then inform the Parties of the remaining names and the Parties should rank them in order of preference from 1 to 4 (or whatever the number of remaining candidates) with 1 being the most preferred candidate; each Party should communicate its rankings simultaneously to the two co-arbitrators at a pre-agreed time within five calendar days of receiving the list from the co-arbitrators, without copying the other Party;

- The co-arbitrators should then select as presiding arbitrator the candidate with the lowest aggregate score and jointly contact that proposed arbitrator; if more than one candidate shared the lowest score, the co-arbitrators should endeavour to agree on one of those candidates, after having consulted their appointing party. If the co-arbitrators were not able to agree, they should revert to the Parties for a decision.

30. The Parties also agreed that neither of them would approach the OIC or the PCA for any action until 10 July 2020[21].

31. On 13 June 2020 the co-arbitrators contacted Professor Fernández-Armesto to act as presiding arbitrator. On 13 August 2020, the co-arbitrators informed Professor Armesto that the list procedure had resulted in the Parties jointly selecting him as presiding arbitrator.

32. On 18 August 2020 Professor Fernández-Armesto accepted the appointment and the Tribunal was constituted.

4. TERMS OF APPOINTMENT AND REFERENCE

33. On 25 August 2020 the Tribunal issued communication A 1, asking the Parties for a complete copy of the case file, and informing that it would convene a first

[20] All such candidates had to have previously been appointed as presiding arbitrator in an investor-State arbitration in which the award is publicly available, and could not be a national of either Qatar or the Kingdom of Saudi Arabia. The Parties could not communicate directly with any of the proposed arbitrator candidates.
[21] Communication OIC 11; Communication PCA 8.

conference once it had had the opportunity to review such file. On 25 September 2020 the Parties submitted to the Tribunal all the relevant documents exchanged between them until then[22].

34. On 18 October 2020 the Arbitral Tribunal sent the Parties a draft Terms of Appointment, convened them to a first conference call and asked them to exchange preliminary views on the applicable procedural rules and timetable[23].

35. On 2 November 2020 the Parties submitted their proposed edits to the draft Terms of Appointment and informed the Tribunal that they were still conferring regarding the procedural rules and timetable[24].

36. On 4 November 2020 the Parties and the Tribunal held a first conference call, during which they discussed the Terms of Appointment, the case administration, and the procedural timetable. On this occasion, the Parties agreed that the Tribunal should contact the Court to enquire whether it would be willing to administer the proceedings[25].

37. After confirmation by the ICC, on 12 November 2020 the Tribunal circulated a new version of the Terms of Appointment and Reference for the Parties' comments and decided that the rules applicable to the procedure would be the 2017 ICC Rules[26].

38. After hearing the Parties, on 19 November 2020 the Tribunal circulated the final version of the Terms of Appointment and Reference[27], which were signed by the Parties and the Tribunal and transmitted to the Secretariat of the Court, which deemed the arbitration to have commenced on that same day[28].

39. On 3 December 2020 the Court[29]:

- Took note of the constitution of the Tribunal in accordance with the Parties' agreement;
- Took note of the Terms of Appointment and Reference signed by the Parties and the Tribunal (Art. 23(2) of the ICC Rules); and
- Fixed the advance on costs at USD 320,000, subject to later readjustments (Art. 37(2) of the ICC Rules).

5. CLAIMANTS' DOCUMENTS

40. At the 4 November 2020 conference call Claimants explained that to prepare their Statement of Claim they would need access to certain documents allegedly placed under seal in their facilities in Saudi Arabia [the "**Documents**"]. Therefore, the

[22] Communication C 37.
[23] Communication A 3.
[24] Communications C 39 and R 39.
[25] Communication A 6.
[26] Communication A 8.
[27] Communication A 9.
[28] Communication of the Secretariat dated 25 November 2020.
[29] Communication of the Secretariat dated 3 December 2020.

discussion of a procedural timetable was postponed until after the Parties had had the opportunity to make submissions on this issue.

41. On that same day, the Tribunal encouraged the Parties to solve the issue amicably; in case no agreement was reached, Claimants should prepare a submission with the details of the Documents needed by 18 November 2020, to which Respondent would have the opportunity to respond by 2 December 2020. *Ad cautelam*, the Tribunal reserved a date to discuss this issue in further detail with the Parties[30].

42. On 18 November 2020 and 2 December 2020 Claimants[31] and Respondent[32], respectively, submitted their positions on the issue of the access to Claimants' Documents. On 9 December 2020 Claimants submitted a reply on this issue[33] and on 16 December 2020 the Respondent presented a rebuttal[34].

43. On 17 December 2020 the Parties and the Tribunal held a conference call to discuss Claimants' access to the Documents. The Parties and the Tribunal agreed that Claimants should present a full-fledged request for the preservation of and access to the Documents[35], to which Respondent would have the opportunity to respond. The Tribunal established that Claimants should present their Statement of Claim by 5 April 2021, subject to the Tribunal and the Parties conferring and adopting appropriate measures in case Claimants had not been able to access their Documents by then. Lastly, the Tribunal invited the Parties to reinstate their discussions regarding the procedural timetable[36].

6. REQUEST FOR INTERIM MEASURES AND PO NO. 1

44. On 20 January 2021 Claimants filed a "**Request for Interim Measures**"[37], requesting, *inter alia*, an order of the Tribunal granting Claimants' vendor of choice immediate access to the Documents[38]. The Tribunal granted Respondent the opportunity to comment on Claimants' Request for Interim Measures and convened the Parties for a conference call[39].

45. On 1 February 2021 Claimants sent two proposals of procedural timetable:

- Timetable I, submitted jointly on behalf of both Parties, contemplating a scenario with no request for bifurcation;

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[30] Communication A 6.
[31] Communication C 42.
[32] Communication R 45.
[33] Communication C 47.
[34] Communication R 48.
[35] Specifying the applicable legal standards on which Claimants' request was based; marshalling evidence regarding their title over the premises where the Documents are allegedly located and the Documents themselves; identifying the lawyers who would be designated to travel to the Kingdom and access the Documents and describing the tasks to be performed; and specifying the constraints faced in accessing their banking accounts in Saudi Arabia and the specific measures requested.
[36] Communication A 11.
[37] Together with factual exhibits **C-4** through **C-16**; legal authorities **CLA-1** through **CLA-18**; the first witness statement of Mr. Mohamed Antar, Finance Manager of Qatar Pharma ["**CWS-1**"] and the first witness statement of Mr. Yasser Kotb, Country Marketing Manager of Qatar Pharma ["**CWS-2**"].
[38] Communication C 49
[39] Communication A 12.

- Timetable II, submitted by Claimants, contemplating a scenario with a request for bifurcation.

46. Furthermore, Claimants stated that the Parties had agreed to extend the deadline for the filing of the Statement of Claim until 17 June 2021[40].

47. On 3 February 2021 Respondent submitted its proposal regarding Timetable II[41] and on 8 February 2021 it filed its opposition to Claimants' Request for Interim Measures[42].

48. On 10 February 2021 the Parties and the Tribunal held a conference call during which they discussed the Request for Interim Measures and the procedural timetable. The Parties and the Tribunal agreed on a calendar until the Tribunal's decision on bifurcation[43].

49. On 3 March 2021 the Tribunal sent a draft Procedural Order ["**PO**"] No. 1 to the Parties, inviting them to submit their comments[44], which they did jointly on 10 March 2021[45].

50. On 12 March 2021 the Tribunal issued PO No. 1, setting out the procedural timetable and the rules governing the conduct of the arbitration[46].

51. On 12 April 2021 Claimants submitted an update concerning their efforts to obtain access to the Documents and their bank accounts[47]. Claimants, however, did not seek any specific relief from the Tribunal[48].

7. MAIN SUBMISSIONS

A. Statement of Claim

52. On 17 June 2021 Claimants filed their Statement of Claim ["**C I**"], supported by:

- Factual exhibits **C-17** through **C-305**;
- Legal authorities **CLA-19** through **CLA-187**;
- The first witness statements of Dr. Al Sulaiti ["**CWS-3**"] and of Mr. Abdul Haliem Jaffar ["**CWS-4**"], and the second witness statements of Dr. Yasser Kotb ["**CWS-5**"] and of Mr. Mohamed Antar ["**CWS-6**"]; and

[40] Communication C 51.
[41] Communication R 50.
[42] Communication R 51.
[43] Communication A 15.
[44] Communication A 17.
[45] Communication C 54; Communication A 18.
[46] Communication A 19.
[47] Communication C 55.
[48] Communication A 20.

- The first expert report of Mr. Kiran Sequeira and Mr. Bryan d'Aguiar[49] ["**CER-1**"][50].

B. PO No. 2 – Decision on bifurcation

53. On 17 August 2021 Respondent submitted its Statement of Preliminary Objections and Request for Bifurcation ["**RPO**"] supported by exhibits **R-1** to **R-8**.

54. On 20 September 2021 Claimants filed their Observations to the RPO, accompanied by legal authorities **CLA-188** through **CLA-222**.

55. On 15 October 2021 the Tribunal issued PO No. 2, deciding, by majority, to dismiss the Kingdom's request for bifurcation and to join the jurisdictional objections to the merits and quantum.

C. PO No. 3 – Procedural Timetable

56. On 20 October 2021 the Parties and the Tribunal held a conference call to discuss the procedural timetable applicable to the continuation of the proceedings. The Tribunal encouraged the Parties to confer and attempt to agree on a shorter procedural timetable.

57. On 27 October 2021 Claimants sent a new timetable proposal on behalf of both Parties. This proposal reflected only two areas of disagreement between the Parties. On that same day, Claimants explained the rationale behind their proposal[51]; Respondent did the same on 1 November 2021[52].

58. On 16 November 2021 the Tribunal issued communication A 22, deciding on the Parties' disagreements regarding the procedural timetable and transmitting a draft PO No. 3 for the Parties' comments. On 24 November 2021 each Party sent its comments to draft PO No. 3[53]. Thereafter, the Tribunal invited the Parties to confer and reach agreements regarding their respective proposals, and to inform the Tribunal of their agreements or lack thereof by 3 December 2021[54]. The Parties agreed to extend this deadline[55].

59. On 6 December 2021 Respondent informed that it was no longer represented by Squire Patton Boggs in the arbitration[56].

60. On 8 December 2021 Claimants filed a communication with the Parties' agreements and Claimants' own position regarding the points of contention[57]. On 9 December

[49] Together with exhibits **VP-1** to **VP-116** and Appendixes A to G.
[50] Mr. Sequeira and Mr. d'Aguiar initially published their report as part of Versant Partners, which was acquired by the firm Secretariat in August 2021.
[51] Communication C 60.
[52] Communication R 59.
[53] Communications C 61 and R 60.
[54] Communication A 23.
[55] Communications R 61 and C 62.
[56] Communication R 62.
[57] Communication C 63.

2021 the Kingdom confirmed the Parties' agreements and provided its comments on the issues in dispute[58].

61. On 3 January 2022 the Tribunal solved the Parties' disagreements and issued PO No. 3[59].

D. Statement of Defence and Objections on Jurisdiction

62. On 15 February 2022 Saudi Arabia informed that it had instructed Enyo Law and several members of 3 Verulam Buildings as its new counsel in the arbitration. Considering these new instructions, the Kingdom argued that it required a reasonable extension of time to prepare its Statement of Defence and Objections on Jurisdiction, and that it would seek Claimants' agreement[60].

63. After several exchanges, the Parties were unable to reach an agreement[61]. The Tribunal found that the Kingdom had *de facto* accepted the Tribunal's offer to transfer one month of preparation of the Statement of Rejoinder to the preparation of the Statement of Defence. The Tribunal decided to deduct this month from the preparation time for filing the Statement of Rejoinder and ordered Respondent to file its Statement of Defence by 18 April 2022[62].

64. Accordingly, on 18 April 2022 Respondent filed its Statement of Defence and Objections to Jurisdiction ["**R I**"], together with:

- Factual exhibits **R-9** through **R-179**;
- Legal authorities **RLA-48** through **RLA-216**;
- The witness statements of Dr. Mohammed Dahhas ["**RWS-1**"], Mr. Ali Bin Saad Al Qahtani ["**RWS-2**"], Mr. Abdul Karim Al-Amari ["**RWS-3**"], Mr. Abdulla Al-Zahrani ["**RWS-4**"], Dr. Abdulla Al-Ahmari ["**RWS-5**"], Mr. Munif Al-Otaibi ["**RWS-6**"] and Mr. Abdalla Al-Asfor ["**RWS-7**"]; and
- The first expert report of Dr. Richard Hern ["**RER-1**"].

E. Document Production

65. Between May and June 2022, the Parties exchanged their document production schedules, which they submitted to the Tribunal on 30 June 2022 for a decision on document production.

66. On 14 July 2022 the Tribunal issued its communication A 28 and decided on the Parties' requests for document production.

[58] Communication R 63.
[59] Communication A 25.
[60] Communication R 63.
[61] Communications R 64, C 64, C 65 and A 26.
[62] Communication A 27.

Access to Claimants' Documents

67. On this occasion, the Tribunal encouraged Claimants to try to gain access to the Riyadh warehouse [the "**Riyadh Warehouse**"] where the Documents were allegedly stored and to inform the Tribunal of the outcome of this attempt by 1 August 2022[63]. The Tribunal noted that its decisions regarding the Parties' document production requests had been made on the assumption that Claimants would be able to access their Documents. Should this prove impossible, the Tribunal reserved the right to revisit some of its decisions[64].

68. On 1 August 2022 Claimants informed that their vendor, Deloitte Professional Services (DIFC) Limited ["**Deloitte**"], had finally been able to enter the Riyadh Warehouse on 26 July 2022 with the assistance of a locksmith[65]. Claimants submitted into the record the report of this visit prepared by Deloitte on 31 July 2022, video footage recorded by Deloitte[66] and a third witness statement by Mr. Yasser Kotb ["**CWS-7**"]. Claimants informed that many of their business records, including eight of the nine computers previously stored at the Warehouse, had been removed. Therefore, Claimants requested that[67]:

- The Tribunal reconsider its decision on Claimants' document production requests, specifically that Respondent be ordered to produce documents responsive to Requests No. 23 (regarding proof of delivery of Qatar Pharma products) and No. 31 (regarding contracts entered into between Qatar Pharma and Respondent); and

- The Tribunal use all available means to address the highly irregular disappearance of targeted evidence and to fashion further relief as necessary.

69. Respondent asked for an extension of the deadline to respond to these requests[68], which was granted by the Tribunal after hearing Claimants[69] on 8 August 2022[70]. Accordingly, on 16 August 2022, Respondent filed its response to Claimants' application, asking the Tribunal to dismiss it[71].

70. On 18 August 2022 the Tribunal issued communication A 33, by which it decided Claimants' requests. On account of the Tribunal's decision, Saudi Arabia filed on the record an affidavit by Mr. Mohammed Ibrahim al-Subeehy, Executive Director of Legal Affairs of the Saudi Food and Drug Authority ["**RWS-8**"].

Parties' applications

71. Thereafter, each of the Parties filed an application with the Tribunal related to document production:

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[63] Communication A 28, para. 22.
[64] Communication A 28, para. 24.
[65] Communication C 66.
[66] **Doc. C-317** (Report); **Docs. C-306** and **C-307** (Video footage).
[67] Communication C 66.
[68] Communication R 68.
[69] Communication C 67.
[70] Communication A 31.
[71] Communication R 69.

- On 17 August 2022 Respondent filed an application for an order from the Tribunal directing Claimants to provide consent to the Saudi Arabian British Bank ["**SABB**"], or, in the alternative, ordering the Saudi Central Bank to authorize SABB, to produce all of Claimants' banking records to both Parties simultaneously[72]; and

- On 26 August 2022 Claimants submitted a new application for an order from the Tribunal directing Respondent to produce all documents responsive to Claimants' requests for document production which Respondent was ordered by the Tribunal or voluntarily agreed to produce, and any previously redacted documents in unredacted form, or otherwise provide information explaining the basis of each redaction[73].

72. After giving each Party the opportunity to respond to the counterparty's application[74], on 16 September 2022 the Tribunal issued communication A 36, by which it decided on both applications.

F. Reply and Statement of Defence on Jurisdiction

73. On 7 November 2022 Claimants filed their Reply and Statement of Defence on Jurisdiction ["**C II**"], together with:

- Factual exhibits **C-324** through **C-478**;

- Legal authorities **CLA-230** through **CLA-301**;

- The second witness statements of Dr. Al Sulaiti ["**CWS-8**"] and Dr. Abdul Haliem Jaffar ["**CWS-9**"], and the third witness statement of Mr. Mohammed Antar ["**CWS-10**"]; and

- The expert report of Dr. Kristian Coates Ulrichsen[75] ["**CER-2**"] and the second expert report of Mr. Sequeira and Mr. d'Aguiar[76] ["**CER-3**"].

G. Rejoinder and Reply on Jurisdiction

74. On 7 March 2023 Respondent filed its Rejoinder and Reply on Jurisdiction ["**R II**"] accompanied by:

- Factual exhibits **R-187** through **R-257**;

- Legal authorities **RLA-220** through **RLA-308**;

- The witness statements of Mr. Ali Bin Saad Al Qahtani ["**RWS-9**"], Mr. Munif Al-Otaibi ["**RWS-10**"], Mr. Abdul Karim Al-Amari ["**RWS-11**"], Dr. Abdullah Al-Ahmari ["**RWS-12**"], Dr. Mohammed Dahhas ["**RWS-13**"] and Mr. Sufian Banaja ["**RWS-14**"]; and

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[72] Communication R 70.
[73] Communication C 68.
[74] Communications R 72, R 73, C 69 and C 70.
[75] Together with exhibits **KU-1** to **KU-106**.
[76] Together with exhibits **VP-117** to **VP-145** and Appendixes H to S.

- The second expert report of Dr. Richard Hern ["**RER-2**"] and the expert report of Ambassador Simon Paul Collis CMG[77] ["**RER-3**"].

H. Rejoinder on Jurisdiction

75. On 6 April 2023 Claimants filed their Rejoinder on Jurisdiction ["**C III**"] together with:

- Factual exhibits **C-479** through **C-494**; and
- Legal authorities **CLA-302** through **CLA-312**.

8. HEARING

76. On 6 February 2023 the Parties informed the Tribunal that they had agreed to conduct an in-person evidentiary hearing [the "**Hearing**"] at the International Dispute Resolution Centre in London[78].

77. On 10 March 2023 the Tribunal asked the Parties to confer and try to reach agreements on the procedural aspects of the Hearing[79]. On 10 April 2023 the Parties notified the Tribunal of the witnesses that they wished to cross-examine at the Hearing[80]. On 13 April 2023 the Parties submitted a joint communication regarding Hearing logistics[81].

78. On 14 April 2023 Claimants requested leave from the Tribunal to submit a "limited number of supplemental materials into the record" that were available in the public domain (factual exhibits **C-495** to **C-518**)[82]. The Kingdom consented to the introduction of the additional exhibits into the record[83]. The Parties, however, disagreed on whether Dr. Kristian Ulrichsen – Claimants' geopolitical expert – should be allowed to address these additional exhibits at the Hearing[84].

79. On 17 April 2023 the Parties and the Tribunal held a pre-Hearing conference call, in which they discussed the organization of the Hearing.

80. On 21 April 2023 the Tribunal circulated a draft PO No. 4 and invited the Parties to provide their comments by 2 May 2023, which they did.

81. On 11 May 2023 the Tribunal issued PO No. 4, regarding Hearing arrangements. The Tribunal also decided on various points of disagreement between the Parties, including the possibility for the geopolitical experts to address the additional exhibits introduced by Claimants on the record[85].

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[77] Together with exhibits **SC-1** to **SC-68**.
[78] Communication R 73.
[79] Communication A 38.
[80] Communications C 75 and R 77.
[81] Communication C 77.
[82] Communication C 78.
[83] Communication R 81.
[84] Communications C 79 and R 81.
[85] Communication A 43.

82. The Hearing took place from 22 May to 2 June 2023 at the International Dispute Resolution Centre in London. The following individuals attended the Hearing:

For Claimants

- Mr. Kevin Walsh (DLA Piper)
- Ms. Kiera S. Gans (DLA Piper)
- Ms. Elena Rizzo (DLA Piper)
- Mr. Joshua S. Wan (DLA Piper)
- Ms. Erin Collins (DLA Piper)
- Ms. Alice A. Gyamfi (DLA Piper)
- Mr. Matthew Matystik (DLA Piper)
- Ms. Gayle Zwerling (DLA Piper)
- Dr. Ioannis Konstantinidis (Qatar University)
- Dr. Al Sulaiti (Claimant, Client Representative)

For Respondent

- Dr. Christopher Harris KC (3 Verulam Buildings)
- Mr. Khalid Al-Thebity (Khalid Al-Thebity Law Firm)
- Mr. Matthew Watson (3 Verulam Buildings)
- Mr. Mark Wassouf (3 Verulam Buildings)
- Dr. Cameron Miles (3 Verulam Buildings)
- Mr. Calum Mulderrig (3 Verulam Buildings)
- Ms. Chinmayi Sharma (3 Verulam Buildings)
- Ms. Lucinda Orr (Enyo Law LLP)
- Ms. Victoria McIntosh (Enyo Law LLP)

The Arbitral Tribunal

- Dr. Charles Poncet (Arbitrator)
- Professor Nassib G. Ziadé (Arbitrator)
- Professor Juan Fernández-Armesto (Presiding Arbitrator)

The Administrative Secretary

- Ms. Sofia de Sampaio Jalles

83. The Hearing was transcribed and the transcripts ["**HT**"] were made available to the Parties and the Tribunal.

84. At the end of the Hearing the Tribunal asked the Parties if there were any issues of due process that the Parties would like to raise at that stage so the Tribunal could take remedial action. The Parties confirmed that there were none[86].

9. POST-HEARING SUBMISSIONS

85. On 6 June 2023 the Tribunal issued communication A 46 setting out the rules for the next stage of the arbitration. The Tribunal reserved 6 November 2023 for the oral rebuttals to the post-Hearing briefs and answers to the Tribunal's questions (if

[86] HT, Day 10, p. 2298, l. 16 to p. 2299, l. 2.

any). The Tribunal established that these oral rebuttals would take place virtually, by Zoom [the "**Closing Hearing**"]. The Parties agreed to file their post-Hearing briefs by 29 September 2023[87].

A. New documents

86. Between 16 June and 20 July 2023, the Parties discussed the admission into the record of five documents related to Claimants' request for an exemption to cross the Saudi-Qatari land border in October 2017[88].

87. On 31 July 2023 the Tribunal decided to admit the five documents into the record, as well as the statement of the Director of Legal Affairs at the Kingdom's Ministry of Health, Mr. Talal Mohammed Albazie, and two other letters identified by Claimants[89]. Accordingly, on 3 and 5 August 2023 Respondent and Claimants, respectively, filed on the record[90]:

- Exhibits **R-259** to **R-261**;
- Exhibits **C-519** to **C-522**.

B. Post-Hearing briefs and Closing Hearing

88. On 29 September 2023:

- Claimants submitted their post-Hearing brief ["**CPHB**"] together with legal authorities **CLA-315** through **CLA-346**[91];
- Respondent filed its post-Hearing brief ["**RPHB**"] accompanied by Annex A, Tables 1 to 3, and legal authorities **RLA-313** to **RLA-444**[92].

89. On 19 October 2023 the Tribunal decided the Parties' disagreements on the Closing Hearing and established its final schedule[93].

90. The Closing Hearing took place virtually on 6 November 2023. The Parties and the Tribunal received the transcript of the Closing Hearing ["**CHT**"].

C. Statements of Costs

91. On 1 December 2023 the Parties filed their Statements of Costs[94]. On 15 December 2023 Respondent filed comments to Claimants' Statement of Costs, together with legal authorities **RLA-445** and **RLA-446**[95]. On the following day, Claimants

[87] Communication C 93.
[88] Communications C 92, C 94, R 88, R 89 and R 91.
[89] Communication A 51.
[90] Communications R 92 and C 95.
[91] Communication C 96.
[92] Communication R 93.
[93] Communication A 53.
[94] Communications C 100 and R 96.
[95] Communication R 97.

confirmed that they would not be submitting a further statement regarding costs and rested on their prior pleadings[96].

10. EVIDENCE

92. Claimants have marshalled the following evidence in the proceedings:

Factual exhibits	C-1 to C-522
Legal authorities	CLA-1 to CLA-346
Witness statements	CWS-1 to CWS-10
Expert reports	CER-1[97], CER-2[98] and CER-3[99]
Hearing demonstratives	H-1, H-3, H-5, H-7[100]

93. Respondent has submitted the following evidence during the arbitration:

Factual exhibits	R-1 to R-261
Legal authorities	RL-1 to RL-446
Witness statements	RWS-1 to RWS-14
Expert reports	RER-1, RER-2 and RER-3[101]
Hearing demonstratives	H-2, H-4, H-6, H-8[102]

94. The Tribunal has reviewed and examined all the evidence marshalled by the Parties and discussed it at length throughout this Award.

11. ADVANCE ON COSTS

95. On 3 December 2020 the Court fixed the advance on costs at USD 320,000, subject to later readjustments, pursuant to Art. 37(2) of the ICC Rules[103]. The Parties paid the advance on costs in equal parts[104]. On 30 June 2022 the Court readjusted the advance on costs and increased it to USD 1,090,000. The Court also granted the members of the Tribunal a first advance on fees[105]. The Parties paid the increased advance in equal parts.

96. On 11 September 2024 the Court fixed the costs of the arbitration at USD 1,090,000[106].

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[96] Communication C 101.
[97] Together with exhibits VP-1 to VP-116.
[98] Together with exhibits KU-1 to KU-106.
[99] Together with exhibits VP-117 to VP-145.
[100] Respectively, Claimants' Opening Presentation at the Hearing; Presentation of Dr. Ulrichsen; Presentation of Mr. Sequeira and Mr. d'Aguiar; Claimants' Rebuttal Presentation at the Closing Hearing.
[101] Together with exhibits SC-1 to SC-68.
[102] Respectively, Respondent's Opening Presentation at the Hearing; Presentation of Ambassador Collis CMG; Presentation of Dr. Hern; Respondent's Rebuttal Presentation at the Closing Hearing.
[103] Communication of the Secretariat to the Parties and co-arbitrators of 3 December 2020.
[104] Financial Table of 11 January 2021.
[105] Communication of the Secretariat to the Parties and co-arbitrators of 1 July 2022 and Financial Table of 1 July 2022.
[106] Financial Table of 13 September 2024.

12. TIME LIMIT TO RENDER THE AWARD AND CLOSING OF THE PROCEEDINGS

97. In the Terms of Appointment and Reference, the Parties acknowledged that this is a complex arbitration and that the Tribunal would require sufficient time to prepare the award after the last substantive hearing on matters to be decided in the award or the filing of the last written submissions concerning such matters (excluding cost submissions), whichever is later[107].

98. Furthermore, the Parties agreed that paras. 121-122 of the ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration of 1 January 2019 should not apply and the Tribunal would not be subject to a reduction of fees based on the timeliness of the submission of the draft award to the Court[108].

99. On 30 May 2024 the Court extended the time limit for rendering the final award until 30 September 2024[109]. On 26 September 2024 the Court extended the time limit for rendering the final award until 31 October 2024[110].

100. On 12 August 2024 the Tribunal closed the proceedings.

13. SIGNATURE OF AWARDS

101. Subject to any requirements of mandatory law that may be applicable, the Parties agreed that any award would be signed by the members of the Arbitral Tribunal in counterparts, and that all such counterparts would be assembled in a single electronic file and notified to the Parties by the Secretariat by email or any other means of telecommunication that provides a record of the sending thereof, pursuant to Art. 35 of the ICC Rules[111].

[107] Terms of Appointment and Reference, para. 78.
[108] Terms of Appointment and Reference, para. 79.
[109] Communication of the Secretariat of 5 June 2024.
[110] Communication of the Secretariat of 1 September 2024.
[111] Terms of Appointment and Reference, para. 80.

III. FACTS

102. Qatar Pharma is a developer, manufacturer and distributor of pharmaceutical products founded in 2006 in Doha, Qatar, by Dr. Al Sulaiti[112]. Dr. Al Sulaiti, a citizen and resident of Qatar[113], is the majority owner of Qatar Pharma[114] and of the Al Sulaiti Holding Company ["**Al Sulaiti Holding**"], a family business[115].

103. Qatar Pharma distributed and sold its pharmaceutical products in Saudi Arabia – one of Qatar's neighbouring countries. On 5 June 2017, however, Saudi Arabia announced a decision to "sever diplomatic and consular relations with the State of Qatar"[116], which led to the closure of Saudi Arabia's land, air and sea borders with Qatar, and an order that all Qatari citizens abandon the country [the "**Measures**"]. Claimants submit that the Measures had a devastating impact on their investments in Saudi Arabia[117].

104. In the following sections, the Tribunal will describe Qatar Pharma's operations and presence in Saudi territory (**1.**). It will then turn to Saudi Arabia's decision to sever diplomatic and consular relations with the State of Qatar (**2.**) and how these Measures affected Qatar Pharma's dealings with the Kingdom (**3.**), eventually leading to the start of this arbitration (**4.**). Finally, the Tribunal will dedicate a section to the signature of the Al-Ula Declaration, which restored ties between Qatar and Saudi Arabia (**5.**).

1. QATAR PHARMA'S BUSINESS

A. Founding of Qatar Pharma

105. Dr. Al Sulaiti founded and registered Qatar Pharma in Qatar in March 2006[118], with the goal of becoming one of the few producers of pharmaceutical products in the Gulf region[119]. The construction of Qatar Pharma's factory, the first intravenous solutions manufacturing facility in Doha, was completed in 2009[120]. That same year, the Qatari Supreme Council of Health authorised the commencement of production and registered the first products[121]. At the time, the factory had two production lines: one for manufacturing 50-2,000 mL sterile intravenous solution

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[112] CWS-3, paras. 12-13. See also C I, para. 13; R I, para. 47.
[113] **Doc. C-3.**
[114] **Doc. C-18/VP-23**, p. 1; CER-1, para. 69 and Figure 5, p. 36. Until 2017, Dr. Al Sulaiti was the majority shareholder of Qatar Pharma's shares, with a direct 70% share. Al-Sulaiti Holding owned 10% of Qatar Pharma's shares. The remaining 20% were owned by related entities (including entities where Dr. Al Sulaiti has an interest) and family members of Dr. Al Sulaiti.
[115] **Doc. C-20**; **Doc. C-64**, p. 46; CWS-3, para. 8; CER-1, para. 69 and Figure 5, p. 36. In 2017, Dr. Al Sulaiti was the majority shareholder of Al Sulaiti Holding, with a direct 70% share.
[116] **Doc. C-71/R-122.**
[117] C I, paras. 74-85, 131-138.
[118] The company's original commercial name was Qatar Pharmaceutical Solutions Factory, and its trademark name was Qatar Pharma (**Doc. C-17**). In 2017 it became known simply as Qatar Pharma (**Doc. C-18**).
[119] CWS-3, paras. 10-12.
[120] CWS-3, para. 17.
[121] **Doc. C-28**; CWS-3, para. 18; CWS-8, para. 10. See also **Doc. C-24**, with the certificate of "good manufacturing practice" issued by the Qatar Supreme Council of Health in August 2009.

bags and one for manufacturing 500 mL sterile intravenous solution bottles[122]. Progressively, Qatar Pharma increased its production lines to include irrigation solutions, haemodialysis solutions and topical medication[123]. By 2016 it was operating 14 production lines[124].

106. The factory complied with various international standards, such as the Good Manufacturing Practices of the World Health Organization and the *Conformité Européenne* Medical Device Directive[125].

B. Expansion into Saudi Arabia

107. In 2010 Qatar Pharma decided to expand sales to Saudi Arabia, given its geographic proximity (Qatar's only land border is with Saudi Arabia)[126], large population[127], and growing pharmaceutical market[128]. Moreover, both Qatar and Saudi Arabia are member States of the Gulf Cooperation Council[129] ["**GCC**"] and the Gulf Health Council ["**GHC**"][130]. The timing also seemed favourable: at the time, most pharmaceutical products consumed in the GCC region were imported, and GCC governments were eager to reduce reliance on imports and to increase local drug manufacturing[131].

Agency contract with Banaja

108. Under Saudi law, as it stood in 2010, any non-Saudi enterprise seeking to sell pharmaceutical products in Saudi Arabia was required to employ a licensed Saudi agent[132]. To enter the Saudi market, Qatar Pharma executed a commercial agency contract with Banaja & Partners ["**Banaja**"], a Saudi import company[133]. Pursuant to this contract (valid for three years[134]), Banaja would act as the sole distributor and exclusive agent of Qatar Pharma in the Kingdom[135].

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[122] CWS-3, para. 16. See also C I, para. 23.
[123] See **Doc. C-64**, pp. 6 and 45.
[124] **Doc. C-59**.
[125] **Doc. C-23**; **Doc. C-24**; **Doc. C-25**; **Doc. C-26**; **Doc. C-28**; CWS-3, paras. 15-18; CWS-4, para. 10.
[126] CER-1, para. 72; **Doc. H-5**, slide 10.
[127] **Doc. C-29**, p. 11; **Doc. H-5**, slide 10.
[128] **Doc. C-56/VP-9**, p. 16; **Doc. C-57**; **Doc. C-64**, p. 33; CER-1, paras. 54, 57, Figure 2; RWS-1, para. 7; RWS-4, paras. 10-12; RWS-5, paras. 10-11.
[129] In 2010 Qatar Pharma was approved by the GCC Central Drug Registration Program, a unified procurement program for medicines, medical equipment and pricing of products aimed at ensuring that registered pharmaceutical companies provide safe, effective and high-quality medicine (**Doc. C-215**; CWS-3, paras. 19-21; CWS-4, para. 10).
[130] **Doc. C-27**.
[131] **Doc. C-64**, pp. 38-39. See also **Doc. H-5**, slide 10.
[132] C II, para. 85; R I, para. 341; CWS-3, para. 37; CWS-4, para. 18; RWS-1, para. 11; RWS-4, para. 14; RWS-14, para. 6.
[133] **Doc. C-39**; CWS-3, para. 37; RWS-14, para. 7.
[134] **Doc. C-39**, Art. 5, p. 2.
[135] **Doc. C-39**, Art. 2, p. 2.

109. Despite some initial difficulties[136], in 2011 Qatar Pharma's facilities were eventually approved by the Saudi Food and Drug Authority[137] ["**SFDA**"] and its products were authorised to be distributed in Saudi Arabia[138] using its own facilities in Doha as distribution hub[139]. The initial term of these authorisations was five years[140], and in 2016 and early 2017 the SFDA renewed these registrations for another five-year term[141].

110. For nearly three years, Qatar Pharma's products were distributed in Saudi Arabia both to public and private sector customers via Banaja. In early 2013, however, Banaja and Qatar Pharma decided to terminate their contract[142]. The witnesses disagree on the causes that led to the breakdown of the relationship but agree that after 2013 Qatar Pharma and Banaja were no longer bound by an agency agreement[143].

Qatar Pharma's enterprise in Saudi Arabia

111. Accordingly, Claimants started to make plans to set up their own distribution system in the Kingdom. The first step was the creation of a branch known as Qatar Establishment for Medical Solution[144] ["**QEMS**"], which was registered at the Saudi Commercial Register[145].

112. This endeavour further required the creation of a scientific office plus a warehouse located in Saudi Arabia[146]. Qatar Pharma established a scientific office in Riyadh [the "**Scientific Office**"] and on 30 June 2013, the SFDA issued a "**Scientific Office Licence**" for a term of five years (valid until May 2018)[147]. Furthermore, in November 2013 Qatar Pharma signed a lease agreement for a warehouse in Riyadh[148] [previously defined as the "Riyadh Warehouse"].

113. In March 2014 Saudi Arabia adopted the Foreign Investment Law, which permitted GCC residents to own 100% of a local Saudi company[149]; taking advantage of this legislative change, Claimants decided to convert their branch, QEMS[150], into an

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[136] **Doc. R-14.** In 2010 the GHC postponed the registration of 14 products of Qatar Pharma after several stability study assessments concluded that there were discrepancies in the data presented at the time of registration.
[137] **Doc. C-222;** CWS-4, paras. 12-16. See also **Doc. C-32; Doc. C-33; Doc. C-34; Doc. C-35; Doc. C-36; Doc. C-37.**
[138] **Doc. C-32; Doc. C-33; Doc. C-34; Doc. C-35; Doc. C-36; Doc. C-37; Doc. C-219; Doc. C-246; Doc. C-247; Doc. C-259; Doc. C-260; Doc. C-261; Doc. C-262; Doc. C-262; Doc. C-263; Doc. C-264; Doc. C-296; Doc. C-297; Doc. C-298; Doc. C-299; Doc. C-300; Doc. C-301; Doc. VP-20; Doc. VP-36;** CWS-4, paras. 10-17, 39. See also **Doc. H-5,** slide 12.
[139] CWS-3, para. 37.
[140] **Doc. VP-20; Doc. VP-36; Doc. H-5,** slide 12; CWS-4, paras. 17.
[141] **Doc. C-214; Doc. C-256; Doc. C-257; Doc. C-258;** CWS-4, paras. 17, 37-38.
[142] **Doc. C-404; Doc. C-405;** CWS-3, para. 41; RWS-14, para. 9.
[143] CWS-3, para. 41; RWS-14, paras. 8-11; HT, Day 3, p. 610, ll. 10-25 (Dr. Al Sulaiti).
[144] QEMS was first incorporated in Qatar in 2007 (**Doc. C-38; Doc. VP-26;** CER-1, Figure 5, p. 36). QEMS is also sometimes referred to as Qatar Pharma Solutions Establishment.
[145] **Doc. VP-24; Doc. VP-25;** CER-1, para. 69(ii)(1).
[146] **Doc. C-404.**
[147] **Doc. C-217; Doc. R-70; Doc. R-171;** RWS-1, para. 29. See also CWS-3, para. 39.
[148] **Doc. C-4/R-50; Doc. R-165; Doc. R-172;** CWS-3, para. 38.
[149] **Doc. CLA-23.**
[150] At the time under the name of "Qatar Pharmaceutical Solutions Establishment" **(Doc. C-51).**

independent "local establishment" in Saudi Arabia, registered with the Ministry of Commerce and Industry[151].

114. Thereafter, Qatar Pharma concluded a "Licensing and Commercial Representation Contract" with QEMS[152], pursuant to which QEMS was appointed as "sole representative and distributor" of Qatar Pharma in Saudi Arabia[153]. QEMS imported, sold and distributed the pharmaceutical solutions produced by Qatar Pharma in Saudi Arabia[154].

115. Furthermore, in 2014 Dr. Al Sulaiti, via Al Sulaiti Holding, established a transport company in Qatar, Al Qima Transport, Shipping and Storage ["**Al Qima**"][155]. In March 2016 Al Qima and QEMS concluded a transportation agreement, pursuant to which Al Qima leased ten trucks to QEMS to transport products from Qatar to Saudi Arabia and vice-versa[156].

116. Qatar Pharma further expanded its operations in Saudi Arabia, by leasing two additional warehouses:

- In May 2016 QEMS leased Warehouse No. 29 in Dammam for a term of one year[157] ["**Dammam Warehouse**"]; and

- In February 2017 QEMS leased Warehouse No. 53 in Jeddah, also for the term of one year[158] ["**Jeddah Warehouse**"];

[together with the Riyadh Warehouse, the "**Warehouses**"].

117. Qatar Pharma carried out works in the three Warehouses and started procedures to obtain the required operating licences and authorizations[159]. The Parties disagree on whether the Warehouses were properly licensed by the Saudi authorities[160].

C. Participation in tender processes

118. Most Qatar Pharma's revenues were generated outside of Qatar, in particular, in Saudi Arabia. Qatar Pharma's products were distributed both to public and private sector customers, but the largest portion of revenue came from the participation in public tenders for the sale of products to governmental entities[161].

119. Saudi Arabia has a centralized system for the procurement of pharmaceutical products for the public sector[162]:

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[151] **Doc. C-51**; **Doc. C-413**, p. 17 of PDF; CER-1, para. 69(ii)(2). See also CWS-8, para. 15.
[152] **Doc. VP-86**.
[153] **Doc. VP-86**, Art. 2.
[154] **Doc. VP-86**, Preface.
[155] **Doc. C-48/VP-28**; CER-1, paras. 69(ii)(3), 69(iii), 89. See also C I, Appendix 1.
[156] **Doc. C-49/VP-27**. QEMS was at the time operating as "Qatar Pharmaceutical Solutions Establishment".
[157] **Doc. C-41**. See also CWS-3, para. 47; **Doc. H-5**, slide 15.
[158] **Doc. C-40**. See also CWS-3, para. 46; **Doc. H-5**, slide 15.
[159] **Doc. C-45**; **Doc. C-46**; **Doc. C-47**; **Doc. VP-93**; **Doc. C-390**; **Doc. C-403**; **Doc. C-465**; **Doc. C-464**; **Doc. C-479**.
[160] See section V.2 *infra*.
[161] **Doc. C-64**, pp. 49-50; **Doc. H-5**, slide 14. See also CWS-4, para. 28; CWS-5, para. 18; **Doc. VP-145**.
[162] **Doc. C-64**, p. 39. See also CWS-4, para. 33.

- On the one hand, the Saudi National Company for the Unified Purchase of Medicines, Devices and Medical Supplies ["**NUPCO**"] organizes public tenders, negotiates with international manufacturers, and unifies prices and product specifications for the Saudi public sector[163];

- On the other hand, Saudi Arabia also acquires pharmaceutical products by means of the tender processes organized by the GHC[164], which allow GCC countries to purchase in bulk and benefit from costs savings through large order quantity discounts.

120. Both the NUPCO and the GHC organize annual tenders, for procuring different types of products[165].

121. Between 2011 and 2015 Qatar Pharma (initially via its agent Banaja, and then through QEMS) participated in tender processes organized by the NUPCO and the GHC[166]. Qatar Pharma won several tenders and entered into annual contracts for the supply of pharmaceutical products to the Saudi Ministry of Health[167], which quickly became Qatar Pharma's largest customer[168].

Delays in delivery

122. However, during the execution of these contracts, Qatar Pharma incurred several delays or incomplete delivery of goods[169]. Qatar Pharma requested Saudi Arabia

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[163] **Doc. C-64**, p. 39. See also CWS-5, para. 18. NUPCO's clients include, *inter alia*, the Ministry of Health, the Ministry of Finance, King Faisal Specialist Hospital, and the National Guard Health Affairs.
[164] Also referred to by Claimants as the Secretariat General of Health or "**SGH**".
[165] CWS-5, para. 18.
[166] **Doc. C-60**; **Doc. C-61**; **Doc. R-19**; CWS-3, para. 49; CWS-4, para. 34; CWS-5, para. 19; R I, para. 7, Table A (p. 34), Table B (p. 35), Table E (p. 39), Table F (p. 40).
[167] **Doc. R-18**, Procurement and Supply Contract, SGH-33 Tender 2011, between the Ministry of Health and Qatar Pharma (via its agent Banaja), valid for one year (15 August 2011 to 14 August 2012); **Doc. C-254**, Procurement and Supply Contract, SGH-34 Tender 2012, between the Ministry of Health and QEMS, valid for one year (15 July 2012 to 14 July 2013); **Doc. C-213/R-41**, Procurement and Supply Contract, NUPCO Tender 2013, between the Ministry of Health and QEMS, valid for one year (15 July 2013 to 14 July 2014); **Doc. C-255/R-39**, Procurement and Supply Contract, SGH-35 Tender 2013, between the Ministry of Health and QEMS, valid for one year (7 July 2013 to 6 July 2014); **Doc. R-40**, Procurement and Supply Contract, Tender for Artificial Kidney Solutions (8), between the Ministry of Health and QEMS, valid for one year (7 July 2013 to 6 July 2014); **Doc. C-62/R-65**, Procurement and Supply Contract, NUPCO Tender 2014, between the Ministry of Health and QEMS, valid for one year (25 June 2014 to 24 June 2015); **Doc. C-290**, Procurement and Supply Contract, SGH-9 Tender 2014, between the Ministry of Health and QEMS, valid for one year (6 July 2014 to 5 July 2015); **Doc. R-63**, Procurement and Supply Contract, SGH-36 Tender 2014, between the Ministry of Health and QEMS, valid for one year (6 July 2014 to 5 July 2015); **Doc. R-64**, Procurement and Supply Contract, Tender for Artificial Kidney Solutions (9), between the Ministry of Health and QEMS, valid for one year (6 July 2014 to 5 July 2015); **Doc. R-91**, Procurement and Supply Contract, SGH-37 Tender 2015, between the Ministry of Health and QEMS, valid for one year (17 June 2015 to 16 June 2016); **Doc. R-92**, Procurement and Supply Contract, Tender for Artificial Kidney Solutions (10), between the Ministry of Health and QEMS, valid for one year (17 June 2015 to 16 June 2016); **Doc. R-93**, Procurement and Supply Contract, NUPCO Tender 2015, between the Ministry of Health and QEMS, valid for one year (17 June 2015 to 16 June 2016). See also CWS-5, para. 15; CWS-9, paras. 45, 48; **Doc. H-5**, slide 15.
[168] **Doc. C-64**, pp. 9, 49.
[169] **Doc. R-43**; **Doc. R-44**; **Doc. R-45**; **Doc. R-46**; **Doc. R-47**; **Doc. R-48**; **Doc. R-51**; **Doc. R-52**; **Doc. R-76**; **Doc. R-86**; **Doc. R-87**; **RLA-49**; **RLA-50**. See also HT, Day 5, pp. 1098-1099 (Mr. Al Ahmari).

additional time to supply various of the delayed or incomplete shipments, which the Kingdom granted, while imposing delay penalties[170].

123. Between 2012 and 2014 Qatar Pharma signed several compromises with the Saudi Ministry of Health undertaking to[171]:

- Adhere to delivery dates;
- Comply with the batches included in the supply invoices;
- Ensure products were properly packed; and
- Complete the required paperwork following each delivery.

Suspension from 2016 GHC tender

124. Nonetheless, due to Qatar Pharma's delays, the GHC eventually decided to suspend Qatar Pharma from participating in the 2016 GHC's public tender[172]. Qatar Pharma also did not participate in the 2016 NUPCO tender[173].

The 2017 tenders

125. In 2017 Qatar Pharma was permitted to bid both in the GHC and the NUPCO tenders. Qatar Pharma participated in the GHC tender No. 39 for 2017[174], in the GHC Artificial Kidney Solution Tender No. 12 for 2017[175] and in the 2017 NUPCO tender[176].

126. The Parties have discussed at length whether Qatar Pharma was awarded these tenders and, if so, what was the size of such awards[177]. They agree, nevertheless, that Qatar Pharma did obtain final awards in the GHC tender No. 39[178] and in the 2017 NUPCO tender[179] – although the matter of the size of these awards remains

[170] **Doc. R-33**; **Doc. R-54**; **Doc. R-55**; **Doc. R-56**; **Doc. R-57**; **Doc. R-58**; **Doc. R-59**; **Doc. R-60**; **Doc. R-61**; **Doc. R-72**; **Doc. R-82**; **Doc. R-100**.
[171] **Doc. R-22**; **Doc. R-31**; **Doc. R-32**; **Doc. R-83**; **Doc. R-88**.
[172] **Doc. R-108**, paras. 6(A)(1)-6(A)(2); **Doc. R-71**, para. F. See also R I, paras. 64-65; R II, para. 101; C II, para. 63.
[173] **Doc. H-5**, slide 15; R II, para. 101; C II, para. 65.
[174] **Doc. C-60**; **Doc. VP-40**. See also R I, para. 68; CPHB, para. 63.
[175] **Doc. C-61**. See also R I, para. 68; CPHB, para. 63.
[176] CPHB, para. 63; RPHB, para. 159.
[177] Claimants argue that Qatar Pharma obtained large orders under the three tenders (see, e.g., C II, para. 75; CPHB, paras. 62 *et seq.*; CER-3, Table 7; **Doc. H-5**, slide 17; CWS-9, paras. 45-49). Respondent disagrees (R I, paras. 68 and 76; R II, paras. 113-115; RPHB, paras. 158 *et seq.*).
[178] **Doc. R-127**; R II, paras. 91-92; RPHB, para. 159. See also **Doc. C-384**.
[179] **Doc. R-173**; R II, paras. 91-92; RPHB, para. 159. See also **Doc. C-288/C-429**, whereby the Ministry of Health acknowledged that products were awarded to Claimants under the 2017 NUPCO tender.

disputed[180]. It is unclear, however, whether Qatar Pharma was awarded any products under the 2017 GHC Artificial Kidney Solution Tender No. 12[181].

D. Qatar Pharma's prospective IPO

127. Sometime around 2016, Qatar Pharma began contemplating the possibility of issuing an initial public offering ["**IPO**"] on the Qatar Stock Exchange[182]. It hired Qatar National Bank Capital to conduct a readiness assessment, who in turn engaged the consulting firm, Frost & Sullivan, to provide independent research and market data[183].

128. In May 2016, Frost & Sullivan issued a Market Report with an in-depth review of Saudi Arabia's healthcare market. It concluded that the Saudi market offered great potential and presented very attractive growth opportunities for Qatar Pharma[184]. The Frost & Sullivan Market Report also contemplated the possibility that Qatar Pharma would add new production lines in its factory[185].

129. However, in June 2016, the Qatar National Bank concluded that Qatar Pharma was not yet ready to issue an IPO[186]. Instead, it provided certain recommendations regarding corporate governance, financial reporting, business growth and international expansion[187], which would permit an IPO in 2017 or ideally in 2018[188].

130. Qatar Pharma argues that as a consequence of the Measures it was forced to suspend its planned IPO[189], while Respondent contests the possibility of Qatar Pharma ever going public, irrespective of the Measures[190].

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[180] The Parties discuss whether **Doc. C-373** represents the award granted to Qatar Pharma in GHC tender No. 39 or whether it is part of the quotation submitted by Qatar Pharma as Doc. C-61 (C II, para. 68; RPHB, paras. 159, 161). Likewise, it is unclear whether **Doc. C-386**, named "Awarded Items for Pharmaceuticals Tender No. 39/2017" represents indeed an award or not, since it does not permit to ascertain how many units were awarded and destined to Saudi Arabia. The Parties also discuss whether **Doc. C-376** represents the award granted to Qatar Pharma in the 2017 NUPCO tender (C II, para. 72; RPHB, paras. 159, 161).

[181] Claimants have marshalled **Doc. C-374** on the record, which they purport represents the final award (C II, para. 70, fn. 128). Respondent disputes this (RPHB, paras. 159 *et seq.*). The document is a single page named "Awarded Items for Renal Dialysis Solutions Tender No. 12/2017", which does not permit to ascertain if the listed products were indeed awarded by the GHC to Qatar Pharma and if so, how many units were destined for Saudi Arabia. Indeed, the document has no information about quantity, price or proposed buyers. Furthermore, Claimants have also presented **Doc. C-385**, which is the "Objections Result for Renal Dialysis Solutions Tender No. 12/2017", which seems to show that Qatar Pharma was indeed awarded one product for renal dialysis.

[182] **Doc. VP-38**, p. 4. See also CWS-3, paras. 57-64; CER-1, para. 96(a).

[183] **Doc. C-64**, p. 4.

[184] **Doc. C-56/VP-9**, pp. 3-4, 16-17, 29. See also **Doc. C-57**, p. 1; CER-1, para. 62, Figure 3; CWS-3, para. 42; CWS-5, paras. 9, 11.

[185] **Doc. C-56/VP-9**, p. 23.

[186] **Doc. C-64**, pp. 25-26, 103, 122-123.

[187] **Doc. C-64**, pp. 27-28, 104-116, 124-134.

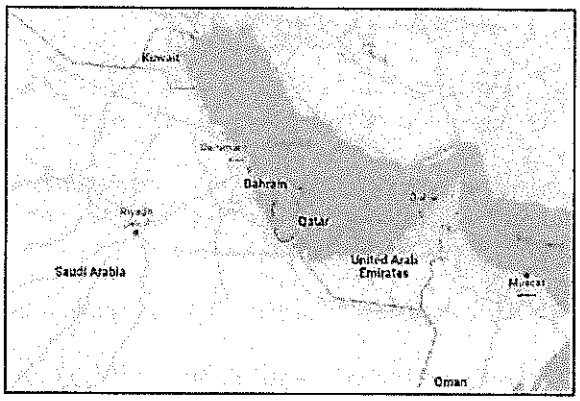
[188] **Doc. C-64**, p. 133.

[189] C I, paras. 59-65; C II, paras. 93 *et seq.*; CWS-3, paras. 119-120.

[190] R I, para. 135; R II, paras. 148 *et seq.*

2. SAUDI ARABIA SEVERS RELATIONS WITH QATAR

131. Qatar and Saudi Arabia are two neighbouring countries in the Gulf region; Qatar in fact has a single land border, which it shares with Saudi Arabia[191]. They both belong to several intergovernmental organizations, including, *inter alia*, the OIC, the GCC and the Arab League.



A. The Riyadh Agreements

132. The GCC was founded in 1981 and is composed of six member States: Saudi Arabia, Qatar, Bahrain, Kuwait, Oman and the United Arab Emirates ["**UAE**"][192]. Due to the instability and security threats faced by the Gulf region, starting in 2013 the GCC States signed a series of treaties, with the aim of "abolish[ing] whatever muddies the[ir] relations", particularly with regard to security challenges [jointly the "**Riyadh Agreements**"][193].

133. The first "**Riyadh Agreement**" was signed on 23 and 24 November 2013. The GCC States undertook a series of obligations, including[194]:

- Not to interfere in their respective internal affairs, whether directly or indirectly;
- Not to give harbour or naturalize "any citizen of the [GCC] States that has any activity which opposes his country's regimes, except with the approval of his country";
- Not to support the Muslim Brotherhood or any other organization or group aimed at destabilizing the GCC States; and
- Not to support any faction in Yemen that could pose a threat to Yemen's neighbouring countries.

[191] **Doc. H-3**, slide 6. See also CER-1, para. 72.
[192] **Doc. SC-24**; RER-3, Collis, para. 73.
[193] See also CER-2, Ulrichsen, pp. 22-23; RER-3, Collis, paras. 85-87; **Doc. H-4**, slide 4.
[194] **Doc. R-53**.

134. However, less than four months later, Saudi Arabia, the UAE and Bahrain recalled their ambassadors in Qatar due to the country's alleged refusal to abide by the terms of the Riyadh Agreement and to agree on a monitoring mechanism[195].

135. Despite this diplomatic incident, on 17 April 2014 the GCC States (including Qatar) signed the "**Mechanism Implementing the Riyadh Agreement**", which reiterated the commitments and provided, among other things, that if any GCC member failed to comply with the Mechanism, then[196]:

> "[…] the other GCC Countries shall have the right to take any appropriate action to protect their security and stability."

136. Then, on 16 November 2014, the GCC States signed the "**Supplementary Riyadh Agreement**"[197], a treaty labelled "Top Secret", with a particular focus on security, whereby the GCC States committed[198]:

- To fully implement the Riyadh Agreement within one month;
- To deny support and actively prosecute "any person or media apparatus that harbours inclinations harmful to any [GCC State]"; and
- To provide support to Egypt, "ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcasted on Al-Jazeera".

137. The Supplementary Riyadh Agreement ordered "intelligence chiefs to follow up on the implementation […] and to report regularly to the leaders, in order to take the measures they deem necessary to protect the security and stability of their countries"[199].

138. On that same day, Saudi Arabia's ambassador returned to Doha[200].

B. The Measures

139. Notwithstanding the execution of the successive Riyadh Agreements, and the reestablishment of diplomatic relations, the friction between Saudi Arabia and Qatar did not abate[201].

140. The situation worsened in 2017: after recalling once again the Saudi ambassador to Qatar, on 5 June 2017 the Saudi Ministry of Foreign Affairs published a press release announcing that Qatar had[202]:

> "[…] repeatedly violated their international obligations and the agreements they signed under the umbrella of the Gulf Cooperation Council (GCC) for

[195] **Doc. KU-59**, p. 1.; **Doc. SC-44**; CER-2, Ulrichsen, para. 4.55; RER-3, Collis, para. 88.
[196] **Doc. R-73.**
[197] CER-2, Ulrichsen, para. 4.55.
[198] **Doc. R-90**, p. 1.
[199] **Doc. R-90**, p. 2.
[200] **Doc. SC-44.**
[201] **Doc. RLA-212**, paras. 2.33-2.46; RER-3, Collis, para. 55.
[202] **Doc. R-122.** See also **Doc. C-71.**

> Arab States to cease the hostilities against the Kingdom and stand against terrorist groups and activities of which the latest one was their failure to implement the Riyadh Agreement." [Emphasis added]

141. The press release added that[203]:

> "An official source stated that the Government of Saudi Arabia, in exercising its sovereign rights guaranteed by the international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land, sea and airports, prevent crossing into Saudi territories, airspace and territorial waters […] for reasons relating to Saudi national security. […] Saudi citizens are prohibited from traveling to Qatar, residing in or passing through it, while Saudi residents and visitors have to hurry leaving Qatari territories within 14 days. The decision, for security reasons, unfortunately prevents Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia and those Qatari residents and visitors have to leave Saudi territories within 14 days." [Emphasis added]

142. In sum, Saudi Arabia (and several other States, including Egypt, the UAE and Bahrain) adopted the following measures [previously defined as the "**Measures**"][204]:

- Sever diplomatic and consular relations with Qatar;
- Close all land, sea and air communications to and from Qatar;
- Prevent crossings from Qatar into its territory, airspace and waters;
- Prohibit Saudi citizens from traveling to or through Qatar;
- Require Saudi citizens resident in Qatar to leave within 14 days; and
- Order Qatari citizens visiting or residing in Saudi territory to leave within 14 days.

143. Following this announcement:

- The Saudi authorities closed Qatar's only land border crossing at Abu Samra [the "**Salwa Crossing**"][205];
- The Saudi Ports Authority issued a circular instructing the directors of ports in Saudi Arabia "not to receive any ship flying the Qatari flag, or owned by Qatari persons or companies, and not to unload any goods of Qatari origin in Saudi ports"[206]; and

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[203] **Doc. R-122**. See also **Doc. C-70**.
[204] **Doc. R-122**; CER-2, Ulrichsen, paras. 4.1-4.4; RER-3, Collis, para. 24. See also HT, Day 6, p. 1387 (Dr. Harris); RPHB, para. 93.
[205] **Doc. KU-5**; **Doc. C-81**; **Doc. C-82**; CER-2, Ulrichsen, para. 4.5; RER-3, Collis, fn. 2. The border closed on 18 June 2017 and was temporarily reopened to permit pilgrims to travel to the holy city of Mecca during the Hajj in August 2017; it was subsequently closed again.
[206] **Doc. C-80**; CER-2, Ulrichsen, para. 4.2; RER-3, Collis, para. 24.

- The General Authority of Civil Aviation in Saudi Arabia revoked Qatar Airways' licence to operate in the Kingdom and issued a notice that all flights registered in Qatar were no longer authorized to land at Saudi airports or to overfly Saudi Arabian airspace[207].

C. The practical demands

144. After the adoption of the Measures, a period of diplomatic mediation and negotiations, spearheaded by Kuwait, the United States and the European Union, ensued[208].

145. On 23 June 2017 Saudi Arabia (together with Bahrain, the UAE and Egypt) delivered a list of 13 practical demands to Qatar, which included, *inter alia*, curbing diplomatic ties with Iran, severing all ties to "terrorist organizations", shutting down the Qatari news site Al-Jazeera and other news outlets, and terminating all Turkish military presence in Qatar. Qatar was required to agree to all demands within 10 days and thereafter to submit itself to monthly and annual monitoring[209]. Qatar, however, rejected this list of demands, arguing that they would amount to a violation of its sovereignty[210].

146. On 19 July 2017 Saudi Arabia transformed the 13 demands into six "principles", which required Qatar, *inter alia*, to commit fully to the Riyadh Agreements, to combat extremism and terrorism, to refrain from inciting hatred and violence and to refrain from interfering in the internal affairs of States – Qatar, however, once again declined to submit to the Kingdom's demands[211].

3. INTERRUPTION OF QATAR PHARMA'S OPERATIONS IN SAUDI ARABIA

147. By 2017, although Qatar Pharma was registered across the GCC countries, and also in Iraq, Sudan, Jordan, Libya, Syria and Yemen[212], approximately 70% of its revenues were generated in Saudi Arabia, particularly through sales to the Saudi Ministry of Health[213]. The Parties disagree on the scale and success of Qatar Pharma's venture in Saudi Arabia[214], but it is undeniable that the Measures affected its business operation.

Disruption of business

148. The most immediate impact was the closure of borders. The Al Qima trucks, which used to transport products between Qatar and Saudi Arabia, were not authorized to pass the Salwa Crossing and the supply of medical products stopped[215].

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[207] **Doc. C-78**; **Doc. C-79**; **Doc. R-179**; CER-2, Ulrichsen, para. 4.3; RER-3, Collis, para. 24.
[208] **Doc. KU-100**, p. 1; **Doc. KU-96**; RER-3, Collis, paras. 58, 111.
[209] **Doc. KU-72**; **Doc. KU-96**; **Doc. SC-13**; **Doc. C-159**; CER-2, Ulrichsen, para. 4.81; RER-3, Collis, para. 57.
[210] **Doc. KU-100**, p. 2; CER-2, Ulrichsen, paras. 4.84, 4.86.
[211] **Doc. C-160**; **Doc. KU-100**; CER-2, Ulrichsen, para. 4.84; RER-3, Collis, para. 58.
[212] **Doc. C-64**, p. 6.
[213] **Doc. C-64**, pp. 8-9, 49, 53-54. See also CER-1, para. 19; **Doc. H-5**, slide 8; CWS-6, para. 26.
[214] R I, paras. 4-6, 55-56, 78; C II, paras. 56-61.
[215] CWS-3, paras. 69, 80, 83.

149. There were additional, indirect effects: Saudi customers stopped placing orders, accepting deliveries[216], and paying invoices[217]. Claimants submit that Qatar Pharma accumulated[218]:

- SAR 89.1 million in unpaid receivables due by the Saudi Ministry of Health; and

- SAR 10.6 million in unpaid receivables due by Saudi private clients[219].

150. All employees of Qatari nationality who were working for QEMS in Saudi Arabia were forced to leave the country within 14 days[220]. The effect on QEMS's workforce was reinforced, because most of its Saudi employees decided to leave their employment with a Qatari company[221]. Dr. Al Sulaiti instructed his remaining employees to consolidate all products, documents, records and materials from the Warehouses and the Scientific Office at the Riyadh Warehouse[222].

151. Furthermore, after the enactment of the Measures, the SFDA conducted an inspection at the Riyadh Warehouse and eventually decided to seal it[223]. The Parties have discussed at length whether Claimants were or not capable of accessing the Riyadh Warehouse while the Measures were in force and after the sealing by the SFDA[224]. In July 2022, once this arbitration was ongoing, Claimants engaged Deloitte's forensic team to access the Riyadh Warehouse[225]. Images of the visit performed by Deloitte show that the Warehouse apparently had been looted, but that certain documents and products remained[226].

152. Finally, Qatar Pharma's access to its Alawwal Bank [today the Saudi Arabian British Bank, already defined as "**SABB**"] account became disrupted[227]. The extent to which Dr. Al Sulaiti was able to access the bank accounts of Qatar Pharma and Respondent's interference in the access to the SABB account are disputed facts[228].

Request for exemption

153. On 3 October 2017 QEMS sent a letter to the Director General of the General Directorate of Medical Supply at the Kingdom's Ministry of Health, informing that it was[229]:

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[216] CER-3, Figure 7; CWS-3, para. 93; CWS-8, paras. 30-31.
[217] **Doc. C-156**; **Doc. C-220**; CER-1, paras. 26, 100.
[218] CER-1, Tables 1 and 6; **Doc. H-5**, slides 21 and 31.
[219] CPHB, para. 189 (QAR 11.4 M minus QAR 800,000 already paid). See also CER-1, Secretariat I, para. 133, Table 6; **Doc. H-5**, slide 21.
[220] CWS-2, para. 2; CWS-3, paras. 71, 80-83; CWS-5, paras. 42-45.
[221] CWS-3, para. 87; CWS-5, para. 37; HT, Day 4, pp. 982-983 (Mr. Kotb).
[222] CWS-2, paras. 5-10; CWS-3, paras. 87-92; CWS-5, paras. 37-41.
[223] **Doc. C-6**; **Doc. R-6**; **Doc. R-7**; CWS-2, paras. 5, 11; CWS-3, paras. 90-91; CWS-4, para. 49; CWS-5, paras. 46-50; RWS-1, paras. 34-36. See also Communication C 49, para. 6.
[224] See, e.g., R I, para. 554.1; C II, paras. 477-478, fns. 888-889.
[225] Communication C 66; **Doc. C-317**.
[226] **Doc. C-317**; **Doc. C-306**; **Doc. C-307**.
[227] **Doc. C-16**; **Doc. C-180**; **Doc. C-181**; **Doc. C-231**; **Doc. C-232**; CWS-3, paras. 97-106; CPHB, paras. 17, 21.
[228] **Doc. C-99**, pp. 3-4; **Doc. C-100**; **Doc. R-154**; **Doc. R-156**; **Doc. R-157**; RWS-6, paras. 10-16.
[229] **Doc. C-94**. See also **Doc. C-520**, with minor differences in the translation.

> "[…] fully and completely prepared to supply [the items awarded under SGH (39,12) and NUPCO 2017 Tenders] as [] requested. Please note that all quantities awarded to us were manufactured and that the Ministry of Health's logo was affixed thereto prior to the decision to close the land borders. Accordingly, we cannot sell them to any other entity."

154. Therefore, QEMS asked that[230]:

> "In light of closure of the Saudi-Qatari land border, which is considered an exceptional emergency situation and a force majeure beyond our control, and given that we are fully prepared to supply all quantities of the aforementioned tenders, we ask Your Excellency to instruct the parties concerned to exempt these medicines and allow these shipments to cross the Saudi-Qatari land border."

155. The Ministry of Health received this letter[231]. The Kingdom has produced on the record a letter dated 11 October 2017, which allegedly demonstrates that the Ministry of Health responded to QEMS's request, asking that QEMS provide it[232]:

> "[…] with the notification letters of award (Awarded Sheet) for the items of these tenders, which were provided to [QEMS] by the Executive Office for Unified Procurement in the Gulf Cooperation Council [GHC] and the National Unified Company Procurement (NUPCO) so that we can take necessary action."

156. Claimants question the authenticity and relevance of the Ministry's response[233]; the Tribunal will discuss this issue in further detail in section VI *infra*.

VAT and income tax payments

157. Saudi taxpayers are required to file income tax declarations to the Zakat, Tax and Customs Authority ["**ZATCA**"][234], within 120 days of the end of the tax year[235]. When a corporation ceases its economic activity, it must notify ZATCA[236] and apply for deregistration from value added tax ["**VAT**"][237]. Because QEMS was registered as a local entity in Saudi Arabia, it was required to file tax declarations and VAT returns. After the Measures Qatar Pharma failed to deregister from ZATCA and did not file its tax returns. Since December 2019 ZATCA has sent Qatar Pharma over 15 letters regarding unpaid tax invoices, failures to submit VAT returns, and late penalties[238].

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[230] **Doc. C-94**. See also **Doc. C-520**, with minor differences in the translation.
[231] **Doc. C-519**; Communication R 89.
[232] **Doc. R-259**.
[233] CPHB, paras. 137-140. See also Communication C 92.
[234] Previously called the General Authority of Zakat and Tax (or GAZT).
[235] **Doc. RLA-54**; **Doc. R-148**, p. 36; **Doc. R-149**, p. 13; **RLA-55**, Arts. 58(1) and (2).
[236] **Doc. RLA-54**, Art. 60(D).
[237] **Doc. RLA-55**, Art. 13.
[238] **Doc. C-182**; **Doc. C-183**; **Doc. C-184**; **Doc. C-185**; **Doc. C-186**; **Doc. C-187**; **Doc. C-188**, **Doc. C-189**; **Doc. C-190**; **Doc. C-191**; **Doc. C-192**; **Doc. C-193**; **Doc. C-194**; **Doc. C-195**; **Doc. C-196**; **Doc. C-197**, **Doc. C-198**; **Doc. C-199**; **Doc. C-200**; **Doc. C-201**; **Doc. C-202**; **Doc. C-203**; **Doc. C-204**; **Doc. 205**; **Doc. R-148**, p. 44; CWS-3, paras. 97-106. See also C I, paras. 151-159; R I, para. 260

4. START OF THE ARBITRATION PROCEEDINGS

158. On 5 April 2018 – less than a year after the adoption of the Measures – Dr. Al Sulaiti sent a letter to the Saudi Ministry of Foreign Affairs on his behalf and on behalf of Qatar Pharma, as a "formal notice of the existence of an investment dispute under the OIC Agreement and the KSA-Austria BIT" and seeking to solve the matter amicably[239]. There is no evidence of a response by the Kingdom.

159. Consequently, on 28 March 2019 Claimants filed the Notice of Arbitration against Saudi Arabia[240], leading to the start of the present arbitration.

5. THE AL-ULA DECLARATION

160. On 5 January 2021, the GCC States held a summit in the Saudi heritage site of Al-Ula, in which they signed an agreement to put an end to the Measures and restore their ties [the "**Al-Ula Declaration**"][241].

161. Pursuant to the Al-Ula Declaration, the signatory States undertook to "stand firm against any confrontation that could undermine the national or regional security of any of [them]" and to be "united against any direct or indirect interference in the internal affairs of any of [them]"[242]. Furthermore, the Al-Ula Declaration provides that the parties[243]:

> "[…] to the present Declaration [are] committed to bringing an end to any claims, complaints, measures, protests, objections or disputes of any sort against any other State party to the Declaration, including by dropping, withdrawing or rescinding them, and to stopping implementation of the measures announced on 10 Ramadan A.H. 1438 (5 June 2017) [*i.e.*, the Measures]." [Emphasis added]

162. As a consequence, as of early 2021 the Qatar-Saudi land, air and sea borders reopened and trade and commercial relations between both States were restored[244].

163. The Parties agree that the Al-Ula Declaration has put an end to any claims and complaints regarding the Measures at a State-to-State level[245]. However, the Declaration does not deal with private businesses or individuals.

Impact on Qatar Pharma

164. By 2021, the approval of Qatar Pharma's factory and the registration of its products by the SFDA had expired[246]. Shortly after the Al-Ula Declaration, Qatar Pharma wrote to the SFDA, asking for an extension of its factory's registration certificate

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[239] Communication C 1 (Notice of Dispute), p. 3.
[240] Communication C 2 (Notice of Arbitration).
[241] **Doc. RLA-79/KU-101**, p. 7. See also **Doc. C-206**; CER-2, Ulrichsen, para. 4.87; RER-3, Collis, paras. 110-112. The Al-Ula Declaration was also signed by Egypt.
[242] **Doc. RLA-79/KU-101**, p. 7.
[243] **Doc. RLA-79/KU-101**, p. 7.
[244] **Doc. RLA-79/KU-101**, p. 7; CER-2, Ulrichsen, para. 4.90; RER-3, Collis, paras. 117-130. See also RPHB, para. 81.
[245] CER-2, Ulrichsen, paras. 4.88-4.89; CPHB, paras. 82-84; RPHB, paras. 82-84.
[246] CER-1, para. 107; CWS-4, paras. 57-58. See also HT, Day 1, p. 300, l. 7 to p. 301, l. 11 (Dr. Harris).

(which had been issued in November 2016 for a period of five years) for a period equivalent to the embargo[247]. However, in February 2021 the SFDA denied the requested extension and noted that Qatar Pharma had to pay the inspection service fee, after which the SFDA would conduct a new inspection, which could eventually result in a new registration[248]. This, however, has not occurred.

165. Furthermore, there is evidence that in 2022 Dr. Al Sulaiti held discussions with officials of Saudi health institutions, regarding the possibility for Qatar Pharma to participate in the project of a centre for establishing a production line for pharmaceutical products, particularly parenteral solutions[249]. However, Qatar Pharma never received a formal invitation to re-enter the Saudi market[250].

166. According to Claimants, Qatar Pharma would have to undertake significant investments to be able to re-enter the Saudi market[251]. In any case, Dr. Al Sulaiti has declared under oath that he would not be willing to go back to Saudi Arabia, either in a personal capacity or with his business, for fear of alleged reprisals as a result of his pursuit of legal claims against the Kingdom[252].

[247] **Doc. C-209**; **Doc. C-210**. See also Doc. C-211; CWS-3, para. 138; CWS-4, para. 58.
[248] **Doc. C-208**; **Doc. C-209**. See also CWS-3, para. 138; CWS-4, paras. 59-60.
[249] **Doc. C-342**. See also CWS-8, para. 48.
[250] CWS-8, paras. 50-51.
[251] CWS-3, para. 138; CWS-4, para. 58. See also CER-1, para. 107; C I, paras. 165-166; CPHB, paras. 77-78; CHT, p. 2443, l. 12 to p. 2444, l. 4 (Mr. Walsh).
[252] HT, Day 10, p. 2277, l. 1 to p. 2284, l. 8 (Dr. Al Sulaiti). See also CWS-3, para. 140; CWS-8, para. 52.

IV. REQUEST FOR RELIEF

1. CLAIMANTS' REQUEST FOR RELIEF

167. Claimants seek the following relief from the Tribunal[253]:

> "244.1. DISMISS Respondent's jurisdictional and admissibility objections;
>
> 244.2. DECLARE that Respondent is in breach of its obligations under Articles 2, 5, 8 and 10 of the OIC Agreement;
>
> 244.3. ORDER Respondent to pay to Claimants damages constituting full reparation in connection with Saudi Arabia's breaches of Articles 2, 5, 8 and 10 of the OIC Agreement, as set forth in Paragraphs 239 and 240 above, or in the alternative at Paragraphs 241 and 243 above, or in the further alternative at 242 and 243 above;
>
> 244.4. AWARD such other relief as the Tribunal considers appropriate; and
>
> 244.5. ORDER Saudi Arabia to pay all of Claimants' costs and expenses associated with this arbitration, including all attorneys' and experts' fees and costs, with compound interest on this amount from the date of the Award until the date of payment."

2. RESPONDENT'S REQUEST FOR RELIEF

168. The Kingdom, on the other hand, requests that the Tribunal[254]:

> "562.1. Dismiss these proceedings on the ground that the Tribunal lacks jurisdiction *ratione voluntatis*;
>
> 562.2. Alternatively, declare the Claimants' claims inadmissible and decline to hear these proceedings;
>
> 562.3. Alternatively, dismiss these proceedings on the merits; and in each case
>
> 562.4. Order the Claimants to pay all the Kingdom's costs and expenses associated with these proceedings, including all legal and expert fees and expenses, from the date of the award until the date of payment."

[253] CPHB, para. 244. See also C I, para. 461; C II, para. 575; C III, paras. 114-115.
[254] R II, para. 562. See also R I, para. 654.

V. JURISDICTIONAL AND ADMISSIBILITY OBJECTIONS

169. Claimants argue that they have met all the relevant jurisdictional requirements under the OIC Agreement to bring this arbitration against Saudi Arabia[255]:

- The Tribunal has jurisdiction *ratione personae*: Qatar Pharma and Dr. Al Sulaiti are both protected investors under the OIC Agreement, since the former is a limited liability company established under the laws of Qatar and the latter is a Qatari citizen[256];

- The Tribunal has jurisdiction *ratione materiae*: Claimants own and hold significant investments[257] covered by the OIC Agreement's definition of "investment"[258];

- The Tribunal has jurisdiction *ratione voluntatis*: as a Contracting Party to the OIC Agreement, Saudi Arabia expressly and unequivocally consented to resolve disputes with investors who are nationals of other Contracting Parties by way of arbitration[259]; and

- The Tribunal has jurisdiction *ratione temporis*: Claimants made their investments in Saudi Arabia starting in 2010 and the dispute between the Parties arose in 2017, well after the OIC Agreement entered into force as between the Kingdom and Qatar in 2003[260].

170. The Kingdom does not dispute that Claimants are protected investors, which own and hold protected investments made between 2010 and 2017 in Saudi Arabia; the Kingdom, however, voices two objections[261]:

- First, Saudi Arabia argues that the Tribunal does not have jurisdiction *ratione voluntatis* over this dispute, because under Art. 17(2)(a) of the OIC Agreement recourse to arbitration is only permitted after conciliation has been resorted to and has failed – something which has not happened in this case;

- Second, the Kingdom avers that Claimants' claims are inadmissible, because Claimants do not have "clean hands" and are therefore in breach of Art. 9 of the OIC Agreement.

171. Claimants counter that the requirements of Art. 17 of the OIC Agreement have been met, and that conciliation is not a precondition to arbitration. Furthermore,

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[255] C I, paras. 171 *et seq.*
[256] C I, paras. 173-175.
[257] Which, according to Claimants, includes, but is not limited to, shares in QEMS; contractual rights to payment and performance relating to public and private contracts; contractual rights to payment and performance relating to public and private contracts through Dr. Al Sulaiti's interest in Al Qima with QEMS; licences and registrations obtained from relevant Saudi government agencies to establish and operate Claimants' business in Saudi Arabia; and rights *in rem* over real estate properties and other tangible assets, including pharmaceutical products present in the territory of Saudi Arabia.
[258] C I, paras. 176-183.
[259] C I, paras. 184 *et seq.*
[260] C I, paras. 235-237.
[261] R II, para. 218.

Claimants deny that the "clean hands" doctrine applies to this case, but even if it did, Claimants made and operated their investment in compliance with Saudi law, and therefore have clean hands to bring the dispute[262].

172. The Tribunal will first determine whether or not Claimants have met the requirements of Art. 17 of the OIC Agreement (**V.1**) and then whether or not there is any issue of admissibility on the basis of the so-called "clean hands" doctrine (**V.2**). For each of these objections, the Tribunal will briefly summarise the position of the Kingdom and Claimants, before making its decision.

[262] C III, paras. 1 and 4-5.

V.1. JURISDICTIONAL OBJECTION: ART. 17 OF THE OIC AGREEMENT

173. The Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference – otherwise referred to as the OIC Agreement – is an agreement between the member States of the OIC [the "**Member States**"], who in the preamble declared, *inter alia*, that[263]:

> "Convinced that relations among the Islamic States in the field of investment are one of the major areas of economic cooperation among these States through which economic and social development therein can be fostered on the basis of common interest and mutual benefit,
>
> Anxious to provide and develop a favourable climate for investments, in which the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples,
>
> Have approved this Agreement […]" [Emphasis in the original]

174. The OIC Agreement is divided into four chapters[264]:

- "Definitions",
- "General provisions regarding promotion, protection and guarantee of the capitals and investments and the rules governing them in the territories of the Contracting Parties",
- "Investment guarantees", and
- "General and final provisions".

175. The Parties' discussion revolves around two provisions[265] that fall under chapter 3, "Investment guarantees". The first of these provisions is Art. 16, which reads as follows[266]:

> "Article - 16
>
> The host state undertakes to allow the investor the right to resort to its national judicial system to complain against a measure adopted by its authorities against him, or to contest the extent of its conformity with the provisions of the regulations and laws in force in its territory, or to complain against the non-adoption by the host state of a certain measure which is in the interest of the investor, and which the state should have adopted, irrespective of whether the complaint is related, or otherwise, to the implementation of the provisions of the Agreement to the relationship between the investor and the host state.

[263] **Doc. CLA-10**, pp. 1-2.
[264] **Doc. CLA-10**, pp. 2, 6, 10, 19.
[265] C II, paras. 212-213; CPHB, para. 151; **Doc. H-2**, slide 1.
[266] **Doc. CLA-10**, p. 15.

> Provided that if the investor chooses to raise the complaint before the national courts or before an arbitral tribunal then having done so before one of the two quarters he loses the right of recourse to the other." [Emphasis added]

176. Both Parties agree that Art. 16, second paragraph, contains a fork-in-the-road provision, which offers a binary option between litigation and arbitration[267].

177. Art. 17 is the other relevant provision. There is a basic rule [the "**Basic Rule**"] which establishes that[268]:

> "Article - 17
>
> 1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures." [Emphasis added]

178. To date, no organ for the settlement of disputes has been created, so that the second part of the sentence applies.

179. This provision then has two procedural subsections:

- One entitled "1. Conciliation", and
- The other entitled "2. Arbitration".

180. Art. 17(1)(a), relating to conciliation, establishes that[269]:

> "1. Conciliation
>
> a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. The parties concerned may request the Secretary General to choose the conciliator. The General Secretariat shall forward to the conciliator a copy of the conciliation agreement so that he may assume his duties."

181. Art. 17(1)(b) goes on to state that the task of the conciliator shall be "confined to bringing the different view points closer and making proposals which may lead to a solution that may be acceptable to the parties concerned". The conciliator must submit a report "within the period assigned for the completion of his task", but this report has no legal authority[270].

182. Art. 17(2)(a), in turn, provides that[271]:

> "2. Arbitration

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[267] C II, para. 212; C III, para. 13; R I, para. 309; R II, para. 232.
[268] **Doc. CLA-10**, pp. 15-16.
[269] **Doc. CLA-10**, p. 16.
[270] **Doc. CLA-10**, p. 16.
[271] **Doc. CLA-10**, p. 17.

a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute."

183. Art. 17(2)(b) goes on to explain how the arbitration proceeding unfolds: it begins with a notification by one the parties to the dispute requesting arbitration from the other party[272]:

> "b) The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitration Tribunal."

184. Finally, Art. 17(2)(c) establishes that the arbitral tribunal must hold a first meeting with the parties, while Art. 17(2)(d) deals with the binding nature of the arbitral tribunal's decisions.

1. RESPONDENT'S POSITION

185. The Kingdom objects to the Tribunal's jurisdiction *ratione voluntatis* on a single ground: Claimants' non-compliance with the requirements of Art. 17(2)(a) of the OIC Agreement[273].

186. The Kingdom submits that Art. 17 of the OIC Agreement provides for a tiered dispute settlement mechanism, that does not include *ex ante* consent by the State, either to conciliation or arbitration. Even if the disputing parties agree on having conciliation, arbitration is available only if the conciliation attempt fails in one of the specific ways listed in Art. 17(2)(a) (**1.1**).

187. Furthermore, the Kingdom argues that conciliation is a jurisdictional prerequisite to arbitration; since there was not even an attempt at conciliation in this case, the Tribunal lacks jurisdiction (**1.2**).

1.1 ART. 17 PROVIDES A TIERED DISPUTE RESOLUTION MECHANISM

188. The Kingdom's primary argument is that Art. 17 of the OIC Agreement does not include an *ex ante* consent by the State to conciliation or arbitration. Instead, it provides for the possibility for the disputing parties to agree to arbitration *ex post*, but only if they first agreed to conciliation and the attempt to conciliate failed[274].

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[272] **Doc. CLA-10**, pp. 17-18.
[273] R I, para. 286.
[274] R II, paras. 220.4-220.5; RPHB, para. 21.2.

The Kingdom says that its interpretation of Art. 17 is confirmed by an analysis of the ordinary meaning of the text, pursuant to Art. 31 of the Vienna Convention on the Law of Treaties ["**VCLT**"] (**A.**), by the OIC Member States' practice, in light of Art. 32 of the VCLT (**B.**), and by the relevant OIC case law (**C.**).

A. The ordinary meaning of Art. 17

189. According to the Kingdom, the ordinary meaning of Art. 17 shows that it envisions a tiered dispute settlement mechanism, in which conciliation is a precondition to arbitration[275]. This mechanism works as follows[276]:

- The OIC Agreement provides for three forms of investor-State dispute settlement: local litigation (Art. 16(1)), conciliation (Art. 17(1)) and arbitration (Art. 17(2));
- When a dispute arises, the investor can always resort to local litigation under Art. 16 – unless the dispute has been referred to arbitration, in which case the fork-in-the-road provision is triggered;
- The alternative to local litigation is Art. 17, where conciliation is a precondition to arbitration; both the host State and the investor must agree to submit the dispute to conciliation, as provided by Art. 17(1)(a); if either party does not give its consent to conciliation, the only forum available to the investor is litigation in the national courts, pursuant to the first paragraph of Art. 16;
- If the disputing parties agree to conciliate, the parties try to find a mutually acceptable solution and the conciliator must provide a report in the timeframe assigned for the task, as per Art. 17(1)(b);
- Before accessing the following tier, the conciliation attempt must fail in one of three ways listed in Art. 17(2)(a):
  - The parties fail to reach an agreement in the conciliation,
  - The conciliator does not issue its report in the mandated timeframe, or
  - The parties do not accept the solutions proposed in the conciliator report.
- If one of these scenarios were to crystallize, the parties may then agree to arbitrate their dispute pursuant to Art. 17(2)(b); if they do not, the investor is once more left with the option to litigate in national courts, as per Art. 16[277].

190. To support its arguments, the Kingdom focuses on three sections of Art. 17:

191. First, on the Basic Rule of Art. 17, which provides that potential disputes shall be resolved through conciliation or arbitration "in accordance with the [...] rules and procedures" of Art. 17 itself. According to the Kingdom, this wording implies that

[275] R I, para. 311; R II, para. 220.6.
[276] R I, paras. 310-310.5; R II, paras. 220.1-220.7.
[277] R I, para. 309; R II, para. 232.

the right to conciliation and arbitration under the OIC is not an unconditional one: rather, it is subject to a tiered mechanism of preconditions and express consent, as provided for in the rest of Art. 17[278].

192. The Kingdom finds that, contrary to Claimants' allegation, the fact that the Basic Rule of Art. 17 provides that disputes "shall be [settled] through conciliation or arbitration" cannot mean that it is mandatory for the parties to resort to conciliation or arbitration – otherwise other forms of dispute settlement, such as negotiation or local litigation would be excluded[279]. Furthermore, the conjunction "or" simply reflects that if conciliation fails, the dispute can then go to arbitration – it does not imply that a host State must arbitrate irrespective of conciliation[280].

193. Second, on Art. 17(1)(a), which provides that parties can resort to conciliation only "[i]n case the parties to the dispute agree" to it. The ordinary meaning of the text is that an *ex post* consent is necessary: only after a dispute has arisen can the parties give their consent to conciliate it[281].

194. Third, on the "if/then" wording of Art. 17(2)(a)[282]:

> "**If** the parties to the dispute do not reach an agreement as a result of their resort to conciliation [...] **then** each party has the right to resort to the Arbitration Tribunal [...]" [Emphasis added]

195. The Kingdom avers that the ordinary meaning of this provision entails that parties cannot resort to arbitration unless their conciliation attempt has failed in one of the manners specified therein[283]. The "if/then" language clearly sets out a sequence of preconditions that must be met before the right to resort to arbitration crystallizes and can be accessed by the investor – proving that conciliation and arbitration must be pursued consecutively[284].

B. The OIC Member States' practice

196. The Kingdom submits that treaty practice is relevant to the proper interpretation of Art. 17, and admissible as a supplementary means of interpretation under Art. 32 of the VCLT[285]. Indeed, supplementary means of interpretation encompass "agreements and practice among a subgroup of parties to a treaty"[286]. In the present case, agreements can be divided into four main categories:

- Multilateral treaties between OIC Member States (including Saudi Arabia and Qatar),

[278] R I, para. 306; R II, paras. 225-228.
[279] R II, paras. 222-224.
[280] R II, para. 227.
[281] R II, para. 220.4.
[282] RPO, para. 43; R I, paras. 303-304; R II, paras. 220.6, 227.
[283] R II, paras. 225-227.
[284] R II, paras. 220.6, 227, 231.
[285] RPHB, paras. 21.1, 23.
[286] RPHB, para. 25.

- Multilateral treaties between OIC Member States (excluding Saudi Arabia and Qatar),

- Bilateral treaties among OIC Member States, and

- Bilateral treaties between OIC Member States and third States.

197. The Kingdom submits that treaty practice confirms its interpretation of Art. 17: virtually all relevant treaties confirm the common position between Member States that, as between themselves, investor-State arbitration was[287]:

- Either not offered, or

- If it was offered, then only on condition of *ex post* consent by the host State.

Multilateral treaties between OIC Member States

198. According to the Kingdom, the most relevant multilateral treaty for interpreting the OIC Agreement is the 1980 Unified Agreement for the Investment of Arab Capital in Arab States prepared by the League of Arab States [the "**Unified Agreement**"], whose twenty-two signatories are also signatories of the OIC Agreement – including Saudi Arabia and Qatar[288]. The Unified Agreement contains a dispute resolution clause similar to Art. 17 of the OIC. Art. 2 of its Annex provides that parties "may agree" to arbitration, but only if they[289]:

> "[…] fail to agree to conciliation or the conciliator is unable to render its decision within the period specified or where the parties do not agree to accept the solutions proposed."

199. Other relevant examples include two multilateral treaties concluded by Saudi Arabia and Qatar:

- The Agreement on Investment and Free Movement of Arab Capital among Arab Countries, predecessor of the Unified Agreement (concluded between the same parties)[290], and

- The Unified Economic Agreement between the Countries of the Gulf Cooperation Council, concluded by certain parties of the Unified Agreement[291].

200. According to the Kingdom, the fact that neither of these treaties contains an investor-State dispute settlement provision is a clear indication that no *ex ante* consent could have been included in the OIC Agreement[292].

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[287] RPHB, paras. 21.2 and 28.
[288] RPHB, para. 29.
[289] RPHB, para. 30, citing to **Doc. RLA-337**, Annex, Art. 2(1).
[290] **Doc. RLA-331.**
[291] **Doc. RLA-338.**
[292] RPHB, paras. 34-35.

Multilateral treaties between OIC Member States that do not include Saudi Arabia and Qatar

201. The same conclusion is reached when analysing the multilateral agreements concluded among other Member States – not involving Saudi Arabia or Qatar – at the relevant time. Six of them were signed around the time the OIC Agreement was concluded, and none of them contains an investor-State dispute settlement provision – thus confirming that at the time the OIC Agreement was entered into, the practice was not to give *ex ante* consent to arbitration brought by foreign investors[293].

Bilateral treaties between OIC Member States

202. Bilateral practice of OIC Member States confirms and further bolsters the same argument: while eleven BITs were signed at the relevant time, none of the six that are publicly available contains investor-State arbitration provisions (even though some contain inter-State arbitration agreements for disputes concerning the interpretation or application of these treaties)[294]. Such practice demonstrates a clear aversion towards *ex ante* consent for investor-State arbitration[295].

Bilateral treaties between OIC Member States and third States

203. The bilateral agreements concluded by OIC Member States with third States also support the same view: of the 96 that are publicly available, 61 do not provide for investor-State dispute settlement at all. Only 29 bilateral treaties provided for general *ex ante* consent to investor-State dispute settlement, none of which includes Saudi Arabia or Qatar[296]. But even in those limited cases in which the OIC Member States entered into BITs with third States that gave *ex ante* consent to arbitration, they did so in clear terms that left no doubt[297].

204. More importantly, the Kingdom and Qatar maintained their practice of avoiding all forms of *ex ante* consent to arbitration until the mid-1990s[298].

* * *

205. In sum, the Kingdom submits that the ordinary meaning of the OIC Agreement is plain, and that an interpretation under Art. 32 of the VCLT further supports the conclusion that consent must be given *ex post*[299]. Treaty practice at the time of execution of the OIC Agreement shows that Member States could not have agreed to an *ex ante*, unconditional consent to arbitration - most of the relevant treaties do not provide for investor-State arbitration at all, demonstrating a clear aversion towards the concept[300]. It would be unreasonable to assume that this consistent

[293] RPHB, paras. 37-41.
[294] RPHB, paras. 42-44.
[295] RPHB, para. 45.
[296] RPHB, paras. 46-47.
[297] RPHB, para. 47.4.
[298] RPHB, para. 47.1.
[299] RPHB, para. 52.
[300] RPHB, paras. 48-50.

treaty practice had been abandoned without plain and explicit language in Art. 17 of the OIC Agreement[301].

C. The relevant case law

206. Finally, the Kingdom argues that the relevant case law confirms its interpretation of Art. 17. The Kingdom relies first and foremost on the *Itisaluna* award[302], where the tribunal, by majority, found that, given the conditional "if/then" language of Art. 17(2)(a)[303]:

> "[…] the intended gateway to arbitration under this provision is prior resort to conciliation and, thereafter, the failure of the conciliation process. While the chapeau of Article 17 addresses 'conciliation or arbitration', and the terms of Article 17(1) suggest that resort to conciliation requires agreement between the parties, there is no avoiding the 'if … then' language of Article 17(2). It necessarily follows from this language that resort to arbitration is conditional on the prior resort to conciliation."

207. The *Al-Warraq* case[304], cited by Claimants in support of their position, was discussed in *Itisaluna*: the tribunal, by majority, found that the *Al-Warraq* tribunal had not duly considered the "if/then" language of Art. 17, and thus its analysis was of limited relevance[305]. The Kingdom also avers that the *Al-Warraq* tribunal erred in its analysis since it only referred to the Basic Rule of Art. 17, instead of considering Art. 17 in its entirety[306].

1.2 THE CONCILIATION PRECONDITION IS JURISDICTIONAL IN NATURE AND IS ABSENT

208. The Kingdom submits that the conciliation precondition, as provided by Art. 17(2)(a), is jurisdictional in nature[307] – and not, as Claimants suggest, a mere procedural requirement. Conciliation in the text of the OIC Agreement is set out as a formal dispute resolution mechanism, based necessarily on the consent of both the investor and the State. It is deeply intertwined with the subsequent arbitration mechanism, so much so that arbitral proceedings cannot exist without a prior – failed – conciliation attempt[308].

209. Even if the conciliation precondition was an informal dispute resolution method, akin, for instance, to negotiation (*quod non*), this would not alter its jurisdictional nature[309]. Negotiations and cooling-off periods are still jurisdictional prerequisites to arbitral proceedings, as held in multiple ICJ and investment arbitration cases[310].

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[301] RPHB, para. 51.
[302] **Doc. CLA-52**, *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020 ["***Itisaluna***"].
[303] R I, para. 290; R II, para. 220.7 citing to **Doc. CLA-52**, *Itisaluna*, para. 183 (see also para. 177).
[304] **Doc. CLA-50**, *Hesham Talaat M Al-Warraq v. Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012 ["***Al-Warraq***"].
[305] R II, para. 236.
[306] RPO, para. 46.
[307] R II, para. 250.
[308] R I, para. 317.
[309] R II, para. 250.2.
[310] R II, paras. 256-263.

210. The Kingdom argues that Claimants have not met such precondition. Art. 17(2)(a) requires the State's *ex post* consent for a conciliation to be attempted. In this case, the Kingdom has never given such consent. In fact, Claimants have never even made a "genuine attempt" at conciliation: their Notice of Dispute – allegedly containing certain conciliatory attempts – does not make any reference to conciliation under Art. 17, or to arbitration under this provision. It merely refers to arbitration under the Treaty's most-favoured nation ["**MFN**"] provision, Art. 8(1)[311].

211. According to the Kingdom, Claimants' suggestion that the "futility doctrine" should apply to their – inexistent – attempt at conciliation is devoid of any legal basis. The doctrine of futility only applies to procedural requirements, and, in any event, it requires "substantial and credible evidence" of a clear unwillingness by one of the parties to participate in a dispute settlement attempt, so that it would make it futile to engage in conciliation – which did not occur in the present case[312].

212. In sum, the Kingdom avers that the Tribunal does not have jurisdiction over the present dispute because the conciliation precondition has a jurisdictional nature, the Kingdom never gave its consent to conciliation and Claimants never made a genuine attempt to conciliate[313].

2. CLAIMANTS' POSITION

213. Claimants' primary argument is that the Kingdom already gave its *ex ante* consent to arbitrate disputes with investors under Art. 17[314], which does not provide that conciliation is a precondition to arbitration[315] (**2.1**).

214. Even if conciliation could be considered as a precondition to arbitration under Art. 17, (i) it is not jurisdictional in nature, and thus does not bar the Tribunal's jurisdiction over the case, and (ii) it was satisfied by Claimants[316] (**2.2**).

2.1 ART. 17 INCLUDES THE STATE'S UNCONDITIONAL CONSENT TO ARBITRATION

215. Claimants submit that Art. 17 of the OIC Agreement provides for conciliation as a mere alternative to arbitration, not as a precondition to it. A reading of the ordinary meaning of the terms, in their context and in light of the object and purpose of the Treaty – in application of Art. 31 of the VCLT – supports this conclusion[317] (**A.**).

216. This remains true even when considering treaty practice under Art. 32 of the VCLT – which is in any case unnecessary, because there is no ambiguity, obscurity, or manifestly absurd and unreasonable results stemming from an interpretation under

[311] R II, paras. 274-277.
[312] R II, paras. 284-288.
[313] R II, paras. 289.2-289.4.
[314] C II, para. 228.
[315] C I, paras. 217-221; C II, para. 208.
[316] C II, paras. 222, 229.
[317] CPHB, para. 156.

Art. 31[318] (**B.**). Finally, the relevant OIC case law further confirms Claimants' interpretation of Art. 17 (**C.**).

A. The interpretation of Art. 17 under Art. 31 VCLT

217. It is Claimants' position that the conditional, tiered interpretation of Art. 17 given by the Kingdom is flawed, as is its application of the VCLT[319]. Pursuant to Art. 31 of the VCLT, the tribunal must interpret the ordinary meaning of the text, in its context – under the light of the object and purpose of the treaty itself. This implies that Art. 17 of the OIC Agreement must be considered as a whole and in the context of the entire Treaty, instead of focusing solely on the "if/then" wording suggested by the Kingdom[320].

218. First, a correct interpretation of the Basic Rule of Art. 17 confirms Claimants' position: by stating that eventual disputes "shall" be resolved either "through conciliation or arbitration in accordance with the following rules and procedures", the provision's ordinary meaning is that disputants can resort to any of the two dispute settlement mechanisms – none of which is a precondition of the other[321]. Moreover, the word "shall" is mandatory in nature: considered in the context of dispute resolution clauses similar to Art. 17 of the OIC Agreement, "shall" implies an express, *ex ante* consent by the State to arbitration[322].

219. While the Basic Rule does provide that a dispute must be resolved according to the "rules and procedures" of Art. 17, this cannot be interpreted as a restriction in the choice between conciliation and arbitration[323]; rather, such wording is aimed at regulating any of the two dispute settlement mechanisms, once chosen. The signatories of the OIC Agreement offered their *ex ante* consent before the mention of specific "rules and procedures".

220. Second, Art. 17(1)(a) provides that a dispute can be solved through conciliation "[i]n case the parties to the dispute agree" to it. The Kingdom's reading of the provision as stating a necessary *ex post* consent is incorrect: rather, the norm confirms that conciliation is one of the alternatives available to the disputing parties under the OIC Agreement[324].

221. Third, the Kingdom's reliance on the "if/then" wording of Art. 17(2)(a) is also misleading: such language cannot mean that arbitration can be accessed only in case a conciliation attempt fails. The "if/then" sequence applies only when disputing parties agree to conciliation: if that is the case, Art. 17(2)(a) clarifies that, if conciliation fails, the investor can nonetheless resort to arbitration. This is the only interpretation that gives an *effet utile* to the provision[325].

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[318] CPHB, paras. 157-159.
[319] C III, para. 11.
[320] C III, para. 11.
[321] C II, para. 209.
[322] C II, para. 210.
[323] C II, para. 211; C III, paras. 19-20.
[324] C I, paras. 218-219; C II, para. 212.
[325] C II, para. 217; C III, para. 21.

222. If Art. 17 were read as the Kingdom suggests, OIC Member States could effectively deny investors their right to arbitrate a dispute, simply by ignoring or not accepting an invitation to conciliate after a dispute had arisen[326]. This would contravene the object and purpose of the OIC: in the Preamble of the text, the Member States expressed a clear intent to create an environment favourable to investors[327]. Many tribunals have referred to the Preamble: they concluded that the intention of the Member States was to grant investors the possibility to protect their substantial rights through an effective dispute resolution mechanism – *i.e.*, arbitration[328].

223. Fourth, the Tribunal must interpret Art. 17 by considering its context. Art. 16 of the OIC Agreement, which appears before Art. 17's reference to conciliation, expressly grants investors the "right of recourse" to arbitration. The only logical conclusion is that investors have the right of recourse to arbitration regardless of whether any prior conciliation proceedings took place[329].

B. The interpretation of Art. 17 under Art. 32 VCLT

224. Art. 32 of the VCLT provides for certain supplementary means of treaty interpretation, that may be relied upon only in case of ambiguity, obscurity, or manifestly absurd and unreasonable results stemming from an interpretation pursuant to Art. 31 of the VCLT. Any treaty practice falling under this characterization should be given only minimal consideration, if at all[330].

225. Moreover, the available instruments are completely unrelated to the OIC Agreement. The Unified Agreement, cited by the Kingdom, does not share all the contracting parties to the OIC Agreement. Moreover, it does not require States to give an *ex post* consent, as argued by the Kingdom: instead, it provides an express *ex ante* consent, thus further confirming Claimants' interpretation of the OIC[331].

226. Finally, the BIT practices invoked by the Kingdom should be disregarded completely because they are unrelated to the OIC. The Treaty should carry the same meaning for all the contracting parties: by referring to different BITs signed by different Member States, the interpretation would be damaged by the fracturing of its multilateral character, as pointed out by the *Itisaluna* award[332]. Certain BITs discussed by the Kingdom were also misinterpreted[333].

227. Even if treaty practices were to be considered, it would still confirm Claimants' interpretation of the OIC Agreement as providing an *ex ante* consent of the Member States. In fact, both the Qatar-Morocco BIT and the Saudi Arabia-Malaysia BIT clearly set out that no *ex post* consent is required for arbitration proceedings to take place[334].

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[326] C II, para. 218; CPHB, para. 154.
[327] C III, para. 34.
[328] C III, para. 34. See also section C *infra*.
[329] CPHB, para. 152.
[330] CPHB, para. 159.
[331] CPHB, para. 161.
[332] CPHB, paras. 159 and 162.
[333] C III, para. 31.
[334] C II, para. 215.

C. The relevant case law

228. Claimants rely on several cases in support of their arguments. First and foremost, on the *Al Warraq* case, which explicitly denied that Art. 17 implies that conciliation is a precondition to arbitration[335]; in that case, the tribunal held that under Arts. 16 and 17 investors are entitled to an "*immediate* right to arbitration"[336]. The tribunal in the 2020 *Navodaya Trading v. Gabon* award took a similar approach[337].

229. Claimants submit that the case on which the Kingdom mainly relies – *Itisaluna* – did not make a conclusive finding regarding conciliation as a precondition to arbitration. In fact, the tribunal expressly refrained from doing so[338].

230. In support of the argument that the arbitration provision in Art. 17 would be deprived of its *effet utile* if interpreted as suggested by the Kingdom, Claimants refer to the *Millicom v. Senegal* case[339]. Albeit not directly connected to the OIC Agreement, it is relevant because it dealt with very similar arguments from Senegal, in relation to a treaty provision closely resembling Art. 17: the applicable treaty also had a contentious arbitral provision, interpreted by Senegal as requiring *ex post* consent for the parties to resort to arbitration. The tribunal disagreed, noting how such an interpretation would be contrary to the purpose of the treaty and negate an effective protection to investors[340].

231. Therefore, considering the relevant case law directly related to the OIC Agreement, the *Millicom* case and the Preamble of the OIC – including its aim of providing investors with a favourable environment –, Art. 17 must be interpreted as containing *ex ante* consent to arbitration.

2.2 THE CONCILIATION PRECONDITION IS NOT JURISDICTIONAL IN NATURE AND, IN ANY EVENT, WAS SATISFIED BY CLAIMANTS

232. Claimants submit that, even if Art. 17 were to be interpreted as requiring conciliation as a precondition to arbitration (*quod non*), such precondition is not jurisdictional in nature: at best, it is a procedural requirement, which does not deprive the Tribunal of jurisdiction if it is not complied with by the parties[341].

233. Claimants aver that conciliation and negotiation can be considered akin to one another in this respect. In both instances, consent from the State and the investor is required and both represent instruments of amicable, non-binding dispute settlement; the only difference is the presence of the conciliator[342].

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[335] C III, paras. 25-26.
[336] C III, para. 26; CPHB, para. 153.
[337] C III, para. 27; CPHB, para. 153, citing to *Navodaya Trading DMCC v. Gabonese Republic*, PCA Case No. 2018-23, Award, 2 December 2020 (award not public: see Doc. **CLA-54**, D. Charlotin, "Uncovered: Kaufmann-Kohler chaired tribunal confirms that OIC Agreement contains consent to arbitration, but ultimately dismisses mining claims on the merits", IA Reporter, 17 February 2021) ["***Navodaya Trading***"].
[338] C III, para. 23. See also CPHB, para. 153.
[339] **Doc. CLA-232**, *Millicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010.
[340] C III, para. 35.
[341] C I, paras. 222, 226; C II, para. 222; C III, para. 36.
[342] C II, para. 225.

234. Case law regarding negotiation as a prerequisite before arbitration should be considered when analysing the case at hand. For example, in *Abaclat v. Argentina*[343] the applicable BIT contained a requirement of negotiation and 18-month litigation before arbitration proceedings. The tribunal considered that these were procedural requirements, which did not impact Argentina's consent to arbitration; the arbitrators considered the negotiation as a good faith dispute settlement instrument that should not be forced on the parties[344]. Therefore, the absence of negotiation could not impair the tribunal's jurisdiction over the dispute[345].

235. In any event, Claimants have satisfied the alleged precondition, whether it is procedural or jurisdictional in nature. In their Notice of Dispute, Claimants expressly asked the Kingdom to "engage in a good faith attempt to amicably resolve this dispute", inviting the Kingdom to suggest when it would be possible for the Parties to meet[346]. The Kingdom does not recognize this as an actual invitation to conciliate as required by Art. 17, since it lacks certain formal references to said provision. Nevertheless, these formalities are not necessary for a conciliation precondition to be validly satisfied[347].

236. Claimants also argue that the Kingdom never had any intention to conciliate the present dispute. Any effort by the Claimants would have been futile[348]. Contrary to the Kingdom's argument that the futility doctrine should not apply to conciliation, there is case law that clearly demonstrates the contrary[349].

3. DECISION OF THE ARBITRAL TRIBUNAL

237. The Parties discuss whether the Tribunal has jurisdiction *ratione voluntatis*:

- While Claimants argue that the Kingdom gave its express and unequivocal consent to arbitrate investor-State disputes by way of arbitration when it executed the OIC Agreement[350];

- The Kingdom says that conciliation is a precondition to arbitration, for which the State's consent is needed, and that in this case Claimants have failed to satisfy this precondition[351].

238. The Tribunal will start by recalling some relevant facts (**3.1**). It will then turn to the interpretation of Art. 17, which is the relevant provision to determine jurisdiction *ratione voluntatis* (**3.2**). After addressing certain arguments by the Kingdom (**3.3**), the Tribunal will finally draw its conclusion (**3.4**).

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[343] **Doc. CLA-78**, *Abaclat and Others (Case Formerly Known as Giovanna A Becerra and Others) v. Argentine Republic*, ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility, 4 August 2011.
[344] C II, paras. 226-227.
[345] C III, paras. 41-45.
[346] C I, paras. 228-229; C II, para. 229; C III, para. 47.
[347] C III, para. 48.
[348] C I, paras. 230-231; C III, paras. 51-52 and 58.
[349] C III, paras. 55-56.
[350] C I, para. 184.
[351] R I, paras. 286-287; R II, para. 7.

3.1 RELEVANT FACTS

239. On 5 June 1981 the Member States of the OIC signed the OIC Agreement, which entered into force almost seven years later, in February 1988. It entered into force as between Saudi Arabia and Qatar in February 2003[352].

240. Almost 15 years later, on 5 June 2017, the Kingdom adopted the Measures.

241. A year thereafter, on 5 April 2018, Dr. Al Sulaiti sent a letter to the Saudi Ministry of Foreign Affairs on his behalf and on behalf of Qatar Pharma, arguing that the Measures were in violation of the OIC Agreement and the protections to which Claimants were entitled. Claimants noted that[353]:

> "[…] by virtue of Article 8(1) of the OIC Agreement providing for treatment 'not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement... in the context of that [economic] activity and in respect of the rights and privileges accorded to those investors,' Qatar Pharma is fully entitled to the rights and privileges—both substantive and procedural—under the Agreement between the Kingdom of Saudi Arabia and the Republic of Austria concerning the Encouragement and Reciprocal Protection of Investments (the 'KSA-Austria BIT') and other treaties to which KSA is party. This includes, but is not limited to, the right to arbitrate disputes in a neutral forum pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (the 'UNCITRAL Rules') as provided for in Article 11(2)(b) of the KSA-Austria BIT."

242. The letter stated that it should be considered a "formal notice of the existence of an investment dispute under the OIC Agreement and the KSA-Austria BIT". It further noted that[354]:

> "[…] in accordance with Article 11(1) of the KSA-Austria BIT, and despite the futility of prior conciliation and diplomatic efforts, we hereby request that KSA engage in a good faith attempt to amicably resolve this dispute with Qatar Pharma. In order to further discuss this alternative, we propose your and our representatives meet for consultations in the next few weeks. We would be grateful if KSA could inform us of a date and time at which its representatives would be available to meet."

243. There is no evidence of a response by the Kingdom.

244. On 28 March 2019, Claimants filed a Notice of Arbitration pursuant to Art. 17 of the OIC Agreement[355] against the Kingdom. Claimants appointed Dr. Poncet as arbitrator and noted that[356]:

> "Claimants have attempted to reach an amicable resolution of the dispute with Saudi Arabia.

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[352] C I, fn. 578. See also **Doc. CLA-29**, p. 28.
[353] Communication C 1 (Notice of Dispute), p. 2.
[354] Communication C 1 (Notice of Dispute), p. 3.
[355] Communication C 2 (Notice of Arbitration), para. 1.
[356] Communication C 2 (Notice of Arbitration), paras. 55-56.

> Specifically, Claimants sent a Notice of Dispute to Saudi Arabia in April 2018. Saudi Arabia did not respond to the Notice, nor did it accede to Claimants' request to resolve the dispute. Qatar Pharma also sent an invoice to the Saudi Arabian Ministry of Health seeking settlement of the outstanding payment amounts after the Coercive Measures were implemented, but no response was received. Saudi Arabia's failure to respond confirms that it is unwilling to resolve the matter amicably, and that any other efforts on the part of Claimants would be futile."

245. On 27 May 2019, Saudi Arabia appointed Professor Ziadé as arbitrator pursuant to Art. 17 of the OIC Agreement, reserving its position and objections on all issues[357].

3.2 INTERPRETATION OF THE OIC AGREEMENT

246. The Parties agree that the Tribunal must interpret Art. 17 of the OIC Agreement pursuant to Art. 31 of the VCLT[358], guided "in good faith" by the "ordinary meaning" of the terms (**A.**), "in their context" (**B.**) and "in light of [the Treaty's] object and purpose" (**C.**)[359]. In doing so, the Tribunal must start by elucidating the meaning of the text, which is the best expression of the intention of the signatory parties.

247. If the interpretation according to Art. 31 leaves the meaning of Art. 17 ambiguous, obscure or leads to a result which is manifestly absurd or unreasonable, then the Tribunal may also resort to "supplementary means of interpretation" (**D.**), which include the Treaty's *travaux préparatoires* and other circumstances regarding the conclusion of the Treaty, pursuant to Art. 32 of the VCLT[360].

A. Ordinary meaning of the text

248. As recalled in paras. 177-184 *supra*, Art. 17 is made up of a Basic Rule and two procedural subsections, one headed "Conciliation" and the other "Arbitration".

a. The Basic Rule

249. Art. 17's Basic Rule reads as follows:

> "Article - 17
>
> 1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures." [Emphasis added]

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[357] Communication R 1.
[358] C I, paras. 199-200; C II, para. 208; R I, para. 300.1.
[359] **Doc. CLA-73**, Art. 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
[360] **Doc. CLA-73**, Art. 32: "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 when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."

250. Although the Parties discuss many aspects of Art. 17, they agree that the provision refers to the settlement of investor-State disputes[361]. The intention of the State parties to the OIC Agreement was to eventually create an "Organ for the settlement of disputes arising under the [OIC] Agreement", which would adjudicate this type of disagreements between protected investors and States, and which would make Art. 17 redundant. It is undisputed that such organ has not been created, so that the transitory rule provided for in Art. 17 continues to apply.

251. What does Art. 17 establish?

252. The Basic Rule is that the investment disputes that may arise in the interim period:

> "[...] shall be entitled through conciliation or arbitration in accordance with the following rules and procedures."

253. What does the expression "be entitled" mean?

254. Black's law dictionary defines to entitle as "to grant a legal right to or qualify for"[362] – but this meaning does not seem to give a coherent sense to the sentence (disputes cannot be given a legal right through conciliation or arbitration). The OIC Agreement was drawn up in three versions, Arabic, English and French, "each version being equally authentic" (in the words of Art. 25). The Arabic version uses the word "يحل" and the French version the word "*réglés*", which both express the idea that the disputes are settled. The correct meaning of "be entitled" is thus "be settled" – as both Parties acknowledge[363].

255. The Basic Rule in Art. 17 is that disputes "shall" be settled through conciliation or arbitration. The Merriam Webster Dictionary explains that "shall" is a modal verb, used to express what is inevitable, a determination, or a command or exhortation. The use of "shall" implies that Member States envisioned that investor-State disputes would necessarily be settled "through conciliation or arbitration".

256. The Parties have discussed at length the meaning of the disjunctive "or" (in French "*ou*" and in Arabic "أو"), placed between the words "conciliation" and "arbitration". They, nevertheless, both agree (and the Tribunal, by majority, confirms) that it provides an alternative to the claimant[364]: the dispute can be settled either by conciliation or by arbitration, at the claimant's option.

257. Finally, the Basic Rule says that when exercising its option, the claimant must do so "in accordance with the following rules and procedures". This plain wording raises no interpretative doubts. Once the claimant has opted for conciliation or arbitration, such procedure will be subject to the rules established in that same Art. 17 – not to some other set of rules or any instrument external to the OIC Agreement, such as could be, for instance, the Conciliation and Arbitration Rules of the International Centre for Settlement of Investment Disputes ["**ICSID**"]. In the

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[361] C I, para. 195; R I, para. 299.
[362] Black Law's Dictionary, Ninth Edition, p. 612.
[363] As recognized by both Parties (see C III, para. 27; R I, para. 310.3).
[364] C II, para. 212; R II, para. 231: "The Kingdom does not dispute that conciliation and arbitration are alternatives, nor does the Kingdom contend that either process must be pursued: its only point is that if they are pursued, they must be pursued consecutively, consistently with the plain words of Article 17(2)(a)."

interim period until the creation of an "Organ for the settlement of disputes", the Member States preferred to create an *ad hoc* procedure, organized in accordance with the rules and procedures set forth in Art. 17, rather than to import the provisions on the settlement of disputes of another source[365].

258. In sum, the Tribunal, by majority, finds that a literal interpretation of the Basic Rule of Art. 17 leads to the conclusion that to settle an investor-State dispute which arises from a breach of the OIC Agreement, during the interim period until the creation of a specific organ, the OIC Member States decided that:

- Claimants would have the choice to resort either to conciliation *or* to arbitration, at each claimant's option, and

- The procedural aspects of the conciliation or arbitration would be those established in the subsequent subsections of Art. 17.

259. Thus, the State's consent to arbitration is unequivocally contained in the Basic Rule.

b. The Arbitration procedure

260. If a claimant opts to resort to arbitration to settle the dispute, Art. 17(2)(b) of the OIC Agreement is the relevant rule as regards the initiation of the procedure:

> "b) The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed."

261. Once the claimant has submitted the "notification [...] clearly explaining the nature of the dispute and the name of the arbitrator he has appointed", the same provision grants the counterparty a term of 60 days "to inform the party requesting arbitration of the name of the arbitrator appointed".

262. A plain reading of this provision shows that the arbitration is put in motion by the claimant sending a notification of arbitration, without any requirement of additional consent by the counterparty. This is because consent to arbitration is already contained in the Basic Rule. Art. 17(2)(b) *et seq.* merely develop the rules and procedures that will govern the arbitration, as anticipated in the Basic Rule.

263. Art. 17(2)(b) then goes on to establish that the two arbitrators "are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes", while Art. 17(2)(c) determines that the tribunal must hold a first meeting with the parties. These various procedural rules culminate in Art. 17(2)(d), which contains the principle that the tribunal's award shall be binding on the parties.

c. The Conciliation procedure

264. Alternatively, the claimant may opt to attempt a conciliation procedure prior to starting an arbitration. However, contrary to arbitration, for there to be conciliation

[365] **Doc. CLA-55**, *Libye v. D.S. Construction* (*Cour d'appel de Paris*), para. 98.

the other party must consent to it, as established in Art. 17(1)(a), which provides, in its relevant part, that:

> "a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. […]" [Emphasis added]

265. A plain reading of this provision shows that *both* parties to the dispute must "agree" to conciliate (*i.e.*, the investor and the host State). Conciliation is, by its very nature, an amicable procedure and, in this case, it requires the parties to agree on:

- The description of the dispute;
- Their respective claims; and
- The name of a conciliator.

Absent such agreement, the conciliation cannot proceed.

266. Art. 17(1)(a) and (b) go on to establish the tasks and powers of the conciliator, finalizing with the rule that – contrary to the arbitration procedure – the decision adopted by the conciliator will not be binding on the parties.

267. The regulation of consent in conciliation is different from that in arbitration, (where, as has been explained above, the Basic Rule already incorporates the States' *ex ante* consent – see section 3.2.a *supra*). The different treatment of consent in arbitration and conciliation is reasonable and logic, because it reflects the different nature of both institutions: conciliation leads to the adoption by the conciliator of a non-binding decision, and consequently the procedure, without the agreement by and participation of both parties, is doomed from the outset.

d. Evolution of conciliation into arbitration

268. The Treaty devotes a rule – Art. 17(2)(a) – to the evolution of a conciliation into an arbitration – and inserts this rule in the arbitration subsection. The rule provides that *if* (notwithstanding the initial agreement to conciliate) the conciliation eventually is unsuccessful, *then* neither party loses the right to resort to arbitration and has the right to start arbitration proceedings to obtain a binding award (rather than the non-binding report prepared by the conciliator):

> "(a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute."

269. If the claimant and the respondent initially agree to attempt a (potentially unsuccessful) conciliation procedure, such agreement does not forfeit both parties' right to eventually resort to arbitration, if the conciliation has proved a failure. Moving from conciliation to arbitration does not require any additional consent by the respondent State, for the simple reason that the State has already given its express consent to arbitration in the Basic Rule under Art. 17.

* * *

270. In sum, the Tribunal, by majority, finds that reading Art. 17 in accordance with the ordinary meaning of its terms leads to the conclusion that Member States established a Basic Rule: a claimant in an investor-State dispute could choose between starting a conciliation or an arbitration procedure against the respondent State. These procedures are governed by the two procedural subsections of Art. 17 – and not by some other external set of rules – as follows:

- If the claimant decides to start an arbitration, it must notify the respondent State, and no additional consent is required from such State;

- Alternatively, if the claimant decides to opt for conciliation, it must obtain the agreement of its counterparty; and

- If conciliation fails, both parties retain the right to start an arbitration, by notifying the counterparty in accordance with the rules established in Art. 17(2)(b) and without the need of further consent by the State.

B. The context confirms the ordinary meaning of the text

271. The ordinary meaning of the text of Art. 17 is confirmed by the context in which this provision is inserted. Indeed, Art. 16, which is the previous provision, supports the Tribunal's (by majority) analysis. Under Art. 16 the host State undertakes to allow the investor the right to resort to its national judicial system to complain regarding an investment dispute adding that:

> "[…] if the investor chooses to raise the complaint before the national courts or before an arbitral tribunal then having done so before one of the two quarters he loses the right of recourse to the other."

272. The fork-in-the-road provision confirms that the claimant always has the *right* to *choose* to resort to arbitration, as an alternative to conciliation. Indeed, if the claimant *chooses* to go to arbitration, it loses the *right* to recourse to the national courts, and vice-versa. The wording of Art. 16 leaves no margin to doubt that the claimant is free to select the option that better suits it, and that no additional consent by the State is required.

273. The Tribunal's (by majority) reading of Art. 17 is the only capable of giving an *effet utile* to the fork-in-the-road provision. If the Tribunal were to follow the Kingdom's interpretation, the words "if the investor chooses" and "the right of recourse" would be deprived of their meaning, because under the Kingdom's interpretation the investor does not have a right to resort to arbitration and is always reliant on the State's prior acceptance.

C. The object and purpose of the OIC Agreement

274. Furthermore, the Treaty's "object and purpose" also support the interpretation of the Tribunal (by majority). The Preamble of the Treaty shows that Member States were eager to foment foreign investment between the various States, as a means of

fostering economic and social development. For this, they understood that they had to "provide and develop a favourable climate for investment", to ensure that[366]:

> "[…] the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples […]"

275. Thus, the Member States had the clear intention of providing and developing favourable conditions for investments. This includes ensuring the promotion, protection and guarantee of investments, as the title of the OIC Agreement itself indicates ("Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference").

276. Granting investors the right to resort to arbitration in case of dispute with a host State related to an investment is undoubtedly an effective means of protection. The alternative only leaves the investor access to the local courts – something which was, in any case, already permitted under Art. 16. Arbitration offers investors an additional means of protection, as investors generally prefer to solve their disputes in a neutral forum.

D. No need for supplementary means of interpretation

277. Art. 32 of the VCLT provides that[367]:

> "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 when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."

278. An interpretation of Art. 17 pursuant to Art. 31 of the VCLT, guided "in good faith" by the "ordinary meaning" of the terms, "in their context" and "in light of [the Treaty's] object and purpose" leads to a meaning that is neither "ambiguous" nor "obscure"; it also does not lead to a result "which is manifestly absurd or unreasonable". On the contrary: the Member States gave investors the choice of referring their investor-State disputes either to arbitration or to conciliation; if they opted for arbitration, the State's consent was already consigned in the Basic Rule, whereas if they opted for conciliation, the specific consent of the State would be required – a reasonable demand for conciliation is an amicable procedure, which hinges on the goodwill of both parties; and if the conciliation procedure was unsuccessful, claimants would not forfeit their right to access arbitration, without the need for any additional consent by the State.

279. Considering the above, the Tribunal, by majority, finds that there is no need to resort to supplementary means of interpretation under Art. 32 of the VCLT.

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[366] **Doc. CLA-10**, p. 2.
[367] **Doc. CLA-73**, Art. 32.

280. In any case, the Tribunal, by majority, observes that no evidence regarding the *travaux préparatoires* has been marshalled and that the Parties have not pointed to other relevant "circumstances" regarding the "conclusion" of this particular Treaty.

3.3 COUNTERARGUMENTS BY RESPONDENT

281. The Kingdom has three counterarguments:

- That conciliation is a necessary prerequisite for arbitration (**A.**);
- That contemporary treaty practice shows that there was no *ex ante* consent to arbitration (**B.**); and
- That other investment awards support its argumentation (**C.**).

A. Conciliation cannot be a prerequisite for arbitration

282. The Kingdom recognizes that arbitration is available, but only if the parties first agree and engage in a conciliation[368]:

> "The Kingdom does not dispute that conciliation and arbitration are alternatives, nor does the Kingdom contend that either process must be pursued: its only point is that if they are pursued, they must be pursued consecutively, consistently with the plain words of Article 17(2)(a)." [Emphasis in the original]

283. The *quaestio vexata* is whether or not conciliation constitutes a prerequisite for arbitration?

284. The Tribunal, by majority, finds that the answer is negative, for several reasons.

285. First, the literal text of the Basic Rule does not say so. Indeed, the text does not say that the dispute shall be settled "through conciliation *and if conciliation fails through* arbitration". The Basic Rule clearly states that the dispute shall be settled "through conciliation *or* arbitration", without any requirement that conciliation must precede arbitration. The exceptional solution proposed by the Kingdom cannot be based on an implied choice.

286. Second, and as previously explained, such an interpretation would deprive the fork-in-the-road provision of its *effet utile*.

287. Finally, the Tribunal (by majority) has already provided its interpretation of Art. 17(2)(a): it regulates the evolution of a failed conciliation into an arbitration – but it does not mean that conciliation must take place before arbitration.

[368] R II, para. 231.

B. Other treaty practice is inapposite

288. The Kingdom submits that treaty practice is relevant to the proper interpretation of Art. 17 and admissible as a supplementary means of interpretation under Art. 32 of the VCLT[369].

289. The Tribunal, by majority, is unpersuaded: treaty practice is not a recognized means of interpretation under Arts. 31 and 32 of the VCLT, except if it concerns the "subsequent practice in the application of the treaty" by the contracting parties to said treaty[370]. And none of the practice to which the Kingdom has drawn the Tribunal's attention concerns the application of this particular Treaty. It only concerns other treaties, which were signed by Saudi Arabia and Qatar with other countries, but not in their capacity as Member States of the OIC – a specific intergovernmental organization, with its own set of members and rules. As noted by the *Itisaluna* tribunal[371]:

> "[…] it is incumbent on the Tribunal to exercise considerable caution when it comes to a (proposed) interpretation of the [OIC] Agreement that neither follows clearly and necessarily from the plain and ordinary meaning of its terms nor derives from the clear and dispositive practice of all of its Contracting Parties, resting rather on the contested practice of one of its Contracting Parties alone. The reason for such caution is that any interpretation of the OIC Agreement that the Tribunal may adopt by reference to the non-OIC bilateral treaty obligations of Iraq would inevitably colour the appreciation of the legal obligations of other OIC Agreement Contracting Parties under the OIC Agreement. In the Tribunal's view, the bilateral treaty practice of one party to a multilateral agreement, bilateral practice that is unrelated to the multilateral agreement, cannot be safely relied upon as a yardstick for the interpretation and application of that multilateral agreement. The OIC Agreement, interpreted in the present case, must carry the same meaning for all its Contracting Parties. This meaning cannot be shaped by the unrelated treaty practice of one Contracting Party only." [Emphasis added]

290. The same reasoning applies to multilateral treaty practice, between certain (and not other) Member States to the OIC Agreement.

The Unified Agreement

291. Be that as it may, the Unified Agreement – which according to the Kingdom should be "[o]f greatest assistance to the Tribunal in its interpretation" of Art. 17[372] – in fact seems to support the Tribunal's analysis, and not that of the Kingdom.

292. The Unified Agreement was signed in 1980 by the member States of the League of Arab States – a regional organization that encompasses Saudi Arabia and Qatar, but whose scope and members[373] are ultimately different from the OIC. Contrary to the

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[369] RPHB, paras. 21.1 and 23.
[370] **Doc. CLA-73**, Art. 31(3)(b).
[371] **Doc. CLA-52**, *Itisaluna*, para. 153.
[372] RPHB, para. 29.
[373] The League of Arab States has fewer members than the OIC, even though all members of the League of Arab States are also members of the OIC.

OIC Agreement, the Unified Agreement contains an entire chapter entitled "The Settlement of Disputes"[374].

293. Art. 25 of the Unified Agreement provides that disputes arising out of said agreement "shall be settled by way of conciliation or arbitration or by recourse to the Arab Investment Court". Art. 26 establishes that conciliation and arbitration[375]:

> "[…] shall be conducted in accordance with the regulations and procedures contained in the annex to the Agreement which is regarded as an integral part thereof."

294. The annex in question, entitled "Conciliation and Arbitration", contains two articles: Art. 1 on "Conciliation" and Art. 2 on "Arbitration"[376]. Art. 1(1) of the annex indicates, in its relevant part, that:

> "Where two disputing parties agree to conciliation, the agreement must comprise a description of the dispute, the demands of the parties concerned, the name of the conciliator they have selected and the remuneration which they have decided he should receive." [Emphasis added]

295. Here too conciliation requires the agreement of both disputing parties, particularly on the scope of the dispute, the claims in questions and the name and remuneration of the conciliator. Art. 1(2) of the annex goes on to explain that the conciliator's task is to achieve a "*rapprochement*" between the different points of view.

296. Contrarily to Art. 17(2)(a) of the OIC Agreement, Art. 2(1) of the annex establishes that:

> "Where the two parties fail to agree to conciliation or where the conciliator proves unable to render his decision within the period specified or where the parties do not agree to accept the solutions proposed, they may agree to resort to arbitration." [Emphasis added]

297. This Tribunal is not called upon to interpret the Unified Agreement. But it bears noticing that Art. 2(1) requires the disputing parties to "agree to resort to arbitration" – a provision which is absent from the OIC Agreement; on the contrary, the OIC Agreement makes it clear that "each party has the right to resort to arbitration" even if conciliation fails.

298. Therefore, the Tribunal, by majority, finds that the Unified Agreement does not support the Kingdom's position.

C. Prior awards

299. Both Parties have relied on prior awards that interpreted the OIC Agreement to further their positions.

300. The Tribunal is not bound by preceding awards. There is no system of *stare decisis* in investment arbitration, and the Tribunal is free to reach conclusions different

[374] **Doc. RLA-337**, Chapter VI, internal pp. 220 *et seq.*
[375] **Doc. RLA-337**, internal p. 220.
[376] **Doc. RLA-337**, internal p. 225.

from those of other tribunals. That said, legal certainty is enhanced when subsequent tribunals, applying the same treaty, strive to reach the same interpretation as their predecessors. Contradictory interpretations only cause confusion, increase the risk for investors and thus operate contrary to the very purpose of investment treaties.

301. In this case the available prior decisions are split. The Parties have drawn the Tribunal's attention to three cases[377] that have discussed and decided on the proper interpretation of Art. 17 of the OIC Agreement:

- The case of *Al-Warraq*, whose award on the State's preliminary objections to jurisdiction and admissibility of the claims was published on 21 June 2012[378];
- The case of *Itisaluna*, whose award was published on 3 April 2020[379]; and
- The case of *Navodaya Trading*, whose award was issued on 2 December 2020 but has not been made public[380].

302. Out of these three awards, two have recognized jurisdiction under Art. 17 (*Al-Warraq*[381] and *Navodaya Trading*[382]) and one has denied jurisdiction (*Itisaluna*[383], subject to the dissenting opinion of arbitrator Dr. Wolfgang Peter).

303. In *Itisaluna*, the tribunal remarked that[384]:

> "[...] *the* critical question that requires decision by the Tribunal in these proceedings is whether the Claimants are able to incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq-Japan BIT. If the Claimants do not succeed on this point, their jurisdictional case fails, notwithstanding any other points on which they may otherwise prevail along the way." [Emphasis added]

304. On this question, the tribunal, by majority, concluded that Art. 8 of the OIC Agreement could not be relied upon by the investors to incorporate into the OIC Agreement the consent in writing to submit the dispute to ICSID arbitration derived

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[377] In fact, two other cases have upheld jurisdiction under Art. 17: in one, the State did not make an objection to the tribunal's *ratione voluntatis* jurisdiction (**Doc. CLA-51**, *Kontinental Conseil Ingénierie S.A.R.L. v. Gabon Republic*, PCA Case No. 2015-25, Final Award, 23 December 2016, para. 158); in the other, the decision on jurisdiction is not public (**Doc. CLA-53**, L.E. Peterson, OIC Round-Up: An Update on Pending Arbitration Cases Lodged under the OIC Investment Agreement, IA Reporter, 11 August 2020, regarding *Omar Bin Sulaiman Abdul Aziz Al Rajhi v. Oman*, PCA Case No. 2017-32).

[378] **Doc. CLA-50**. Arbitral Tribunal: Mr. Bernardo Cremades (Chair); Mr. Michael Hwang S.C.; Mr. Fali S. Nariman S.C.

[379] **Doc. CLA-52**. Arbitral Tribunal: Sir Daniel Bethlehem, K.C. (Chair); Dr. Wolfgang Peter; Professor Brigitte Stern.

[380] **Doc. CLA-54**. Arbitral Tribunal: Professor Gabrielle Kaufmann-Kohler (Chair); Dr. Stanimir A. Alexandrov; Professor Laurent Aynès.

[381] **Doc. CLA-50**, *Al-Warraq*, paras. 79-83, 93.

[382] **Doc. CLA-54**.

[383] **Doc. CLA-52**, paras. 223-225.

[384] **Doc. CLA-52**, *Itisaluna*, para. 146.

from the Iraq-Japan BIT. This is why the tribunal upheld the respondent's *ratione voluntatis* objection[385]; but this is not the question put before this Tribunal.

305. The *Itisaluna* tribunal did interpret Art. 17 of the OIC Agreement, but this was not the main focus of its decision. In conducting its analysis, the tribunal paid little attention to the Basic Rule of Art. 17 and rather concentrated on the "if/then" language contained in Art. 17(2)(a), reaching a conclusion similar to that supported by the Kingdom in this arbitration[386] – and this Tribunal has already given its interpretation of this provision.

306. Overall, the Tribunal, by majority, finds its own interpretation (which is line with the awards in *Al-Warraq* and *Navodaya Trading*) more convincing.

3.4 CONCLUSION

307. The Tribunal, by majority[387], finds that a proper interpretation of Art. 17 of the OIC Agreement, in accordance with the VCLT, supports the conclusion that the

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[385] **Doc. CLA-52**, *Itisaluna*, para. 148.

[386] **Doc. CLA-52**, *Itisaluna*, paras. 175-184.

[387] Having carefully reviewed the record before the Tribunal and the arguments of both Parties in this case, Professor Ziadé disagrees with the interpretation by the majority of the Tribunal of Article 17 of the OIC Agreement for the following reasons:

"The OIC Agreement of 1981, which entered into force in 1986, was dormant for decades. However, since 2010, it has been the basis for many *ad hoc* arbitration claims. Article 17 of the OIC Agreement is not a model of clarity, and its interpretation has led to disagreements among arbitration tribunals, as well as within the same tribunals, as to whether conciliation is a mandatory precondition to arbitration.

The Tribunal's majority reaches the conclusion that if an investor opts for conciliation, the investor must obtain the host State's *ex post* consent for the conciliation to be attempted. However, no such State's *ex post* consent would be needed should the investor opt for arbitration because the host State is presumed to have given its advance consent to arbitration by the mere fact of ratifying the OIC Agreement. In other words, the Tribunal's majority posits that the investor needs the specific consent of the host State for a procedure that will end at best with a non-binding recommendation but does not need the specific consent of the State for a procedure that will end with a binding award. Such interpretation 'leads to a result that is manifestly absurd or unreasonable,' which, pursuant to Article 32(b) of the Vienna Convention on the Law of Treaties, allows for recourse to supplementary means of interpretation. Moreover, the latter would help resolving the ambiguity of the text.

In this respect, the tribunal in the *AAPL v. Sri Lanka* case has held as early as in 1990 that:

> *When there is need of* interpretation *of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration.* [*AAPL v. Sri Lanka* Award, para. 40 Rule F]

The Respondent has demonstrated convincingly in its Post-Hearing Brief that '[t]reaty practice at the time of execution of the OIC Agreement shows that Member States could not have agreed to an *ex ante*, unconditional consent to arbitration.' [RPHB pp. 24-35]. One may add that such *ex ante* standing offers on the part of State parties to treaties to submit to arbitration were little known in 1981 at the time of the execution of the OIC Agreement, as the first award recognizing this possibility, the ICSID *AAPL v. Sri Lanka* award, came a decade later in 1990.

It is my view, for the reasons explained below, that Article 17 of the OIC Agreement provides for conciliation as a precondition to arbitration and conditions resort to arbitration on the prior resort to, and failure of, conciliation. This is consistent with Arab and Islamic traditions where conciliation is highly valued. A relevant example is the 1974 Convention on the Settlement of Investment Disputes between Host States of Arab Investments and Nationals of Other Arab States (the 1974 Arab Convention) [a French translation of which is published in *Revue de l'arbitrage* 1981.348], which, as its name implies, was based closely on the ICSID Convention. The 1974 Arab Convention included seven Arab contracting parties, all of them parties to the OIC Agreement. Like the ICSID Convention, the 1974 Arab Convention established a system for the conciliation and arbitration of investment disputes between States parties to the Convention and nationals of other parties. Though very similar to the ICSID Convention, the 1974 Arab Convention

Kingdom made a standing offer to arbitrate investment disputes, which Claimants were entitled to accept by submitting a notification of arbitration; once Claimants had expressed their acceptance, arbitration was not subject to a further *ex post* consent by the State. The Tribunal, by majority, also finds that arbitration is not subject to the prerequisite of a previous attempt at conciliation.

308. Under the OIC Agreement, investors in Saudi Arabia faced with an investment dispute have the right to choose whether:

- To resort to the Kingdom's national courts (under Art. 16),

- To attempt to agree with the Kingdom on a conciliation procedure (in accordance with the provisions of Art. 17(1)(a) and (b) and 17(2)(a)), or

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differed from the ICSID Convention in that it made recourse to conciliation a prerequisite to recourse to arbitration. Only if the conciliation effort failed could the parties submit the dispute to arbitration.
Under Article 17 of the OIC Agreement, conciliation and arbitration must be pursued in sequence, with the host State giving its ex-post consent at the time of the conciliation without having to repeat its consent at the time of arbitration when conciliation efforts would have failed.
The *Itisaluna v. Iraq* award also reached the conclusion that Article 17 provides for conciliation as a precondition to arbitration by relying mainly on the 'if … then' language included in the provision:

> *Having regard to the conditional "if ... then" language of Article 17(2)(a), language that is not disputed, the Tribunal considers that the intended gateway to arbitration under this provision is prior resort to conciliation and, thereafter, the failure of the conciliation process. [...] It necessarily follows from this language that resort to arbitration is conditional on the prior resort to conciliation. The Tribunal observes, as well, that such an interpretation is not per se inconsistent with the rest of the Article and is not at odds with any settled approach to dispute settlement provisions in international investment treaties.* [*Itisaluna v. Iraq* Award, para. 183]

It may be noted that the 'if … then' language of the English version of Article 17(2)(a) is reflected in the Arabic version of Article 17(2)(a) ("فـ ... إذا"). The French version includes the equivalent of the word 'if' ('*si*') but does not require the word 'then,' as its use in the French text would have created a tautology. The word '*alors*' is assumed in the French version of Article 17 before the word '*chaque*.'
The above interpretation of Article 17(2)(a) is supported by the same provision giving the right to 'each party' (i.e., not only the investor but also the host State) to resort to arbitration in case conciliation fails. This can only make sense if it is presumed that the investor would have already given its consent at the preceding stage of conciliation.
As to the interpretation of the second sentence of Article 16 of the OIC Agreement and its relationship with Article 17, there is general agreement between the parties to this case and among arbitration tribunals generally [for example, *Al-Warraq v. Indonesia* Award, para. 75.3; *Itisaluna v. Iraq* Award, para. 164] that Article 16 is a fork-in-the-road provision. An investor who raises a claim before a national court is precluded from raising the same claim before an arbitration tribunal, and vice versa. However, the investor is not precluded from raising the same claim before a conciliator. In the case of arbitration, conciliation is a prerequisite. In the case of the investor's resort to national courts, conciliation is still an option either before, during or after, provided that the parties to the dispute agree to conciliation. Article 16 of the OIC Agreement cannot be interpreted in a way that would deprive Article 17(2)(a) of its *effet utile*.
As to the relationship between the chapeau of Article 17 and the rest of the provision, more particularly Article 17(2)(a), while the chapeau refers to 'conciliation *or* arbitration,' it is believed that the phrase is to be 'read simply as an expression of the available modalities of settlement, i.e., neutral on the issue of association.' [*Itisaluna v. Iraq* Award, para. 173]. This interpretation is supported by the *chapeau*'s next phrase 'in accordance with the following rules and procedures,' which leaves little doubt that Article 17(2)(a) is controlling.
It would be of great assistance to parties and arbitration tribunals alike if the Contracting States to the OIC Agreement were to clarify the unclear provisions of the Agreement, the more so since Article 22 of the Agreement provides for the possibility of the Agreement being amended at the request of at least five States and with the approval of four-fifths of the Contracting Parties. This would put an end to an unsettling situation."

- To directly file an arbitration against the State (in accordance with the provisions of Art. 17(2)(b), (c) and (d)).

309. Therefore, the Tribunal, by majority, dismisses the Kingdom's objection *ratione voluntatis*.

V.2. ADMISSIBILITY OBJECTION: ART. 9 OF THE OIC AGREEMENT AND THE CLEAN HANDS DOCTRINE

310. Art. 9 of the OIC Agreement provides that[388]:

> "The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."

311. The Kingdom states that this provision embodies the general principle of international law of "clean hands", and that Claimants have breached this principle through various illegalities related to their investments in the Kingdom (**1.**).

312. Conversely, Claimants assert that Art. 9 does not reflect the "clean hands" doctrine, which, in any event, does not constitute a general principle of international law, and is not applicable in the present case. Regardless, Claimants submit that their investments were carried out and performed in conformity with applicable laws and regulations (**2.**).

313. The Tribunal will summarise the Parties' positions and make its decision (**3.**).

1. RESPONDENT'S POSITION

314. The Kingdom submits that both Art. 9 of the OIC Agreement and international law recognize the "clean hands" principle (**1.1**). Claimants have breached such principle, since they acted fraudulently when procuring the Scientific Office Licence and failing to license properly their Warehouses, which Claimants used to generate their profit-making business activities[389] (**1.2**).

1.1 ART. 9 EMBODIES THE "CLEAN HANDS" PRINCIPLE

315. The Kingdom argues that Art. 9 of the OIC embodies the "clean hands" principle, which is, in and of itself, a general principle of international law within the meaning of Art. 38(1)(c) Statute of the International Court of Justice[390].

316. This has been recognized by the *Al Warraq* tribunal, who has interpreted Art. 9 as a provision that binds the investor to certain standards of conduct: if an investor's claim is based on actions that would be deemed illicit under the host State's law, said claim becomes inadmissible[391].

317. The Kingdom argues that the "clean hands" principle was first recognized in the Permanent Court of International Justice's *Eastern Greenland* case of 1933, which established the proposition that "an unlawful act cannot serve as the basis of an

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[388] **Doc. CLA-10**, p. 9.
[389] R II, para. 218.2.
[390] R II, para. 290.
[391] R I, paras. 337-339; R II, paras. 291 and 301-302, citing to **Doc. CLA-32**, *Al-Warraq*, paras. 631-648.

action at law"[392]. Since then, many investment tribunals have regularly applied it to exclude treaty claims based on illegal acts[393] (e.g., *Rusoro*[394], *Flughafen*[395], *Spentex*[396], *Churchill Mining*[397], *Littop*[398], among others[399]). Furthermore, "clean hands" has been recognized as a general principle of international law and "an implicit and inherent feature of all investment treaties"[400].

Claimants' arguments should be dismissed

318. Claimants disagree with the Kingdom's position, as will be explained in section 2.1 *infra*. The Kingdom avers that Claimants' arguments should be dismissed for five reasons.

319. First, Claimants cite two dated (or questionable) cases: unlike the OIC Agreement, the treaties applicable in *Yukos*[401] and *South American Silver*[402] did not contain a provision that embodied the "clean hands" principle. Moreover, the reasoning in these awards is an outlier and has not been followed by other tribunals[403].

320. Second, the Kingdom disagrees with Claimants' argument that the only purpose of Art. 9 is to allow States to bring a counterclaim against an investor for breach of law. This reasoning is absurd, considering that the host State has its entire criminal justice system to bring claims against an investor who acts illegally[404].

321. Third, the Kingdom notes that case law does not support Claimants' suggestion that the "clean hands" doctrine should apply only to the *making* of an investment and not to its operation. Art. 9 is not drafted like a regular legality clause and contains no temporal limitation. In any case, the making of an investment can be continuous in time and does not occur only when the investor acquires its first property right[405].

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[392] R II, para. 290, citing to **Doc. RLA-83**, *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Ser A/B No 54.
[393] R II, paras. 290-292.
[394] **Doc. RLA-256**, *Rusoro Mining Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016.
[395] **Doc. RLA-257**, *Flughafen Zürich AG & Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014.
[396] *Spentex Netherlands BV v Republic of Uzbekistan*, ICSID Case No ARB/13/26, Award, 27 December 2016.
[397] **Doc. RLA-85**, *Churchill Mining & Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 &12/14, Award, 6 December 2016, para. 508.
[398] **Doc. RLA-87**, *Littop Enterprises Limited, Bridgemont Ventures Limited & Bordo Management Limited v. Ukraine*, SCC Case No V 2015/092, Final Award, 4 February 2021, para. 442.
[399] R II, fn. 599, citing to eleven other cases.
[400] R II, para. 294, citing to **Doc. RLA-255**, P. Dumberry, "The Clean Hands Doctrine as a General Principle of International Law" (2020) 21 JWIT 489 ["**Dumberry**"], p. 518.
[401] **Doc. CLA-238**, *Yukos Universal Limited v. Russian Federation*, PCA Case No AA 227, Final Award, 18 July 2014.
[402] **Doc. CLA-37**, *South American Silver Ltd. (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018.
[403] R II, paras. 296-298.
[404] R II, para. 304.
[405] R II, para. 305.

322. Fourth, even though the Kingdom agrees with Claimants that not all incidences of unlawful conduct connected with an investment can trigger the application of the "clean hands" doctrine, a fraud on the regulatory bodies of the State certainly can[406].

323. Finally, it is true that the principle of estoppel would block the State from invoking the "clean hands" doctrine if, being aware of the illegality, the Kingdom had chosen to disregard or even endorse it. However, this is not the case in the present dispute, as the estoppel requirements have not been met[407].

1.2 CLAIMANTS HAVE BREACHED THE "CLEAN HANDS" PRINCIPLE

324. The Kingdom's position is that Claimants come to this Tribunal with unclean hands. The Kingdom does not make any allegation of corruption[408]; rather, it argues that Claimants' investment was procured through fraud[409]. According to the Kingdom, the available evidence shows that Claimants[410]:

- Acted fraudulently to obtain and maintain a Scientific Office Licence (**A.**);
- Operated their Warehouses unlawfully (**B.**); and
- Committed unlawful acts in relation to their distributors in Saudi Arabia[411] (**C.**).

A. The Scientific Office Licence fraud

325. Under the Saudi pharmaceutical law, to obtain a pharmaceutical licence – a *sine qua non* condition for establishing and running a pharmaceutical import and distribution business in the Kingdom[412] – Claimants had to[413]:

- Employ a full-time pharmacist from Saudi Arabia with a valid licence;
- Have a scientific office which satisfied the conditions set forth in said law.

326. The Kingdom submits that Claimants breached both legal requirements but fraudulently represented to the SFDA that they were in compliance for the purposes of obtaining the Scientific Office Licence[414].

327. First, at least since 2014 Qatar Pharma did not employ a full-time Saudi pharmacist to manage the Scientific Office[415]. The two Saudi pharmacists allegedly employed by Qatar Pharma – Mr. Al Qahtani and Mr. Al-Amari [the "**Pharmacists**"] – did not carry out any tangible activity for the company; instead, their arrangement with

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[406] R II, paras. 306-307, citing to **Doc. RLA-88**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 135.
[407] R II, paras. 308-309.
[408] RPHB, para. 54.
[409] R II, para. 310; RPHB, para. 55.
[410] RPHB, para. 55.
[411] R II, para. 315.
[412] R II, para. 316; RPHB, para. 57.1.
[413] R I, para. 341; R II, para. 316.
[414] R I, para. 342; R II, para. 310.
[415] R I, para. 342.1.

Qatar Pharma was a sham[416]. They have both denied carrying out any work for Qatar Pharma[417] and they both had employment contracts elsewhere[418]. Despite this, Qatar Pharma represented to the SFDA that the Pharmacists were full-time employees in order to obtain the Scientific Office Licence[419]. Mr. Al Qahtani was even misled into signing Qatar Pharma's application for the Scientific Office Licence[420].

328. Second, Claimants' representative, Mr. Antar, corresponded with the Kingdom's authorities under the Pharmacists' names without their knowledge or permission, and forged their signatures on various documents submitted to the Kingdom[421].

329. Third, if it is true that Claimants employed the Pharmacists, then Claimants failed on several aspects related to labour law and social insurance[422].

330. Finally, the office space supposedly dedicated to the Scientific Office was just an empty room with one computer, lacking any appropriate medical storage and laboratory equipment[423].

331. In sum, the Scientific Office Licence was granted based on a clear fraud[424].

B. The unlawful operation of the Warehouses

332. The Kingdom additionally submits that the Warehouses operated by Claimants in Saudi Arabia lacked the mandatory SFDA licences that permitted the storage of pharmaceutical products, in violation of the Kingdom's law[425]:

- Claimants never obtained an SFDA licence to operate the Dammam Warehouse, which was therefore operating illegally in December 2016[426];
- Claimants never obtained an SFDA licence to operate the Jeddah Warehouse either, only an initial approval – with the consequence that this Warehouse too was being operated unlawfully[427]; and
- Claimants only obtained a licence to operate the Riyadh Warehouse in April 2017, when in fact they had been operating it since 4 November 2013 – with the consequence that they operated the Warehouse illegally for years[428].

[416] R II, para. 310.1; RPHB, para. 56.1; CHT, p. 2390, ll. 10-15.
[417] R II, paras. 310.1-310.2; RPHB, para. 56.1(2).
[418] RPHB, paras. 56-57.3.
[419] R I, para. 342.2.
[420] RPHB, para. 56.2; CHT, p. 2391, l. 6 to p. 2392, l. 15.
[421] R II, paras. 310.2 and 313; RPHB, para. 56.3; CHT, p. 2392, ll. 21-25.
[422] R II, para. 312.
[423] R I, para. 341.3; R II, para. 310.3.
[424] R I, paras. 342-343; R II, paras. 310-310.2; RPHB, para. 56.2.
[425] R I, para. 345; R II, para. 311; RPHB, paras. 58-60.
[426] R I, para. 345; RPHB, para. 58.1; CHT, p. 2393, ll. 18-21.
[427] R I, para. 345; RPHB, para. 58.2; CHT, p. 2393, ll. 18-21.
[428] RPHB, paras. 58.3 and 60; CHT, p. 2393, l. 24 to p. 2394, l. 4.

333. The Kingdom argues that the receipt of planning permissions to build a warehouse – which Claimants apparently received – does not equate to a SFDA licence permitting the storage of pharmaceutical products[429].

C. The unlawful acts related to distributors

334. Finally, the Kingdom argues that Claimants committed two unlawful acts in relation to their distributors in Saudi Arabia[430]:

- First, they failed to register their agency and distributorship arrangements with Banaja, and subsequently with QEMS, in contravention of the Law of Commercial Agencies and its Implementing Regulations; and

- Second, they misrepresented to the authorities that QEMS was a Saudi company, when in fact it was wholly owned by a foreign national – Dr. Al Sulaiti; under the Law of Commercial Agencies, a distributor must be a Saudi national, or an entity wholly Saudi-owned (*i.e.*, the share capital of the entity must be wholly Saudi-owned); had the authorities known that QEMS was not a Saudi-owned company, QEMS would likely have been prohibited from continuing to operate in Saudi Arabia.

2. CLAIMANTS' POSITION

335. Claimants deny that the "clean hands" doctrine finds application in the present case: it is neither embodied in Art. 9 of the OIC Agreement nor a general principle of international law (**2.1**). Even if it were applicable, Claimants have not committed any fraudulent activity when establishing or operating their investments in Saudi Arabia (**2.2**)[431].

2.1 THE "CLEAN HANDS" DOCTRINE IS NEITHER EMBODIED IN ART. 9, NOR A GENERAL PRINCIPLE OF INTERNATIONAL LAW

336. Claimants submit that, contrary to the Kingdom's arguments, the "clean hands" doctrine does not fall within the scope of Art. 9 of the OIC Agreement. The *Al-Warraq* case – on which the Kingdom relies – only mentioned that the claimant's actions in that case violated Art. 9 and the "clean hands" doctrine. However, it did not connect explicitly these two elements[432]. As noted by the same tribunal, Art. 9 only elevates a violation of national law provisions to the international sphere, similarly to what an umbrella clause does for contractual obligations[433].

337. In any event, Claimants aver that the text of Art. 9 cannot be interpreted as an admissibility barrier to investor claims. Rather, it should be considered as a basis for counterclaims by OIC Member States in cases where their laws or regulations have been broken, as found by the *Al-Warraq* tribunal[434].

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[429] RPHB, para. 59.1.
[430] R II, para. 315.
[431] C II, para. 243; C III, para. 59.
[432] C II, para. 247; C III, para. 65.
[433] C III, para. 68.
[434] C II, para. 249; C III, para. 66.

338. Claimants also deny that "clean hands" is a general principle of international law or a rule of customary international law. Many authorities confirm this view:

- Professor Crawford, as Special Rapporteur of the International Law Commission on State Responsibility, clearly rejected the idea that "clean hands" exists either as a principle of international law or as a rule of customary international law[435];

- Various investment tribunals have reiterated this same finding, such as in the *Yukos*[436] and the *South American Silver*[437] cases.

339. As to the cases cited by the Kingdom, a correct analysis of the relevant jurisprudence confirms that there is significant doubt as to whether a clean hands "principle" exists[438]. In any event, to constitute a bar to admissibility such doctrine should only be applied to the establishment of the investment – certainly not to its operation[439].

340. Finally, Claimants argue that the Kingdom was aware of the alleged misconducts on which it bases its arguments. The Kingdom has conceded that the "clean hands" doctrine cannot be invoked if a State was aware and chose to disregard – or even encourage – the illicit conduct of the investor[440]. The only elements that tribunals consider are the gravity of the violations and the good faith of the investor[441].

341. In any event, the facts alleged by the Kingdom (if proven, *quod non*) do not qualify as grave violations of the host State's law; at most, they could be considered as minor infractions, which would fall outside the scope of an alleged "clean hands" principle[442].

2.2 CLAIMANTS HAVE NOT ENGAGED IN ANY FRAUDULENT CONDUCT

342. In any event, Claimants deny that they have breached the "clean hands" doctrine. Qatar Pharma has established and operated its investment in the Kingdom in compliance with the applicable law and in good faith. In fact, the allegations of illegalities have no basis: both the Scientific Office (**A.**) and the Warehouses (**B.**) were properly licensed, the Kingdom was always aware of Claimants' activities, and Claimants properly registered their distributors (**C.**)[443].

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[435] C II, para. 246, citing to **Doc. CLA-237**, para. 336; C III, para. 63.
[436] **Doc. CLA-238**, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award.
[437] C II, para. 246; **Doc. CLA-37**, *South American Silver Ltd. (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award.
[438] C III, paras. 60-62.
[439] C III, paras. 70-73.
[440] C III, paras. 77-78.
[441] C III, paras. 79-80.
[442] C III, paras. 76, 79.
[443] C III, paras. 82-84; CPHB, para. 164; CHT, p. 2317, ll. 9-14.

A. The Scientific Office Licence was properly obtained

343. Claimants argue that the SFDA issued a Licence for the Scientific Office on 30 June 2013, and for good reason[444].

344. First, both Saudi Pharmacists employed in the Scientific Office were duly registered with the SFDA, and their names appeared on the request for the Scientific Office Licence[445]. Both Pharmacists had a full-time employment contract and received a regular salary from Qatar Pharma – salary that they never returned[446]. Mr. Al Qahtani admitted to signing the application and the form sent to the SFDA to obtain the Licence[447], and this is also why the SFDA was provided with his phone number[448].

345. Second, Claimants had no knowledge of the Pharmacists' other work contracts with the Boots pharmacy and the Saudi Ministry of Health. On the contrary, the SFDA was the only authority who could know about the existence of these other contracts. The Kingdom cannot rely on these contracts to argue that Claimants' claims are inadmissible, since the Kingdom was aware of them and chose to disregard them until the present proceedings[449].

346. Third, as to the Kingdom's allegation that Mr. Antar forged the signatures of the Pharmacists on various letters addressed to the Kingdom, the fact is that the only letter on which Mr. Antar was questioned is a letter dated 13 March 2018 and addressed to the Saudi Ministry of Health. Such correspondence only contains the signature of Mr. Antar "on behalf of" Mr. Al-Amari – not a forged signature. This practice was required because the Kingdom's Ministry of Health simply did not respond to anyone who was not a Saudi national – and, in fact, it never responded to such letter. As to the product registrations, they all indicate that they were being signed "on behalf of" Mr. Al-Amari, so there can be no doubt that the Kingdom knew that it was not Mr. Al-Amari who had signed them[450].

B. The Warehouses were properly licensed

347. Claimants also reject the alleged lack of final licences for the Warehouses:

- Qatar Pharma first operated a Riyadh Warehouse in 2013, for which it obtained a licence; when the Warehouse was relocated to another district of Riyadh, Qatar Pharma obtained a new licence in April 2017[451];

- As to the Dammam and Jeddah Warehouses, the SFDA expressly approved and encouraged their operation (even if only with an initial licence for the

[444] CPHB, para. 166; CHT, p. 2318, ll. 14-16.
[445] C III, para. 92; CPHB, para. 177.
[446] C III, paras. 82 and 85; CPHB, paras. 173-174.
[447] CHT, p. 2320, l. 22 to p. 2321, l. 24.
[448] CPHB, para. 173; CHT, p. 2322, ll. 2-8.
[449] CPHB, para. 177; CHT, p. 2322, ll. 9-18.
[450] CPHB, para. 178; CHT, p. 2322, l. 24 to p. 2323, l. 15.
[451] CPHB, para. 180.

Dammam Warehouse), given the benefits that derived from them to the Kingdom, as clearly declared by Dr. Dahhas[452].

348. It follows that the competent regulator was fully aware of Qatar Pharma's activities and the Kingdom cannot invoke the clean hands doctrine when it approved the very conduct that it now seeks to challenge[453].

C. The distributors were properly registered

349. Claimants note that for the first time in its second written submission the Kingdom decided to come up with two additional "unlawful acts": that Claimants failed to register their agency/distributorship agreements with Banaja, and later QEMS, and misrepresented to Saudi authorities that QEMS was a Saudi company[454]. Claimants note that the Kingdom failed to explain why it did not raise these issues whether in the normal course of Qatar Pharma's operations or in its Statement of Defence. In any case, the Kingdom's allegations are false[455]:

- Qatar Pharma's Agency Contract with Banaja bears a stamp evidencing the fact that the document had been registered with the Council of Saudi Chamber;
- Qatar Pharma's Agency Contract with QEMS was registered with the Saudi authorities, as evidenced by the official stamp from the Riyadh Chamber of Commerce and Industry;
- Qatar Pharma disclosed to Saudi authorities that QEMS was wholly owned by a Qatari national, as demonstrated by its registration certificate; in fact, following a change in Saudi law that permitted GCC residents to own a local Saudi company, Claimants converted QEMS into a local establishment.

350. In view of the above, Claimants submit that the Tribunal should dismiss the Kingdom's admissibility objection[456].

3. DECISION OF THE ARBITRAL TRIBUNAL

351. The Kingdom objects to the admissibility of Claimants' claims on the grounds that they acted in contravention of Saudi laws and regulations when conducting their affairs in the Kingdom. The Kingdom says that Claimants acted dishonestly and that they come before this Tribunal without clean hands. Claimants deny any impropriety and put in doubt the relevance of the principle of clean hands in investment arbitration.

352. The Tribunal will first establish the scope of the legality requirement under Art. 9 of the OIC Agreement (**3.1**). Thereafter, it will look into the alleged sources of illegality as pointed out by the Kingdom and contrast them with the available

[452] CPHB, paras. 181-183.
[453] CPHB, para. 183.
[454] C III, para. 106.
[455] C III, paras. 106-110.
[456] C III, para. 114.1.

evidence (**3.2**) in order to determine whether Claimants have committed a breach of Saudi laws and regulations (**3.3**).

3.1 THE LEGALITY REQUIREMENT UNDER ART. 9 OF THE OIC AGREEMENT

353. Under Art. 9 of the OIC Agreement[457]:

> "The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. […]"

354. Art. 9 of the OIC Agreement creates a legality requirement: to comply with this rule the investor must respect the host State's laws and regulations and must abstain from acts that disturb public order or morals or are prejudicial to the public interest.

355. There are two types of investment treaties:

- Some treaties contain explicit clauses that require investors to comply with certain legality requirements (like the OIC Agreement; other BITs typically require that investments be made "in accordance with" the laws of the host State[458]);

- While others do not include such clauses; however, even in such cases, tribunals, invoking the clean hands doctrine or similar principles of international law, have concluded that investors must respect municipal law[459].

356. Investors must conform with the host State's laws both during the establishment of the investment and in the post-establishment phase[460]. This conclusion is reinforced in the present case because Art. 9 of the OIC Agreement (unlike many other investment treaties) does not simply ask that the investment be "made in accordance with the host State's law", but binds the investor to respect municipal law, public order, morals and public interest without any temporal limitation – therefore actively requiring the investor to comply with the law. The wording leaves little doubt that, in this case, the legality requirement covers not only the investment, but also the post-investment phase – as the *Al-Warraq* tribunal acknowledged applying this same provision[461].

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[457] **Doc. CLA-10**, p. 9.
[458] **Doc. CLA-135**, R. Dolzer and C. Schreuer, "Admission and Establishment" *in Principles of International Investment Law*, p. 5 of the PDF.
[459] **Doc. RLA-258**, *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, para. 308; **Doc. RLA-262**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award; **Doc. RLA-88**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award. See also **Doc. CLA-135**, pp. 5-6 of the PDF.
[460] **Doc. RLA-262**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No ARB/06/5, Award, para. 101; **Doc. RLA-101**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, paras. 123-124; **Doc. RLA-263**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award, para. 328; **Doc. RLA-258**, *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, para. 306.
[461] **Doc. CLA-50**, *Al-Warraq*, para. 645.

Consequences of a breach of Art. 9

357. Does a breach of Art. 9 of the OIC Agreement imply that the investor's claims become inadmissible?

358. In the Tribunal's opinion, the answer to this question depends on the seriousness of the breach. If an investor seriously breaches municipal law (e.g., when the investor engages in corruption or fraud), tribunals have found that the investor forfeits its right to access investment protection under international law and that its claims become inadmissible. In the words of the *SAUR* tribunal, which this Tribunal shares[462]:

> "[...] *le Tribunal* [...] *entend que la finalité du système d'arbitrage d'investissement consiste à protéger uniquement les investissements licites et* bona fide. *Le fait que l'APRI entre la France et l'Argentine mentionne ou non l'exigence que l'investisseur agisse conformément à la législation interne ne constitue pas un facteur pertinent. La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu'un État offre le bénéfice de la protection par un arbitrage d'investissement si l'investisseur, pour obtenir cette protection, a agi à l'encontre du droit.*" [Emphasis added]

359. But minor breaches will not provoke this severe consequence.

360. The loss of investment protection is a grave sanction: the investor is deprived of the possibility of accessing international justice, even if the State has committed an international delict and impaired the investment. There must be proportionality between offence and sanction: not any minor breach of the municipal legal order (say a ticket for speeding or a delay in the payment of a tax) can result in the inadmissibility of the investor's claims; what is required is that the investor has committed a serious violation of municipal law[463].

361. Bribery, corruption, money laundering and violations of international human rights obligations most certainly fall into this serious category[464]. The commitment of other criminal offenses, such as forgery, fraud, serious misrepresentations, serious breaches of administrative, tax or environmental laws, may also, depending on the circumstances, surpass the threshold.

362. Minor breaches of municipal law, however, should not lead to the *ex ante* dismissal of claims, but should be considered together with the merits, and be taken into consideration when assessing damages and costs[465].

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[462] **Doc. RLA-258**, *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, para. 308. Free translation: "the Tribunal [...] understands that the purpose of the investment arbitration system is to protect only lawful and *bona fide* investments. The fact that the BIT between France and Argentina does or does not mention the requirement that the investor act in accordance with domestic law is not a relevant factor. The condition of not committing a serious breach of the legal order is a tacit condition, underlying any BIT, because in any event, it is incomprehensible for a State to offer the benefit of protection through investment arbitration if the investor, in order to obtain this protection, has acted contrary to the law."
[463] **Doc. RLA-255**, Dumberry, p. 243.
[464] **Doc. RLA-255**, Dumberry, p. 245.
[465] **Doc. RLA-255**, Dumberry, p. 243.

Other awards

363. Other awards support this conclusion. When investment tribunals have declared claims inadmissible, the investor had committed a serious breach of municipal law:

- In *Al-Warraq*, the tribunal declared the inadmissibility of claimants' claims, after finding that the investors had perpetrated serious criminal offences, for which they had been convicted by a municipal court[466];
- In *World Duty Free*, the tribunal declared the inadmissibility of claimant's claims based on a finding that the investor had concealed a payment in exchange for doing business in Kenya, constituting a bribe[467];
- In *Plama*, the tribunal declared the inadmissibility of claimant's claim on the grounds of fraudulent misrepresentations to the Bulgarian Government[468];
- In *Churchill Mining*, the tribunal declared the inadmissibility of claimants' claims on the grounds that the mining licences, upon which the claims were based, had been forged[469];
- In *Álvarez y Marín Corporación*, the tribunal declared the inadmissibility of claimants' claims on the grounds that the investment had been illegally purchased[470].

364. In other cases, tribunals have determined not that the claims were inadmissible, but rather that the tribunal lacked jurisdiction to adjudicate the case on the basis of the investors' serious breaches of municipal law:

- In *Littop*, the tribunal declined jurisdiction, among others, on the grounds that the alleged investment had been tainted by bribery and corruption[471];
- In *Cortec Mining*, the tribunal declined jurisdiction over claimants' claims on the grounds that the investment failed to comply with Kenya's environmental regulations by obtaining a mining licence to operate in a protected area without meeting all the necessary requirements for its approval[472];
- In *Inceysa*, the tribunal declined jurisdiction over a contract obtained on misrepresentations and forgeries as claimant's bid contained false

[466] **Doc. CLA-50**, *Al-Warraq*, para. 645.
[467] **Doc. RLA-260**, *World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, paras. 161, 167-169, 179.
[468] **Doc. RLA-88**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, para. 321.
[469] **Doc. RLA-85**, *Churchill Mining & Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 & 12/14, Award, paras. 508, 510-511, 516, 528-531.
[470] **Doc. RLA-266**, *Cornelis Willem van Noordenne, Mr Bartus van Noordenne, Stichting Administratiekantoor Anbadi, Estudios Tributarios AP SA & Álvarez y Marín Corporación SA v. Republic of Panama*, ICSID Case No. ARB/15/14, Award, paras. 132-137, 151-154, 156.
[471] **Doc. RLA-87**, *Littop Enterprises Limited, Bridgemont Ventures Limited & Bordo Management Limited v. Ukraine*, SCC Case No. V 2015/092, Final Award, paras. 455, 485, 654(b).
[472] **Doc. RLA-265**, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award, paras. 333, 343, 347, 349, 351, 365.

information regarding its real financial condition, claimant's auditor was not an accredited auditor, and claimant lied about its experience[473];

- In *Fraport*, the tribunal declined jurisdiction over claimant's claims on the ground that claimant knowingly structured its investment in violation to municipal law[474].

365. Whether it is treated as an issue of lack of admissibility of claims or of lack of jurisdiction of the Tribunal, the outcome is the same: what is clear is that to forfeit its claims the conduct of the investor must reach a certain threshold of impropriety. Several tribunals have explicitly declared that the alleged conduct must be serious or grave:

- In *Navodaya Trading*, a case under the OIC Agreement, the tribunal determined that claimant's conduct should meet a certain threshold of gravity for the tribunal to conclude that the claims were inadmissible, which was not present in that case[475];

- In *Hamester*, the tribunal found that there was not sufficient evidence to conclude that the investment had been made fraudulently; the tribunal further noted that, even though claimant's practices might not be in line with what could be called "*l'éthique des affaires*", they did not amount to a fraud that would affect the tribunal's jurisdiction[476].

3.2 HAVE CLAIMANTS COMMITTED A SERIOUS BREACH OF SAUDI LAW?

366. Having established that under Art. 9 of the OIC Agreement Claimants' claims would be inadmissible if they had committed a serious breach of Saudi laws and regulations, either during the establishment of the investment or in the post-investment phase, the next question that the Tribunal must address is whether or not this has actually happened.

The alleged illegalities committed by Claimants

367. The facts surrounding the creation and establishment of Qatar Pharma are summarised in section III.1 *supra*. In the present section, the Tribunal will simply elaborate on those that are relevant for the Kingdom's admissibility objection.

368. Qatar Pharma manufactured its pharmaceutical products at its factory in Doha, and then exported them to Saudi Arabia for distribution to public and private sector customers, in Riyadh and in other locations[477]. When in 2010 Qatar Pharma first decided to enter the Saudi market[478], it executed a commercial agency contract with

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[473] **Doc. RLA-261**, *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, paras. 224-227, 240-244, 252.
[474] **Doc. RLA-263**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No ARB/11/12, Award, paras. paras. 328, 332-333, 467.
[475] **Doc. CLA-54**, *Navodaya Trading*, p. 4.
[476] **Doc. RLA-101**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, paras. 123-124, 137-138.
[477] See also **Doc. H-5**, slide 8.
[478] CWS-3, para. 25.

the Saudi import company, Banaja[479], which distributed Qatar Pharma's products for three years. However, in early 2013 Banaja and Qatar Pharma put an end to their contract[480].

369. Thereafter Qatar Pharma decided to set up its own distribution operation in Saudi Arabia[481]. The first step was to register QEMS at the Saudi Commercial Register as a local branch[482], which was later converted into a permanent establishment in March 2014. QEMS thereafter opened a Scientific Office and three Warehouses in the Kingdom[483].

370. It is the Kingdom's position that when setting up their operations in the Kingdom Claimants committed a number of illegalities:

- They failed to register their agency and distributorship arrangements with Banaja, and they misrepresented to the Saudi authorities that QEMS was a Saudi company, when it was in fact owned by a Qatari national (Dr. Al Sulaiti) (**A.**);

- They acted fraudulently to obtain and maintain a Scientific Office Licence (**B.**); and

- They operated their Warehouses unlawfully, without the necessary SFDA licences (**C.**).

371. These are the alleged illegalities, as submitted by the Kingdom. The Tribunal will contrast these allegations with the available evidence and draw its conclusions (**D.**).

372. The Tribunal notes that, answering a direct question from the Tribunal to dispel any doubts, the Kingdom stated in its PHB that "it does not advance" an allegation that Claimants incurred in corruption, by bribing Kingdom officials[484].

A. Banaja and QEMS

373. When presenting its first written submission, the Kingdom did not draw the Tribunal's attention to alleged improprieties regarding the registration of Qatar Pharma's agency agreements with Banaja or the fact that QEMS was owned by a Qatari national. The Kingdom raised these allegedly "unlawful acts" for the first – and only – time in its second written submission[485], and did not address them again at the Hearing or in posterior submissions. The Tribunal will nevertheless deal with the Kingdom's arguments:

- Claimants' alleged failure to register the Banaja agency agreement (**a.**);

- Claimants' alleged failure to register the QEMS licensing agreement (**b.**); and

[479] **Doc. C-39**; CWS-3, para. 37; RWS-14, para. 7.
[480] **Doc. C-404**; **Doc. C-405**; CWS-3, para. 41; RWS-14, para. 9.
[481] **Doc. C-404.** See also CWS-1, paras. 2-3.
[482] **Doc. VP-24**; **Doc. VP-25.** See also CWS-1, para. 3.
[483] CWS-1, para. 3.
[484] RPHB, para. 54.
[485] R II, para. 315.

- Claimants' alleged misrepresentation that QEMS was a Saudi company (**c.**).

a. The Banaja agency contract

374. Art. 1 of the Saudi "**Law of Commercial Agencies**" provides that[486]:

> "A non-Saudi person, whether natural or legal, may not operate as a commercial agent in the Kingdom. Saudi companies operating as commercial agents must have a 100% Saudi capital, and the members of their boards of directors and authorized signatories shall be Saudis."

375. Art. 3 of the said Law establishes that[487]:

> "A person may not operate as a commercial agent unless his name is registered with the Ministry of Commerce and Industry in a register designated for this purpose; said register shall be established pursuant to a decision by the Minister of Commerce and Industry. The register shall include the name of merchant or company, type of goods, name of the authorizing company or establishment, date of authorization, and, if definite, term of authorization. Registration applications shall be submitted together with supporting documents to the Deputy Minister of Commerce and Industry. Such applications may not be rejected except for non-Saudis or for Saudis who are unqualified or barred from engaging in business. Rejected applicants may appeal before the Minister of Commerce and Industry."

376. Claimants have produced on the record a "Commercial Agency Contract" dated 17 May 2010 between:

- On the one hand, "Qatar Medical Solutions Factory (Qatar Pharma)", having its address "in Doha, State of Qatar" and represented by Dr. Al Sulaiti, and

- On the other hand, "Saudi Import Company – Abdul Lateef Banaja and Partners", having its address in "Jeddah – Kingdom of Saudi Arabia" and represented by Mr. Banaja[488].

377. Pursuant to this agency contract, Qatar Pharma appointed Banaja "as its sole distributor in KSA", who shall "register [Qatar Pharma] and the products of the Factory in the [SFDA] and other competent Government entities"[489]. Furthermore, Qatar Pharma designated Banaja as its "sole and exclusive agent and distributor in KSA of all products"[490].

378. The Kingdom does not question that Banaja is a Saudi company; rather, it argues that Claimants "failed to register their agency and distributorship arrangements with Banaja, [...] in contravention [of Art. 6] of the Law of Commercial Agencies and its Implementing Regulations"[491].

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[486] **Doc. RLA-293.**
[487] **Doc. RLA-293.**
[488] **Doc. C-39.**
[489] **Doc. C-39**, Art. 2.
[490] **Doc. C-39**, Art. 2.
[491] R II, para. 315.1.

379. It is unclear, however, to what part of Art. 6 of the Law of Commercial Agencies the Kingdom is referring to, since none of the translated provisions of said law refer to an obligation to register an agency contract. The Kingdom has also not clarified with whom Qatar Pharma should have registered the contract. As to the registration obligation set forth in Art. 3 of the Law of Commercial Agencies, it bears on the agent and not on the principal that hires the agent.

380. Be that as it may, the Banaja agency contract has several seals[492]:

- That of a "Chamber of Commerce and Industry" in each of the contract pages;
- That of the Qatar Chamber of Commerce and Industry, which certifies the signature of Dr. Al Sulaiti in page 7;
- That of the Saudi Embassy (Consulate Section) in Doha, which ratifies the seal and the signature, without assuming responsibility for the contents, on page 7; and
- That of the Council of Saudi Chambers, which certifies that Banaja is the agent of Qatar Pharma, on page 8.

381. It follows that the Council of Saudi Chambers had access to the agency contract and certified Banaja as the agent of Qatar Pharma.

b. The QEMS licensing and commercial representation contract

382. In March 2014 Saudi Arabia adopted the Foreign Investment Law, which permitted GCC residents to own 100% of a local Saudi company[493].

383. Taking advantage of this legislative change, Qatar Pharma decided to convert its branch, QEMS[494], into a local establishment in Saudi Arabia. Therefore, on 4 March 2014, it registered QEMS with the Saudi Ministry of Commerce and Industry[495].

384. On 5 March 2014, Qatar Pharma concluded a "Licensing and Commercial Representation Contract" with QEMS, which at the time was already registered as a local Saudi establishment[496]. Under this agreement, QEMS was appointed as "sole representative and distributor" of Qatar Pharma in Saudi Arabia[497].

385. This contract also bears several seals[498]:

- That of the Qatar Chamber of Commerce & Industry in each page;
- That of the Riyadh Chamber of Commerce & Industry in page 5.

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[492] **Doc. C-39.**
[493] **Doc. CLA-23.**
[494] At the time under the name of "Qatar Pharmaceutical Solutions Establishment" (**Doc. C-51**).
[495] **Doc. C-51**; **Doc. C-413**, p. 17 of PDF; CER-1, para. 69(ii)(2). See also CWS-8, para. 15.
[496] **Doc. VP-86.**
[497] **Doc. VP-86**, Art. 2.
[498] **Doc. VP-86.**

c. The nationality of QEMS

386. Qatar Pharma first registered QEMS as a local branch in Saudi Arabia on 26 August 2012[499]. The certificate issued by the Saudi Ministry of Commerce and Industry identified Dr. Al Sulaiti, a "Qatari" national, both as the "merchant" and as the "manager or authorized agent" of QEMS[500].

387. In March 2014 Qatar Pharma converted QEMS into a local establishment. The "Commercial Register Modification Certificate" issued by the Director of the Ministry of Commerce and Investment Office clearly reflects that QEMS is owned by Dr. Al-Sulaiti, "a Qatari citizen"[501]. It follows that at all relevant times Saudi Arabia knew that QEMS was not a Saudi-owned company.

388. Furthermore, the Kingdom has failed to direct the Tribunal to any evidence that there was a misrepresentation regarding the ownership of QEMS[502]; and in any case, the argument is belied by the following facts:

- The company was called "Qatar Pharmaceutical Solutions Establishment"; any Qatari investor, wishing to hide its Qatari origin or ownership, would have avoided a business name with the word "Qatar" in it, which proclaimed its origin *urbi et orbe*;

- No witness in this arbitration has declared that they thought Dr. Al Sulaiti was a Saudi citizen; Dr. Dahhas, who was part of the Executive Directorate of Inspection and Law Enforcement at the SFDA at the time[503], declared under oath at the Hearing that he knew that QEMS was owned by Dr. Al Sulaiti[504].

B. <u>The Scientific Office Licence</u>

389. The Kingdom avers that Claimants acted fraudulently to obtain and maintain a Scientific Office Licence, for the following reasons[505]:

- Qatar Pharma obtained the Licence by identifying two Pharmacists as its "Scientific Office Managers" who, in fact, were not properly employed; if they were properly employed, then Claimants failed on several aspects related to labour law and social insurance;

- Qatar Pharma forged the signatures of the Pharmacists on various documents submitted to the Kingdom; and

- The office space supposedly dedicated to the Scientific Office was just an empty room with one computer, lacking any appropriate medical storage and laboratory equipment.

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[499] **Doc. C-50.**
[500] **Doc. C-50.**
[501] **Doc. C-51.**
[502] R II, para. 315.2.
[503] RWS-1, para. 8.
[504] HT, Day 7, p. 1586, ll. 4-16 (Dr. Dahhas).
[505] See section V.2.1.2A *supra*.

The Saudi Pharmaceutical Law

390. In July 2004, Saudi Arabia passed Royal Decree No. M/31, establishing the Law of Pharmaceutical Institutions and Products ["**Pharmaceutical Law**"][506]. Art. 2 of this Law provides that[507]:

> "No pharmaceutical institution may be opened without having obtained the necessary licence from the Ministry in the name of the owner of the institution."

391. Such licence has a term of five years and may be renewed[508].

392. Art. 3, in turn, establishes that only Saudi Arabian citizens may own pharmacies or institutions for the sale of herbal products or centres for medical consultation and the analysis of pharmaceutical products[509]. The term Saudis includes establishments like QEMS, owned by GCC nationals incorporated in the Kingdom. To obtain a licence the owner (or one of its partners) must be a pharmacist licensed to practice, and the manager of the pharmacy, institution or centre must be a Saudi national who is a full-time pharmacist licensed to practice[510].

393. Pursuant to Art. 6 of the Pharmaceutical Law, a company engaged in the manufacturing of pharmaceutical products must have a factory which is registered in the Kingdom and a scientific office[511]. In its "Guidelines" a scientific office is defined by the SFDA as[512]:

> "[…] a pharmaceutical facility, which provides scientific and technical information and marketing of pharmaceuticals in the Kingdom."

394. The Guidelines provide that the licence for a new scientific office must be obtained through a two-step procedure:

- The first step is the so-called "**Initial Approval**", which is granted upon presentation by the applicant of a series of documents (commercial register, a copy of the deed of the site, a precise location of the facility, a copy of the person responsible for follow-up calls with the SFDA, and a copy of a power of attorney)[513];
- The second step is the "**Licence**"; the applicant must request the Licence before the expiry of the Initial Approval and prove that it has[514]:

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[506] **Doc. RLA-51**.
[507] **Doc. RLA-51**, Art. 2.
[508] **Doc. RLA-51**, Art. 7.
[509] This is defined as: "[…] a pharmaceutical institution which provides medical consultation services, and the analysis of pharmaceutical and herbal products, and the study of bioavailability and equivalence availability, and quality control of medicines; and determining the levels of medicines in biological solutions." (**Doc. RLA-51**, p. 2).
[510] **Doc. RLA-51**, Art. 3.
[511] **Doc. RLA-51**, Art. 6.
[512] **Doc. C-249**, p. 3.
[513] **Doc. C-249**, p. 4.
[514] **Doc. C-249**, pp. 4-5.

- An office capable "to perform its assigned tasks",
- Office equipment needed "to perform its assigned tasks",
- A "convenient place to save the free samples of products", and
- A scientific director who is a "full-time pharmacist" of Saudi nationality licensed to practice.

395. The granting of a Licence for a scientific office is thus conditional on the applicant employing a scientific office manager who is a Saudi national and a full-time pharmacist[515].

Qatar Pharma's obtainment of a Scientific Office Licence

396. The available evidence shows that in 2013 Qatar Pharma (through its local branch, QEMS) leased an office space in Riyadh[516] and filed an application to obtain a Scientific Office Licence. While considering Qatar Pharma's application, the SFDA conducted at least two visits to the Scientific Office, one on 9 June 2013[517] and the other on 16 June 2013[518]:

- In the first of these visits, the SFDA identified a few issues with the office and decided to postpone the approval of the Licence application until these issues had been rectified[519];
- In the second visit, all but two issues had been rectified; thus, the SFDA recommended the approval of the Licence, subject to confirmation that such issues had been resolved[520].

397. Qatar Pharma must have provided such confirmation, since the record shows that on 30 June 2013 the SFDA issued a final Scientific Office Licence, valid until 8 May 2018[521]. Dr. Dahhas, who was part of the Executive Directorate of Inspection and Law Enforcement at the SFDA at the time[522], declared under oath that the Scientific Office Licence had been issued "following a sound procedure" from the SFDA[523].

398. The original Licence does not seem to be available on the record, but there are three amended copies; each copy was issued to reflect a change in the Scientific Office manager[524]:

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[515] **Doc. RLA-51**, Art. 6.
[516] **Doc. C-5**. See also CWS-1, para. 4; **Doc. R-70**; **Doc. R-169**; **Doc. R-170**; **Doc. R-171**; **Doc. C-217**.
[517] **Doc. R-169**. See also RWS-1, para. 29.
[518] **Doc. R-170**. See also RWS-1, para. 29.
[519] **Doc. R-169**, p. 2.
[520] **Doc. R-170**, p. 2. See also HT, Day 7, p. 1502, ll. 5-20 (Dr. Dahhas).
[521] **Doc. C-217**; **Doc. R-70**; **Doc. R-171**; RWS-1, para. 29. See also CWS-3, para. 39.
[522] RWS-1, para. 8.
[523] HT, Day 7, p. 1503, ll. 7-16 (Dr. Dahhas).
[524] See also RWS-1, para. 30.

- In the first copy, dated 3 November 2013[525], the Office manager is identified as Mr. Saleh Abdulrahman Ibrahim Alnabhan (a Saudi national);

- In the second copy, dated 4 March 2014[526], the Office manager is identified as the Saudi pharmacist Mr. Ali bin Saad bin Saad Al Qahtani ["**Mr. Al Qahtani**"]; and

- In the third copy, dated 10 December 2014[527], the Office manager is identified as the Saudi pharmacist Mr. Abdul Karim bin Abdul Rahman bin Saeed Al-Amari ["**Mr. Al-Amari**"].

399. The Kingdom submits that Mr. Al Qahtani (**a.**) and Mr. Al-Amari (**b.**) were not employed by Qatar Pharma and never conducted any meaningful work, with the implication that the Scientific Office Licence was fraudulently obtained[528]. Alternatively, if it is true that Claimants employed the Pharmacists, then it follows that they committed a number of other unlawful acts as a matter of Saudi labour law (**c.**). Finally, the Kingdom says that the Scientific Office was not properly conditioned (**d.**).

a. The Pharmacist Mr. Al Qahtani

400. Mr. Al Qahtani, a Saudi national[529], has been called as a witness by Saudi Arabia, has submitted two witness statements[530], and has also been interrogated at the Hearing by the Parties and the Tribunal[531].

401. In his witness statements, Mr. Al Qahtani has declared that he had recently graduated as a pharmacist, when he was first contacted in early 2014 by Mr. Mohamed Antar (Qatar Pharma's Finance Manager[532]) about a job opportunity at Qatar Pharma[533]. Mr. Antar explained to him that Qatar Pharma was looking to employ a Saudi qualified pharmacist as the manager of the Scientific Office[534]. According to Mr. Al Qahtani, at the time the Scientific Office was a simple office space, with no laboratory equipment or obvious space for storing samples of products[535].

[525] **Doc. R-171.**
[526] **Doc. R-70.**
[527] **Doc. C-217.**
[528] See Respondent's position in section V.2.1.2A *supra*.
[529] RWS-2, para. 5.
[530] RWS-2 (First Witness Statement) and RWS-9 (Second Witness Statement).
[531] HT, Day 6, pp. 1231-1284.
[532] CWS-1, paras. 1-2.
[533] RWS-2, para. 5.
[534] RWS-2, para. 6.
[535] RWS-2, para. 6.

402. Mr. Al Qahtani has admitted that:

- He accepted Qatar Pharma's offer[536], signed an employment contract with Qatar Pharma on 26 February 2014[537], was paid throughout his employment[538], and left the job after six or seven months[539];

- He signed an application on behalf of QEMS to permit the renewal of its Scientific Office Licence on 6 February 2014[540]; the application, which is available on the record, shows that Dr. Al Sulaiti clearly informed the SFDA that[541]:

  "Pharmacist Ali Bin Saad Bin Saad Al Qahtani has been appointed as the Scientific Office Manager of Qatar Establishment for Medical Solutions' Branch - Qatar Pharma with ID No. 1073446294, Professional Registration Card No. 13-R-P-0046620."

- He was "not surprised" that his name appeared in the amended Scientific Office Licence dated 4 March 2014, since he[542]:

  "[…] knew that Qatar Pharma intended to use [his] credentials as a qualified pharmacist in Saudi Arabia, and as a Saudi national, in order to help them to get the licence."

403. However, Mr. Al Qahtani:

- Denies that he performed any meaningful work for Qatar Pharma[543]; and

- Notes that he was shown two letters addressed to the Director General of the General Directorate of Medical Supplies at the Mecca Health Department dated 10 November 2014 which feature his name, but a signature which is not his[544]; and that he never authorized other Qatar Pharma's employees to sign these letters on his behalf[545].

404. As to the first argument, Mr. Al Qahtani has not been able to identify which precise functions he was supposed to be performing and was not performing[546]. In any case, Mr. Al Qahtani admitted under oath at the Hearing that he in fact had dealings with the SFDA on behalf of Qatar Pharma because he had been designated as the person in charge of the relationship[547]. And *in tempore insuspecto* the SFDA never complained to Qatar Pharma that any work which should have been performed by a Saudi-licensed pharmacist was not being properly performed.

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[536] RWS-2, paras. 7-8.
[537] RWS-9, para. 5. See **Doc. C-367.**
[538] HT, Day 6, p. 1248, ll. 13-20 (Mr. Al Qahtani).
[539] RWS-2, para. 8.
[540] RWS-9, para. 6; HT, Day 6, p. 1248, l. 21 to p. 1249, l. 3 (Mr. Al Qahtani). See **Doc. C-418.**
[541] **Doc. C-418.**
[542] RWS-2, para. 9.
[543] RWS-2, paras. 7-8.
[544] **Doc. C-421; Doc. C-422.**
[545] RWS-9, paras. 7-8.
[546] HT, Day 6, p. 1265, l. 22 to p. 1270, l. 19 (Mr. Al Qahtani).
[547] HT, Day 6, p. 1249, l. 4 to p. 1250, l. 7 and p. 1261, l. 1 to p. 1262, l. 13 (Mr. Al Qahtani).

405. As to the second argument, the Tribunal notes that the two 2014 letters are purely formal: in both Qatar Pharma simply requests a meeting with the Director General of the Mecca and the Jeddah Medical Supplies Department, in which Dr. Al-Sulaiti was to lead the Qatar Pharma team, which would also comprise Mr. Al Qahtani[548].

b. The Pharmacist Mr. Al-Amari

406. Mr. Al-Amari (sometimes spelled Al-Emari), a Saudi national[549], has also been called as a witness in these proceedings by Saudi Arabia, has submitted two witness statements[550], and has also been interrogated at the Hearing by the Parties and the Tribunal[551].

407. Mr. Al-Amari, a qualified and licensed pharmacist[552], has testified that his relationship with Qatar Pharma began "in late 2014", when he was told that Qatar Pharma was looking to employ "a Saudi licensed pharmacist"[553].

The employment contract

408. Mr. Al-Amari has repeatedly testified that he had an "informal arrangement"[554] and he never signed an employment contract with Qatar Pharma[555].

409. Claimants, however, have produced on the record an employment contract dated 27 November 2014, pursuant to which Qatar Pharma employed Mr. Al-Amari as "Pharmacist (Director of the Scientific Office)", in exchange for a monthly salary of SAR 6,000[556].

410. Mr. Al-Amari denies that it is his signature that appears at the bottom of this employment contract[557]. Several other contemporaneous documents seem to call this statement into question:

411. First, the evidence shows that Qatar Pharma paid Mr. Al-Amari a monthly sum of SAR 6,000 (*i.e.*, the amount defined in the employment contract) from 3 February 2015 to 3 October 2017[558]; the Kingdom and Mr. Al-Amari have failed to point to any evidence that these sums were ever returned.

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[548] **Doc. C-421.**
[549] RWS-3, para. 5.
[550] RWS-3 (First Witness Statement) and RWS-11 (Second Witness Statement).
[551] HT, Day 6, pp. 1285-1341.
[552] RWS-3, para. 5.
[553] RWS-3, para. 6. See also HT, Day 6, p. 1292, l. 24 to p. 1293, l. 7 (Mr. Al-Amari).
[554] RWS-3, paras. 7, 9. See also HT, Day 6, p. 1289, l. 23 to p. 1290, l. 10 and p. 1293, l. 21 to p. 1294, l. 4 (Mr. Al-Amari).
[555] RWS-3, para. 9: "I was never an employee of Qatar Pharma" and para. 14: "It became clear to me that Qatar Pharma had no intention of offering me a formal, permanent role. I cannot recall exactly when I stopped my informal arrangement with them but I think it was in around mid-2016. I stopped accepting calls from Qatar Pharma in around the beginning of 2017, and I have not been in contact with them since". See also RWS-11, paras. 5-7.
[556] **Doc. C-368**, Clauses First and Fourth.
[557] RWS-11, para. 5: "The signature which is at the bottom of the employment contract looks to me like an attempt at imitating my real signature. I confirm that this is not my handwriting and I did not sign it."
[558] **Doc. C-415**; **Doc. R-191**, pp. 33 *et seq.* (Bank account ending in 2219940). See also HT, Day 6, p. 1297, l. 24 to p. 1315, l. 3 (Mr. Al-Amari).

412. Mr. Al-Amari, while confirming that he had received payments from Qatar Pharma between 2015 and 2017, argues that these were payments for work performed on an "*ad hoc* basis", upon the provision of services[559]. But the evidence does not support Mr. Al-Amari's averment: the recurrency and the dates of the payments are consistent with the payment of a monthly salary – not with "*ad hoc*" payments; Mr. Al-Amari has also not been able to specify the precise services that he was allegedly performing on an *ad hoc* basis.

413. Second, there is a document from Qatar Pharma's human resources and administration department that shows that Mr. Al-Amari started working effective as of 20 December 2014[560]. The Tribunal notes that the first payment made to Mr. Al-Amari on 3 February 2015 was for SAR 8,710, which would roughly correspond to the pro-rata of his salary for ten days in December 2014 plus the month of January 2015[561].

414. Third, there is an authorization sent by Dr. Al Sulaiti on behalf of Qatar Pharma to the SFDA on 25 October 2016 in which he authorises Mr. Al-Amari to act as "an agent for the company before the SFDA"[562].

415. Fourth, in November 2016 Mr. Al-Amari sent several emails related to a visit of the SFDA to the Scientific Office, which he signed as "Manager of the Scientific Office"[563].

416. Finally, there is a document which shows that from 5 to 8 December 2016 Mr. Al-Amari participated in a one-week training programme at Qatar Pharma's facilities in Doha[564]. Mr. Al-Amari himself has produced a hotel reservation that shows that he was indeed in Doha on those same dates[565] – although he has denied that the purpose of his visit was to attend a course at Qatar Pharma[566]. His testimony is contradicted by that of Dr. Jaffar (General Manager of Qatar Pharma in Doha), who claims that he organized the training, and that Mr. Al-Amari did attend it[567].

The designation as Scientific Office Manager

417. Mr. Al-Amari has also denied that he was aware that Qatar Pharma's Scientific Office Licence designated him formally as manager[568]. However:

- The copy of the Scientific Office Licence dated 10 December 2014[569] was issued by the SFDA, after Mr. Al-Amari had already formally signed his

[559] RWS-11, para. 8.
[560] **Doc. C-414.**
[561] **Doc. R-191**, p. 33 (Bank account ending in 2219940).
[562] **Doc. C-419.**
[563] **Doc. C-369.**
[564] **Doc. C-370.**
[565] **Doc. R-210.**
[566] RWS-11, para. 10.
[567] CWS-9, para. 34.
[568] RWS-3, para. 12.
[569] As Mr. Al-Amari himself acknowledges (RWS-3, para. 15(a)).

employment contract with Qatar Pharma, in which he is expressly designated as "Director of the Scientific Office"[570];

- Mr. Al-Amari signed emails in which he identified himself as "Manager of the Scientific Office"[571].

Mr. Al-Amari's employment with the Ministry of Health

418. From the evidence given at the Hearing, it has also transpired that while employed by Qatar Pharma, Mr. Al-Amari was simultaneously working for the Saudi Minister of Health – a post where he remained until 2022 (once this arbitration was already ongoing)[572]. This fact, which he apparently failed to disclose to Claimants[573] (there is no evidence that he did), further undermines the reliability of his testimony.

The Disputed Letters

419. The Kingdom has identified 24 letters [the "**Disputed Letters**"], sent by QEMS, which state that they were signed by Mr. Al-Amari, as Director of the Scientific Office, on behalf of QEMS, but which, in the Kingdom's submission, were actually signed by Mr. Mohamed Antar, Qatar Pharma's Financial Manager, by appending his own signature (not by forging that of Mr. Al-Amari)[574].

420. In Annex A to its PHB the Kingdom has reproduced Mr. Antar's admitted signature, as shown in his first witness statement, and the signatures appearing on the Disputed Letters. During the Hearing Mr. Antar was explicitly asked regarding the authorship of the signature on one of the Letters[575] and he confirmed that it was indeed his signature[576]; Mr. Al-Amari denied that the signature on several of these Letters was his[577]. Although none of the Parties has submitted a calligraphic expert report, a cursory review by the non-expert eyes of the Tribunal seems to show that the signatures which appear on the Disputed Letters are those of Mr. Antar – while the name of the signatory is identified as that of Mr. Al-Amari.

421. The Kingdom says that Claimants corresponded with the Kingdom's authorities under Mr. Al-Amari's name, but without his knowledge or permission, and that Mr. Antar[578]:

> "[…] was responsible for forging a large number of letters purporting to come from QEMS's 'pharmacists' for the purpose of deceiving the Kingdom's authorities."

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[570] **Doc. C-368.**
[571] **Doc. C-369.**
[572] HT, Day 6, p. 1290, l. 24 to p. 1292, l. 3 (Mr. Al-Amari).
[573] CPHB, para. 178.
[574] See Annex A to RPHB and **Doc. R-5.**
[575] Dated 18 March 2018 (**Doc. C-155**).
[576] HT, Day 4, p. 938, ll. 5-21 (Mr. Antar). See also CWS-6, para. 141.
[577] RWS-11, paras. 9-11.
[578] RPHB, para. 56.3(2).

No forgery, no deceit

422. The Tribunal, by majority, finds that a careful analysis of the Disputed Letters and the surrounding circumstances disavows the Kingdom's allegation: there was no forgery, and the Kingdom's authorities were not deceived.

423. First, the Disputed Letters, which span a period from August 2016 through March 2018, and which were all (except four) voluntarily submitted by Claimants, can be divided into three categories:

- Four letters sent by QEMS to the Ministry of Health in August, September and October 2017 and in March 2018[579], in which Mr. Antar (assuming the signature to be his) signs "for" Mr. Al-Amari[580];
- Two sets of requests for registration of products, one dated 10 August 2016[581] and the other 1 January 2017[582], in which Mr. Antar (assuming the signature to be his) signs on behalf of Mr. Al-Amari; but the expression "for" seems to have been omitted; and
- Four letters from QEMS to the SFDA[583], in August and September 2017, again signed by Mr. Antar (assuming the signature to be his) on behalf of Mr. Al-Amari, apparently without the expression "for".

424. During this period, QEMS must have sent hundreds of letters and requests to the Saudi authorities. The Kingdom, who has access to the totality of documents submitted by QEMS to the Saudi Authorities, has failed to present any further documents in which Mr. Antar (or any other officer of QEMS) purportedly signed on behalf of Mr. Al-Amari. The assumption must consequently be that no further documents with these characteristics exist.

425. Second, Mr. Antar has explained that he signed the documents "on behalf" of Mr. Al-Amari[584].

426. Third, it was the practice of the Ministry of Health and the SFDA to refuse correspondence signed by foreigners, even if issued on behalf of a Saudi company as QEMS (a practice consistent with the authorities' refusal to receive visiting foreign suppliers unless accompanied by a Saudi national)[585]. To comply with this customary requirement, all Disputed Letters state that the signatory on behalf of QEMS was Mr. Al-Amari, the Saudi national who acted as Manager of the Scientific Office.

427. Fourth, contrary to the Kingdom's arguments, the Disputed Letters were not "forged". These were genuine documents issued on behalf of QEMS, which QEMS

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[579] **Docs. C-94, C-95, C-289, C-155.**
[580] **Doc. C-155**: the English translation does not have the word "for" but Mr. Antar testified that in the original the expression used is "*an'hu*" which means "on behalf of" (HT, Day 4, p. 928, ll. 16-18); the statement has not been contradicted by Respondent. See also CWS-4, para. 53.
[581] **Docs. C-266, C-267, C-268, C-269, C-270, C-271, C-272, C-273, C-274, C-275.**
[582] **Docs. C-265, C-276, C-277, C-278, C-279, C-280.**
[583] **Doc. R-5.**
[584] HT, Day 4, p. 928, l. 5 to p. 941, l. 15 (Mr. Antar).
[585] CPHB, para. 178; HT, Day 4, p. 939, ll. 2-18 and p. 941, ll. 2-15 (Mr. Antar).

has never disavowed. The Kingdom does not allege that there is in any falsehood or inaccuracy in the content of the Letters, thus accepting that these were proper and legitimate communications sent by QEMS to the Saudi authorities.

428. Fifth, as regards the Letter to the Ministry of Health issued in March 2018[586] (*i.e.*, well after the enactment of the Measures) Mr. Antar has explained that at that time QEMS had no Saudi employees, because all of them had left. This is why he signed the letter, which were simple cover letters attaching a statement of account, and he did so on behalf of Mr. Al-Amari, without Mr. Al-Amari (who at that time was no longer employed by QEMS) having seen the document or given his authorization[587].

c. Other allegedly unlawful acts

429. The Kingdom argues that if it is true that Claimants employed the two Pharmacists, then it follows that Claimants committed "a number of other unlawful acts as a matter of Saudi law"[588].

430. First, the Kingdom says that Claimants failed to register their alleged employees and their alleged employment contracts with the Saudi Ministry of Human Resources and Social Development, as they were required to do by law. Further, under Arts. 51 and 52 of the Saudi Labour Law all employment contracts must be documented in writing, must follow an approved template, must include certain information[589] and must be registered electronically[590].

431. Arts. 51 and 52 of the Saudi Labour Law do indeed prescribe that a work contract must be signed in duplicates and "either party may at any time demand that the contract be in writing"[591]. Furthermore[592]:

> "The work contract shall primarily include the name of the employer, venue, the name of the worker, nationality, identification, wage agreed upon, type and location of work, date of employment, duration of the contract if fixed, subject to the provisions of Article 37 of this Law."

432. Both employment contracts signed between the Pharmacists and Qatar Pharma comply with the Labour Law requirements: they are in writing, they were made in two original copies, and they include all the mandatory provisions described in the Labour Law[593].

433. As to the other requirements pointed out by the Kingdom, the Kingdom has failed to show that they were in effect at the time that the contracts with the Pharmacists were signed; and, in fact, it seems that the obligation to register employment

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[586] **Doc. C-155.**
[587] HT, Day 4, p. 939, l. 25 to p. 940, l. 6 (Mr. Antar).
[588] R II, para. 312.
[589] R II, para. 312.1, referring to **Docs. RLA-290** and **RLA-292.**
[590] R II, para. 312.2, referring to **Doc. RLA-291.**
[591] **Doc. RLA-292**, p. 22.
[592] **Doc. RLA-292**, p. 22.
[593] **Doc. C-367** (Mr. Al Qahtani); **Doc. C-368** (Mr. Al-Amari).

contracts electronically was only enacted in 2019[594] – two years after the Kingdom had already adopted the Measures.

434. Second, Saudi Arabia argues that Claimants failed to register the Pharmacists with the General Organization for Social Insurance[595]. Claimants, however, have produced on the record several certificates issued in 2016, in which the General Organization for Social Insurance[596]:

> "[…] certifies that the aforementioned establishment [QEMS] has fulfilled its obligations towards the General Organization for Social Insurance, according to the information it had submitted as of the date of issuance of this certificate […]"

435. Finally, the Kingdom submits that Claimants also failed to submit to the competent labour office certain information, including the number of employees, and details of their respective employment relationship, as required under Arts. 15 and 25 of the Saudi Labour Law[597].

436. Here again, the available evidence seems to contradict the Kingdom's averment. Claimants have produced a certificate issued by the Saudi Ministry of Labour, which attests that QEMS had achieved the required "Saudization percentages"[598]. Likewise, the certificates issued by the General Organization for Social Insurance indicate how many Saudis and non-Saudis are employed by QEMS[599].

d. The conditions of the Scientific Office

437. Finally, the Kingdom argues that, as part of the alleged fraud to obtain a Scientific Office Licence, Qatar Pharma hired a bare office space, without appropriate medical storage and laboratory equipment[600].

438. The evidence on which the Kingdom relies to make this assertion is the witness statement of Mr. Al Qahtani, who says that[601]:

> "I recall that the office just looked like an ordinary, bare office with a laptop. There was no laboratory equipment or obvious place for storing samples of products."

439. The Kingdom's position is unconvincing for two reasons.

440. First, a scientific office is defined by the SFDA as[602]:

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[594] **Doc. RLA-291.**
[595] R II, para. 312.3.
[596] **Doc. C-413**, p. 21; **Doc. C-484**; **Doc. C-485.**
[597] R II, para. 312.4.
[598] **Doc. C-413**, p. 15.
[599] **Doc. C-413**, p. 21; **Doc. C-484**; **Doc. C-485.**
[600] R I, para. 342.3; R II, para. 310.3.
[601] RWS-2, para. 6, cited in R I, para. 113.2.
[602] **Doc. C-249**, p. 3.

> "[…] a pharmaceutical facility, which provides scientific and technical information and marketing of pharmaceuticals in the Kingdom." [Emphasis added]

441. A facility focused on providing "information and marketing" does not require any particular laboratory or technical equipment. The Kingdom points the Tribunal to Chapter 4 of the SFDA's Investor Guide to the Scientific Office Licensing Regime – a document which was only issued in 2018, after the adoption of the Measures. But this Guide only states that to obtain a Scientific Office Licence[603]:

> "1. The scientific office shall contain mechanical offices to do the assigned tasks.
>
> 2. The scientific office shall contain preparation and necessary references to do the assigned tasks.
>
> 3. There shall be specified and appropriate place to store the free samples of the registered products according to the technical principals of storage.
>
> 4. The office manager shall be Saudi and free pharmacist who is licensed to do the job."

442. There is no mention of laboratory equipment or large medical storage (only storage necessary to store "free samples"). In fact, contrary to a warehouse, the purpose of a scientific office is not to store pharmaceutical products, and for this reason the SFDA only conducts inspections when there is a specific need[604].

443. Second, and in any case, the SFDA conducted several inspections of the Scientific Office, signalled several issues and eventually granted a final Scientific Office Licence to Qatar Pharma. Dr. Dahhas has testified under oath that the Licence had been issued "following a sound procedure" from the SFDA[605]. It follows that the SFDA must have been satisfied that the Scientific Office's facilities complied with the necessary requirements – otherwise, it would not have granted a Licence.

C. The Warehouses

444. The Kingdom argues that Claimants operated their Warehouses unlawfully because they lacked the necessary SFDA Licences[606].

The Saudi Pharmaceutical Law

445. To obtain a Licence to open and operate a warehouse for pharmaceutical products, Art. 4 of the Pharmaceutical Law establishes that[607]:

> "a) The applicant must be a Saudi national, and if the applicant is an individual, he must be at least 21 years of age.

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[603] **Doc. R-144**, Chapter 4, p. 6.
[604] HT, Day 7, p. 1543, l. 3 to 1544, l. 25 and p. 1545, l. 18 to p. 1546, l. 21 (Dr. Dahhas); HT, Day 8, p. 1630, l. 22 to p. 1631, l. 10 (Dr. Dahhas).
[605] HT, Day 7, p. 1503, ll. 7-16 (Dr. Dahhas).
[606] R I, para. 345; R II, para. 311; RPHB, paras. 58-60.
[607] **Doc. RLA-51**, Art. 4.

b) [The applicant] must not have any prior convictions for a crime impugning honour or integrity, unless he has been rehabilitated.

c) The manager of the warehouse must be a Saudi national who is a full-time pharmacist or a pharmacy technician licensed to practice.

d) The conditions and specifications which are set out in the regulation must be satisfied in the warehouse." [Emphasis added]

446. There are again two steps to obtain a Warehouse Licence: first the applicant must obtain an Initial Approval, and before the end date of expiry of such Initial Approval the applicant must request a License, proving that a number of requirements have been fulfilled, including[608]:

- The appointment of a full-time Saudi manager for the warehouse, who must be a pharmacist or a pharmacy technician,
- The obtainment of a municipal licence and a civil defence licence, and
- The compliance with certain technical requirements (air conditioning, humidity, electronic measurement system…).

447. It is undisputed that Qatar Pharma first operated from its Riyadh Warehouse, and that in 2016 it decided to lease a new Warehouse in Dammam (a city geographically remote from Riyadh and close to the Bahraini border) and another one in Jeddah (a city close to Mecca, where Hajj pilgrims flow every year)[609]. According to Dr. Al Sulaiti, Saudi officials incited him to open these two Warehouses to cater to local populations[610].

448. It is also a fact that Qatar Pharma openly disclosed to the SFDA and to the other Saudi authorities that it was operating out of three Warehouses in Riyadh, Dammam and Jeddah – for example when in October 2016 Qatar Pharma registered as a vendor with the Kingdom's National Guard Health Affairs, it identified precisely these Warehouses[611]. The SFDA not only was aware of this situation, but it regularly inspected the Warehouses and Dr. Dahhas, Executive Director of Inspection and Law Enforcement at the SFDA at the time of the relevant facts[612], has declared under oath in the Hearing that there was never any SFDA investigation regarding irregularities committed by Qatar Pharma[613].

449. That said, the documentary evidence in the arbitration file regarding the specific Initial Approvals and Warehouse Licences issued to each of the premises is limited:

- The corporate documentation was consolidated at the Riyadh Warehouse after the issuance of the Measures;

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[608] **Doc. C-248**, p. 1.
[609] CPHB, para. 58.
[610] CWS-3, paras. 46-47.
[611] **Doc. C-413**, p. 2.
[612] RWS-1, para. 8.
[613] HT, Day 7, p. 1503, ll. 7-16 (Dr. Dahhas).

- The Riyadh Warehouse seems to have been looted between the Measures and the moment Deloitte accessed it in the course of this arbitration; and

- The Kingdom, which must have a complete documentary record, has also not marshalled any evidence.

a. The Riyadh Warehouse

450. As regards the Riyadh Warehouse, the Initial Approval granted by the SFDA is not in the case file. What Claimants have been able to present are the following authorizations:

- A 2013 Business Activity Licence for a "shop location" granted by the Riyadh Region Municipality, on Prince Abdul-Aziz bin Musaed bin Jalawi Street in the Al Murabba District, with an area of 235 square meters[614];

- A 2016 Civil Defence Certificate issued by the Saudi Ministry of Interior[615]; and

- An April 2017 SFDA Licence[616].

451. The file also shows that in December 2016 the SFDA conducted an inspection to a QEMS warehouse located on the Al Dar Al Baida District, on Al-Kharj Road, concluding that there was the need for some improvements, including for monitoring the temperature of products[617]. After several exchanges of information with Qatar Pharma, in April 2017 the SFDA considered that the Warehouse had fixed most of the issues and was satisfied that a Licence could be issued[618].

452. Summing up, the available documents show that the SFDA was aware that QEMS was using its Riyadh Warehouse, inspected the premises and in due course issued its Licence. There is no evidence that Qatar Pharma incurred in any illegality as regards the Riyadh Warehouse.

b. The Dammam Warehouse

453. On 24 May 2016 QEMS signed a lease agreement for the Dammam Warehouse, valid for a term of one year, until May 2017[619], fitted the Warehouse with storage racks, cooling units, electricity and forklifts[620], and started the process to obtain an SFDA Licence.

454. At some point in time (although it is unclear when), the Dammam Warehouse obtained an Initial Approval from the SFDA, set to expire by 29 June 2017[621].

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[614] **Doc. C-403.**
[615] **Doc. C-44.**
[616] **Doc. C-216.**
[617] **Doc. R-1.** See also RWS-1, para. 31.
[618] **Doc. R-114**; **Doc. R-115**; **Doc. R-117.** See also RWS-1, para. 32.
[619] **Doc. C-41.** See also CWS-3, para. 47; **Doc. H-5**, slide 15.
[620] **Doc. C-464**, photograph of the Dammam Warehouse dated 21 November 2016. See also CWS-3, paras. 46-47.
[621] **Doc. C-479.**

Claimants have submitted a 2016 Civil Defence Certificate issued by the Saudi Ministry of the Interior[622].

455. In December 2016 the SFDA undertook an inspection of the Dammam Warehouse, noting that the Warehouse was in use[623] and thereafter issued a "Violation Control Report" for "practicing activity without licence"[624]. The "Violation Control Report" did not give rise to any sanction – the Warehouse was in possession of an Initial Approval, which was valid until 2017, and which authorised its provisional activity.

456. At the Hearing, Dr. Dahhas (Executive Director of Inspection and Law Enforcement at the SFDA) was interrogated about this "Violation Control Report". He declared that he personally took the decision not to seize products from the Dammam Warehouse, because the Report had not identified any failures regarding the quality or storage of the products[625]. Although Dr. Dahhas was not responsible for granting Licences, he noted that the Licence Department did not revoke the Dammam Warehouse's Initial Approval[626]:

> "[…] because we made the request to encourage the company to make the necessary steps to get the final licence. […] The letter that was issued by the inspection directorate addressing the licensing department said that to encourage the company to get all the necessary licensing so that the products are not impacted by the lack of the [final] licence."

c. The Jeddah Warehouse

457. Around the same time, Qatar Pharma opened its Jeddah Warehouse. Claimants have submitted the following authorizations:

- A 2016 "Shop Opening Licence" for a "Warehouse for human drugs and herbal and health products" issued by the Secretariat of the Province of Jeddah[627];
- A 2016 Registration Certificate for a Warehouse No. 53, located on "Haraj Al-Sawarikh", for the "Wholesale and retail trade in medical products and equipment and medical supplies" issued by the Saudi Ministry of Commerce and Industry[628];
- A January 2017 SFDA Initial Approval to operate a Warehouse in Jeddah, valid until 23 June 2017[629].

458. There is no irregularity with regard to the Jeddah Warehouse.

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[622] **Doc. C-45.**
[623] **Doc. R-109.**
[624] **Doc. R-110.**
[625] HT, Day 7, p. 1568, l. 23 to p. 1570, l. 23 (Dr. Dahhas).
[626] HT, Day 7, p. 1571, ll. 11-22 (Dr. Dahhas).
[627] **Doc. C-47.**
[628] **Doc. C-46.**
[629] **Doc. C-409.**

D. Discussion

459. After carefully analysing the arguments submitted and the evidence marshalled by the Kingdom, the Tribunal, by majority, finds that the Kingdom has failed to prove that Claimants have committed a breach of municipal law. Further, the Tribunal unanimously finds that there was no breach of municipal law of such seriousness as to deserve to be sanctioned with the inadmissibility of their claims. The Tribunal finds the following reasons compelling:

a. Lack of claims *in tempore insuspecto*

460. First, Dr. Al Sulaiti performed his investment activities in the Saudi health sector in open daylight and under full scrutiny, inviting Saudi authorities to participate in the inauguration of his premises and factories in Qatar[630], and he repeatedly travelled to the Kingdom, to meet authorities and introduce his products[631]. It is telling that *in tempore insuspecto* none of the multiple Saudi authorities involved in the health sector, which repeatedly granted authorizations to QEMS and performed inspections of its premises[632], raised any of the complaints which the Kingdom is now submitting.

461. The fact that the Kingdom has brought up these allegations for the first time in this arbitration, and for the purpose of supporting a defence that Claimants' claims are inadmissible, undermines the persuasiveness of the Kingdom's claims.

b. Banaja and QEMS

462. Second, the Kingdom's allegation that Claimants failed to register the Banaja agency agreement or the QEMS licensing agreement and Claimants' alleged misrepresentation that QEMS was a Saudi company, remain unproven. Indeed, the Kingdom's allegations on this point were scarce (Respondent only referred to this issue in one paragraph in its second written submission[633]) and not supported by documentary evidence.

c. The Scientific Office and the two Pharmacists

463. Third, as regards the two Pharmacists employed by QEMS at its Scientific Office, they were engaged precisely to comply with Saudi law, which specifically requires the creation of such an Office and the hiring of a Saudi pharmacist to lead it. The evidence shows that QEMS properly engaged the two Pharmacists, that it signed employment contracts with them and that they performed the two activities which Saudi practice requires them to perform: to sign documents addressed to the Saudi authorities, and to accompany non-Saudi persons, like Dr. Al Sulaiti, when visiting Saudi authorities. The designation of Mr. Al Qahtani and Mr. Al-Amari was duly communicated to the SFDA, and the SFDA did not raise any issue. Mr. Al-Amari was simultaneously employed by the Ministry of Health – a fact which the authorities must have known, and about which they did not complain.

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[630] CWS-3, paras. 18-22, 29, 31-33; CWS-8, para. 8; **Doc. C-325.**
[631] CWS-3, paras. 23, 26-28, 34-35.
[632] **Doc. C-45**; **Doc. C-47**; **Doc. C-409**; CWS-4, para. 16.
[633] R II, para. 315.

464. The Kingdom also avers that Claimants, when employing the two Pharmacists, breached Saudi labour and social security law, and that the Scientific Office lacked appropriate medical storage and laboratory equipment. The Tribunal has carefully studied these claims and has dismissed them as unsubstantiated[634].

465. That said, even if these accusations had been proven (*quod non*), the alleged minor irregularities of labour, social security and administrative law would not in any case have constituted a breach of such seriousness as to deserve the sanction that the Tribunal declare Claimants' claims inadmissible[635].

The Disputed Letters

466. The Kingdom has drawn the Tribunal's attention to the so-called Disputed Letters (four Letters addressed to the Ministry of Health, four to the SFDA, and two sets of requests for registration, in a span of 17 months), averring that Mr. Antar (Qatar Pharma's Finance Manager) "was responsible for forging a large number of letters purporting to come from QEMS's 'pharmacists' for the purpose of deceiving the Kingdom's authorities"[636].

467. In the view of the Tribunal, by majority, a careful review of the available evidence does not support Respondent's allegation that QEMS forged the Disputed Letters for the purpose of deceiving the Kingdom's authorities. The preparation and issuance of the Disputed Letters did not involve any kind of forgery – Mr. Al-Amari's signature was never forged. And the Kingdom's authorities were most certainly not deceived by the Letters – the Kingdom is not claiming that the content of the Disputed Letter was in any way untrue or dishonest, nor does QEMS allege not to be bound by these Letters.

468. What in fact happened is much simpler: to comply with Saudi administrative practice, which required that a Saudi national sign any official communication, the Letters stated the name of Mr. Al-Amari as the officer who was signing on behalf of QEMS, while who actually signed appears to have been Mr. Antar (a non-Saudi), acting on behalf of Mr. Al-Amari. Mr. Al-Amari denies that he gave his consent for Mr. Antar to sign on his behalf; that said, in the view of the Tribunal, by majority, Mr. Al-Amari is not a very credible witness, since he repeatedly contradicted himself during his examination.

469. Does this practice constitute a serious breach of Saudi laws and regulations, which deserves that Claimants' claims be declared inadmissible *ab initio*?

470. The Kingdom has not drawn the Tribunal's attention to any specific provision in Saudi law that would have been breached by Claimants' practice; the Kingdom has simply referred to forgery and deceit – and the Tribunal has already found that Claimants' practice did not amount to forgery (since Mr. Al-Amari's signature was not forged by Mr. Antar) or deceit of the Saudi authorities (since the content of the Letters was accurate). In the Tribunal's opinion, what the practice shows is a certain administrative sloppiness by Claimants: if Mr. Al-Amari was indeed authorizing

[634] See paras. 429-436 *supra*.
[635] See paras. 362-365 *supra*.
[636] RPHB, para. 56.3(2).

Mr. Antar to sign on his behalf, the power of attorney should have been formalized in writing – and there is no indication that Qatar Pharma adopted this practice.

471. The Kingdom, however, has put much emphasis on a letter signed by Mr. Antar on behalf of Mr. Al-Amari in March 2018[637] – *i.e.*, after the adoption of the Measures by the Kingdom – which could not have been authorized by Mr. Al-Amari, who had ceased to work for QEMS months before; and Mr. Antar has indeed acknowledged that he signed without the Pharmacist's knowledge or authorization[638].

472. Mr. Antar was cross-examined at the Hearing on this point and gave his explanation for what had occurred[639]. Mr. Antar was in a predicament akin to *force majeure*: by March 2018, and because of the Measures, all Saudi employees of QEMS had left (including Mr. Al-Amari) and the Saudi authorities had stopped payment of all invoices. Mr. Antar, as Financial Manager, legitimately wished to draw the Ministry of Health's attention to the outstanding statement of account. Any letter not signed by a Saudi national would have been disregarded – yet no Saudi was working for QEMS. In this quandary, Mr. Antar opted to sign on behalf of Mr. Al-Amari, although he lacked an authorization to do so. That said, his efforts were in vain: the Ministry of Health did not pay the outstanding amounts, and these will have to be adjudicated in this Award.

473. In sum, the Tribunal finds that the Kingdom has failed to prove that Mr. Antar's conduct as regards the Disputed Letters amounts to a breach of Saudi law of such seriousness that it would merit that the totality of Claimants' claims become inadmissible.

d. The Warehouses

474. Fourth, the Kingdom says that Claimants operated their Warehouses unlawfully, because they lacked the necessary SFDA Licenses.

475. The Tribunal dismisses the Kingdom's allegation.

476. Qatar Pharma openly disclosed to the SFDA and to the other Saudi authorities that it was operating out of three Warehouses, in Riyadh, Dammam and Jeddah. Although the documentary evidence in the arbitration file regarding the specific Initial Approvals and Warehouse Licences issued to each of the premises is sketchy (after the adoption of the Measures, the corporate documentation was consolidated at the Riyadh Warehouse, that appears to have been looted in the meantime, and the Kingdom, who must have a full documentary record, has chosen not to submit any evidence on the topic), the Tribunal is satisfied that the three Warehouses were duly disclosed to and inspected by the SFDA, and that they obtained Initial Approvals or Licenses which permitted their operation.

[637] **Doc. C-155.**
[638] HT, Day 4, p. 939, l. 21 to p. 940, l. 6 (Mr. Antar).
[639] HT, Day 4, p. 938, l. 5 to p. 942, l. 25 (Mr. Antar).

3.3 CONCLUSION

477. Art. 9 of the OIC Agreement creates an explicit "legality requirement": the rule does not simply ask that the investment be "made in accordance with the host State's law", but actively requires the investor to respect municipal law, public order, morals and public interest. The legality requirement covers not only the establishment of the investment, but also the post-investment phase and implies that serious violations of municipal law committed by an investor (like bribery, corruption, money laundering, violations of international human rights, criminal offenses, forgery, fraud, serious misrepresentations, serious breaches of administrative, tax or environmental laws) will result in the investor's claims being declared inadmissible.

478. Minor breaches of municipal law, however, should not lead to the *ex ante* dismissal of claims, but should be considered together with the merits, and be taken into consideration when assessing damages and costs[640].

479. *In casu*, the Tribunal finds that the Kingdom has failed to direct it to evidence that Claimants have committed a serious breach of municipal law that deserves to be sanctioned with the inadmissibility of their claims[641]. Therefore, the Kingdom's objection is dismissed.

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[640] **Doc. RLA-255**, Dumberry, p. 243.

[641] Professor Ziadé disagrees with the view expressed by the majority of the Tribunal that the Claimants' breaches of Saudi laws and regulations were insignificant. Though he agrees with his colleagues that the breaches do not reach the threshold that would lead to the inadmissibility of the Claimants' claims, he believes that their seriousness should result in the moderation of the quantum:

"Pursuant to Article 3(b) of the Saudi Law of Pharmaceutical Institutions and Products of 2004, the manager of a pharmacy 'must be a Saudi national who is a full-time pharmacist licensed to practice.' The two Saudi pharmacists sequentially employed in the Scientific Office, Mr. Al Qahtani and Mr. Al Amari, stated that they did not do any work for Qatar Pharma, and the Claimants did not disprove their statements by producing e-mails and other communications showing that they undertook substantive work. As a matter of fact, Mr. Al Amari, while employed by Qatar Pharma, was simultaneously working for the Saudi Ministry of Health.

Mr. Al Qahtani claimed that the signatures accompanying his name in two letters of 10 November 2014 were not his, and that he had never seen the two letters at the time nor given his permission for any Qatar Pharma employee to sign any documents on his behalf. His version is credible. As Mr. Al Qahtani started working for Qatar Pharma 'in around February 2014' and 'left after about six or seven months,' [RWS-2, para.8], it is very unlikely that he was still working with Qatar Pharma in November 2014. In addition, Mr. Al Qahtani's signatures of his First Written Statement [RWS-2, p.3] and his Second Written Statement [RWS-9, p.4], as well as in his employment contract of 26 February 2014 with QEMS [Doc. C-367, p.5] and the application by QEMS to renew its Scientific Office dated 6 February 2014 [Doc. C-418, p. 20], are identical. By contrast, the signatures accompanying Mr. Al Qahtani's name in the two contested letters of 10 November 2014 differ significantly. He obviously did not personally sign the two letters, and the Claimants have not provided evidence to the effect that Mr. Al Qahtani had authorized his former colleagues in Qatar Pharma to sign letters on his behalf after he left his job.

The most serious allegations are those made by the Respondent that Mr. Antar, Qatar Pharma's Finance Manager, signed twenty-four letters with Mr. Al Amari's name, and without his authorization. (Mr. Al Antar admitted having signed one such letter in March 2018 well after Mr. Al Amari had left Qatar Pharma.) Sixteen such letters were signed before the adoption of the Measures, and eight letters after their adoption, which shows that there was a pattern of using Mr. Al Amari's name unrelated to the adoption of the Measures. Mr. Al Amari having severed his links with Qatar Pharma in early 2017 [Doc. RWS-3, para.14], many of the letters signed on his behalf were sent after his departure. There is no evidence that he authorized Mr. Al Antar to sign letters on his behalf, especially after he left his job. Some of the letters sent to the SFDA concerned the registration of pharmaceutical products and the quality of several Qatar Pharma

products, with the implication that Mr. Al Amari was absent most of the time and Qatar Pharma was operating its business in total disregard of the requirement of having a full-time Saudi pharmacist. Further, out of the twenty-four letters, only three contain a clear indication, in their Arabic version, that Mr. Antar was signing 'for' Mr. Al Amari. In the remaining twenty-one letters, the indication that Mr. Antar was signing 'for' Mr. Al Amari is barely visible or readable; in some instances, both 'for' and the signature are obscured by Qatar Pharma's stamp. In the English translations provided by counsel for the Claimants for these letters, there is no mention of the word 'for,' which seems to indicate that even the Claimants' own counsel did not notice that the letters were sent on behalf of Mr. Al Amari. It is doubtful that the Respondent's officials and government employees would have realized at the time that the letters were not signed by Mr. Al Amari.

Nor did the Claimants comply with the Respondent's Agency Law, though the provisions of the Law are mandatory. Article 3 of the Agency Law provides in relevant part that '[a] person may not operate as a commercial agent unless his name is registered with the Ministry of Commerce and Industry in a register designated for this purpose.' Article 3 further provides that, in addition to registering themselves, the commercial agent must include the name of the authorizing company, the type of goods to be distributed, and the duration of the agency agreement. Article 23 of the 2014 contract of commercial agency, which was entered into between the Claimants and QEMS rightly imposed on QEMS an obligation to register the contract with the Ministry of Commerce and Industry. This did not take place. While QEMS was registered in the commercial register of the Ministry of Commerce and Industry [Doc. C-51], its contract of agency with the Claimants has not been registered in the agency register of the Ministry. It is not clear whether the provision of Article 1 of the Agency Law that 'Saudi companies operating as commercial agents *must have a 100% Saudi capital, and the members of their boards of directors and authorized signatories shall be Saudis*' [emphasis added] had any bearing on the decision of QEMS not to seek registration of its contract of agency.

The Tribunal's majority downplays the seriousness of each of the Claimants' irregularities, looking at each separately and ultimately concluding that the Claimants did not commit a serious breach of Saudi law. However, the Claimants conducted their business in a non-transparent manner. They violated the Saudi Agency Law. They also engaged in fraudulent misrepresentations. Each of the Claimants' breach of Saudi municipal law was a serious breach according to Saudi law, the more so if they were to be taken cumulatively.

A foreign investor that makes an investment must comply with the laws and regulations of the host State, even those the investor finds meaningless. It is paradoxical for an investor to commit a series of serious irregularities and then to bring a claim based on the OIC Agreement, which provides, in its very Article 9, that '[t]he investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts … that may be prejudicial to the public interest.' These serious irregularities should be taken into consideration when assessing damages."

VI. MERITS

480. Having dismissed the Kingdom's jurisdictional and admissibility objections, the Tribunal must now turn to the merits of Claimants' claims.

481. Claimants argue that the Kingdom first encouraged them to invest in Saudi Arabia[642] and then approved their investment[643], and that they succeeded in developing a successful business[644] with expectations of exponential growth[645]. However, on 5 June 2017 Saudi Arabia instituted the Measures, a blockade against Qatar, which was publicized merely through a press release of the Ministry of Foreign Affairs[646]. Suddenly, Qatari companies and citizens were refused access to the Kingdom and all borders with Qatar were closed[647]. The Kingdom then created and promoted a climate of fear against Qataris[648].

482. Claimants submit that the Measures had a lasting and devastating impact on their investments[649] and that the Kingdom's conduct constituted a violation of four provisions of the OIC Agreement[650]:

- Art. 10, which prohibits expropriation of Claimants' investments without compensation;
- Art. 8, which requires the Kingdom to treat Claimants not less favourably than investors belonging to States not party to the OIC Agreement; by operation of this most favoured nation ["**MFN**"] clause Claimants propose to import certain "rights and privileges" from the Agreement between the Republic of Austria and the Kingdom of Saudi Arabia concerning the Encouragement and Reciprocal Protection of Investments [the "**Saudi Arabia-Austria BIT**"][651], namely, the Kingdom's obligation under that BIT:
  - to afford fair and equitable treatment ["**FET**"],
  - to abstain from arbitrary or discriminatory measures, and
  - to observe its own undertakings;
- Art. 2, which obliges the Kingdom to provide adequate protection and security; and
- Art. 5, under which the Kingdom promised to provide the necessary facilities and grant required permits for entry, exit, and residence.

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[642] CPHB, para. 6; **Doc. H-1**, slides 8-11, 19.
[643] **Doc. H-1**, slides 27-28.
[644] CPHB, para. 6; **Doc. H-1**, slides 36-64.
[645] CPHB, para. 6; **Doc. H-1**, slide 66.
[646] **Doc. H-1**, slide 68.
[647] CPHB, para. 8; **Doc. H-1**, slides 68-73.
[648] **Doc. H-1**, slides 75 *et seq.*
[649] CPHB, para. 5.
[650] C I, para. 239; **Doc. H-1**, slides 94-96; CPHB, para. 244(2).
[651] **Doc. CLA-133.**

483. The Kingdom, in turn, avers that if the Tribunal assumes jurisdiction over this dispute and finds the claims admissible, then it must determine whether the acts that are allegedly constitutive of the Kingdom's liability under the OIC Agreement are attributable to Saudi Arabia under the law of State responsibility – *quod non*[652].

484. In any case, the Kingdom avers that the Measures were a legitimate response to a long-standing national security concern by the Kingdom, which as permissible preventive measures adopted by a Saudi competent authority, cannot give rise to an expropriation, as provided for in Art. 10(2)(b) of the OIC Agreement. The Kingdom also denies the possibility of applying the MFN clause to import standards from other BITs and rejects having breached any undertaking assumed either under the OIC Agreement or the Saudi Arabia-Austria BIT[653].

485. The Tribunal will start by defining the law applicable to Claimants' claims and dealing with the matter of attribution (**VI.1**). It will then address Claimants' main claim that the Kingdom expropriated their investment in breach of Art. 10 of the OIC Agreement and the Kingdom's main defence: that the Measures were permissible under Art. 10(2)(b) of the OIC Agreement, because they were adopted to protect the Kingdom's national security interests (**VI.2**). Thereafter, the Tribunal will turn to Claimants' claims under Arts. 8, 2 and 5 of the OIC Agreement (**VI.3**). Lastly, the Tribunal will deal with Claimants' ancillary claims (**VI.4**).

[652] R I, para. 348.
[653] R I, para. 348.

VI.1. INTRODUCTION

1. APPLICABLE LAW

486. The OIC Agreement does not contain an express provision on the law applicable to an investment dispute under Art. 17.

487. Nevertheless, in the Terms of Appointment and Reference, the Parties agreed that the Tribunal would decide the substantive issues in dispute in accordance with the provisions of the OIC Agreement and international law[654].

488. Therefore, the OIC Agreement will be the primary source of law which the Tribunal will apply when deciding the Parties' claims and defences. Subsidiarily, the Tribunal will consider international law to confirm the meaning of the provisions of the OIC Agreement.

489. As noted by Claimants[655], the laws of Qatar and Saudi Arabia may also be relevant, to the extent that the applicable provisions of the OIC Agreement refer to them.

2. ATTRIBUTION

A. Respondent's position

490. The Kingdom avers that a significant part of the conduct on which Claimants rely is not attributable to the Kingdom under Arts. 4 and 8 of the International Law Commission's ["**ILC**"] Articles on Responsibility of States for Internationally Wrongful Acts ["**ARSIWA**"][656].

491. Under Art. 4 of ARSIWA, the following can be considered State organs[657]:

- Entities considered to be an integral part of the State under its internal law (*de jure* organs);
- Entities possessing separate legal personality, but which due to their lack of factual independence from the State are deemed to be organs regardless; and
- Natural persons can also be considered organ of the State, but not when their actions are conducted in a private capacity.

492. The Kingdom submits that under Art. 8 of ARSIWA, for the conduct of an entity *separate* from the State to be attributed to the State, what must be established is either that[658]:

- The non-State actor acted on the "instructions" of the State, or

[654] Terms of Appointment and Reference, para. 53.
[655] C I, para. 169.
[656] R II, paras. 317-319.
[657] R I, para. 354.
[658] R I, para. 358; R II, para. 322.

- The State exercised "direction or control" over that actor in "carrying out the conduct".

493. The Kingdom notes that Claimants complain about alleged acts and omissions by[659]:

- The landlord of the Riyadh Warehouse;
- The Alawwal Bank (and its successor, SABB); and
- Individuals and independent media who are said to have created a "climate of fear" for Qataris.

494. The Kingdom submits that Claimants have failed to discharge their burden of proving that the alleged international wrongs are attributable to Saudi Arabia[660].

495. First, the acts of the landlord of the Riyadh Warehouse – a privately owned entity over which the Kingdom exercises no control, who allegedly refused to let Claimants access the Warehouse – are not attributable to the Kingdom. There is no evidence that the landlord acted on the instructions of the Kingdom[661].

496. Second, as to Claimants' allegation that they have been prevented by Alawwal Bank (and its successor, SABB) from accessing QEMS's bank account in Saudi Arabia, this cannot be attributed to the Kingdom either. This is a publicly traded bank, in which the Kingdom has but a minority stake, and over which the State does not exercise control[662]. There is no evidence that the Kingdom ever instructed SABB not to deal with Qataris, including Claimants. In fact, Dr. Al Sulaiti remained able to access his accounts long after the Measures were implemented[663].

497. Third, the statements allegedly made by private Saudi individuals and media outlets can also not be attributed to the State. Claimants have failed to demonstrate that the Kingdom controlled such media outlets or that it had control over any of the statements made by such outlets[664].

498. Furthermore, the Kingdom rejects that there was a "climate of fear" for Qataris in Saudi Arabia at any point in time. Any anger expressed by individuals towards Qatar or Qataris was not at the direction of the State[665]. For the rest, Claimants have failed to identify any specific act or any Saudi State organ who allegedly perpetrated a "campaign of widespread and systematic arbitrary arrests and detentions that began in September 2017"[666].

499. As to Mr. Saoud Al Qahtani's posting of certain tweets in August 2017, such conduct cannot be attributed to the State because Mr. Al Qahtani was not acting in

[659] R I, para. 362. See also R II, para. 329.
[660] R I, para. 362; R II, para. 328.
[661] R I, paras. 363-367; RPHB, para. 16.5.
[662] R I, para. 368; R II, para. 340.
[663] R I, para. 369; RPHB, para. 16.4.
[664] R II, para. 336.
[665] R I, paras. 371 *et seq.*
[666] R II, para. 330.

an official capacity[667]. If Claimants' arguments were accepted, all statements made by State officials in their personal social media accounts would automatically be treated as statements made by the State – an unreasonable proposition[668].

500. In sum, the Kingdom argues that Claimants have failed to show that the Saudi State either instructed or exercised effective control in relation to the conduct they allege is wrongful[669]. If Claimants suffered harm as a consequence of the actions of these non-State actors, their claim lies against those private entities and individuals – not against the Kingdom[670].

B. Claimants' position

501. Claimants, on the contrary, aver that *most* acts invoked by them are clearly attributable to the Kingdom; in the few instances where there could be doubts, the correct application of the law of attribution shows that the acts can also be attributed to the Kingdom[671].

502. First, Claimants note that the Kingdom has conceded that the closure of the Qatari-Saudi border and the expulsion of Qataris from Saudi territory were undertaken by organs of the Saudi State – this is the consequence of asserting that the Measures were implemented for reasons of State national security, upon the exercise of Saudi Arabia's sovereign rights[672]. By Respondent's own admission, these Measures were undertaken by the Saudi Ports Authority and the Saudi Customs Directorate, and other government authorities[673]. It follows that, by application of Art. 4 of the ARSIWA, such Measures are attributable to the Kingdom.

503. Second, Claimants argue that additional harm flowed from these Measures: the Kingdom engendered a "climate of fear", placed restrictions on Claimants' access to their bank accounts and sealed their Warehouse; this conduct is also attributable to Saudi Arabia pursuant to Arts. 4 and 8 of ARSIWA[674]. According to Claimants, Art. 8 does not establish a particular degree of control necessary for an act to be attributed to the State and does not require the application of an "effective control" test, as confirmed by the ILC in its commentaries; thus, a finding of attribution will be warranted if the circumstances of a particular case call for such a finding[675].

504. In this case, the measures adopted by the Kingdom went beyond the expulsion of Qataris and the closure of the Qatari-Saudi borders: the Kingdom compelled the entire Saudi population to ostracize and denounce Qataris and their sympathisers, through mass arrests, show trials and prosecutions, and "blacklists"[676]. Saudi authorities undertook a campaign of "widespread and systematic arbitrary arrests

[667] R II, para. 331.
[668] R II, para. 333.
[669] R II, para. 337.
[670] R I, para. 382.
[671] C II, para. 256.
[672] C II, para. 257; CPHB, paras. 8-10.
[673] C II, para. 258.
[674] C II, para. 260; CPHB, paras. 8 *et seq.*
[675] C II, paras. 263-267.
[676] C II, para. 270.

and detention"[677]. Mr. Saoud Al Qahtani, a senior adviser to the Saudi royal court, by his own admissions, was acting on behalf of the Saudi State when he tweeted a "blacklist", inviting Saudis to denounce fellow citizens who showed sympathy to Qataris[678]. Saudi media outlets also acted under the control of the Kingdom in disseminating hatred against Qatar and its nationals[679].

505. According to Claimants, the "climate of fear" engendered by the Kingdom had the effect of terrorizing the Saudi population and business community into shunning Qatari nationals. Those effects were felt by Claimants: they became unable to maintain relationships with key customers, third-parties (such as their bank and landlord) and employees[680]. The Alawwal bank, in which the Saudi government held an ownership stake, readily bowed to the pressure exerted by the State and cut-off its dealings with Qatari customers – and this is precisely what it did with Claimants' accounts[681].

506. In sum, Claimants argue that the Measures imposed on them were undertaken by organs of the Saudi State or by people acting under the instructions or control of Saudi Arabia and are therefore attributable to it under Arts. 4 and 8 of ARSIWA[682].

C. Decision of the Arbitral Tribunal

507. To establish the existence of an internationally wrongful act, the conduct in question must be attributable to the State under international law and must constitute a breach of an international legal obligation in force for that State at that time[683] – e.g., an obligation under the OIC Agreement. A precondition for determining whether Saudi Arabia breached its obligations under the OIC Agreement is to determine whether the conduct in question is attributable to the Kingdom.

508. The Parties agree that the issue of attribution in this case must be decided on the basis of Arts. 4 and 8 of the ARSIWA[684].

509. Art. 4 of the ARSIWA provides that[685]:

> "*Article 4. Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the

[677] C II, para. 272.
[678] C II, paras. 273-274.
[679] C II, paras. 275-277.
[680] C II, para. 278; CPHB, para. 8.
[681] C II, para. 278.
[682] C II, para. 278.
[683] **Doc. CLA-171**, Art. 2 – *Elements of an internationally wrongful act of a State*: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.". See also **Doc. CLA-229**, C. Kovács, "Chapter 5: The Attribution of Internationally Wrongful Conduct," in *Dispute Attribution in International Investment Law*, Vol. 45, p. 55.
[684] **Doc. CLA-171**. See also **Doc. RLA-214**.
[685] **Doc. CLA-171**, pp. 2-3.

> State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

510. Art. 8, in turn, establishes that[686]:

> "*Article 8. Conduct directed or controlled by a State*
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

511. It follows that the ARSIWA distinguish between two types of conduct that will be attributable to the State:

- The conduct of "any" organ of a State, whether it exercises legislative, executive, judicial "or any other functions", and whatever its position in the organization of the State and character (Art. 4); and

- The conduct of "a person or group of persons" who are "in fact" acting on the instructions of, or under the direction or control of, the State (Art. 8).

512. In the present case, Claimants complain of two types of allegedly illegal conduct[687]:

- Measures which, they argue, are directly attributable to the Saudi State by virtue of Art. 4, including the complete closure of Saudi borders and the expulsion of Qatari nationals from Saudi territory[688]; and

- Measures which, they argue, are a consequence of the former and were adopted by entities that were either acting under the instructions, or under the direction or control, of the Saudi State[689].

513. The Tribunal agrees that the former are indeed attributable to the Kingdom (**a.**), but Claimants have failed to prove that the latter were in fact adopted upon the instructions or at the direction or control of the Saudi State (**b.**).

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[686] **Doc. CLA-171**, p. 3.
[687] CPHB, paras. 8-34.
[688] C II, paras. 257-259; CPHB, paras. 8, 10, 12-15.
[689] CPHB, paras. 8, 16-32.

a. Conduct attributable to the State under Art. 4 of the ARSIWA

514. Claimants argue that their investments in Saudi Arabia were destroyed by the closure of borders and the expulsion and ban of Qatari citizens and goods from Saudi territory[690].

515. Saudi Arabia recognises that on 5 June 2017 it adopted the following Measures[691]:

- It severed diplomatic and consular relations with Qatar;
- It closed all land, sea and air communications to and from Qatar;
- It prevented crossings from Qatar into its territory, airspace and waters;
- It prohibited Saudi citizens from traveling to or through Qatar;
- It required Saudi citizens resident in Qatar to leave within 14 days; and
- It ordered Qatari citizens visiting or residing in Saudi territory to leave within 14 days.

516. This was announced by means of a statement [the "**Official Statement**"][692], distributed through the press service of the Saudi Ministry of Foreign Affairs, acknowledging the fact that the Measures had been adopted, explaining the underlying reasons and giving an outline of what they entailed[693].

517. The Kingdom has explained that the legal means by which the Measures were adopted was a Royal Decree issued by His Majesty the King [the "**Royal Decree**"], setting forth the directions which must be taken by each Ministry and government body in execution of His Majesty's decision[694].

518. And, in compliance with the Royal Decree:

- The Saudi Customs Directorate closed the Salwa Crossing[695];
- The Saudi Ports Authority issued a circular instructing the directors of ports in Saudi Arabia "not to receive any ship flying the Qatari flag, or owned by Qatari persons or companies, and not to unload any goods of Qatari origin in Saudi ports"[696];
- The General Authority of Civil Aviation in Saudi Arabia revoked Qatar Airways' licence to operate in the Kingdom and issued a notice that all flights

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[690] CPHB, paras. 8-15.
[691] **Doc. R-122**; R I, para. 413; R II, para. 152; RPHB, para. 93; RER-3, Collis, para. 24; HT. Day 6, p. 1387 (Dr. Harris).
[692] **Doc. R-122**. See also **Doc. C-71**.
[693] See also RPHB, para. 93.
[694] RPHB, para. 117.
[695] **Doc. KU-5**; **Doc. C-81**; **Doc. C-82**; CER-2, Ulrichsen, para. 4.5; RER-3, Collis, fn. 2; R I, para. 415.4.
[696] **Doc. C-80**; CER-2, Ulrichsen, para. 4.2; RER-3, Collis, para. 24.

registered in Qatar were no longer authorized to land at Saudi airports or to overfly Saudi Arabian airspace[697].

519. The Tribunal has no doubt that the above Measures are attributable to the Saudi State pursuant to Art. 4 of the ARSIWA. Indeed:

- The Royal Decree was issued by His Majesty the King, who, as Head of State, has both executive and legislative powers within Saudi Arabia[698];
- The Measures were publicized by an Official Statement of the Saudi Ministry of Foreign Affairs, one of the organs of the Saudi government;
- The Measures were then implemented by several other organs of the State, including land, air and sea border authorities – border control being one of the main exercises of sovereign power by a State.

520. This conclusion is confirmed by Saudi Arabia's averment that the Measures "were each adopted by competent authorities and in accordance with domestic Saudi law"[699].

The conduct of tax authorities

521. Claimants further complain about the conduct of the Zakat, Tax and Customs Authority [previously defined as "ZATCA"], which, since December 2019, has sent Qatar Pharma multiple letters regarding unpaid tax invoices, failures to submit VAT returns, and late penalties[700]. Claimants argue that the imposition of massive VAT assessments and penalties for the period after Qatar Pharma ceased to do business in Saudi Arabia constitutes an illegitimate and retaliatory harassment[701].

522. The Kingdom denies that it instructed its tax authorities to harass Claimants and argues that it was Qatar Pharma who failed to comply with Saudi tax law; in any case, the ambit of the Measures was well defined and did not have any implications for the Kingdom's tax authorities[702].

523. The Tribunal notes that the Measures, as adopted on 5 June 2017, do not refer to any aspects of tax law; and, in fact, Claimants only complain about measures adopted by the Saudi tax authorities after 2019, as an alleged retaliation to the start of the present arbitration[703].

524. That said, the Tribunal finds that, to the extent that Claimants can prove that the ZATCA illegitimately imposed any tax assessments or penalties, such conduct is attributable to the Saudi State pursuant to Art. 4 of the ARSIWA: the ZATCA is

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[697] **Doc. C-78; Doc. C-79; Doc. R-179**; CER-2, Ulrichsen, para. 4.3; RER-3, Collis, para. 24.
[698] HT, Day 8, p. 1814, l. 17 to p. 1815, l. 3 (Amb. Collis).
[699] R I, para. 416. See also paras. 413-416.
[700] **Doc. C-182; Doc. C-183; Doc. C-184; Doc. C-185; Doc. C-186; Doc. C-187; Doc. C-188, Doc. C-189; Doc. C-190; Doc. C-191; Doc. C-192; Doc. C-193; Doc. C-194; Doc. C-195; Doc. C-196; Doc. C-197, Doc. C-198; Doc. C-199; Doc. C-200; Doc. C-201; Doc. C-202; Doc. C-203; Doc. C-204; Doc. 205; Doc. R-148**, p. 44; CWS-3, paras. 97-106. See also C I, paras. 151-159; R I, para. 260.
[701] C I, paras. 10, 151-159; CPHB, paras. 33-34.
[702] R I, paras. 259 *et seq.*; RPHB, paras. 78-80.
[703] C I, paras. 151-159, 362, 366, 370.

the Saudi tax authority, the organ of the State responsible for supervising that taxpayers are filing their returns, collecting tax payments, and imposing penalties on behalf of the Saudi State[704].

The conduct of the SFDA

525. Claimants further complain about the conduct of the SFDA, which, after the imposition of the Measures, sealed the Riyadh Warehouse. According to Claimants, by sealing the Warehouse, the SFDA failed to protect what little remained of Claimants' investment[705].

526. The Kingdom, once again, denies this and argues that the evidence shows that the Riyadh Warehouse remained operational after the Measures were adopted, and that the SFDA only acted due to serious regulatory violations on Claimants' part[706].

527. Once again, the Tribunal notes that the Measures adopted on 5 June 2017 make no express reference to the sealing of the Warehouse. That said, to the extent that Claimants can prove that the SFDA acted illegitimately when sealing or inspecting the Riyadh Warehouse, the Tribunal finds that this conduct is attributable to the Saudi State under Art. 4 of the ARSIWA: the SFDA is the organ of the State in charge of regulating and monitoring food, pharmaceutical products and medical devices, and for overseeing businesses such as that of Qatar Pharma[707].

* * *

528. In sum, the Tribunal finds that the closing of the Qatari-Saudi borders and the expulsion and ban of Qataris nationals and products from Saudi territory, are all attributable to the Saudi State. Likewise, the conduct of the ZATCA, the Saudi tax authority, and of the SFDA, the food and pharmaceutical authority, is also attributable to the State.

b. Conduct that is not attributable to the Saudi State under Art. 8 of the ARSIWA

529. Claimants also complain of a series of actions that took place in the aftermath of the Measures, and which, in their opinion, are attributable to the State pursuant to Art. 8 of the ARSIWA[708]:

- A "climate of fear" that was widespread throughout the country, which made Claimants unable to maintain relationships with key customers, third-parties (such as their bank and landlord) and employees;
- The blocking of access to the Riyadh Warehouse by the landlord; and
- The denial of banking services by the Alawwal (now SABB) bank.

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[704] See R I, paras. 260-265.
[705] CPHB, paras. 22 *et seq.*
[706] RPHB, para. 3.5.
[707] R I, para. 3.1; RWS-1, paras. 9-10.
[708] C I, paras. 86-119, 139-159; C II, paras. 270-278; CPHB, paras. 16-34.

530. The Kingdom denies that this conduct can be attributed to the Saudi State, since it was undertaken by private persons or entities[709].

531. In the commentaries to Art. 8 of the ARSIWA, the ILC explains that[710]:

> "As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control. Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery."

532. Therefore, the general principle is that the conduct of private persons or entities is not attributable to the State, unless it can be established that:

- There is a *specific factual relationship* between the person or entity engaging in the conduct and the State; and

- There is a real link between the person or entity and the State machinery when performing the action in question.

533. Furthermore, the actions in question must have been taken upon instructions given by the State or under the State's direction or control. The terms "instructions", "directions" and "control" are disjunctive, and it suffices to establish one of them[711]. As noted in the ILC commentary[712]:

> "Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State." [Emphasis added]

534. The Tribunal will examine the conduct of the actors whose conduct Claimants seek to attribute to the Saudi State to determine whether they effectively had any relationship or link with the State apparatus, and whether there is evidence that their conduct was undertaken at the instructions of the State or under the State's direction or control.

(i) Climate of fear

535. Claimants aver that the Kingdom orchestrated a "climate of fear" in the aftermath of 5 June 2017, which led, *inter alia*, to the resignation of Qatar Pharma's local employees, to the difficulty in finding customers willing to buy from Qatar Pharma

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[709] R I, paras. 362 *et seq.*; R II, paras. 328 *et seq.*
[710] **Doc. RLA-214**, p. 47, Commentary (1) to Art. 8.
[711] **Doc. RLA-214**, p. 48, Commentary (7) to Art. 8.
[712] **Doc. RLA-214**, p. 47, Commentary (2) to Art. 8.

and to the general fear of third-parties to interact with Claimants[713]. According to Claimants, this "climate of fear" was promoted by Saudi authority figures, by daily media coverage, by an aggressive and coordinated social media campaign aimed at sowing hatred towards Qataris, and by the violent punishment of all forms of dissent[714]. Claimants rely on the opinion of their policy expert, Dr. Kristian Coates Ulrichsen, to support their position[715].

536. The Kingdom denies that there was a "climate of fear" and submits that, even if one existed, there is no evidence of State involvement[716].

537. The Tribunal agrees that there is no evidence that the Saudi State was promoting a "climate of fear" against Qataris.

538. There is no doubt that the Measures created a strained relationship between Saudi Arabia and Qatar, and that there were tensions between nationals of both countries – as recognised by both Parties' policy experts[717]. The Tribunal is also fully convinced that media coverage and social media commentary were not particularly favourable towards Qataris[718], and that Saudi citizens may have felt discouraged from engaging with Qataris. This, however, is the logical consequence of the cut in the relationship between both countries, which was widely publicized.

539. Claimants have failed to prove that the concrete conduct of which they complain was undertaken by private people or entities acting on the instructions of or at the direction or control of the Saudi State.

Social media

540. In general, social media platforms lie outside the control of governments and act as a stage in which private individuals share their thoughts and express their opinions. According to statistics released in 2022, more than 82% of the Saudi population used social networks as part of their daily lives, particularly Twitter and Facebook[719]. It follows that social media in Saudi Arabia is bound to reflect a wide range of opinions, including some that voice support and others that voice dissent against the government.

541. Claimants take issue with two statements made on social media[720].

542. First, Claimants point to a Tweet published by an account called "SaudiNews50", with the following message[721]:

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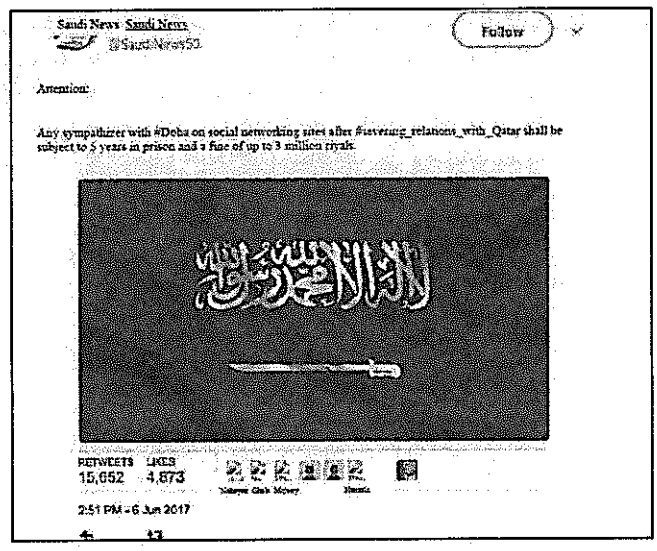
[713] C I, para. 86; CPHB, para. 16.
[714] C I, para. 86; C II, paras. 114-115; **Doc. H-1**, slides 75-87.
[715] CER-2, Ulrichsen, paras. 4.14-4.31.
[716] R I, para. 372; R II, paras. 152-159; RPHB, paras. 3.5, 103-106.
[717] CER-2, Ulrichsen, para. 4.16; RER-3, Collis, para. 34.a.
[718] CER-2, Ulrichsen, para. 4.8; RER-3, Collis, para. 36.
[719] **Doc. SC-2**.
[720] C I, paras. 87-90; C II, paras. 273-275.
[721] **Doc. C-105**.



543. Claimants argue that SaudiNews50 was "acting as a megaphone" for the Saudi State, because it is a social media marketing company that also manages accounts for Saudi government departments, acts for the Saudi royal family, and enjoys ties to several high-profile Saudi figures[722].

544. However, the evidence adduced by Claimants is flimsy, at best; SaudiNews50 is a private company and there is no evidence that it was acting on the instructions, or at the direction or control of the Saudi State when it made this statement. The fact that a government hires a private company in unrelated matters does not render the actions of that company attributable to the State.

545. Furthermore, it is unclear where the information vehiculated by SaudiNews50 is coming from; the statement is not attributed to any organ of the State and Claimants have not pointed out to any laws enacted by Saudi Arabia that sought to imprison or to fine people for expressing sympathy towards Qatar[723].

546. Claimants argue[724] that this same news was then reprinted in other Saudi news outlets, including Saudi Al-Marsd[725] and Okaz[726]. But the source of these alleged news is "Attorney Musharraf Al-Khashrami", a private attorney, who is said to be basing his opinion on a review of the Saudi Anti-Cyber Crime Law (which predates the enactment of the Measures by ten years[727]). Any attorney is entitled to make his own interpretation of the law, without this being attributable to the State; in any case, Claimants have not even sought to prove that this gentleman had ties to the Saudi government.

547. Second, Claimants argue that Mr. Saoud Al Qahtani – who, according to Claimants, was an agent of the Saudi State and one of the main architects of the "climate of

[722] C I, para. 87.
[723] Contrary, it seems, to the UAE, who banned all expression of sympathy towards Qatar, making it a criminal offence punishable with up to 15 years in prison (**Doc. C-121**, p. 3).
[724] C I, paras. 88-89.
[725] **Doc. C-110.**
[726] **Doc. C-111; Doc. C-114; Doc. C-115.**
[727] CER-2, Ulrichsen, para. 4.27.

fear" – created a hashtag on Twitter named "#TheBlacklist", with the intention of compiling accusations against anyone who conspired against Saudi Arabia. Saudi citizens responded enthusiastically to Mr. Al Qahtani's message by tweeting the names of those who had "expressed solidarity with Qatar"[728].

548. The Tweet in question was publicized by two media outlets: Al-Jazeera[729] and Middle East Eye[730], who described Mr. Al Qahtani as a "Saudi official" and a "Saudi royal adviser", respectively. The Tweet, dated 17 August 2017, reads as follows[731]:

Translation[732]: "Saudi Arabia and its allies, when they say they will do something they do it. And that is a promise. Put any names you think should be added to #TheBlacklist on the hashtag. And it will be sorted. And they will be followed from now."

549. Can the conduct of Mr. Al Qahtani be attributed to the Saudi State?

550. For this to happen, there would need to be a specific factual relationship between Mr. Al Qahtani and the State, and there would need to be proof that he was acting upon the instructions of, or at the direction or control of, the State.

551. Claimants point to a tweet where an individual called Saad Abedine quotes Mr. Al Qahtani as saying that he would not make decisions without guidance or without following the orders of the Saudi King and the Crown Prince[733]:

[728] C I, para. 90; C II, paras. 273-273; **Doc. H-1**, slides 80-83; CER-2, Ulrichsen, paras. 4.22-4.23.
[729] **Doc. C-121**.
[730] **Doc. C-122**.
[731] See **Doc. C-121**, p. 1.
[732] As translated in **Doc. C-122**. See also **Doc. H-1**, slide 82.
[733] **Doc. KU-23**.

552. However, the actual Tweet by Mr. Al Qahtani was made from his personal account, not from an official channel, and there is no indication that he was acting in an official capacity or under the instructions of the Saudi royal family when he made the Tweet.

553. Claimants have not pointed to any official channels of the State that divulged a so-called "Blacklist" or to other contemporaneous evidence that this was being promoted by the State. In the absence of further evidence, the Tribunal cannot attribute Mr. Al Qahtani's Tweet to the Saudi State.

Media outlets

554. Claimants also argue that Saudi media outlets were involved in spreading the "climate of fear" and that they were acting under the control of the Kingdom, because the Saudi State wields significant power and control over its media[734].

555. However, Claimants have failed to demonstrate that any of the news outlets in question was acting under instructions of, or at the direction or control of, the Saudi State. To establish attribution based on Art. 8, it is not sufficient to say that because Saudi Arabia is a monarchy, the State necessarily controls media outlets. There must be evidence of concrete instructions or directions given by the State to the media outlets in question to divulge certain information – and such evidence is absent in the present case. Furthermore, Claimants have not established that the State controlled any of the media outlets in question, which, for the most part, were entirely privately-owned. It is possible – as recognised by Claimants' own policy expert, Dr. Ulrichsen[735] – that some of these media outlets were simply more critical of the Qatari State and more favourable to Saudi State policies.

[734] C I, paras. 99-102; C II, para. 275; **Doc. H-1**, slides 75-78.
[735] HT, Day 8, p. 1780, ll. 5-17 (Dr. Ulrichsen)

Alleged punishment of dissent

556. Finally, Claimants have pointed out to press releases by Human Rights Watch[736], Amnesty International[737] and the Office of the High Commissioner for the United Nations Human Rights Council[738] to argue that there was a[739]:

> "[…] campaign of 'widespread and systematic arbitrary arrests and detention' that began in September 2017 with capturing persons that expressed sympathy towards Qatar […]."

557. It is true that these three organisations denounced a wave of arrests in Saudi Arabia throughout late 2017 and early 2018, which, according to them, targeted dissenters who expressed their own opinion[740]. However, they also acknowledge that the exact reasons for the arrests remain unclear, and that it is possibly linked to counter-terrorism and to State security matters. No direct link is made between the Measures and the arrests; in fact, Qatar does not appear mentioned in these press releases. Without further evidence, the Tribunal cannot attribute these arrests to an attempt by the State to create a so-called "climate of fear".

(ii) Access to the Riyadh Warehouse

558. Claimants have argued that they were repeatedly blocked from accessing the Riyadh Warehouse by the landlord for fear of reprisals from the State – fear that the landlord would allegedly have confirmed in a conversation with Dr. Al Sulaiti[741].

559. The Kingdom denies that the State exerted any pressure on the landlord of the Riyadh Warehouse to prevent Claimants from accessing their Warehouse; in fact, there was nothing preventing Claimants' access[742].

560. In this arbitration, the Kingdom has produced the witness statement of Mr. Abdalla Al-Asfor, an employee of the landlord[743].

561. Mr. Al-Asfor has declared that the Riyadh Warehouse is owned by Abdulaziz Abdullah Al Mosa & Sons Real Estate Co. Limited, a private family company that has been operating in the Saudi real estate sector for more than 25 years[744]. He further explained that the only set of keys to the Riyadh Warehouse was delivered to Dr. Al Sulaiti and that the landlord did not have a spare[745]. In his testimony, Mr. Al-Asfor has made clear that[746]:

> "10 […] The SFDA has never told me or, as far as I am aware, anyone connected to the Riyadh Landlord to deny anyone access to the Riyadh

[736] **Doc. C-126.**
[737] **Doc. C-127.**
[738] **Doc. C-128.**
[739] C II, para. 272. See also C I, paras. 91-92.
[740] **Docs. C-126, C-127** and **C-128.**
[741] C I, paras. 115, 140-146; CWS-3, paras. 125-133; C II, para. 278; CPHB, paras. 29-30; **Doc. C-179.**
[742] R I, paras. 3.6, 28, 237-243.
[743] RWS-7.
[744] RWS-7, para. 5.
[745] RWS-7, paras. 8-9; HT, Day 7, p. 1418, ll. 6-23 (Mr. Al-Asfor).
[746] RWS-7, paras. 10, 14 and 16.

> Warehouse. My colleague, Mr Al Ansari has also told me that he has never been told to deny anyone access to the Riyadh Warehouse. […]
>
> 14. Whilst I also cannot recall whether I said that I did not have authority to allow the representatives to enter the Riyadh Warehouse, as far as I understand, that is true. Whilst QEMS is the tenant, neither the Riyadh Landlord nor its agents are permitted to force entry by having a locksmith change the locks. It is for the tenant to gain access through a locksmith, if that is what is required. That is my understanding of Saudi law, although I am not a lawyer. I would not have been referring to anything to do with SFDA, or any other Saudi government agency. No Saudi government agency has said that the Riyadh Landlord must deny access to the Riyadh Warehouse. […]
>
> 16. The Claimants allege that, after the visit on 4 April 2021, Dr Al Sulaiti contacted the Riyadh Landlord, who said that he would not permit access to the Riyadh Warehouse because it would expose 'him' to harm. I do not know who Dr Al Sulaiti claims to have spoken to because Dr Al Sulaiti does not say. He refers to the landlord as a person, but the landlord is not a person. I keep in regular contact with the Al Mosa family and I have spoken to my colleague Mr Al Ansari. None of us is aware of any such communication with Dr Al Sulaiti. Nobody would have said that they feared harm from the Saudi government, because the Saudi government has never threatened any harm. As far as the Riyadh Landlord, Mr Al Ansari and I are concerned, Dr Sulaiti, Qatar Pharma and QEMS (or their representatives) are, and always have been, free to enter the Riyadh Warehouse at any time they want." [Emphasis added]

562. Mr. Al-Asfor's unequivocal statements that there were never any instructions by any organs of the Saudi State (including the SFDA) to block access to the Riyadh Warehouse, which are not contradicted by other evidence on the record, are sufficient to put to rest Claimants' attempt to attribute the conduct of the landlord to the Saudi State.

563. This is further supported by a letter addressed by the SFDA to Respondent's lawyers in March 2021, in which it expressly confirmed that[747]:

> "[…] it is not restricting access to [the Riyadh Warehouse] or any documents and/or computers stored at that location. Insofar as the SFDA is concerned, the relevant entity with an ownership interest in the premises may access the premises for the purpose of collecting any documents and/or computers without prior approval of, and without being accompanied by representatives of, the SFDA. […] This letter does not concern any regulatory violations committed by Qatar Pharma, which would have to be remediated in accordance with SFDA regulations before business operations are permitted."

(iii) Access to banking services

564. Finally, Claimants say that they were restricted from accessing QEMS's Saudi bank account at the Alawwal bank after June 2017, at the instruction of the Kingdom (who owns a stake in this bank) and also for fear of reprisals[748]. This denial of banking services disrupted their ability to pay employee salaries, rents, and general

[747] **Doc. C-173.**
[748] C I, paras. 85, 150; C II, paras. 192, 287; CWS-3, paras. 97-99.

expenses, and to collect funds from Saudi customers[749]. Claimants say that since 2018 and to this day they cannot access their Saudi bank account remotely, nor transfer funds to Qatar[750].

565. The Kingdom argues that Claimants' allegation that they have been unable to access QEMS's account and that the Saudi government instructed the Alawwal bank not to deal with Qataris or Claimants is undermined by all available evidence[751].

566. Before determining whether Claimants were indeed blocked from accessing QEMS's account at the Alawwal (now SABB) bank, the Tribunal must establish whether the conduct of this entity can be attributed to the State pursuant to Art. 8 of the ARSIWA. If not, it becomes irrelevant to establish if Claimants were able to access their bank accounts for the purposes of this investment arbitration.

567. The Kingdom has acknowledged that it holds a minority stake in the SABB bank, but that this is a "publicly traded bank [...] over which the state does not exercise control"[752]. The Kingdom submits, in any case, that the ownership of shares in an entity by the State is insufficient to establish attribution[753].

568. The Tribunal agrees with the Kingdom on this point.

569. As the ILC's commentaries to Art. 8 make clear, the State's control over a person or entity must be established case by case; the mere fact that the State holds a participation in a corporate entity is not sufficient for the attribution to the State of the conduct of that entity[754].

570. In the present case, Claimants have failed to establish that the Kingdom owns a controlling stake in the Alawwal (now SABB) bank that permits the State to shape the conduct of the bank towards its customers. They have also not proven that the State issued instructions or directions on how the bank should deal with Qataris (or with Claimants) after the enactment of the Measures.

571. The Kingdom has produced two witness statements signed by Mr. Munif Al-Otaibi, Head of Business Banking & SME at the SABB[755] (and an employee of Alawwal prior to the merger between the two entities[756]). Mr. Al-Otaibi was also called to testify at the Hearing[757]. He has declared that[758]:

> "11. I am not aware of the Saudi Central Bank giving any such guidance (whether formally or informally). If the Saudi Central Bank had given guidance like that in June 2017 or at any time afterwards, it would have been passed to the compliance departments of Saudi banks. Both Alawwal Bank and SABB (prior to their merger) would have received it. If Alawwal Bank's

[749] C I, para. 85; CPHB, para. 17; CWS-3, para. 100.
[750] C I, para. 85; CPHB, para. 21; CWS-3, paras. 101-105.
[751] R I, para. 369; R II, para. 340; RPHB, paras. 97-102.
[752] R I, para. 368; RWS-6, para. 7.
[753] R I, para. 340.
[754] **Doc. RLA-214**, p. 48, Commentaries (5) and (6) to Art. 8.
[755] RWS-6 and RWS-10.
[756] RWS-6, para. 7.
[757] HT, Day 6, pp. 1342-1378.
[758] RWS-6, paras. 11-12.

> compliance department had received guidance in June 2017 or afterwards, that department would have passed such a communication to me in my capacity as Deputy Head of Corporate Risk Management and Head of SME Risk. I did not receive anything.
>
> 12. I have made enquiries of SABB's (post-merger) compliance department, and there is no record of any guidance from the Saudi Central Bank about dealing with Qataris nor is there any record of any instruction being given to Alawwal Bank (or SABB) about transactions with Qataris or entities connected to Qataris. Again, if there had been such an instruction given to Alawwal Bank, I would have been informed at the time." [Emphasis added]

572. This is corroborated by other contemporaneous evidence. On 19 August 2017, the Saudi Central Bank issued the following statement[759]:

> "Referring to what was recently circulated on some social media that the Kingdom has stopped dealing in Qatari riyals, the Saudi Arabian Monetary Authority confirms that it has not issued any instructions to financial institutions and exchange institutions operating in the Kingdom that include stopping dealing in Qatari riyals since the severance of relations with the State of Qatar.
>
> And brotherly Qatari citizens can exchange the Qatari riyal naturally through banks and licensed money exchange shops, as well as use automatic withdrawal machines."

573. The main evidence on which Claimants rely when arguing that their access to the QEMS's bank account was suspended "upon instruction of the Saudi government" is the statement of Dr. Al Sulaiti[760]. According to him, it was the Alawwal Bank branch manager, Mr. Bandr Al-Otaibi, who informed him that the Saudi government had given such instructions[761].

574. In their post-Hearing brief, Claimants argue that the Kingdom failed to call Mr. Bandr Al-Otaibi as a witness and instead chose to proffer Mr. Munif Al-Otaibi as a witness, who was not familiar with Dr. Al Sulaiti's situation[762]. The Tribunal notes, however, that Claimants are the ones who bear the burden of proving that the State instructed or directed the Alawwal bank to act in a certain way. If they wished, they should have called Mr. Bandr Al-Otaibi or asked the Tribunal to do so on their behalf.

575. After weighing the available evidence, the Tribunal finds that it is not possible to establish that the conduct of the Alawwal bank is attributable to the Saudi State.

* * *

576. In view of the above, the Tribunal concludes that the actions of the landlord of the Riyadh Warehouse, of the Alawwal (now SABB) bank, and of other private individuals and entities, are not attributable to the Saudi State, with the consequence

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[759] **Doc. R-134.**
[760] C I, para. 272, referring to CWS-3, para. 99; CPHB, paras. 17 *et seq.*, referring to CWS-3, paras. 97-106.
[761] CWS-3, para. 99.
[762] CPHB, paras. 18-19.

that the Tribunal will exclude such conduct from the scope of its analysis in the following sections.

577. Ultimately, the conduct of certain Saudi private individuals, such as Qatar Pharma's employees, customers or even its landlord, who were unwilling to continue their dealings with Qatar Pharma, may have been exacerbated as a consequence of the Measures, but the conduct is not attributable to the State. Claimants have failed to produce evidence that the people in question were acting on the instructions, at the direction or under the control of the Saudi State. The fact that individuals wrote articles or tweets expressing lack of sympathy towards Qatar or became less inclined to do business with Qataris does not mean that they were receiving instructions or directions from the State, nor that they were submitting to pressure from the State; they could simply be supportive of the Measures adopted by the Saudi State and critical of Qatar.

578. In the absence of concrete factual evidence demonstrating the existence of instructions, directions or control of the State over the private persons or entities in question, the Tribunal finds that the international responsibility of Saudi Arabia cannot be engaged.

VI.2. THE EXPROPRIATION CLAIM

1. CLAIMANTS' POSITION

1.1 RESPONDENT BREACHED ART. 10 OF THE OIC AGREEMENT

579. Claimants argue that the Kingdom's actions have deprived them of the use, enjoyment, control, and economic value of their investment, in violation of the prohibition on expropriation in Art. 10 of the OIC Agreement[763]. They explain that by 2017 they had successfully invested in Saudi Arabia, at considerable cost: they had established a business that had a strong track record of revenue and profit growth and was well-positioned for further growth in the years to come. This was possible through the investment of know-how, time, and monetary resources and the obtainment of numerous licences and authorizations – all with the approval and encouragement of Saudi officials[764].

580. Claimants argue that the Measures – which implied the expulsion and ban of Qatari nationals and companies from Saudi territory – destroyed their investments: Claimants were effectively shut out from Saudi Arabia, leading to the demise of their Saudi business operations[765].

581. Claimants submit that the Measures totally deprived them of the rights protected by Art. 10, including their "basic rights or the exercise of [their] authority on the ownership, possession or utilization of [their] capital," and "[their] actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth"[766]. Indeed, Claimants and their staff were[767]:

- Expelled from Saudi Arabia, which prevented them from overseeing or managing Qatar Pharma's ordinary and day-to-day operations;
- Barred from selling their products to Saudi customers and performing their contracts;
- Foreclosed from accessing their property (including their facilities and the inventory and business records located therein); and
- Deprived of the ability to manage their business and realize the benefit of their contracts, or other licenses, and authorizations.

582. Qatar Pharma's licenses and registrations expired, its facilities had to be forcibly abandoned and left to deteriorate, and its trained workforce evaporated. After years

[763] C II, para. 319.
[764] C I, paras. 260-263.
[765] C I, paras. 264-265; C II, para. 303.
[766] C I, para. 259; C II, para. 311.
[767] C I, paras. 259, 264-265, 269; C II, para. 317.

of being shut out of the Saudi market, Claimants have completely lost their market share and the good will they had developed[768].

583. Finally, Claimants argue that the Measures were implemented with no specificity and in a totally opaque manner, particularly as to their intended duration[769]. The Measures have had the effect of far more than a "transitory" deprivation of Claimants' investments[770]. The Kingdom itself has conceded that Claimants would have to reestablish their entire business operation if they wished to go back to Saudi Arabia[771]. Accordingly, Claimants can never realize the benefit of their historical investments, which have been destroyed[772].

1.2 NO VALID DEFENCE FOR THE MEASURES

584. Claimants say that the OIC Agreement contains neither an express exception for national security, nor what is known as a "self-judging" clause[773]. In the absence of both, it is wrong for the Kingdom to suggest that its actions were undertaken for "national security" concerns and that this should be the end of the Tribunal's inquiry[774].

585. Multiple cases have confirmed that States must not be afforded absolute deference[775]. On the contrary: the case law makes it clear that a tribunal must evaluate the legitimacy of the public policy allegedly being pursued and independently test the State's justifications and assess whether they are *bona fide*[776].

586. Claimants argue that the Kingdom cannot rely on Art. 10(2)(b) of the OIC Agreement to justify its conduct either: the Kingdom has neither established that the Measures were "issued in accordance with an order from a competent legal authority" nor that they were "executed" through a "decision given by a competent judicial authority", as required by Art. 10(2)(b)[777]. Furthermore, for measures to qualify as "preventive" under Art. 10(2)(b), they must have "*factual* and legal foundations"[778].

587. Claimants argue that Saudi Arabia bears the burden of proving that it took the Measures for justified national security concerns[779]. When assessing the evidence, tribunals should review political recommendations by governmental committees, ministry assessments, contemporaneous government commentary, and witness testimony, that show the need for the adoption of extraordinary measures[780].

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[768] C I, paras. 266, 275; C II, para. 218; CPHB, para. 102.
[769] C II, para. 316.
[770] CPHB, para. 77.
[771] CPHB, para. 78.
[772] CPHB, para. 79.
[773] C II, para. 280.
[774] C II, para. 280; CPHB, para. 113.
[775] C II, paras. 283 *et seq.*
[776] C II, para. 288; CPHB, para. 113.
[777] C II, para. 324.
[778] C II, para. 322.
[779] C II, paras. 289-290; CPHB, para. 114.
[780] C II, para. 291.

588. Claimants submit that the Kingdom has failed to marshal any satisfactory evidence that supports its national security defence or the need to take preventive action: no Saudi official has provided testimony regarding the reasons of sovereign necessity that purportedly justified the Measures; Saudi Arabia has also not offered any first-hand and contemporaneous documents supporting its claims or showing how the Saudi authorities evaluated the national security threat at the time the Measures were conceived or implemented, or how they were calibrated and designed to respond to a specific threat[781].

589. The Kingdom has withheld all documents that assess its purported national security concerns and that discuss how and why the Measures were conceived and implemented – making it impossible for the Tribunal to conduct an informed evaluation of the Kingdom's motives and of the necessity and proportionality of the Measures when measured against their alleged purpose[782]. Since the Kingdom is in possession of such evidence, the Tribunal must infer that Respondent's refusal to disclose implies that there is no valid national security justification[783].

590. In sum, the Kingdom has failed to carry its burden of proof that its conduct with respect to the Measures is entitled to any "deference" or that it has a valid defence under Art. 10(2)(b) of the OIC Agreement[784].

2. RESPONDENT'S POSITION

2.1 THE MEASURES ARE PERMISSIBLE UNDER ART. 10(2)(B)

591. The Kingdom submits that even if the Measures could constitute an expropriation contrary to Art. 10(1) of the OIC Agreement (*quod non*), they are permissible on the basis of Art. 10(2)(b), which allows States to adopt "preventive measures", if they are "issued in accordance with an order from a competent legal authority"[785].

592. Saudi Arabia explains that the Measures were a legitimate response to a long-standing national security concern: the threat created by Qatar's state policies[786]. This is not a situation in which a State has retrospectively attempted to excuse its conduct by reference to amorphous national security concerns; here, there was a genuine tension between Saudi and Qatari foreign policy, and the Kingdom had a genuine apprehension that Qatar's foreign policy gave rise to a national security risk[787]. This is demonstrated by the evidence on the record[788]:

- The 2017 statement by the Kingdom's Ministry of Foreign Affairs, which referred to "reasons related to Saudi security", namely Qatar's breach of the Riyadh Agreements and threats from terrorist groups[789]; and

[781] C II, paras. 296, 323; CPHB, para. 115.
[782] C II, para. 297; CPHB, para. 116.
[783] CPHB, para. 118.
[784] C II, para. 302.
[785] R II, paras. 371-372; RPHB, para. 90.
[786] R I, paras. 14, 18, 385.3; R II, paras. 5, 8, 10.
[787] R II, para. 179.
[788] RPHB, para. 114.
[789] R I, para. 413; RPHB, para. 114, referring to **Doc. R-122.**

- The Riyadh Agreements, which make clear reference to security concerns arising from Qatar's foreign policy over several years prior to the Measures.

593. These documents create a presumption that Saudi Arabia was acting in response to long-held national security concerns, having previously exhausted multiple diplomatic efforts at resolution[790]. The Measures had nothing to do with Qatar Pharma or Dr. Al Sulaiti[791].

594. In circumstances where the Tribunal does not (and could not, for reasons of national security) have all the evidence before it on the motives underlying the Kingdom's actions[792], the Tribunal must afford the Kingdom a wide margin of appreciation to assess and respond to matters of national security, and it should not second-guess the State's decision-making[793]. The Kingdom deserves a high (albeit not an absolute) degree of deference[794]: if the Tribunal is satisfied that the Measures were *bona fide* responses to national security concerns, then – based on the principle of deference – it must not second-guess their legality as a matter of international law[795].

595. Saudi Arabia avers that considering the threat that Qatar's conduct posed to the Kingdom's national security, the application of Art. 10(2)(b) is manifest[796]: the Measures constituted "preventive measures" that were needed to deal with a serious national security crisis (*i.e.*, Qatar's support for and financing of terrorism in the Gulf region)[797].

596. According to the Kingdom, the *Al-Warraq* case sets forth the test to determine if a measure can be considered as "preventive", which can be distilled as follows[798]:

- The measure adopted by the State has to be within the competence of the relevant authority taking the measure; and

- The measure must be lawful as a matter of the State's domestic law.

597. The Kingdom submits that the test is satisfied in this case; the Measures were adopted pursuant to Saudi Arabia's announcement of 5 June 2017, for "reasons related to Saudi security" and they were[799]:

- Fully within the competence of the Saudi authorities;

- Lawful as a matter of Saudi Arabia's domestic law:

The Measures were adopted by a Royal Decree by His Majesty the King, which sets out the directions that must be taken by each government body to execute the

[790] RPHB, para. 115.
[791] R II, para. 10.
[792] R I, para. 385.3.
[793] R I, para. 385.3; R II, para. 177.
[794] R II, paras. 341, 355.
[795] CHT, p. 2445, ll. 10-19 (Dr. Harris).
[796] R I, para. 409; R II, para. 373; RPHB, para. 90.
[797] R I, para. 416; R II, para. 377.
[798] R I, paras. 410-412; R II, para. 374, referring to **Doc. CLA-32**, *Al-Warraq*, paras. 527-530.
[799] R I, paras. 413-416; R II, para. 374.

decision[800]; as is normal practice in Saudi Arabia, the Kingdom did not publish the Decree – only the fact that the Measures had been adopted, the underlying reasons and a clear explanation of what they encompassed[801]. It is not surprising that there is no publicly available record of the Kingdom's decision-making process, since matters of national security are not debated or determined in the public domain[802].

598. In sum, the Kingdom argues that there was both a "factual" and "legal" foundation for the Measures, which were necessary to deal with serious national security concerns. The Measures were properly adopted by competent authorities and in accordance with applicable Saudi law, and thus constituted permissible "preventive measures" within the meaning of Art. 10(2)(b)[803] – with the consequence that there is no expropriation.

2.2 THE PROPER SCOPE OF ART. 10 OF THE OIC AGREEMENT

599. The Kingdom argues that, in any event, Claimants' proposed interpretation of Art. 10 of the OIC Agreement is overbroad: Claimants attempt to conflate this provision with other provisions on expropriation, thereby ignoring the ordinary meaning of the terms of the text in their context[804].

600. According to the Kingdom, Art. 10 provides for a protection against measures which directly or indirectly affect the "ownership" of the investor's "capital" or "investment"; it follows that the investor's "*ownership*" of the investment is the touchstone for Art. 10(1)'s protections – contrasting with the expropriation provisions of other treaties cited by Claimants[805].

601. In this case, none of the Measures taken by the Kingdom has affected the ownership of Claimants' assets – only their value. Dr. Al Sulaiti still owns the shares in QEMS, and Qatar Pharma still has its contractual relationship with QEMS. Therefore, the Measures do not rise to the level of being a "deprivation" and Art. 10(1) is not engaged[806].

3. DECISION OF THE ARBITRAL TRIBUNAL

602. Art. 10 of the OIC Agreement provides that[807]:

> "1. The host state shall undertake not to adopt or permit the adoption of any measure - itself or through one of its organs, institutions or local authorities - if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his basic rights or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying

[800] RPHB, para. 117.
[801] RPHB, para. 118.
[802] R II, para. 377.
[803] R II, para. 379.
[804] R II, para. 357.
[805] R II, para. 358.
[806] R I, paras. 391, 395-396; R II, paras. 362, 370.
[807] **Doc. CLA-10.**

its utilities, the realization of its benefits or guaranteeing its development and growth.

2. It will, however, be permissible to:

(a) […]

(b) Adopt preventive measures issued in accordance with an order from a competent legal authority […]." [Emphasis added]

603. It is Claimants' position that Saudi Arabia has unlawfully expropriated their investment in breach of Art. 10 and that it cannot avail itself of a defence under Art. 10(2)(b) invoking its national security interests. The Kingdom counters that it adopted the Measures for reasons of national security so that – even assuming there was an expropriation – the State's conduct was permissible considering the exception under Art. 10(2)(b) of the OIC Agreement[808]. Subsidiarily, the Kingdom says that Claimants' investments cannot have been expropriated, since the Measures have not affected the ownership of Claimants' assets, *i.e.*, the ownership of the shares in QEMS[809].

604. The Tribunal will first summarize the proven facts (**3.1**) and thereafter focus on Saudi Arabia's national security defence, within the exception provided for by Art. 10(2)(b) of the OIC Agreement. The Tribunal will find that the Kingdom issued the Measures for reasons of national security and that such Measures were permissible under Art. 10(2)(b) of the OIC Agreement (**3.2**).

3.1 SUMMARY OF PROVEN FACTS

A. The Riyadh Agreements

605. As explained by the Parties' geopolitical experts[810], the "Arab Spring", which spread across the Middle East and Northern Africa throughout 2010 and 2011, threatened the *status quo* in the Arab world. The fall of several leaders, in countries such as Tunisia, Egypt, Libya and Yemen, opened political and policy differences between neighbouring countries, and power vacuums, which ultimately led to the rise of groups such as Daesh and the Muslim Brotherhood.

606. It is against this backdrop that in 2013 Qatar and Saudi Arabia and the other members of the GCC signed the Riyadh Agreements, with the aim of "abolish[ing] whatever muddies the[ir] relations" and enhancing their common security[811]; due to the sensitivity of the issues involved, these Agreements were initially secret and were only disclosed to the public in 2017, after the adoption of the Measures[812].

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[808] R I, para. 388; RPHB, para. 90.
[809] R I, para. 389.
[810] CER-2, Ulrichsen, paras. 4.51-4.52; RER-3, Collis, paras. 60(c) and 80 *et seq*. See also **Doc. KU-58**, p. 1.
[811] See also CER-2, Ulrichsen, pp. 22-23; RER-3, Collis, paras. 85-87; **Doc. H-4**, slide 4.
[812] **Doc. KU-50**; CER-2, Ulrichsen, para. 4.47.

The first Riyadh Agreement

607. The first Riyadh Agreement was signed on 23 and 24 November 2013 and in it the GCC States made significant security undertakings[813]; they pledged:

- Not to interfere in their respective internal affairs, whether directly or indirectly;
- Not to give harbour or naturalize "any citizen of the [GCC] States that has any activity which opposes his country's regimes, except with the approval of his country";
- Not to support the Muslim Brotherhood or any other organization or group aimed at destabilizing the GCC States; and
- Not to support any faction in Yemen that could pose a threat to Yemen's neighbouring countries (namely, Saudi Arabia).

Recalling of ambassadors from Qatar

608. Nevertheless, less than four months later, on 5 March 2014, Saudi Arabia, the UAE and Bahrain decided to recall their ambassadors in Qatar, in protest against Qatar's alleged refusal to abide by the terms of the first Riyadh Agreement and to agree on a monitoring mechanism[814].

609. Qatar, in turn, declared that it remained committed to the GCC's values, and would not be recalling its own ambassadors[815].

The Mechanism Implementing the Riyadh Agreement

610. Despite this diplomatic incident, on 17 April 2014 the GCC States (including Qatar) signed the Mechanism Implementing the Riyadh Agreement (a document classified as "Top Secret"), which reiterated the commitments and provided, among other things, that[816]:

> "Foreign ministers of the GCC Countries shall hold private meetings on the margins of annual periodic meetings of the ministerial council wherein violations and complaints reported by any member country of the Council against any [other] member country of the Council shall be reviewed by the foreign ministers to consider, and raise them to leaders." [Emphasis added]
>
> and
>
> "If any country of the GCC Countries fail[s] to comply with this mechanism, the other GCC Countries shall have the right to take any appropriate action to protect their security and stability." [Emphasis added]

[813] **Doc. R-53.**
[814] **Doc. KU-58**, p. 4; **Doc. KU-59**, p. 1.; **Doc. SC-44**; **Doc. RLA-212**, para. 2.21; CER-2, Ulrichsen, para. 4.55; RER-3, Collis, para. 88.
[815] **Doc. KU-59**, p. 3.
[816] **Doc. R-73.**

The August 2014 Meeting of Foreign Ministers

611. As had been contemplated in the Mechanism, on 30 August 2014 the Ministries of Foreign Affairs met in Jeddah. On this occasion, the Saudi Foreign Minister voiced serious concerns in respect of Qatar[817]:

> "We presented during our meeting with His Highness Shaikh Tamim bin Hamad Al Thani [the Emir of Qatar] all the points of conflict, such as the support for Islamists, Muslim Brotherhood, political policy, Libya and the issue of the media as well as the groups that work against the GCC and the consequential dangers that affect us all. We discussed this in detail and we found an acceptance by His Highness and that he is exerting efforts in resolving this problem, particularly that he ascended to the throne a year ago and that he is the first and last person responsible for all that happens in Qatar. He gave his promise to the Custodian of the Two Holy Mosques and that he was committed to this promise. His Highness requested finding indisputable evidence for the implementation and said that he was prepared to cooperate in 'all that you want', adding that there is no problem without a solution.
>
> We informed His Highness that we would like him to stand by Egypt and not with the Muslim Brotherhood or encourage extremists. His Highness agreed to stop the media treatment against us, and, as you know, the media is part of the political policy of any country. His Highness said the media would be committed and will not taunt Egypt, but instead will stand by Egypt and support its efforts, adding that Qatar will not have a hand in supporting extremists or encouraging them, and that this is the policy that we want.
>
> The agreement now that His Highness committed to will be the same general policy that the GCC is committed to." [Emphasis added]

The Supplementary Riyadh Agreement

612. On 16 November 2014, the GCC States signed the Supplementary Riyadh Agreement[818], a treaty again labelled "Top Secret", with a particular focus on security. The States committed[819]:

- To fully implement the Riyadh Agreement within one month;
- To deny support and actively prosecute "any person or media apparatus that harbors inclinations harmful to any [GCC State]"; and
- To provide support to Egypt, "ceasing all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcasted on Al-Jazeera" – a Qatari news channel.

613. The Supplementary Riyadh Agreement finalized with an order to[820]:

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[817] **Doc. R-81**, pp. 2-3. See also **Doc. RLA-212**, para. 2.27.
[818] CER-2, Ulrichsen, paras. 4.55.
[819] **Doc. R-90**, p. 1.
[820] **Doc. R-90**, p. 2.

> "[…] intelligence chiefs to follow up on the implementation […] and to report regularly to the leaders, in order to take the measures they deem necessary to protect the security and stability of their countries." [Emphasis added]

Mistrust between Saudi Arabia and Qatar

614. Notwithstanding the execution of the successive Riyadh Agreements, the friction between Saudi Arabia and Qatar did not abate[821].

615. On 19 February 2017 the Qatari Minister of Foreign Affairs addressed a letter to the GCC, suggesting that the GCC States had made no effort to implement the Riyadh Agreements, and therefore the subject of these agreements had "been exhausted". Qatar thus called upon the other GCC countries[822]:

> "[…] to agree to terminate the Riyadh agreement which has been overtaken by events at the international and regional levels, and in turn, it may be necessary for the member states of the Council to take the necessary steps to amend the [GCC] Charter in line with their aspirations, to be prepared to face any issues that may arise regarding joint gulf cooperation, and regional and international developments in various fields." [Emphasis added]

616. The Kingdom, in turn, suspected that Qatar was providing financial and media support to various groups, including the Muslim Brotherhood, Daesh and Al-Qaeda, and several Iranian-backed groups, in breach of its obligations under the Riyadh Agreement[823].

B. The Measures

617. The situation exploded in 2017: after recalling once again the Saudi ambassador to Qatar, on 5 June 2017 the Kingdom adopted the Measures.

618. The legal means by which the Measures were adopted was a Royal Decree issued by His Majesty the King [previously defined as the "Royal Decree"], setting forth the directions which must be taken by each Ministry and government body in execution of His Majesty's decision[824]. The precise text of the Royal Decree remains secret. The Saudi government only published a statement [previously defined as the "Official Statement"][825], distributed through the press service of the Saudi Ministry of Foreign Affairs, acknowledging the fact that the Measures had been adopted, explaining the underlying reasons and giving an outline of what they entailed.

619. The Official Statement explained that Qatar had repeatedly violated its international obligations and the agreements signed under the umbrella of the GCC to stand against terrorism. Therefore[826]:

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[821] **Doc. KU-49**, p. 2; **Doc. KU-58**, p. 5.
[822] **Doc. R-116**. See also **Doc. RLA-212**, para. 2.47.
[823] **Doc. KU-49**, p. 2; **Doc. RLA-212**, paras. 2.33-2.46; RER-3, Collis, para. 55.
[824] RPHB, para. 117.
[825] **Doc. R-122**. See also **Doc. C-71**.
[826] **Doc. R-122**. See also **Doc. C-71**.

> "[…] the Government of Saudi Arabia, in exercising its sovereign rights guaranteed by the international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land, sea and airports, prevent crossing into Saudi territories, airspace and territorial waters […] for reasons relating to Saudi national security. […] Saudi citizens are prohibited from traveling to Qatar, residing in or passing through it, while Saudi residents and visitors have to hurry leaving Qatari territories within 14 days. The decision, for security reasons, unfortunately prevents Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia and those Qatari residents and visitors have to leave Saudi territories within 14 days." [Emphasis added]

620. In sum, Saudi Arabia (and several other States, namely Egypt, the UAE and Bahrain [also known as the "**Quartet**"]) adopted the following Measures[827]:

- Sever diplomatic and consular relations with Qatar;
- Close all land, sea and air communications to and from Qatar;
- Prevent crossings from Qatar into its territory, airspace and waters;
- Prohibit Saudi citizens from traveling to or through Qatar;
- Require Saudi citizens resident in Qatar to leave within 14 days; and
- Order Qatari citizens visiting or residing in Saudi territory to leave within 14 days.

621. In compliance with the Royal Decree:

- The Saudi Customs Directorate closed the Salwa Crossing[828];
- The Saudi Ports Authority issued a circular instructing the directors of ports in Saudi Arabia "not to receive any ship flying the Qatari flag, or owned by Qatari persons or companies, and not to unload any goods of Qatari origin in Saudi ports"[829];
- The General Authority of Civil Aviation in Saudi Arabia revoked Qatar Airways' licence to operate in the Kingdom and issued a notice that all flights registered in Qatar were no longer authorized to land at Saudi airports or to overfly Saudi Arabian airspace[830].

[827] **Doc. R-122.** See also **Doc. C-71**; CER-2, Ulrichsen, paras. 4.1-4.4; RER-3, Collis, para. 24; HT, Day 6, p. 1387 (Dr. Harris); RPHB, para. 93.
[828] **Doc. KU-5**; **Doc. C-81**; **Doc. C-82**; CER-2, Ulrichsen, para. 4.5; RER-3, Collis, fn. 2; R I, para. 415.4.
[829] **Doc. C-80**; CER-2, Ulrichsen, para. 4.2; RER-3, Collis, para. 24.
[830] **Doc. C-78**; **Doc. C-79**; **Doc. R-179**; CER-2, Ulrichsen, para. 4.3; RER-3, Collis, para. 24.

C. Mediation and negotiations

622. After the adoption of the Measures, a period of diplomatic mediation and negotiations, spearheaded by Kuwait, the United States and the European Union, ensued[831].

623. On 23 June 2017 Saudi Arabia and the other Quartet members delivered a list of 13 practical demands, requiring Qatar to agree to all demands within 10 days and thereafter to submit itself to monthly and annual monitoring[832]. Qatar, however, rejected this list of demands, arguing that they would amount to a violation of its sovereignty[833].

624. On 19 July 2017 Saudi Arabia transformed the 13 demands into six "principles", which required Qatar, *inter alia*,

- to commit fully to the Riyadh Agreements,
- to combat extremism and terrorism,
- to refrain from inciting hatred and violence, and
- to refrain from interfering in the internal affairs of other Arab States;

Qatar, however, once again declined to submit to the Kingdom's demands[834].

D. The Al-Ula Declaration

625. More than three years later, on 5 January 2021, the GCC States (including Qatar) signed the Al-Ula Declaration, putting an end to the Measures and restoring their ties[835]. Pursuant to this Declaration, the signatory States undertook to "stand firm against any confrontation that could undermine the national or regional security of any of [them]" and to be "united against any direct or indirect interference in the internal affairs of any of [them]"[836]. Furthermore, the Al-Ula Declaration provides that the parties[837]:

> "[...] to the present Declaration [are] committed to bringing an end to any claims, complaints, measures, protests, objections or disputes of any sort against any other State party to the Declaration, including by dropping, withdrawing or rescinding them, and to stopping implementation of the measures announced on 10 Ramadan A.H. 1438 (5 June 2017) [*i.e.*, the Measures]." [Emphasis added]

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[831] **Doc. KU-100**, p. 1; **Doc. KU-96**; RER-3, Collis, paras. 58, 111.
[832] **Doc. KU-72**; **Doc. KU-96**; **Doc. SC-13**; **Doc. C-159**; CER-2, Ulrichsen, para. 4.81; RER-3, Collis, para. 57.
[833] **Doc. KU-100**, p. 2; CER-2, Ulrichsen, paras. 4.84, 4.86.
[834] **Doc. C-160**; **Doc. KU-100**; CER-2, Ulrichsen, para. 4.84; RER-3, Collis, para. 58.
[835] **Doc. RLA-79/KU-101**, p. 7. See also **Doc. C-206**; CER-2, Ulrichsen, para. 4.87; RER-3, Collis, paras. 110-112. The Al-Ula Declaration was also signed by Egypt.
[836] **Doc. RLA-79/KU-101**, p. 7.
[837] **Doc. RLA-79/KU-101**, p. 7.

626. Thereafter, the Qatar-Saudi land, air and sea borders reopened and trade and commercial relations between both States were restored[838].

3.2 THE MEASURES ARE PERMISSIBLE UNDER ART. 10(2)(B) OF THE OIC AGREEMENT

627. The Kingdom's main defence is that it adopted the Measures for reasons of national security and that, consequently, the Measures were preventive and are permissible under Art. 10(2)(b) of the OIC Agreement. The Kingdom explains that the Measures against Qatar, taken together with Bahrain, the UAE and Egypt, were justified for a number of reasons:

- Qatar was threatening the stability of the region by supporting terrorists and extremist groups such as the Muslim Brotherhood, Al-Qaeda, Al Nusrah and Daesh[839];
- Qatar's actions resulted in a very real and serious security threat to Saudi Arabia[840]; the Kingdom was concerned that Qatar's sponsorship of violent groups would permit attacks on Saudi soil and against Saudi interests[841];
- Qatar had repeatedly violated the Riyadh Agreements[842] and in 2017 had even attempted to terminate them[843]; and
- Qatar was funding terrorist organizations through ransom payments[844].

628. Saudi Arabia adds that the Tribunal should afford it a wide (albeit not absolute) margin of appreciation to assess and respond to matters of national security, and it should be very cautious to second-guess the State's decision-making process[845].

629. Claimants, on their side, stress that the OIC Agreement does not contain an express exception for national security and even less a "self-judging" clause[846]. In these circumstances, although States can be afforded "some latitude" for their decisions, this deference is far from unfettered and does not preclude a tribunal from engaging in its own independent review of the State's conduct[847].

630. On this preliminary question, the Tribunal tends to agree with Claimants: States are owed a degree of deference when assessing their own security interests, given their

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[838] **Doc. RLA-79/KU-101**, p. 7; CER-2, Ulrichsen, para. 4.90; RER-3, Collis, paras. 117-130. See also RPHB, para. 81.
[839] R II, paras. 182-184.
[840] R II, para. 186.
[841] R II, para. 187.
[842] R I, paras. 142-143, 151.
[843] R I, paras. 175-176.
[844] R I, para. 166.
[845] R I, paras. 385.3, 414; R II, para. 177.
[846] C II, para. 280.
[847] C II, para. 282.

proximity to the situation, expertise and competence[848] – but that deference cannot be unlimited. In the words of the *Deutsche Telekom* tribunal[849]:

> "To assess the necessity of the measures to safeguard the state's essential security interests, the Tribunal will thus determine whether the measure was principally targeted to protect the essential security interests at stake and was objectively required in order to achieve that protection, taking into account whether the state had reasonable alternatives, less in conflict or more compliant with its international obligations."

631. In the present case, the OIC Agreement does not contain a general clause that expressly excludes from its scope measures adopted for national security reasons; but under Art. 10(2)(b) certain measures adopted by the State are exempted from the prohibition of expropriation[850]:

> "It will, however, be permissible to [...] [a]dopt preventive measures issued in accordance with an order from a competent legal authority and the execution measures of the decision given by a competent judicial authority."

632. The Kingdom says that if the Tribunal finds that the Measures were justified to safeguard its national security interests, the necessary consequence is that its conduct falls within the scope of the exception in Art. 10(2)(b) of the OIC Agreement, and that no expropriation in breach of Art. 10(1) can have occurred[851]. Claimants contradict this assertion: they say that the Kingdom cannot rely on Art. 10(2)(b) to justify its conduct, because the Measures do not qualify as "preventive" and there is no evidence that they were "issued in accordance with an order from a competent legal authority"[852].

633. In accordance with Art. 10(2)(b), "it will be permissible" for a host State to:

- "Adopt preventive measures" (**A.**),
- "issued in accordance with an order from a competent legal authority" (**B.**).

634. The Tribunal will now turn to the analysis of these requirements; if they are met, the Measures will be permissible, with the consequence that no expropriation can be found to have occurred.

A. <u>The Measures were preventive</u>

635. The OIC Agreement does not contain a definition of the concept "preventive measures", but the ordinary meaning of the word "preventive" refers to an action undertaken to stop something before it happens[853] or to forestall an anticipated

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[848] **Doc. CLA-249**, *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014- 10, Interim Award ["***Deutsche Telekom***"], para. 238.
[849] **Doc. CLA-249**, *Deutsche Telekom*, para. 239.
[850] **Doc. CLA-10**. Claimants recognise this exception (see C II, para. 320).
[851] R I, para. 408; R II, para. 371.
[852] C II, paras. 323-324.
[853] Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/preventive. Black's Law Dictionary (9th Edition) defines the verb "to prevent" as "to hinder or impede" something from occurring.

hostile act[854]. If follows that for a measure to be deemed permissible under the OIC Agreement, it must have been taken to avert or deter something that is perceived as a threat.

636. In *Al-Warraq*, the tribunal did not define the concept of "preventive" measure but decided to examine whether the measures it was dealing with had "factual and legal foundations"[855] (and ultimately concluded that the measures were indeed permissible under Art. 10(2)(b)[856]). The Tribunal agrees with this approach, and in the following sub-sections will conclude that the stated purpose of the Measures was to further the Kingdom's national security (**a.**), and that it must defer to the Kingdom's judgement on how to best protect its national security (**b.**).

a. The stated motivation of the Measures was the protection of Saudi national security

637. What was the stated motivation of Saudi Arabia when it decided to close its borders with and to impose a blockade on Qatar, expelling Qatari citizens from the Kingdom and recalling Saudi citizens in Qatar – by any understanding a draconian sanction against a neighbouring State with whom the Kingdom shared and still shares significant cultural and economic ties?

638. The motivation can be understood from the Official Statement issued by the Saudi Ministry of Foreign Affairs. The precise wording of the Official Statement is as follows[857]:

> "[…] the Government of Saudi Arabia, in exercising its sovereign rights guaranteed by the international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land, sea and air ports, prevent crossing into Saudi territories, airspace and territorial waters […].
>
> The Kingdom of Saudi Arabia has taken this decisive decision as a result of grave violations committed by the authorities in Doha over the past years in secret and public aiming at dividing internal Saudi ranks, instigating against the State, infringing on its sovereignty, adopting various terrorist and sectarian groups aimed at destabilizing the region including the Muslim Brotherhood Group, Daesh (ISIS) and Al-Qaeda, promoting the ethics and plans of these groups through its media permanently, supporting the activities of Iranian-backed terrorist groups in the governorate of Qatif of the Kingdom of Saudi Arabia and the Kingdom of Bahrain, financing, adopting and sheltering extremists who seek to undermine the stability and unity of the homeland at home and abroad, and enticing the media that seek to fuel the strife internally; and it was clear to the Kingdom of Saudi Arabia the support and backing from the authorities in Doha for coup [sic] Al-Houthi militias even after the announcement of the Coalition to Support the Legitimacy in Yemen. […]
>
> Since 1995, the Kingdom of Saudi Arabia and its brothers have made strenuous and continued efforts to urge the authorities in Doha to abide by its

[854] Merriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/preventive.
[855] **Doc. CLA-32**, *Al-Warraq*, paras. 528 *et seq*.
[856] **Doc. CLA-32**, *Al-Warraq*, para. 539.
[857] **Doc. R-122**; **Doc. C-71**.

> commitments and agreements, yet, they have repeatedly violated their international obligations and the agreements they signed under the umbrella of the Gulf Cooperation Council (GCC) for Arab States to cease the hostilities against the Kingdom and stand against terrorist groups and activities of which the latest one was their failure to implement the Riyadh Agreement." [Emphasis added]

639. The Official Statement explains that the motivation underlying the Measures is a perceived threat to Saudi Arabia's national security, caused by alleged "grave violations committed" by Qatar, namely:

- Its failure to cease "hostilities" against the Kingdom and to "stand against terrorist groups and activities";
- Its repeated violation of its "international obligations and the agreements signed under the GCC"; and
- More recently, its "failure to implement the Riyadh Agreement".

Preceding events

640. The Measures were not taken in a vacuum: the Riyadh Agreements, whose alleged breach was one of the reasons underlying the Measures, had been executed in the aftermath of the "Arab Spring", in a context of geopolitical tensions within the member States of the GCC[858]. There is ample evidence showing that, from the very beginning, Saudi Arabia was never entirely satisfied with Qatar's implementation of the Riyadh Agreements; in fact:

- In March 2014 Saudi Arabia recalled its ambassador from Qatar due to Qatar's alleged refusal to abide by the terms of the first Riyadh Agreement and to agree on a monitoring mechanism[859];
- In August 2014 the Saudi Foreign Minister publicly expressed its concern with alleged terrorist support by Qatar[860].

641. In this context of dissatisfaction, the GCC countries tried to find an agreed solution by signing in 2014 the Mechanism Implementing the Riyadh Agreement and the Supplementary Riyadh Agreement. Both these documents contemplate that GCC countries would monitor complaints and potential violations of the first Riyadh Agreement and would have the right to take "any appropriate action to protect their

[858] See section VI.2.3.1 *supra*.
[859] **Doc. KU-58**, p. 4; **Doc. KU-59**, p. 1.; **Doc. SC-44**; **Doc. RLA-212**, para. 2.21; CER-2, Ulrichsen, para. 4.55; RER-3, Collis, para. 88.
[860] **Doc. R-81**, pp. 2-3. See also **Doc. RLA-212**, para. 2.27.

security and stability"[861]. More importantly, in the Supplementary Riyadh Agreement, Qatar and Saudi Arabia expressly "tasked" their[862]:

> "[…] intelligence chiefs to follow up on the implementation of the results of this supplementary agreement and to report regularly to the leaders, in order to take the measures they deem necessary to protect the security and stability of their countries",

a statement which shows that there was a constant monitoring, at the highest secret intelligence level, of the implementation of the commitments undertaken in the Riyadh Agreements.

642. Furthermore, in February 2017 – *i.e.*, four months prior to the adoption of the Measures – Qatar expressed its lack of satisfaction with the Riyadh Agreement and even called for its termination[863].

643. Summing up, the historic background confirms that Qatar's foreign policy, and the alleged terrorist risks that it entailed for the Kingdom, were the very reasons which led to the adoption of the Measures.

Posterior events

644. After the issuance of the Measures, on 12 July 2017, Saudi Arabia, together with the other members of the Quartet, issued a list of 13 practical demands from Qatar[864], which included *inter multa alia*:

- Curbing diplomatic ties with Iran;
- Severing all ties to "terrorist organizations" and handing over terrorist figures;
- Shutting down the Qatari news site Al-Jazeera and other news outlets;
- Terminating all Turkish military presence in Qatar; and
- Ceasing contact with the political opposition in Saudi Arabia and other Quartet countries.

645. The Kingdom went on to refine these demands into six principles, which comprised commitments to combat extremism and terrorism, to prevent financing and safe havens for such groups and to suspend all acts of incitement[865].

646. Finally, in 2018, the members of the Quartet made a submission to the International Court of Justice, in the context of an appeal against the International Civil Aviation

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[861] **Doc. R-73.** See also **Doc. R-90**, p. 2: "it has been decided that the Riyadh Agreement, and its executive mechanism, and the components of this supplementary agreement, requires the full commitment to its implementation. The leaders have tasked the intelligence chiefs to follow up on the implementation of the results of this supplementary agreement and to report regularly to the leaders, in order to take the measures they deem necessary to protect the security and stability of their countries".
[862] **Doc. R-90**, p. 2.
[863] **Doc. R-116.** See also **Doc. RLA-212**, para. 2.47.
[864] **Doc. KU-72**; **Doc. KU-96**; **Doc. SC-13**; **Doc. C-159**; CER-2, Ulrichsen, para. 4.81; RER-3, Collis, para. 57.
[865] **Doc. C-160**; **Doc. KU-100**; CER-2, Ulrichsen, para. 4.84; RER-3, Collis, para. 58.

Organization's decision in respect of proceedings commenced by Qatar[866]. In this submission, the Quartet explained that the Measures were lawful countermeasures adopted to induce Qatar to cease its international wrongful acts – namely its persistent breaches of the Riyadh Agreements[867].

Claimants' alternative interpretation

647. Claimants propose an alternative reason for the Measures: based on the assessment of Dr. Ulrichsen, their policy expert, Claimants submit that the Measures "related to Saudi regional and geopolitical interests during Donald Trump's unconventional and highly transactional presidency rather than to any national security considerations"[868] and were an "audacious attempt to curry favor with President Trump"[869]. Dr. Ulrichsen – an academic at the James Baker Institute for Public Policy at Rice University in Houston, Texas, who was an associate fellow with the Middle East North Africa programme at Chatham House for almost 10 years[870] – presented an expert report[871] and was examined during the Hearing[872].

648. Although Dr. Ulrichsen has forcefully defended his position, he has failed to marshal sufficiently convincing evidence. His conclusions are belied by the long history of tensions between Qatar and Saudi Arabia, resulting from Qatar's assertion of an independent foreign policy and Saudi Arabia's concern that such foreign policy was furthering the risk of attacks by extremist groups supported by Iran. The first Riyadh Agreement already sought to assuage these tensions – a treaty executed in 2013, well before the election of President Trump.

b. The Tribunal defers to the Kingdom's assessment of its own national security

649. Were the Kingdom's security concerns real and did the Kingdom adopt the Measures to counteract a perceived threat to its sovereign security?

650. Claimants criticise the Kingdom for not having produced "political recommendations by governmental committees, ministry assessments, contemporaneous government commentary and witness testimony", proving the assertion that the Measures were a responsive reaction to a perceived security threat[873]. Claimants add that where measures are particularly severe, as in the present case, tribunals rightly expect to find witness testimony or other first-hand, contemporaneous documents evidencing the need for such draconian measures[874].

651. The Tribunal agrees with Claimants that such evidence is lacking in the present case: the Kingdom has failed to offer any witness who can provide insight on the reasoning underlying the Measures; nor has it produced any contemporaneous

[866] **Doc. RLA-212.**
[867] **Doc. RLA-212,** paras. 1.23-1.27.
[868] CER-2, Ulrichsen, para. 3.5. See also HT, Day 8, p. 1658, l. 14 to p. 1660, l. 11 and p. 1714, ll. 9-11.
[869] CER-2, Ulrichsen, para. 4.71.
[870] HT, Day 8, p. 1656, ll. 4-8 (Dr. Ulrichsen).
[871] CER-2.
[872] HT, Day 8, pp. 1654-1798.
[873] C II, para. 291.
[874] C II, para. 291.

internal document, report or memorandum, on which the political decision to implement the Measures was based.

652. The Kingdom, however, has produced the expert testimony of Ambassador Simon Paul Collis CMG, who between 2015 and 2020 was ambassador of the United Kingdom in Saudi Arabia and senior Arabist of the British government, and before that, ambassador to Qatar between 2005 and 2007[875]. Ambassador Collis presented an expert report[876] and was examined at the Hearing[877].

653. Ambassador Collis has convincingly explained that in a case like this, which affects "core national security matters", such as terrorism, military policy, external military bases, foreign relations, internal insurgency and regional political destabilization, the evidence used by the State, by its very nature, consists of secret intelligence, which normally cannot be made available to external parties (including arbitral tribunals). But even if such access were permitted, external parties would be incapable of assessing the relevance of the information[878],

- without insight into the process of collection,
- without knowledge of the complex scenario planning done to identify future risks, and
- without being capable of gauging the effects of different policy responses to the sovereign's security.

654. In Ambassador Collis' own words[879]:

> "It is not possible to reach a meaningful conclusion about whether the measures were in fact justified without full access to national security archives."

655. The expert's conclusion is confirmed by two facts:

- The Riyadh Agreements were stamped as "Top Secret" documents, and for many years were not publicly available[880];
- The Supplementary Riyadh Agreement finalized with an order to "intelligence chiefs to follow up on the implementation [...] and to report regularly to the leaders, in order to take the measures they deem necessary to protect the security and stability of their countries"[881], showing that each GCC country (including Qatar) entrusted compliance to the highest secret intelligence level.

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[875] RER-3, Collis, paras. 4-8; HT, Day 8, p. 1801, l. 19 to p. 1802, l. 16 (Amb. Collis).
[876] RER-3.
[877] HT, Day 8, pp. 1799-1918 (Amb. Collis).
[878] HT, Day 8, pp. 1810-1811 (Amb. Collis).
[879] RER-3, Collis, para. 22.
[880] **Doc. KU-50**; CER-2, Ulrichsen, para. 4.47. Both the Mechanism Implementing the Riyadh Agreement and the Supplementary Riyadh Agreement are marked as "Top Secret" (**Doc. R-73** and **Doc. R-90**).
[881] **Doc. R-90**, p. 2.

656. There is a further basis for the Tribunal's conclusions: the Riyadh Agreements (which were signed by Qatar) granted the GCC countries broad latitude to take "the measures they deem necessary to protect the security and stability of their countries"[882]. Saudi Arabia (and the other members of the Quartet) determined that the best means to protect its national security interests was to adopt the Measures and to impose a blockade on Qatar.

657. The Tribunal has already found that it owes a degree of deference to the Kingdom's own assessment of its security interests. The degree of deference is heightened in the present case because core security interests of a sovereign State are at stake, and the risk situation can only be evaluated with full knowledge of all information available to the State – and, in this case, full knowledge necessarily requires access to secret intelligence at the highest level, which no sovereign can be expected to release[883].

* * *

658. Summing up, the Tribunal accepts that the Measures adopted by the Kingdom do indeed constitute "preventive measures" as required by Art. 10(2)(b) of the OIC Agreement.

659. Official statements made by the Kingdom consistently declared that the Measures were adopted as a reaction to Qatar's foreign policy and its alleged support for terrorist groups and organizations. Proven facts both before and after the adoption of the Measures show that the Kingdom sincerely believed its own official position. The Tribunal does not have access to all relevant information sources, which include secret intelligence at the highest level, but is prepared to defer to Saudi Arabia's judgement that the policies adopted by Qatar posed an imminent threat to the Kingdom's national security, that the Measures were "necessary to protect [its] national security interests" and that the Riyadh Agreements authorized their adoption.

B. The Measures were issued in accordance with an order from a competent legal authority

660. Art. 10(2)(b) further requires that the "preventive measures" be issued by "an order from a competent authority".

661. The Measures were formalized in a Royal Decree issued by His Majesty the King, which has not been published and remains secret[884]. The public was made aware of the existence and scope of the Measures through an Official Statement published by the Ministry of Foreign Affairs on 5 June 2017[885].

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[882] **Doc. R-90**, p. 2. See also **Doc. R-73**: "If any country of the GCC Countries failed to comply with this mechanism, the other GCC Countries shall have the right to take any appropriate action to protect their security and stability".
[883] RER-3, Collis, para. 103.
[884] RPHB, paras. 117-118.
[885] **Doc. R-122**.

662. The Tribunal posed the question whether this procedure for approving and giving publicity to a government decision was in conformity with Saudi law[886].

663. The answer has been provided by Ambassador Collis.

664. Ambassador Collis has explained that the Kingdom is an absolute monarchy and that the King, as Head of State, has both executive and legislative powers, aided by the Council of Ministers and the Shura Council[887]. Laws can be issued as Royal Decrees, resolutions of the Council of Ministers and ministerial resolutions and circulars[888]. He added[889]:

> "It is not unusual for instructions to government institutions to be based [on] orders [from the King] that are not formally published. This is more likely to be the case on sensitive issues such as national security matters.
>
> While I do not have insight into the process followed on this occasion, from my own time as Ambassador in Saudi Arabia, I observe this was the normal practice of the Saudi government for significant foreign and security policy decisions, in common with other Gulf governments."

665. Examples of this practice were the 2015 military intervention in Yemen, announced in a joint statement by Saudi Arabia and other participating countries published by the Saudi Press Agency, without reference to an underlying Royal Decree[890], and a 2018 decision to freeze new trade with Canada following a dispute over Canadian criticism regarding human rights[891].

666. Ambassador Collis summarized his position with these words[892]:

> "So, in short, it appears to me that while Saudi Arabia's system of governance and its process for making and announcing and implementing lawful decisions differs significantly from that of say, my own country, the United Kingdom[,] [i]t does have a system of governance, it does have a process for lawful decision-making and as far as I can tell on this occasion it followed the process that it has."

667. In his testimony at the Hearing, Dr. Ulrichsen, Claimants' expert, confirmed that on other occasions the Kingdom had also not published Royal Decrees – and that the national security concerns might justify the confidentiality in the present case[893].

668. Summing up, Ambassador Collis' explanation, which is not contradicted by other evidence in the file, supports the conclusion that the Measures were properly approved and announced in accordance with municipal law. Saudi Arabia being an absolute monarchy, the King is the competent legal authority to adopt any

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[886] HT, Day 8, pp. 1789-1792.
[887] HT, Day 8, p. 1814, l. 17 to p. 1815, l. 3 (Amb. Collis).
[888] HT, Day 8, p. 1815, ll. 3-6 (Amb. Collis).
[889] HT, Day 8, p. 1815, ll. 7-17 (Amb. Collis).
[890] HT, Day 8, p. 1815, ll.18-24 (Amb. Collis).
[891] HT, Day 8, p. 1816, ll. 1-7 (Amb. Collis).
[892] HT, Day 8, p. 1816, ll. 8-15 (Amb. Collis).
[893] HT, Day 8, p. 1658, ll. 3-9; p. 1691, ll. 7-24; p. 1790, ll. 1-22 (Dr. Ulrichsen).

legislative or executive measure. The Measures were formalized in a Royal Decree. The second requirement of Art. 10(2)(b) has thus also been complied with.

* * *

669. In conclusion, the Tribunal finds that Claimants' expropriation claim must be dismissed. Even assuming, *arguendo*, that the Measures had resulted in an expropriation of Claimants' investment, in violation of Art. 10(1) of the OIC Agreement, such expropriation would be "permissible" under Art. 10(2)(b), the Measures having been issued in accordance with an order from His Majesty the King – the competent authority in accordance with Saudi law – with the aim of averting a perceived threat to the Kingdom's national security.

VI.3. THE FET, FPS AND PERMITS CLAIMS

670. Claimants submit that the Kingdom has failed to observe several other obligations under the OIC Agreement, namely[894]:

- The obligation to provide fair and equitable treatment ["**FET**"], including the obligation not to impair the investment through discriminatory or arbitrary measures; since the OIC Agreement does not contain a specific FET provision, Claimants propose to import this protection via the OIC Agreement's Art. 8 most-favoured-nation clause [the "**MFN**" clause or provision] and the Saudi Arabia-Austria BIT[895], which has a FET and non-impairment clause;

- The obligation to provide full protection and security ["**FPS**"]; Art. 2 of the OIC Agreement grants protected investors "adequate protection and security"; to the extent that "adequate protection and security" is a lesser standard than FPS, Claimants propose that the FPS standard be imported again via the OIC Agreement's MFN clause and the Saudi Arabia-Austria BIT (which in its Art. 4(1) uses the expression "full protection and security"[896]); and

- The obligation to grant required permits for entry, exit, and residence to the investor and his employees ["**Permits**"] and to provide the necessary facilities, under Art. 5 of the OIC Agreement.

671. The Kingdom, in turn, denies that it breached any of the provisions of the OIC Agreement and argues that the MFN clause does not permit the import of higher protection standards established in treaties signed between Saudi Arabia and third States[897]. In any event, the Measures were a legitimate response to a long-standing national security concern by the Kingdom[898].

672. The Tribunal will briefly summarise the Parties' positions (**1.** and **2.**), and then make its decision (**3.**).

1. CLAIMANTS' POSITION

1.1 RESPONDENT HAS BREACHED THE FET STANDARD AND ACTED ARBITRARILY AND DISCRIMINATORILY

673. Claimants argue that the MFN provision in Art. 8 of the OIC Agreement allows an OIC investor to import into the OIC Agreement the protections specified in a treaty between Saudi Arabia and a third State, provided that such treaty does not expressly exclude or restrict the economic sector to which the investment belongs[899].

674. Claimants submit that they are entitled to the substantive protections contained in all investment treaties concluded by Saudi Arabia, including the Saudi Arabia-

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[894] C I, para. 239; **Doc. H-1**, slides 94-96; CPHB, para. 244(2).
[895] **Doc. CLA-133**.
[896] **Doc. CLA-133**.
[897] R I, sections V.B, V.C, V.D and V.E; R II, para. 384.
[898] R II, para. 385.3.
[899] C I, para. 318, referring to **Doc. CLA-32**, *Al-Warraq*, paras. 551-552; C II, paras. 352-355.

Austria BIT[900] – a treaty that shares the same subject-matter as the OIC Agreement (*i.e.*, the protection and promotion of foreign investment), with the consequence that the *ejusdem generis* rule is satisfied[901]. Furthermore, the Saudi Arabia-Austria BIT does not exclude Claimants' economic sector (the pharmaceutical industry) from the scope of investment protection[902].

675. Claimants note that other cases decided under the OIC Agreement have confirmed this understanding[903], and so have the works of leading commentators[904]. On the other hand, the cases on which Saudia Arabia relies (*İçkale v. Turkmenistan* and *Sehil v. Turkmenistan*) are inapposite, because they concern a treaty provision different from Art. 8 of the OIC Agreement[905].

676. Claimants seek to import the following standards of treatment from the Saudi Arabia-Austria BIT[906]:

- Art. 2(1), on the obligation to provide FET (**A.**); and
- Art. 2(2), on the prohibition to impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments (**B.**).

A. Breach of the FET standard

677. According to Claimants, the obligation to provide FET is generally composed by the host State's obligation[907]:

- To respect investors' legitimate expectations,
- To act transparently, consistently, non-arbitrarily, and not to engage in conduct that is grossly unfair, unjust, idiosyncratic, or discriminatory, and
- To afford due process.

678. Claimants submit that Saudi Arabia's actions have violated the FET standard, for several reasons[908]:

- The Measures were contrary to Claimants' legitimate expectations and violated the Kingdom's obligation to afford a stable, predictable framework; Saudi Arabia encouraged Claimants' investments and then repudiated the assurances it had given, by banning the importation of Claimants' products,

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[900] C I, para. 320; C II, para. 367.
[901] C I, para. 321.
[902] C I, para. 322.
[903] C I, paras. 318-319 and C II, paras. 352, 356-357, referring to **Doc. CLA-32**, *Al-Warraq*; **Doc. CLA-51**, *Kontinental Conseil Ingénierie S.A.R.L. v. Gabon Republic*, PCA Case No. 2015-25, Final Award; **Doc. CLA-54**, *Navodaya Trading*.
[904] C II, para. 355.
[905] C II, paras. 358-364.
[906] C I, para. 322, referring to **Doc. CLA-133**; **Doc. H-1**, slides 95-96; C II, paras. 352, 367.
[907] C I, para. 327; C II, paras. 368 *et seq.*
[908] C I, paras. 344 *et seq.*; C II, paras. 392 *et seq.*

holding hostage their inventory and property, and depriving them of the benefit of authorizations, approvals and contractual rights[909];

- The Measures were neither motivated by rational reasons nor fairly applied; they were shrouded in secrecy and based on "prejudice", for reasons other than those put forward by the decision-maker[910]; the Measures were also not aimed at defending a public or national security interest (for the reasons detailed in section VI.2.1.2 *supra*);

- Even if the Measures were rational (*quod non*), they were entirely disproportionate[911]; if the Kingdom's national security concerns were legitimate, it could have imposed targeted sanctions on particular terrorist organizations or specific groups[912]; Saudi Arabia's national security defence is belied by the testimony of its own witnesses, who stated that the Kingdom could have granted an exemption for pharmaceutical products, and therefore could have adopted less intrusive measures that would have avoided the catastrophic consequences that befell Qatar Pharma[913];

- The Measures came out of nowhere, with no advance notice, without any legislation or transparency as to their scope of implementation, leaving investors in a state of uncertainty as to how to defend themselves and preserve their investments[914];

- The Measures indiscriminately destroyed the businesses of Qatari investors, including Claimants'; in fact, the Measures were intended to arbitrarily discriminate against enterprises of Qatari nationality[915];

- The Kingdom took many arbitrary actions, including the sealing of the Riyadh Warehouse by the SFDA, the cancelation of Dr. Al Sulaiti's residency permit, or the imposition of taxes and penalties while there were no taxable activities[916];

- Finally, Saudi Arabia failed to accord due process to Claimants; Claimants received no notice of:

  - the border closure,

  - the sealing of the Riyadh Warehouse, and

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[909] C I, paras. 346-362; C II, paras. 394-401.
[910] C I, paras. 344, 363-366.
[911] C I, paras. 371-373, referring to the three-pronged test on proportionality identified in **Doc. CLA-155**, *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, para. 355 (*i.e.*, "a measure must (a) be one that is suitable by nature for achieving a legitimate public purpose, (b) be necessary for achieving that purpose in that no less burdensome measure would suffice, and (c) not be excessive in that its advantages are outweighed by its disadvantages."); C II, paras. 412-417; CPHB, paras. 130-140.
[912] C II, paras. 416-417.
[913] CPHB, paras. 109, 134.
[914] C II, paras. 407-409.
[915] C I, paras. 344, 367.
[916] C I, paras. 368-370; C II, para. 406.

- the decision to cancel Dr. Al Sulaiti's residency permit;

Claimants were also not given any direction on how to deal with the border closure or how to preserve their investments[917]; there was no justification for any of the Measures, and thus no way for Claimants to understand their scope or legal basis[918]; Claimants were in any case denied the possibility to challenge these measures before the Saudi courts[919].

B. Breach of the non-impairment clause

679. Claimants argue that under Art. 2(2) of the Saudi Arabia-Austria BIT, the Kingdom is prohibited from impairing foreign investments "in any way" by arbitrary or discriminatory measures[920].

680. According to Claimants, there is an overlap between conduct that violates the non-impairment provision and the FET standard: the breach of one standard entails the breach of the other. Indeed, arbitrary conduct includes that which is not based on legal standards but rather on discretion, prejudice or personal preference; is grossly unfair, unjust or idiosyncratic; lacks in due process such that it offends judicial propriety; or is engaged in for reasons that are different from those put forward by the decision-maker. Discriminatory conduct, on the other hand, is found where similarly-situated persons are treated in a different manner without reasonable or justifiable grounds[921].

Arbitrariness

681. Claimants aver that Saudi Arabia's conduct was arbitrary and impaired Claimants' ability to manage, maintain, use, enjoy and dispose of their investment[922]:

- The Kingdom implemented border closure and entry restrictions, purposefully targeting Qatari nationals for political reasons; this impeded Qatar Pharma from selling products to Saudi customers and prevented Dr. Al Sulaiti and his team from entering Saudi Arabia to properly manage the business[923];

- The Kingdom promoted "Anti-Sympathy Measures" with the goal of instilling hate against Qataris and cease any cooperation from Saudi citizens and institutions[924];

- The Kingdom sealed the Riyadh Warehouse and deprived Claimants of access to their facilities, inventory and operational documentation, without valid justification[925]; even assuming, *arguendo*, that the Warehouse had been

[917] C I, paras. 364, 374; C II, paras. 418-419.
[918] C I, para. 374; C II, para. 419.
[919] C I, paras. 375-377.
[920] C II, para. 426.
[921] C I, paras. 380-381.
[922] C I, paras. 382-383; C II, para. 423.
[923] C I, para. 382.1; C II, para. 432.
[924] C I, para. 382.2; C II, para. 433.
[925] C I, para. 382.3; C II, para. 434.

sealed for failure to store product at the required temperature, that failure would have been caused exclusively and directly by the Measures[926]; and

- The Kingdom suspended Claimants' access to their bank accounts[927].

Discrimination

682. The Measures were also blatantly discriminatory: they targeted *all* Qatari citizens and businesses solely and explicitly based on their nationality[928].

683. Claimants deny that they need to identify a direct comparator from the same industry sector that has been treated differently; the cases on discrimination make it clear that discrimination can be based on a disparate treatment between different groups of people or entities[929]. But even if a direct comparator were needed, none of the other registered pharmaceutical companies operating in Saudi Arabia was a victim of the Measures, and all were treated more favourably than Claimants[930].

684. In sum, the Kingdom has failed to observe the obligations it assumed with regard to Claimants' investments in violation of the Saudi Arabia-Austria BIT and Art. 8 of the OIC Agreement[931].

1.2 RESPONDENT HAS BREACHED THE FPS STANDARD

685. Claimants submit that the obligation to provide FPS imposes positive obligations on the host State to protect investments: it requires the host State "to take active measures" to protect the investment from any adverse effects, either by the State or private parties[932]. This standard requires the State to exercise due diligence and vigilance; to defend itself, the State must show that it has taken all measures of precaution to protect the investments in its territory[933]. The obligation ensures not only physical security, but also legal and commercial protection[934].

686. In Claimants' view, there is no meaningful distinction between "adequate" and "full" protection and security[935]; but even if there were, Claimants would be entitled to import the "full protection and security" standard from the Saudi Arabia-Austria BIT, by means of the MFN provision[936].

687. According to Claimants, Saudi Arabia failed to guarantee the requisite physical, commercial and legal protection of Claimants' various assets within its territory, in contravention of the FPS provision of Art. 2[937]:

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[926] C II, para. 434.
[927] C I, para. 382.4.
[928] C I, para. 383.
[929] C II, paras. 427-428.
[930] C II, para. 429.
[931] C I, para. 389.
[932] C I, para. 392.
[933] C I, para. 393.
[934] C I, para. 394; C II, paras. 465, 471-474.
[935] C I, para. 391, referring to **Doc. CLA-32**, *Al-Warraq*, para. 630; C II, paras. 466-470.
[936] C I, para. 391; C II, para. 352.
[937] C I, paras. 395-396; C II, paras. 476-482.

- The Kingdom violated the physical integrity of assets and property belonging to Claimants by forcibly closing and sealing the Riyadh Warehouse;

- The Kingdom did not protect Claimants' other properties (and the improvements made by Claimants to these properties) that they were forced to abandon, including the Scientific Office and the other Warehouses;

- The Kingdom failed to guarantee a secure commercial and legal environment, by failing to engage and perform the terms of its contracts with Qatar Pharma, thus rendering Qatar Pharma's product registrations valueless; and

- The Kingdom deprived Claimants of the ability to access the Saudi court system to seek redress for this misconduct and of an effective legal mechanism to remedy these and other violations.

1.3 RESPONDENT HAS BREACHED THE OBLIGATION TO PROVIDE PERMITS

688. Finally, Claimants submit that the Kingdom violated Art. 5 of the OIC Agreement by virtue of the travel ban implemented on 5 June 2017, which deprived Claimants of the use and enjoyment of the facilities necessary for their investment (including the Warehouses and the Scientific Office)[938]. The Kingdom also terminated Dr. Al Sulaiti's residency Permit and denied entry into Saudi Arabia of other employees of Qatar Pharma, in clear violation of the obligation to grant Permits under Art. 5[939].

689. Claimants argue that Saudia Arabia has failed to indicate which of its "laws and regulations" provided for the blanket prohibition on entry for Qatari citizens – because none were issued; in any case, the Kingdom cannot rely on the national security defence in this case[940].

2. RESPONDENT'S POSITION

2.1 RESPONDENT HAS NEITHER BREACHED THE FET STANDARD NOR ACTED ARBITRARILY OR DISCRIMINATORILY

690. The Kingdom denies that Art. 8(1) of the OIC Agreements allows Claimants to import substantive treaty standards from the Saudi Arabia-Austria BIT[941]. According to the Kingdom, there are two components to Art. 8(1)[942]:

- MFN protection is afforded to investors within the context of the economic activity in which they have employed their investments; and

- Investors under the OIC Agreement must be extended treatment not less favourable than that accorded to other foreign investors "in the context of that activity and in respect of rights and privileges accorded to those investors".

[938] C I, paras. 404-405; C II, paras. 488-489.
[939] C I, paras. 406-408; C II, para. 489.
[940] C II, paras. 490-491.
[941] R I, paras. 427-429; R II, para. 393.
[942] R I, paras. 430-431; R II, para. 395.

691. Applying Art. 31 of the VCLT, the Kingdom argues that investors are entitled to treatment comparable to that afforded to investors of other nationalities in the context of the same economic activity, *i.e.*, in the context of an actual investment. Art. 8(1) can only be a prohibition on *de facto* discrimination in respect of specific comparators[943]. In other words, Claimants would have to identify a *specific* comparator investor, undertaking the *same* activity as Claimants, which is subject to more favourable treatment by Saudi Arabia without justification[944].

692. Saudi Arabia relies on the *İçkale v. Turkmenistan* and *Sehil v. Turkmenistan* cases in support of its position[945] and denies that there is a *jurisprudence constante* under the OIC Agreement in favour of Claimants' position[946].

693. In sum, the Kingdom argues that Claimants' claim for breach of the MFN must fail because they have not met the criteria of Art. 8(1). But even if Claimants were correct, their claims would still fail because Saudi Arabia did not violate any of the treaty standards in the Saudi Arabia-Austria BIT that Claimants seek to import[947].

A. Respondent has not breached the FET standard

694. The Kingdom argues that the contemporary practice of international tribunals demonstrates that the threshold to establish a breach of the FET standard is a high one[948]. The right to benefit from FET does not give a right to regulatory stability in the absence of a stabilization clause[949]. Tribunals grant host States a significant degree of deference to regulate their interests, particularly where national security is concerned[950].

695. The Kingdom avers that even a drastic change in the host State's legal framework is insufficient to establish a breach of the FET standard, which turns not on the magnitude of the change but on its *unreasonableness*[951]: only a change that is unfair, unreasonable or inequitable can constitute a breach of the FET obligation[952].

696. Likewise, the general standard in respect of transparency, non-arbitrariness and reasonableness is a high one, fulfilled only where there has been a "complete lack of transparency and candour in an administrative process"[953]. The Kingdom argues that the principle of proportionality has very limited support as a rule of public international law; even if it were an acceptable tool for the review of State action (*quod non*), the *PL Holdings* version of the proportionality test on which Claimants

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[943] R I, para. 431; R II, para. 395.
[944] R I, para. 441.
[945] R I, paras. 432-435; R II, paras. 396, 403-406, referring to **Doc. CLA-214**, *İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award ["***İçkale***"] and **Doc. RLA-129**, *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkmenistan*, ICSID Case No. ARB/12/6, Award ["***Sehil***"].
[946] R I, paras. 437-440; R II, paras. 401-402.
[947] R I, paras. 441-442; R II, para. 407.
[948] R I, paras. 443-447; R II, paras. 408-409.
[949] R I, paras. 452-459; R II, paras. 411-414.
[950] R I, paras. 449-450; R II, paras. 408, 414, 419.
[951] R I, paras. 458-459; R II, para. 417.
[952] R II, para. 419.
[953] R I, paras. 469-472; R II, para. 427.

seek to rely has been subject to criticism because it ignores the measure of deference to which host States are entitled[954].

697. Properly analysed, the Kingdom's conduct is not in breach of any of the alleged elements that form the FET standard (e.g., legitimate expectations, transparency, non-arbitrariness and due process), nor of the FET standard as a whole[955]:

- The Kingdom denies that it encouraged Claimants to invest in and expand their investments in Saudi Arabia; Claimants have failed to identify any direct or unequivocal representations made by the Kingdom; instead, Claimants have only made vague assertions of general praise, meetings with Saudi officials and obtaining certifications – which are all insufficient to raise legitimate expectations[956];

- The Kingdom was, in any event, within its right to regulate its internal affairs pursuant to legitimate national security concerns and change its legal framework to impose restrictions on the entry, distribution and mobility of Claimants and other Qatari citizens[957];

- It was Claimants who failed to engage with the SFDA and to comply with Saudi laws and regulations that applied to the Riyadh Warehouse; this is why the SFDA sealed the Riyadh Warehouse and seized improperly stored products as a precautionary measure[958]; furthermore, Claimants committed fraud in respect of the Scientific Office[959];

- Claimants found themselves shut out of the Saudi market long before the Measures were put in place, because of their poor performance; Claimants' business deteriorated due to their inability to comply with existing contractual commitments and Saudi laws and regulations[960]; this non-compliance is the true reason why some invoices were left unpaid[961]; and

- Claimants failed to pay significant sums owed to the Saudi Arabian tax authorities, who rightfully claimed back those sums[962].

698. The Kingdom further avers that its conduct met the transparency standard: in a case where the Measures concerned national security interests and involved the assessment of considerable sensitive and confidential information, the Kingdom could not be expected to make such information publicly available[963].

699. Claimants have also not discharged their burden of proving that the Kingdom's conduct was either arbitrary or unreasonable[964]. The Kingdom cannot be required

[954] R I, paras. 476-477; R II, paras. 433-439.
[955] R II, para. 410.
[956] R II, para. 446.
[957] R II, para. 448.
[958] R II, para. 447.
[959] R II, para. 449.2.
[960] R I, para. 484; R II, para. 449.1.
[961] R II, para. 449.3.
[962] R II, para. 449.4.
[963] R II, paras. 452-453.
[964] R II, para. 454.

to disclose sensitive governmental information on which it relied when taking national security decisions. The State was the best placed to assess the most suitable course of action in light of its national security concerns[965]. The position taken by the Kingdom was similar to that taken by other Gulf states and Egypt, proving that the Measures were neither draconian nor exceptional, but rather calibrated to achieve the Kingdom's essential security interests at the time[966].

700. Finally, the Kingdom argues that it properly complied with the requirements of due process: the Measures were adopted in accordance with Saudi law and through a formal statement setting out the basis on which they were adopted[967]. The sealing of the Riyadh Warehouse followed proper procedures, stipulated by Saudi law. Claimants have also had the opportunity to challenge the assessment of the Saudi tax authorities through an online platform[968].

B. Respondent has not impaired the investment through arbitrary or discriminatory measures

701. The Kingdom's primary position is that the OIC Agreement's MFN clause cannot be used to import the non-impairment standard from the Saudi Arabia-Austria BIT[969]. In any case, the Kingdom avers that for there to be a breach of this standard, the impairment to the investment must be significant[970]. The fact that the words "in any way" appear in Art. 2(2) of the Saudi Arabia-Austria BIT does not dilute this requirement: those words refer only to the manner of the alleged impairment, not to its magnitude[971].

702. As to the discrimination standard, Saudi Arabia avers that it involves the comparison of "similarly situated persons" and therefore requires Claimant to identify a specific comparator within the same industry, since each industry is likely to have a divergent set of practices and considerations[972]. Claimants have failed to meet their burden of proof, because they have not demonstrated that there is a specific company in their industry that is similar and has been treated more favourably[973].

703. In any case, the Kingdom submits that Claimants have failed to demonstrate that Saudi Arabia breached Art. 2(2) of the Saudi Arabia-Austria BIT[974]:

- First, Claimants' business had been consistently and rapidly deteriorating before the Kingdom adopted the Measures; therefore, it was not the border closure and restrictions that impeded Qatar Pharma from selling its products – rather, it was the result of Claimants' internal ineptness[975];

[965] R II, paras. 455-457.
[966] R II, para. 458.
[967] R II, para. 461.
[968] R II, paras. 462-463.
[969] R II, para. 464.
[970] R II, paras. 465-466.
[971] R II, paras. 466-468.
[972] R II, para. 469.
[973] R II, para. 471.
[974] R II, para. 473.
[975] R II, para. 474.

- Second, there was no climate of fear in Saudi Arabia, but even if there were, such conduct is not attributable to the Kingdom; in any case, Claimants have failed to demonstrate the existence of a causal link between the alleged climate of fear and any impairment on their investments[976]; and

- Third, the sealing of the Riyadh Warehouse was a response to Claimants' failure to comply with Saudi laws and regulations; Claimants could have engaged local staff to comply with the laws that continued to be incumbent on them, and to track and ensure compliance with notices issued by the SFDA[977].

2.2 RESPONDENT HAS NOT BREACHED THE FPS STANDARD

704. The Kingdom considers that Claimants' reading of Art. 2 of the OIC Agreement is equally flawed[978]. A correct interpretation of this provision demonstrates that "adequate" protection and security cannot mean the same as "full" protection and security[979]. When it considered that "full protection and security is not a higher standard than adequate protection and security", the *Al Warraq* tribunal did not offer any reasoning or justification for its conclusion – making this case inapposite[980].

705. Likewise, Claimants' suggestion that the adequate protection and security standard must not only apply to the physical integrity of invested capital but must also extend to the legal and commercial protection of Claimants' investments is incorrect[981]: if it were accepted that a "full" protection and security clause extends to both offering physical and legal protection to invested capital (*quod non*), then it must follow that "adequate" protection and security provides a narrower scope of protection, limited to safeguarding the physical integrity of investments[982]. Moreover, the historical objective of the protection and security standard was to offer protection against the immediate consequences of armed conflict; the standard has not drastically evolved to comprise protection from physical damage to legal security[983].

706. In any event, the Kingdom argues that it did not breach Art. 2 of the OIC Agreement and that Claimants' claim must fail[984]:

- The SFDA sealed the Riyadh Warehouse because Claimants failed to comply with Saudi laws and regulations (namely, to store the pharmaceutical products at the correct temperature); Claimants failed to engage with the SFDA to remedy or mitigate their non-compliance; in any event, Qatar Pharma is now free to access the Warehouse[985];

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[976] R II, para. 475.
[977] R II, paras. 476-478.
[978] R I, para. 535; R II, para. 506.
[979] R I, paras. 536-538; R II, paras. 507-509.
[980] R I, paras. 539-540; R II, para. 510, referring to **Doc. CLA-32**, *Al Warraq*, para. 630.
[981] R I, paras. 542-543; R II, para. 511.
[982] R II, para. 511.1.
[983] R I, para. 544; R II, para. 511.3.
[984] R I, paras. 554-555; R II, para. 513.
[985] R I, para. 554.1; R II, para. 514.

- Claimants have not provided any evidence that the alleged improvements undertaken in their Scientific Office or in the Warehouses were of material value or that any expensive equipment was left behind; there was no substantial investment[986]; and

- The Kingdom did not have an obligation to "guarantee a secure commercial and legal environment"; but even if it did, Claimants performed their contractual obligations deficiently and poorly; in such circumstances, the Ministry of Health was entitled to withhold payment; Claimants have failed to prove that they had any other active contracts after the Measures were adopted[987].

2.3 RESPONDENT HAS NOT BREACHED THE OBLIGATION TO PROVIDE PERMITS

707. Finally, the Kingdom recognizes that Art. 5 of the OIC Agreement requires it to grant entry and/or work Permits to Qatari nationals; however, this obligation must only be carried out "in accordance with the laws and regulations of the host state". Therefore, so long as the entry into Saudi territory is regulated in accordance with the laws and regulations of the Kingdom, there will be no breach of Art. 5[988].

708. According to the Kingdom, Claimants have failed to discharge their burden of proof that the Measures taken by the Kingdom – namely the travel restrictions imposed on Qatari citizens – were *not* in accordance with its laws and regulations[989].

709. In any event, the Kingdom says that the Measures were taken in accordance with Saudi Arabia's laws and regulations: a State's right to regulate its borders is implicit in its fundamental sovereign right. Any curtailment on the rights of persons to enter the territory of the Kingdom falls within this sovereign right and is, therefore, in accordance with Saudi Arabian law[990].

3. DECISION OF THE ARBITRAL TRIBUNAL

710. Claimants say that the Kingdom has failed to provide:

- FET,

- FPS, and

- Permits to Claimants' investments,

in breach of Arts. 2, 5 and 8 of the OIC Agreement[991] – allegations which the Kingdom denies[992].

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[986] R I, para. 554.2; R II, para. 515.
[987] R I, para. 554.3; R II, para. 516.
[988] R I, paras. 566-567; R II, para. 520.
[989] R II, para. 521.
[990] R I, para. 568; R II, para. 522.
[991] C I, para. 239; C II, paras. 351 *et seq.*; CPHB, para. 244.2.
[992] RPHB, paras. 3.3-3.5.

711. The Tribunal will first establish the relevant proven facts (**3.1**). It will then turn to relevant legal provisions (**3.2**), and finally it will make its decision (**3.3**).

3.1 PROVEN FACTS

712. The proven facts, relevant for the adjudication of the FET, FPS and Permits claims, are the following.

A. Claimants' business in Saudi Arabia

713. The evidence on the record shows that, with much effort, Dr. Al Sulaiti founded Qatar Pharma in Qatar as one of the few producers of pharmaceutical products in the Gulf region[993]. The pharmaceutical products it manufactured and sold were not particularly complex: sterile intravenous solutions, irrigation solutions, haemodialysis solutions and topical medication[994]; they nevertheless attracted the interest of the members of the GCC, including Saudi Arabia, who were eager to increase local drug manufacturing[995].

714. In 2010 Dr. Al Sulaiti decided to expand his business to Saudi Arabia. After initially working with a local agent, Claimants eventually set up a fully owned subsidiary, QEMS[996], with whom Qatar Pharma signed an agency contract[997], pursuant to which QEMS was appointed as its "sole representative and distributor" in Saudi Arabia[998].

715. Qatar Pharma produced its pharmaceutical products in Qatar and marketed and branded them to the needs of each specific customer[999]. QEMS then imported[1000] and resold these products to Saudi clients in the public and private sectors[1001]. The import into the Kingdom required a cumbersome registration both of the Factory in Qatar which produced them, and of each single product. In 2016 and early 2017 the SFDA renewed the registration of Qatar Pharma's Factory[1002] and a series of products[1003] for a period of five years.

716. The products were transported by land, via the Salwa Crossing[1004], thanks to the refrigerated trucks provided by Al Qima[1005] – another company of Dr. Al Sulaiti.

717. While products ordered by government customers were normally shipped directly from Qatar Pharma's warehouses in Doha[1006], Qatar Pharma's private customers typically did not have warehouses to store products[1007]. Therefore, QEMS set up

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[993] CWS-3, paras. 10-21; CWS-4, paras. 7-8.
[994] See **Doc. C-64**, pp. 6 and 45.
[995] **Doc. C-64**, pp. 38-39; **Doc. C-324**, p. 3. See also CWS-8, paras. 5-8; **Doc. H-5**, slide 10.
[996] **Doc. C-51**; **Doc. C-413**, p. 17 of PDF; **Doc. VP-26**; CER-1, para. 69(ii)(2). See also CWS-8, para. 15.
[997] **Doc. VP-86**.
[998] **Doc. VP-86**, Art. 2.
[999] CWS-4, paras. 31-32; **Doc. C-88**.
[1000] **Doc. VP-86**, Preface.
[1001] **Doc. C-64**, pp. 49-50; **Doc. H-5**, slide 14; CWS-4, paras. 28-29; CWS-5, paras. 1-17; **Doc. VP-145**.
[1002] **Doc. C-214**.
[1003] **Doc. C-256**; **Doc. C-257**; **Doc. C-258**; CWS-4, para. 38.
[1004] CWS-5, paras. 20-21.
[1005] **Doc. C-49/VP-27**; CWS-4, para. 36; CWS-5, paras. 22-23.
[1006] CWS-5, paras. 16, 23.
[1007] CWS-4, para. 20; CWS-5, para. 16.

and equipped three Warehouses in Saudi Arabia[1008]: a central one, in Riyadh, and later two ancillary Warehouses, in Demman and Jeddah[1009]. QEMS further set up a Scientific Office, licensed by the SFDA, to be able to run its business in Saudi Arabia[1010].

718. QEMS's operation was possible thanks to a diverse workforce composed of both Qatari, Saudi and other nationals[1011]. While Dr. Al Sulaiti had a Saudi residency permit valid until 2020[1012], which allowed him to travel to supervise the operation, QEMS had sponsored the issuance of Saudi multi-entry business visas for other Qatari (including Dr. Al Sulaiti's brother[1013]) and non-Qatari (such as Mr. Jaffar[1014] and Mr. Kotb[1015]) employees.

719. In sum, Qatar Pharma's business in Saudi Arabia grew steadily over the years, by successful participation in public tenders with the Saudi Ministry of Health[1016] and other Saudi public entities and by direct sales to private clients.

B. The Measures

720. However, on 5 June 2017 and without notice, Saudi Arabia adopted – via a non-disclosed Royal Decree issued by His Majesty the King – the following Measures[1017]:

- It closed all land, sea and air communications to and from Qatar;
- It prohibited crossings from Qatar into its territory, airspace and waters; and
- It ordered Qatari citizens visiting or residing in Saudi territory to leave within 14 days.

721. The Saudi government only released an Official Statement[1018], distributed through the press service of the Saudi Ministry of Foreign Affairs, giving an outline of the Measures[1019]. As regards the closing of all borders, the precise wording is the following[1020]:

> "An official source stated that the Government of Saudi Arabia, in exercising its sovereign rights guaranteed by the international law and protecting its national security from the dangers of terrorism and extremism has decided to sever diplomatic and consular relations with the State of Qatar, close all land,

[1008] **Doc. C-44**; **Doc. C-45**; CWS-4, paras. 24-25.
[1009] CWS-4, paras. 19-20; CWS-5, para. 16.
[1010] **Doc. C-217**.
[1011] CWS-3, paras. 87-88; CWS-4, paras. 21, 27; CWS-5, paras. 37-38.
[1012] **Doc. C-104**.
[1013] CWS-3, para. 71.
[1014] CWS-4, para. 16.
[1015] CWS-5, para. 24.
[1016] See para. 121 *supra*.
[1017] **Doc. R-122**; CER-2, Ulrichsen, paras. 4.1-4.4; RER-3, Collis, para. 24. See also HT, Day 6, p. 1387 (Dr. Harris); RPHB, para. 93.
[1018] **Doc. R-122**.
[1019] RPHB, para. 118.
[1020] **Doc. R-122**.

> sea and air ports, prevent crossing into Saudi territories, airspace and territorial waters [...]." [Emphasis added]

722. As regards Permits to Qatari citizens, the Official Statement stated that[1021]:

> "The decision, for security reasons, unfortunately prevents Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia and those Qatari residents and visitors have to leave Saudi territories within 14 days, confirming the Kingdom's commitment and keenness to provide all facilities and services for Qatari pilgrims and Umrah performers [*i.e.*, pilgrims to the holy city of Mecca]." [Emphasis added]

723. Finally, as to Saudi citizens, the Official Statement explained that[1022]:

> "In accordance with the decision to cut off diplomatic and consular relations, Saudi citizens are prohibited from traveling to Qatar, residing in or passing through it, while Saudi residents and visitors have to hurry leaving Qatari territories within 14 days." [Emphasis added]

724. No further information was provided either to Qatari or Saudi citizens.

725. Following this announcement, the Saudi Customs Directorate closed the Salwa Crossing[1023]. Likewise, ships flying Qatari flags and flights registered in Qatar were no longer authorized to unload or land in Saudi sea and airports[1024].

C. Disruption of business

726. The Measures had immediate effects on Claimants' investments.

727. The most immediate impact was provoked by the closure of borders: Qatar Pharma could no longer deliver products for QEMS to sell and distribute in Saudi Arabia. The Al Qima trucks were no longer authorized to drive through the Salwa Crossing and the supply of pharmaceutical products coming from Qatar stopped[1025].

728. QEMS was able to sell some of the products stored at its Warehouses to private customers[1026]. However, most Saudi private and public clients stopped placing new orders and many did not accept the delivery of existing orders, with the consequence that by 2018 the business came to a complete stop[1027].

729. QEMS also lost most of its workforce. Its employees of Qatari nationality were forced to leave the country within 14 days[1028] – including Dr. Al Sulaiti, whose residency permit was revoked[1029]. Saudi embassies and consulates in Doha were

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[1021] **Doc. R-122.**
[1022] **Doc. R-122.** See also **Doc. C-71.**
[1023] **Doc. KU-5**; **Doc. C-81**; **Doc. C-82**; CER-2, Ulrichsen, para. 4.5; RER-3, Collis, fn. 2; R I, para. 415.4.
[1024] **Doc. C-78**; **Doc. C-79**; **Doc. R-179**; **Doc. C-80**; CER-2, Ulrichsen, paras. 4.2-4.3; RER-3, Collis, para. 24.
[1025] **Doc. C-63**, p. 2; CWS-3, paras. 69, 80, 83; CWS-4, paras. 45-48, 51; CWS-5, paras. 31-32; CWS-6, paras. 28, 30.
[1026] CWS-8, para. 30.
[1027] CER-3, Figure 7; CWS-3, para. 93; CWS-6, paras. 30-42; CWS-8, paras. 31-35.
[1028] **Doc. C-63**, p. 2; CWS-2, para. 2; CWS-3, paras. 71, 80-83; CWS-5, paras. 42-45.
[1029] CWS-3, para. 99.

closed[1030], with the consequence that Qataris and other non-Qatari employees could no longer obtain business visas sponsored by QEMS[1031]. The effect on QEMS's workforce was reinforced because most of its Saudi employees stopped showing up for work[1032].

D. The request for exemption

730. The Parties agree that Qatar Pharma had obtained final awards in the 2017 GHC tender No. 39[1033] and in the 2017 NUPCO tender[1034]. Delivery of these products should have taken place after enactment of the Measures, but was disrupted because of the closure of the Saudi-Qatari border, which implied that no Qatari products could be shipped to the Kingdom.

731. On 31 July 2017 (*i.e.*, a month after the Measures) Mr. Mohammed Al-Zahrani, the Director General of the General Directorate of Medical Supplies at the Saudi Ministry of Health, wrote to QEMS inquiring about the status of the products awarded under the 2017 NUCPO tender[1035]:

> "This is in reference to what was awarded to you from 2017 Nupco tender.
>
> We hereby urge you to quickly and urgently supply what was awarded to you because of the urgent health needs of the regions and governorates. In the event of a delay in delivery of what was awarded to you, there will be no extension and the items shall be secured at your expense from another source in accordance with the law." [Emphasis added]

732. QEMS replied to the Mr. Al-Zaharni on the following day, 1 August 2017, saying that the company was prepared to supply these items, but that the closure of the land border made delivery impossible[1036]:

> "[…] in reference to the aforementioned subject and the email sent to us on 31/07/2017 regarding your request to expedite supply of what was awarded to us for all regions and governorates due to the immense need, we hereby inform you that we are fully and completely prepared to supply these items to all regions and governorates as you requested. However, given closure of the Saudi-Qatari land border, which is considered an exceptional situation and a force majeure, we hereby inform you that the supply to all regions and governorates will commence as soon as the land borders are opened." [Emphasis added]

733. On 27 September and again on 3 October 2017 QEMS addressed letters to the General Directorate of Medical Supplies at the Ministry of Health, in which it reiterated that it was prepared to supply the products as soon as the land borders

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[1030] **Doc. C-97**, p. 1.
[1031] CWS-3, para. 71; CWS-5, paras. 24, 41, 45.
[1032] CWS-3, para. 87; CWS-5, paras. 37-40; CWS-6, para. 29; HT, Day 4, pp. 982-983 (Mr. Kotb).
[1033] **Doc. R-127**; R II, paras. 91-92; RPHB, para. 159. See also **Doc. C-384**.
[1034] **Doc. R-173**; R II, paras. 91-92; RPHB, para. 159.
[1035] **Doc. C-288/C-429**.
[1036] **Doc. C-289**.

were opened[1037]. In its last letter, QEMS asked for an exemption, so that Qatari medicines could be shipped across the border[1038]:

> "In light of closure of the Saudi-Qatari land border, which is considered an exceptional emergency situation and a force majeure beyond our control, and given that we are fully prepared to supply all quantities of the aforementioned tenders, we ask Your Excellency to instruct the parties concerned to exempt these medicines and allow these shipments to cross the Saudi-Qatari land border." [Emphasis added]

734. The evidence shows that the Ministry of Health received this letter[1039]. The Kingdom has produced on the record a letter dated 11 October 2017, which demonstrates that the Ministry of Health responded to QEMS's request, asking that QEMS provide it[1040]:

> "[…] with the notification letters of award (Awarded Sheet) for the items of these tenders, which were provided to [QEMS] by the Executive Office for Unified Procurement in the Gulf Cooperation Council [GHC] and the National Unified Company Procurement (NUPCO) so that we can take necessary action."

735. Claimants question the authenticity and relevance of the Ministry's response[1041].

736. The Tribunal has no reason to suspect that the document in question is not authentic. The Tribunal notes, however, that:

- It had been the Saudi Ministry of Health who had enquired about the status of the delivery of the products awarded to QEMS under the 2017 NUPCO tender – making it highly unlikely that it did not have in its possession the same information it was requesting in the 11 October letter; and

- The letter was sent to a fax number (4027406)[1042] that had been discontinued by QEMS on 18 October 2016[1043]; and the Saudi Ministry of Health must have been aware of this, since in May 2017 it had faxed letters to another fax number of QEMS (0112140804)[1044].

737. It is thus highly likely that Claimants never received the response from the Ministry of Health – which is only logical, considering that otherwise they would most likely have responded, to preserve their business[1045]. Be that as it may, what is relevant is that the Ministry of Health's letter does not suggest that it was prepared to grant an exemption and that, ultimately, the Kingdom never granted the requested exemption.

[1037] **Doc. C-95. Doc. C-94.** See also **Doc. C-520**, with minor differences in the translation.
[1038] **Doc. C-94.** See also **Doc. C-520**, with minor differences in the translation.
[1039] **Doc. C-519**; Communication R 89.
[1040] **Doc. R-259.**
[1041] CPHB, paras. 137-140. See also Communication C 92.
[1042] **Doc. R-259.**
[1043] **Doc. C-522.**
[1044] **Doc. C-521.**
[1045] CWS-3, para. 72.

E. The SFDA's actions with regard to the Riyadh Warehouse

738. After the Measures, the SFDA inspected the Riyadh Warehouse several times, initially prohibiting disposal of the pharmaceutical products stored therein and later placing seals on the doors. The scope, purpose and legitimacy of these measures have remained in dispute throughout this arbitration[1046].

739. In their Statement of Claim, dated 17 June 2021 (six months after the Al-Ula Declaration), Claimants argued that the SFDA closed the Warehouse, following instructions of the Government[1047]:

> "113. [...] The employees present when the seals were placed reported that the SFDA acknowledged that it had been instructed by the government to close the facility. Neither at the time the seals were placed, nor upon Qatar Pharma's subsequent and unsuccessful attempts to follow-up with the SFDA, did the SFDA provide any substantive justification for this action. [...]
>
> 115. The Riyadh Warehouse would thus remain under the SFDA's (and thus the State's) control for the years to come. Indeed, to this day, Qatar Pharma is unable to enjoy access to the warehouse, which appears to still bear evidence of the seals. Despite Qatar Pharma's extensive efforts to gain access, the landlord has been unwilling to provide this, in light of his expressed fear of reprisal from the State.
>
> 116. The SFDA has, moreover, rebuffed every effort of Qatar Pharma to seek removal of the seals or even to obtain clarification as to why they were applied." [Emphasis added]

740. Claimants' allegations in the Statement of Claim were based on the statements of their witnesses, Dr. Al Sulaiti, Mr. Jaffar and Mr. Kotb[1048].

741. In the Statement of Defence, dated 18 April 2022, the Kingdom denied that Claimants were prevented from accessing the Riyadh Warehouse, there being no prohibition by either the SFDA or the Warehouse's landlord[1049].

742. In July 2022 the Tribunal encouraged Claimants to try to gain access to the Riyadh Warehouse once more[1050]. Finally on 26 July 2022, Deloitte, Claimants' agent, with the assistance of a locksmith, was able to enter the Riyadh Warehouse[1051].

743. The Tribunal has already found that the actions of the Riyadh Warehouse's landlord are not attributable to the Kingdom[1052], whereas those of the SFDA are[1053]. Therefore, the Tribunal will only focus on the conduct of the latter.

[1046] See, e.g., C I, paras. 111-119; C II, paras. 420, 423, 434, 463, 477; **Doc. H-1**, slides 88-92; CPHB, paras. 22-32; HT, Day 1, pp. 103-110; R I, paras. 28-34, 220-233; R II, paras. 447, 462; RPHB, paras. 61-77.
[1047] C I, paras. 113, 115-116 (internal footnotes omitted).
[1048] See C I, fns. 250 to 259.
[1049] R I, paras. 28 *et seq.*
[1050] Communication A 28.
[1051] Communication C 66.
[1052] See section VI.1.2.C.b(ii) *supra*.
[1053] See section VI.1.2.C.a *supra*.

744. The events surrounding the Riyadh Warehouse, set forth in chronological order, are the following:

a. April 2017: Licence renewal for the Riyadh Warehouse

745. In December 2016 (six months prior to the adoption of the Measures) the SFDA conducted an inspection to the Riyadh Warehouse and concluded that there was the need for some improvements, including for monitoring the temperature of products[1054]. QEMS responded to the several issues pointed out by the SFDA[1055], with the last exchange of information dated 4 April 2017[1056]. In each of these exchanges, the SFDA informed that at its next visit it would confirm the implementation of the various solutions offered by QEMS[1057].

746. The SFDA was eventually satisfied that QEMS had fixed most of the issues[1058] and on 18 April 2017 it renewed the Licence for the Riyadh Warehouse[1059].

b. June 2017: The Measures and their impact

747. Two months thereafter, on 5 June 2017, the Kingdom announced the Measures. As a reaction Dr. Al Sulaiti instructed QEMS's employees to consolidate all products, documents, records and materials from the three Warehouses and the Scientific Office at the Riyadh Warehouse[1060]. Within 14 days Dr. Al Sulaiti and all Qatari employees had to leave the Kingdom.

748. Mr. Kotb, an officer of Qatar Pharma, declared in his first witness statement that approximately ten days after 5 June 2017, the SFDA visited the Warehouse and placed seals on the doors, instructing the recipient to contact the SFDA and indicating the penalties to which one was exposed[1061]. But Mr. Kotb's declaration is based on hearsay; as will be explained below, the remaining evidentiary record indicates that the seals were only placed 10 months thereafter, in May 2018.

c. September 2017: The Seizure Order

749. Three months after the adoption of the Measures, on 20 September 2017, the SFDA conducted an inspection at the Riyadh Warehouse and issued a violation report based on two alleged regulatory violations[1062]:

No.	Violation
1	High temperature at the storage area of pharmaceutical products beyond the manufacturer's recommended temperature (34.2° C)
2	Absence of electronic temperature and humidity meters at the storage area of pharmaceutical products.

[1054] **Doc. R-1.** See also RWS-1, para. 31.
[1055] **Doc. R-114; Doc. R-115; Doc. C-439.** See also RWS-1, para. 32.
[1056] **Doc. R-117.**
[1057] **Doc. R-114; Doc. C-439; Doc. R-117.**
[1058] **Doc. R-117;** RWS-1, para. 32.
[1059] **Doc. C-216,** p. 2.
[1060] CWS-2, paras. 5-10; CWS-3, paras. 87-92; CWS-5, paras. 38-39; CWS-6, paras. 53-54; CWS-7, para. 3.
[1061] CWS-2, paras. 11-12.
[1062] **Doc. R-6.**

750. On that same day, the SFDA also issued a "**Seizure Order**", pursuant to which QEMS was obliged to "maintain and avoid disposal or destruction" of all products in the Warehouse without permission from the SFDA[1063].

751. From this moment on, QEMS activities in Saudi Arabia were (from a legal point of view) completely frozen. The import of new products from Qatar was prohibited due to the Measures, while all its products in Saudi Arabia, which had been concentrated at its Riyadh Warehouse, were now affected by the Seizure Order and could not be legally sold (or even destroyed) without authorisation from the SFDA.

d. March 2018: QEMS withdraws from the Warehouse

752. Although upon enactment of the Measures QEMS's Qatari officers were forced to leave, the company retained certain non-Qatari employees, which continued to man the premises. There is evidence that by September 2017 Mr. Ahmed Abdulaziz Mohamed Sallam, an Egyptian national and a QEMS employee, was still working at the Riyadh Warehouse – as Dr. Al Sulaiti has acknowledged[1064]. When the SFDA conducted its September 2017 inspection of the Warehouse[1065], the visit was attended by Mr. Sallam, who is identified as the "Establishment Owner or Technical Manager"[1066]. But a few months thereafter, in February 2018, Qatar Pharma dismissed Mr. Sallam, allegedly for having misappropriated funds[1067].

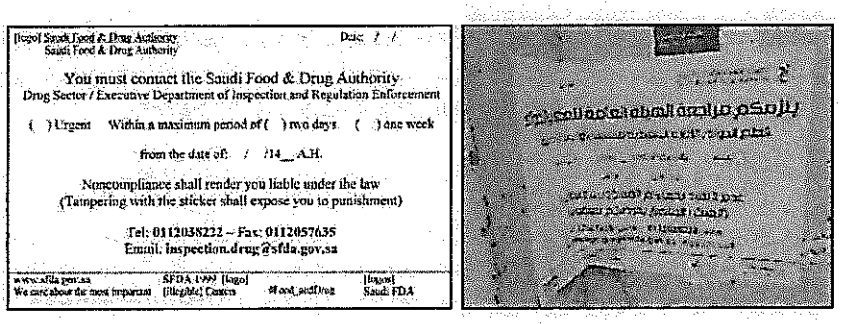
753. The evidence shows that by March 2018 the premises were no longer manned by QEMS's employees. Dr. Dahhas, Executive Director of Inspection and Law Enforcement at the SFDA at the relevant time[1068], has testified that SFDA inspectors visited the Riyadh Warehouse on three occasions between March and April 2018, and that on each occasion they found that the Riyadh Warehouse was closed during business hours[1069].

754. The conclusion is reinforced by two additional facts: that same month QEMS stopped paying the rent of its Riyadh Warehouse[1070], and in early April 2018 Dr. Al Sulaiti notified Saudi Arabia of the existence of an investment dispute[1071].

e. April 2018: The SFDA seals the Warehouse

755. On the last of their three visits, on 3 April 2018, the SFDA inspectors placed three seals [the "**Seals**"] on the doors, stating that the recipient must contact the SFDA urgently, and that noncompliance would render the recipient liable[1072]:

[1063] **Doc. R-7.** See also RWS-1, para. 36.
[1064] CWS-3, para. 95; **Doc. C-156.**
[1065] **Doc. R-6**; **Doc. R-7.**
[1066] **Doc. R-6**; **Doc. R-7.**
[1067] CWS-3, para. 95; **Doc. C-230.**
[1068] RWS-1, para. 8.
[1069] RWS-1, para. 37.
[1070] **Doc. R-142**; **Doc. R-139**; RWS-7, paras. 20-21.
[1071] Communication C 1 (Notice of Dispute), p. 3.
[1072] RWS-1, paras. 38-39; **Doc. C-6.**


[logo] Saudi Food & Drug Authority
Saudi Food & Drug Authority

Date: / /

You must contact the Saudi Food & Drug Authority
Drug Sector / Executive Department of Inspection and Regulation Enforcement

( ) Urgent Within a maximum period of ( ) two days ( ) one week

from the date of: / /14__ A.H.

Noncompliance shall render you liable under the law
(Tampering with the sticker shall expose you to punishment)

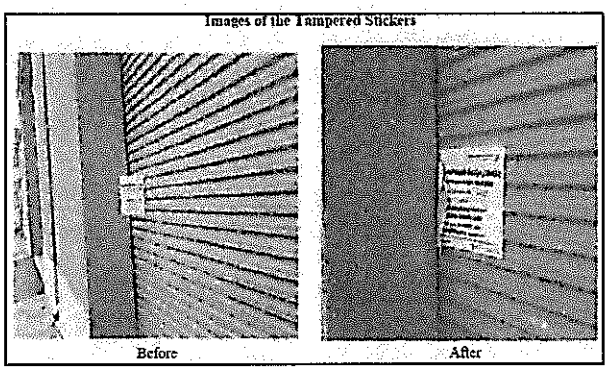
Tel: 0112038222 – Fax: 0112057635
Email: inspection.drug@sfda.gov.sa

www.sfda.gov.sa SFDA 1999 [logo] [logo]
We care about the most important [illegible] Centers #food_sedfvsa Saudi FDA

756. Note that the literal wording of the Seals does not prohibit entrance into the Warehouse – it only requires the recipient (presumably QEMS, although the name of the company is not mentioned) to contact the SFDA. But the text concludes with a severe admonishment: "Tampering with the sticker shall expose you to punishment". Since the Seals had been affixed to the doors, entrance into the premises became impossible without tampering with them and incurring the risk of punishment by the SFDA.

f. May 2018: A violation report

757. On 14 May 2018 the SFDA conducted a final inspection, to ascertain the fate of the Seals[1073]. The report of this inspection, which is in the record, explains that one of the three Seals had been "tampered with"; the report contains the following image showing the tampering[1074]:



758. The photograph shows that one of the Seals had been torn apart, presumably to gain access to the premises through that door – a tampering which was in violation of the express admonishment written on the seal.

759. Accordingly, on that same day the SFDA issued a violation report, indicating the following single violation[1075]:

Sr.	Violation
1	Tampering with a SFDA request to follow up sticker without SFDA's approval
2	

[1073] **Doc. R-8**, p. 6.
[1074] **Doc. R-8**, p. 7.
[1075] **Doc. R-8**, p. 8.

760. QEMS's stamp appears in the violation report, which is signed by a Mr. Abdullah Hammad as "Owner / technical manager of facility"[1076]. There is no evidence that Mr. Hammad was an employee of Qatar Pharma or QEMS.

761. Dr. Al Sulaiti has declared that he was unaware of the SFDA's violation report until this arbitration and that he does not know who Mr. Abdullah Hammad is[1077]. He recognises, however, that Qatar Pharma did have an employee named Mr. Abdullah *Fahad*, who was hired in April 2018 (and terminated his employment three months later) to collect outstanding receivable from Saudi public entities, after the firing of Mr. Sallam (see para. 752 *supra*). But Dr. Al Sulaiti says that Mr. Fahad was never designated as a technical manager and much less as the owner of the Riyadh Warehouse[1078]. According to Dr. Al Sulaiti[1079]:

> "The fact that I was unaware of this May 2018 report until recently, and that the person signing it was in fact not authorized to do so, is consistent with the fact that we had no means of adequately staffing and managing our former warehouses. We clearly were not able to prevent people from accessing the warehouse, given that we were in another country; nor did we have any oversight or transparency as to what was happening there."

Letter from the SFDA

762. Dr. Dahhas has declared that he sent a copy of this violation report to Qatar Pharma[1080]; and the Kingdom has indeed marshalled a letter of Dr. Dahhas, attaching the report and asking that QEMS[1081]:

> "[…] rectify all the observations contained therein, and then respond in a detailed manner clarifying the rectification of each observation separately, in a hard copy and an electronic copy (CD), including all the necessary attachments of photos and documents within 30 days from the date of the letter."

763. There is no evidence of a response by Qatar Pharma. It is unclear, however, whether QEMS received Dr. Dahhas' letter, which has no date and no formal address of contact for QEMS.

764. In July 2018 Dr. Dahhas sent a fax to the attention of QEMS, stating that, in light of the tampering with the seal placed at the Warehouse, QEMS should[1082]:

> "[…] instruct [its] representative for attending to the executive administration for inspection and laws implementation at the drug sector in this regard and to bring any [] relevant documents in five working days."

[1076] **Doc. R-8**, p. 8.
[1077] CWS-8, para. 37.
[1078] CWS-8, para. 37.
[1079] CWS-8, para. 38.
[1080] RWS-1, para. 44.
[1081] **Doc. R-138**.
[1082] **Doc. R-140**.

765. It is unclear to whom the fax was sent; at that time QEMS had no employees in the Kingdom, and the communication was probably never received and never answered.

766. In any case, there is no evidence that the SFDA was able to establish who had tampered with the seal and whether any unauthorized access to the Warehouse had occurred.

g. September 2018: A final inspection

767. A further inspection seems to have taken place on 9 September 2018. The only evidence that this occurred is via the minutes of a later meeting of the SFDA Committee, which includes a brief reference to the September inspection[1083]; it is unknown with whom the SFDA accessed the premises.

768. Dr. Dahhas has declared that following the SFDA Committee's decision the SFDA requested the assistance of the Saudi police, but the police did not respond[1084]:

> "[…] several attempts were made by the SFDA to find the registered manager of the Riyadh Warehouse, to ensure that the destruction of goods was carried out. However, there was no response on the part of Qatar Pharma. As the SFDA was unable to contact any representatives of Qatar Pharma, the SFDA wrote to the Riyadh Police on 12 November 2020 (26/03/1442 A.H.) seeking their assistance. I have checked the SFDA files, and discussed with my SFDA colleagues, and I do not believe there was any response from the Riyadh police. After that, nothing further happened until February 2021 […]."

769. In sum, after the final inspection in September 2018, during which presumably the Warehouse continued to be without any Qatar Pharma representative, the SFDA relented, the police were contacted but did not react, and the Saudi authorities seem not to have paid any further attention to the Warehouse.

h. Did Claimants continue accessing the Warehouse until the end of 2018?

770. The Kingdom says that, notwithstanding the Seals placed by the SFDA in April 2018 and the violation report issued in May 2018, Claimants continued accessing the Riyadh Warehouse until the end of 2018[1085]:

> "The Claimants' own records show that they were invoicing until November 2018. As invoices accompany deliveries, that can only mean that Qatar Pharma continued to make deliveries from the Riyadh Warehouse until at least November 2018."

771. Claimants have submitted an Excel spreadsheet with Qatar Pharma's invoices[1086]. Tab "QPHARMA03490", entitled "Sales Invoices Query (KSA 2018)", does refer to seven small invoices to medical centres, hospitals and clinics issued between April and November 2018[1087]. There is no further information. Dr. Al Sulaiti has

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[1083] **Doc. R-146**. See also RWS-1, para. 45.
[1084] RWS-1, para. 46.
[1085] RPHB, para. 67.3.
[1086] **Doc. VP-145**.
[1087] **Doc. VP-145**, Tab "QPHARMA03490".

testified that invoices tended to accompany deliveries[1088], but it could also happen that invoices for past deliveries were reissued. The scarce evidence is not conclusive.

i. July 2022: Deloitte's access

772. In February 2021, while this arbitration was ongoing, Dr. Al Sulaiti addressed a letter to the SFDA, asking to be permitted access to the Warehouse "including—in particular—to retrieve documents that are believed to still be inside that location"[1089]. In March 2021 the SFDA answered that it was not restricting access to the Riyadh Warehouse, or any documents and computers stored in that location[1090].

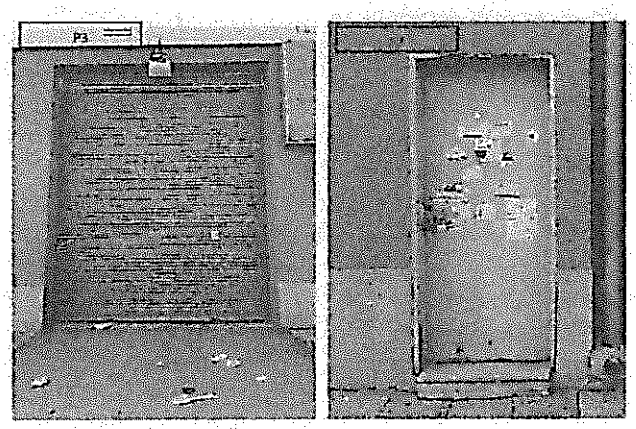
773. Almost a year thereafter, on 26 July 2022, Claimants' agent, Deloitte, finally entered the Riyadh Warehouse with the assistance of a locksmith[1091]. Claimants have submitted into the record the report of this visit prepared by Deloitte on 31 July 2022, video footage recorded by Deloitte[1092] and a third witness statement by Mr. Kotb[1093].

774. Deloitte's report explains that[1094]:

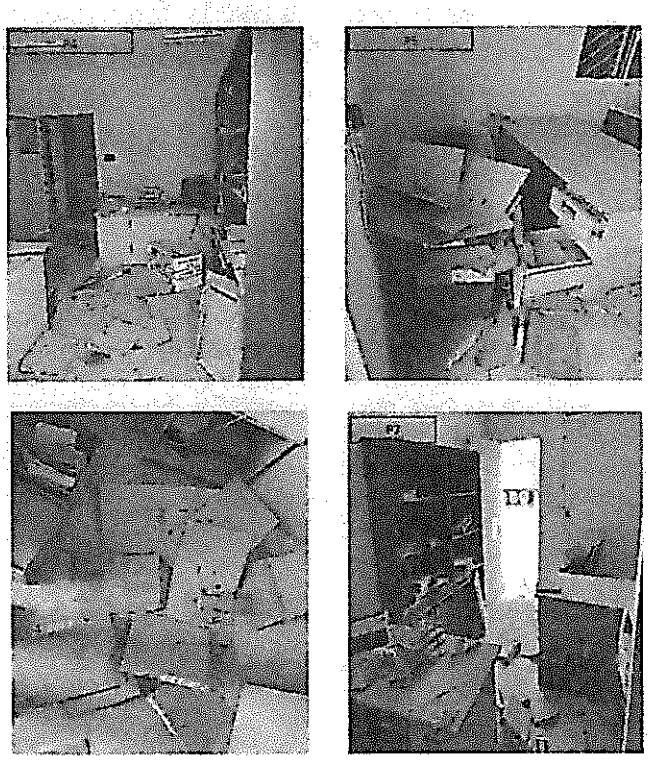
> "4. Prior to our entry, we noticed that the door handle was missing and there were scratches around the lock and handle.
>
> 5. The locksmith was not able to unlock the door and he therefore broke the lock and replaced it. We entered the Warehouse at around 9:25 am along with your Client's representative, Mr. Hassan Alhiqwi. On entering we noticed that the premises were extremely dusty and there was no obvious sign of any recent access (e.g., footprints in the dust)."

775. The photographs taken by Deloitte prior to entering show that the SFDA's Seals had been almost completely removed[1095]:

[1088] HT, Day 2, p. 384, ll. 15-20 and p. 395, ll. 8-22 (Dr. Al Sulaiti).
[1089] **Doc. C-174.**
[1090] **Doc. C-173.**
[1091] Communication C 66.
[1092] **Doc. C-317** (Report); **Docs. C-306** and **C-307** (Video footage).
[1093] CWS-7.
[1094] **Doc. C-317**, paras. 4-5.
[1095] **Doc. C-317**, p. 5.

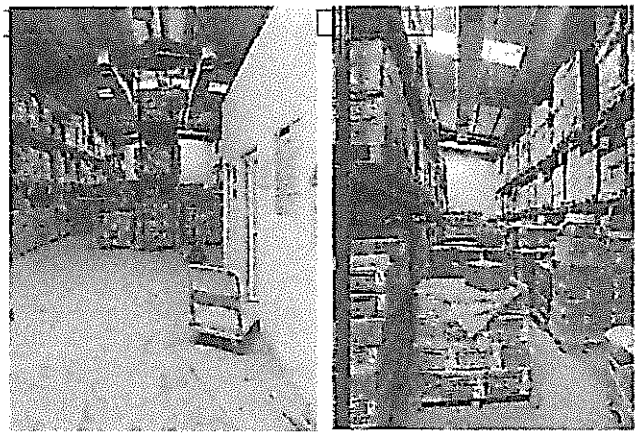


776. The photographs upon entering display dusty and seemingly ransacked offices, with empty document binders spread out on the floor[1096]:



777. Nevertheless, the storage area, although dusty, appears organized with pallets and large quantities of product[1097]:

[1096] **Doc. C-317**, p. 6.
[1097] **Doc. C-317**, p. 9.



778. Mr. Kotb has declared that to the best of his recollection, when he supervised the relocation of QEMS's records, documents and products to the Riyadh Warehouse in June 2017, "all the rooms in the Riyadh Warehouse were left as tidy as possible [...], [n]o cabinets were damaged, and no files were left strewn or scattered on the floor"[1098]. He also says that to his knowledge, no Qatar Pharma employee removed or was authorized to remove files from the Riyadh Warehouse[1099].

779. There is no evidence in the record which might permit to identify the persons who had entered the Warehouse and had ransacked the offices.

F. QEMS's business as of today

780. In 2021 the approval of Qatar Pharma's factory and the registration of its products by the SFDA expired[1100]. Shortly after the signature of the Al-Ula Declaration, Qatar Pharma wrote to the SFDA, asking for an extension of its factory's registration certificate (which had been issued in November 2016 for a period of five years) for a period equivalent to the embargo[1101]. However, in February 2021 the SFDA denied the requested extension and noted that Qatar Pharma had to pay the inspection service fee, after which the SFDA would conduct a new inspection, which could eventually result in a new registration[1102]. This, however, has not occurred.

781. In sum: Qatar Pharma's business in Saudi Arabia has been destroyed and there is no evidence that it could easily be restarted. Qatar Pharma would have to undertake significant investments to be able to re-enter the Saudi market[1103]. In any case, Dr. Al Sulaiti has declared under oath that he would not be willing to go back to Saudi Arabia, either in a personal capacity or with his business, for fear of alleged reprisals because of his pursuit of legal claims against the Kingdom[1104].

[1098] CWS-7, para. 6.
[1099] CWS-7, para. 15.
[1100] CER-1, para. 107; CWS-4, paras. 57-58. See also HT, Day 1, p. 300, l. 7 to p. 301, l. 11 (Dr. Harris).
[1101] **Doc. C-209**; **Doc. C-210**. See also **Doc. C-211**; CWS-3, para. 138; CWS-4, para. 58.
[1102] **Doc. C-208**; **Doc. C-209**. See also CWS-3, para. 138; CWS-4, paras. 59-60.
[1103] CWS-3, para. 138; CWS-4, para. 58. See also CER-1, para. 107; C I, paras. 165-166; CPHB, paras. 77-78; CHT, p. 2443, l. 12 to p. 2444, l. 4 (Mr. Walsh).
[1104] HT, Day 10, 2 June 2023, p. 2277, l. 1 to p. 2284, l. 8 (Dr. Al Sulaiti). See also CWS-3, para. 140; CWS-8, para. 52.

3.2 RELEVANT TREATY PROVISIONS

A. The MFN clause

782. Because the OIC Agreement lacks an FET clause, Claimants seek to import such protection via the Agreement's MFN clause and the Saudi Arabia-Austria BIT.

783. The MFN clause in Art. 8 of the OIC Agreement reads as follows[1105]:

> "1. The investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors.
>
> 2. Provisions of paragraph above shall not be applied to any better treatment given by a contracting party in the following cases:
>
> a) Rights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement.
>
> b) Rights and privileges arising from an international agreement currently in force or to be concluded in the future and to which any contracting party may become a member and under which an economic union, customs union or mutual tax exemption arrangement is set up.
>
> c) Rights and privileges given by a contracting party for a specific project due to its special importance to that state." [Emphasis added]

784. The Parties discuss whether Claimants can rely on this Art. 8 to import certain protections from the Saudi Arabia-Austria BIT.

785. Claimants argue that as consistently confirmed by case law under the OIC Agreement, the MFN clause allows investors to invoke protections in third-State treaties entered into by the host State (e.g., the Saudi Arabia-Austria BIT)[1106]. Being protected investors under the OIC Agreement, who have made an investment in the Kingdom within the pharmaceutical sector, Claimants request their right[1107]:

- To enjoy in the Kingdom,
- The same rights and privileges offered by the Kingdom under the Saudi Arabia-Austria BIT,
- To Austrian investors who are also active in the pharmaceutical sector, and

[1105] **Doc. CLA-10.**
[1106] C II, paras. 352 *et seq.*
[1107] C I, para. 320; C II, para. 352.

- Specifically, the rights and privileges under the FET and FPS standards and the prohibition of impairing investments through arbitrary or discriminatory measures (Art. 2(1), 2(2) and 4(1) of the BIT).

786. The Kingdom advocates a narrow interpretation of Art. 8(1)[1108]: for a breach of the MFN obligation to occur, it is not sufficient for Claimants to point to a more advantageous provision in a different treaty, without reference to any specific investor; Claimants must identify a specific investor from a third State, who, in the context of an actual investment, is receiving more favourable treatment from the Kingdom in like circumstances[1109]. It follows that Art. 8(1) only creates a cause of action for Claimants to prove a *de facto* discrimination between themselves and a specific third State investor in the pharmaceutical sector[1110]. According to the Kingdom, Claimants' position as to the scope of MFN clauses is "outdated" and "overly-expansive"[1111].

787. On this point, the Tribunal sides with Claimants.

788. The "ordinary meaning" of the terms used in Art. 8(1) of the OIC Agreement (**a.**), interpreted in "good faith", "in light of [the treaty's] object and purpose" (**b.**) and in "their context" (**c.**), as required by Art. 31(1) of the VCLT[1112], supports Claimants' construction. The Tribunal's conclusion (**d.**) is reinforced by the reasoning adopted by the tribunals in other cases under the OIC Agreement (**e.**).

a. Ordinary meaning

789. Art. 8(1) of the OIC Agreement grants a protected investor, who has made an investment in a certain "economic activity", a defined right[1113]:

- to "enjoy" in the territory of the host State,
- "[a] treatment not less favourable than the treatment accorded" by the host State to other investors, "in respect of rights and privileges accorded to those investors",
- provided that these investors belong "to another State not party to [the OIC] Agreement", and
- provided further that the treatment is offered "in the context of [the same] activity" performed by the protected investor.

790. The ordinary meaning of Art. 8(1) is clear: it allows protected investors to invoke "treatment [...] in respect of rights and privileges" granted by the host State to other investors, under treaties entered into by such host State with third States, provided

[1108] R II, para. 395.
[1109] R I, para. 431; R II, para. 395.
[1110] R I, para. 436.
[1111] R I, para. 429.
[1112] **Doc. CLA-73.**
[1113] **Doc. CLA-10.**

that such treatment is offered "in the context of the same activity" carried out by the investor.

791. This ordinary meaning does not support Saudi Arabia's proposed restrictive interpretation: Art. 8(1) does not require that the investor invoking the MFN clause identify a specific "other investor" in like circumstances, who *de facto* is enjoying a more favourable treatment; the only requirement is that the "rights and privileges" offered to the "other investor" be more favourable than those of the protected investor. Nothing in the wording of the provision indicates that these more favourable rights and privileges cannot result from higher standards of protection agreed upon in a treaty entered into between the host State and the State of the "other investor".

b. Object and purpose

792. The stated purpose of the OIC Agreement, as explained in its preamble, is[1114]:

> "[…] to provide and develop a favourable climate for investments, in which the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples […]."

793. The preamble of the Saudi Arabia-Austria BIT uses very similar terms[1115]:

> "INTENDING to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party,
>
> RECOGNIZING that the reciprocal promotion and protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both Contracting Parties […]."

794. The OIC Agreement and the Saudi Arabia-Austria BIT thus share identical object and purpose: to create favourable conditions for investments, with the ultimate aim of increasing the prosperity of both Contracting Parties.

795. The interpretation favoured by the Tribunal is compliant with the OIC Agreement's object and purpose of developing a favourable climate for Saudi and Qatari investments: the OIC Agreement was approved and opened for signature in 1981 and entered into force as between Saudi Arabia and Qatar in February 2003[1116]; the Saudi Arabia-Austria BIT entered into force thereafter, in July 2003[1117], and under this treaty Saudi Arabia offered Austrian investors certain additional rights and privileges which had not been granted to Qatari investors. To extend these rights and privileges to Qatari investors, by applying the MFN clause in the OIC Agreement, will create a level playing field for investors of both nationalities, and will contribute to the existence of a "favourable climate" for Qatari investments.

[1114] **Doc. CLA-10**, Preamble.
[1115] **Doc. CLA-133**, Preamble.
[1116] C I, fn. 578. See also **Doc. CLA-29**, p. 28.
[1117] **Doc. CLA-133** (the BIT entered into force on 25 July 2003).

c. Context

796. The context also supports the interpretation favoured by Claimants and the Tribunal.

797. Pursuant to Art. 8(2)(a) of the OIC Agreement, the MFN clause shall not apply to any better treatment given by the host State to an investor of another OIC Contracting Party "in accordance with an international agreement, law or special preferential arrangement"[1118]; this implies that the MFN clause does not apply to preferential treatment accorded pursuant to other treaties which may be concluded between Contracting Parties to the OIC Agreement (*ad exemplum*: if there were a BIT between Saudi Arabia and Pakistan – both OIC Member States – providing higher standards of protection, Art. 8(2)(a) would bar Qatari claimants from invoking these higher standards).

798. Austria is not a Contracting Party to the OIC Agreement, and consequently the Saudi Arabia-Austria BIT is excluded from the scope of Art. 8(2)(a). This exclusion reinforces the argument that the rights and privileges afforded to Austrian investors must be extended to Qatari nationals: *exclusio unius, inclusio alterius*[1119].

d. Conclusion

799. The proper interpretation of Art. 8(1) of the OIC Agreement, applying the principles provided for by Art. 31(1) of the VCLT, supports the conclusion that when Claimants began their pharmaceutical investments in the Kingdom in 2010, they could rely not only on the protections granted by the OIC Agreement, but also on the additional substantive protections afforded to Austrian investors in that same economic area by the Saudi Arabia-Austria BIT, a posterior *ejusdem generis* treaty.

800. The Saudi Arabia-Austria BIT indeed provides Austrian investors with certain "rights and privileges" (FET, FPS, non-impairment), which go further than those afforded to Qatari investors under the OIC Agreement. The substantive treatment in the OIC Agreement is thus "less favourable" than that offered to investors in the Saudi Arabia-Austria BIT, and consequently Art. 8(1) of the OIC Agreement permits Claimants to invoke the more favourable standard.

801. Furthermore, Claimants also comply with the OIC Agreement's requirement that the more favourable treatment be applied in the context of their own investment activity. Claimants made their investment in the pharmaceutical sector, and this is the relevant area of economic activity for the purposes of Art. 8(1). There is nothing in the Saudi Arabia-Austria BIT that excludes or restricts the pharmaceutical sector from its scope of protection[1120].

[1118] **Doc. CLA-10**, Art. 8(2)(a).
[1119] See also **Doc. CLA-52**, *Itisaluna*, para. 206.
[1120] **Doc. CLA-133**. See also **Doc. CLA-32**, *Al-Warraq*, para. 552.

e. Prior awards

802. The practice of incorporating substantive provisions from third treaties goes back to the seminal 1990 award in *AAPL v. Sri Lanka*, in which the tribunal found that an MFN clause[1121]:

> "[...] may be invoked to increase the host State's liability in case a higher standard of international protection becomes granted to investments pertaining to nationals of a Third State."

803. In subsequent case law, whenever the main treaty included a broad MFN clause, tribunals have accepted the incorporation of substantive standards from other treaties[1122]. There have been discussions surrounding the scope of MFN clauses, but these have focussed on whether they can be used to avoid procedural preconditions or to clear jurisdictional obstacles[1123] – a question which is irrelevant for the purpose of the present dispute.

Case law regarding the OIC Agreement

804. As regards Art. 8(1) of the OIC Agreement, the existing case law consistently supports the position adopted by the Tribunal in this award.

805. The *Al-Warraq* tribunal was the first to address this very issue and concluded[1124]:

> "[...] that the MFN clause applies to import other clauses as long as the *ejusdem generis* rule applies. In the present arbitration, the Tribunal notes from the above preamble that the subject matter of the OIC Agreement as well as the UK-Indonesia BIT relied upon by the Claimant to import fair and equitable treatment, is the same, which is the protection of the foreign investment."

806. In that case, the respondent State had argued that Art. 8(1) creates a limitation: the MFN treatment only applies within the context of the same economic activity, and in this respect the provision is different from a typical MFN clause. The *Al-Warraq* tribunal dismissed the respondent State's argument[1125]:

[1121] **Doc. CLA-27**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award ["***AAPL***"], para. 43. See also **Doc. RLA-279**, A. Wang, *The Interpretation and Application of the Most-Favored-Nation Clause in Investment Arbitration*, p. 111.

[1122] **Doc. CLA-125**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, paras. 100-104; **Doc. CLA-128**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB 03/29, Award, para. 157; **Doc. CLA-129**, *Sergei Paushok et. al v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, para. 570 (this tribunal limited the incorporation to the FET clause, stating that the MFN clause could not be applied to introduce into the treaty completely new substantive standards); **Doc. CLA-130**, *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, paras. 362-395; **Doc. CLA-132**, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, paras. 11.2.1-11.2.9; **Doc. CLA-153**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 575. See also **Doc. RLA-279**, A. Wang, pp. 117 *et seq.*; **Doc. CLA-248**, R. Dolzer *et al.*, *Principles of International Investment Law* (3rd ed.), p. 269.

[1123] **Doc. CLA-248**, R. Dolzer *et al*, pp. 268-269. See also A. Wang, *The Interpretation and Application of the Most-Favored-Nation Clause in Investment Arbitration*, pp. 187 and 266.

[1124] **Doc. CLA-32**, *Al-Warraq*, para. 551.

[1125] **Doc. CLA-32**, *Al-Warraq*, para. 552.

> "The Tribunal does not view the reference to 'same economic activity' as imposing a limitation on the scope of application of the MFN clause relevant in this case. The investment of the Claimant was employed in the banking sector, and this is the area of economic activity for the purposes of Article 8. There is nothing in the UK-Indonesia BIT that excludes or restricts the banking sector from the scope of protection granted to investments of the other State."

807. The *Al-Warraq* award is in line with other cases decided under the OIC Agreement. In *KCI* the tribunal held that the investor[1126]:

> "[…] *peut donc invoquer devant ce Tribunal, sur le fondement de l'article 8 de l'Accord, des garanties prévues dans les traités de protection des investissements autres que l'Accord, ratifiés par la République gabonaise.*"

808. Similarly, the *Navodaya Trading* tribunal found that the FET standard in a treaty with a third State could be imported pursuant to Art. 8(1) of the OIC Agreement[1127].

809. The above is not contradicted by the decision of the *Itisaluna* tribunal. In that case, the claimant was requesting that the tribunal incorporate, via the MFN clause in the OIC Agreement, the respondent State's consent to ICSID arbitration under the Iraq-Japan BIT – a distinct issue from that under discussion. The *Itisaluna* tribunal concluded that the MFN clause in the OIC Agreement[1128]:

> "[…] cannot be relied upon by the Claimants to incorporate into the OIC Agreement the Respondent's consent to ICSID arbitration derived from Article 17(4)(a) of the Iraq-Japan BIT."

810. But in reaching this conclusion, the tribunal rejected Iraq's argument that the "economic activity" language excluded the importation of third State treaty benefits, saying that the argument was "excessively narrow and formalistic" and "at odds with the [Agreement's] object and purpose"[1129].

İçkale and *Sehil*

811. The Kingdom has drawn the Tribunal's attention to two cases, *İçkale*[1130] and *Sehil*[1131], which were both decided based on the Turkey-Turkmenistan BIT, whose MFN clause, found at Art. II(2), reads as follows[1132]:

> "Each Party shall accord to [covered investments], once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable." [Emphasis added]

[1126] **Doc. CLA-51**, *KCI*, para. 168; the investor "may therefore invoke before this Tribunal, on the basis of Art. 8 of the [OIC] Agreement, protections provided in investment protection treaties other than the Agreement that have been ratified by the Gabonese Republic".
[1127] **Doc. CLA-54**, *Navodaya Trading*.
[1128] **Doc. CLA-52**, *Itisaluna*, para. 223.
[1129] **Doc. CLA-52**, *Itisaluna*, para. 194.
[1130] **Doc. CLA-214**, *İçkale*, para. 328.
[1131] **Doc. RLA-129**, *Sehil*, paras. 781-794.
[1132] **Doc. CLA-214**, *İçkale*, para. 326.

812. The *İçkale* tribunal considered that[1133]:

> "[…] given the limitation of the scope of application of the MFN clause to 'similar situations,' it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations,' without effectively denying any meaning to the terms 'similar situations.'"

813. A similar approach has been adopted by the *Sehil* tribunal[1134].

814. Both decisions are inapposite, because of the clear differences between Art. 8(1) of the OIC Agreement and Art. II(2) of the Turkey-Turkmenistan BIT:

- While Art. 8(1) affords protected investors treatment no less favourable than the treatment afforded to third State investors "in respect of rights and privileges accorded to those investors", Art. II(2) does not qualify "treatment" with respect to "rights and privileges"[1135];

- Art. 8(1) refers to "treatment accorded […] in the context of [an economic] activity", while Art. II(2) mentions "treatment […] accorded in similar situations"; the OIC Agreement language only limits the scope of the MFN clause if the target treaty excludes the economic activity in question from its own scope of protection (and the Saudi Arabia-Austria BIT does not exclude pharmaceutical activities from its scope of protection); the Art. II(2) language, however, may require, as the *İçkale* tribunal concluded, a comparison of factual situations.

* * *

815. In view of the above, the Tribunal concludes that Art. 8(1) of the OIC Agreement permits Claimants to invoke certain more favourable provisions of the Saudi Arabia-Austria BIT, namely those regarding:

- FET and non-impairment through arbitrary or discriminatory measures (Arts. 2(1) and 2(2)); and

- FPS (Art. 4(1)).

B. The FET standard and the prohibition of impairment through arbitrary and discriminatory measures

816. Art. 2 of the Saudi Arabia-Austria BIT (imported via the MFN Clause in the OIC Agreement) provides that[1136]:

[1133] **Doc. CLA-214**, *İçkale*, para. 329.
[1134] **Doc. RLA-129**, *Sehil*, paras. 781-794.
[1135] **Doc. CLA-52**, *Itisaluna*, para. 194.
[1136] **Doc. CLA-133**, p. 2.

> "1. Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.
>
> "2. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party." [Emphasis added]

The Parties' positions

817. The Parties discuss the precise nature of the obligations under Art. 2 of the Saudi Arabia-Austria BIT.

818. Claimants say that the obligation to provide FET requires the host State (*inter alia*) to act transparently, consistently, non-arbitrarily, not to engage in conduct that is grossly unfair, unjust, idiosyncratic, or discriminatory, and to afford investors the right to due process[1137]. There is an overlap between conduct that violates the non-impairment provision and the FET standard: arbitrary conduct includes that which is not based on legal standards but rather on discretion, prejudice or personal preference, is grossly unfair, unjust or idiosyncratic, lacks in due process such that it offends judicial propriety, or is engaged in for reasons that are different from those put forward by the decision-maker; discriminatory conduct, on the other hand, is found where similarly-situated persons are treated in a different manner without reasonable or justifiable grounds[1138].

819. The Kingdom argues that the contemporary practice of international tribunals demonstrates that the threshold to establish a breach of the FET standard is a high one[1139]: tribunals grant host States a significant degree of deference to regulate their interests, particularly where national security is concerned[1140]; even a drastic change in the host State's legal framework is insufficient to establish a breach of the FET standard, which turns not on the magnitude of the change but on its unreasonableness[1141]. Only a change that is unfair, unreasonable or inequitable can constitute a breach of the FET obligation[1142]. The general standard in respect of transparency, non-arbitrariness and reasonableness is a high one, fulfilled only where there has been a "complete lack of transparency and candour in an administrative process"[1143].

Discussion

820. Under Art. 2 of the Saudi Arabia-Austria BIT, the Kingdom has assumed a positive and a negative obligation:

[1137] C I, para. 327; C II, paras. 368 *et seq.*
[1138] C I, paras. 380-381.
[1139] R I, paras. 443-447; R II, paras. 408-409.
[1140] R I, paras. 449-450; R II, paras. 408, 414, 419.
[1141] R I, paras. 458-459; R II, para. 417.
[1142] R II, para. 419.
[1143] R I, paras. 469-472; R II, para. 427.

- The positive obligation to accord FET to protected investments, and

- The negative obligation to abstain from impairing, by arbitrary or discriminatory measures, the management, maintenance, use, enjoyment or disposal of protected investments.

These obligations are imported via the MFN clause of the OIC Agreement and are echoed in Art. 2 of the OIC Agreement, which states that[1144]:

> "[…] the host state shall give the necessary facilities and incentives to the investors engaged in activities therein."

821. The positive obligation is of Laconic brevity and Delphic obscurity: the host State, in this case Saudi Arabia, "shall in any case accord such investments fair and equitable treatment".

822. What constitutes "fair and equitable treatment"?

823. FET is a term of art, and any effort to decipher the ordinary meaning of the words used only leads to analogous terms of almost equal vagueness. The Parties generally agree that for there to be a breach of the FET standard, the State must have engaged in a conduct that is unfair or inequitable; a complete lack of transparency or due process can also engage the State's responsibility. The FET standard is closely tied to the notion of legitimate expectations – actions or omissions by the host State are contrary to the FET standard if they frustrate legitimate and reasonable expectations on which the investor relied[1145].

824. The Parties do not discuss that the obligation to provide FET binds the State as a whole. It can be breached by the conduct of any branch of government:

- The executive or administrative branch (or its separate agencies) can breach FET by means of administrative acts that directly target the investment;

- The enactment of laws or regulations of general application (be it by Parliament or by the Government), can also breach FET by radically or arbitrarily modifying the applicable legal framework to the detriment of the investment; or

- The State's judicial system as a whole can also disregard the FET obligation by committing a denial of justice which affects the investment.

825. Under Art. 2(2) of the Saudi Arabia-Austria BIT, the Kingdom has also assumed the obligation not to "in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal" of protected investments. A literal interpretation of the rule shows that, for the State's conduct to amount to a violation of this provision, it suffices that it be either arbitrary *or* discriminatory; it need not be both.

[1144] **Doc. CLA-10.**
[1145] **Doc. RLA-123**, *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability ["***Lemire***"], para. 265.

826. As pointed out by Claimants, there is some overlap between Arts. 2(1) and 2(2): any arbitrary or discriminatory measure, by definition, fails to be fair and equitable. Thus, any violation of Art. 2(2) seems *ipso iure* to also constitute a violation of Art. 2(1). The reverse is not true, though. An action or inaction of a State may fall short of fairness and equity without being discriminatory or arbitrary[1146].

Arbitrary measures

827. What are "arbitrary measures"?

828. Arbitrariness has been described as "founded on prejudice or preference rather than on reason or fact"[1147]; "[…] contrary to the law because [it] shocks, or at least surprises, a sense of juridical propriety"[1148]; or "wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety"[1149]; or conduct which "manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination"[1150].

829. In *EDF v. Romania*, Professor Schreuer, appearing as an expert, defined as "arbitrary"[1151]:

> "a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> b. a measure that is not based on legal standards, but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;
>
> d. a measure taken in willful disregard of due process and proper procedure."

830. The *EDF* tribunal accepted this definition in its analysis and ultimately rejected the claim that Romania had adopted arbitrary measures[1152].

Discriminatory measures

831. Discrimination is a relative standard, which requires a comparative analysis between the measures applied to the protected investment and the measures applied to other investments in similar situations. Discrimination means unequal or different treatment.

[1146] **Doc. RLA-123**, *Lemire*, Decision on Jurisdiction and Liability, para. 259.
[1147] **Doc. CLA-75**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, para. 221, quoting to Black's Law Dictionary 7th edition.
[1148] **Doc. CLA-95**, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, para. 154.
[1149] **Doc. CLA-157**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, para. 131.
[1150] **Doc. CLA-116**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award ["***Saluka***"], para. 307.
[1151] **Doc. RLA-96**, *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, Award ["***EDF***"], para. 303.
[1152] **Doc. RLA-96**, *EDF*, para. 303.

832. But this, in itself, is insufficient: for a measure to be discriminatory, the protected investment must be treated differently from similar cases without reasonable justification[1153], such that the host State "exposes the claimant to sectional or racial prejudice"[1154] or "target[s] [c]laimants' investments specifically as foreign investments"[1155].

833. Summing up, the standard defined in Art. 2 of the Saudi Arabia-Austria BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis. It requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, bearing in mind a number of factors, including, among others, the following:

- Whether the State made specific representations creating legitimate expectations in favour of the investor, on which the investor relied;
- Whether the State has failed to offer a stable and predictable legal framework;
- Whether due process has been denied to the investor;
- Whether there is an absence of transparency in the legal procedure or in the actions of the State;
- Whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State; or
- Whether any of the actions of the State can be labelled as arbitrary or discriminatory.

834. The evaluation of the State's action cannot be performed in the abstract and only with a view of protecting the investor's rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred; these factors include, *inter alia*:

- The State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, including its security;
- The investor's duty to perform an investigation before effecting the investment; and
- The investor's conduct in the host country.

[1153] **Doc. CLA-116**, *Saluka*, para. 313.
[1154] **Doc. CLA-147**, *Waste Management*, para. 98.
[1155] **Doc. CLA-28**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, para. 147.

C. The protection and security standard

835. Art. 2 of the OIC Agreement creates an obligation for Saudi Arabia to provide "adequate protection and security" to the "invested capital"[1156]:

> "The contracting parties shall permit the transfer of capitals among them and its utilization therein in the fields permitted for investment in accordance with their laws. The invested capital shall enjoy adequate protection and security and the host state shall give the necessary facilities and incentives to the investors engaged in activities therein." [Emphasis added]

836. Art. 1(4) in turn gives a very wide definition of "capital", defined as "[a]ll assets (including everything that can be evaluated in monetary terms) owned by a contracting party to this Agreement or by its nationals, whether a natural person or a corporate body [...]"[1157].

837. The Saudi Arabia-Austria BIT uses slightly different language. It refers to the State's obligation to provide "full protection and security" to protected investments[1158]:

> "1. Investments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party." [Emphasis added]

838. In Claimants' view, there is no meaningful distinction between "adequate" and "full" protection and security[1159]; but even if there were, Claimants would be entitled to import the FPS standard from the Saudi Arabia-Austria BIT, by means of the MFN clause[1160]. According to Claimants, this obligation ensures not only physical security, but also legal and commercial protection[1161], and it imposes positive obligations on the host State to protect investments[1162].

839. The Kingdom, on the contrary, argues that Art. 2 of the OIC Agreement refers to "adequate" protection and security, and that this concept cannot mean the same as "full" protection and security[1163]. The Kingdom adds that these standards only apply to the physical integrity of invested capital, excluding legal protection[1164].

Discussion

840. The Parties discuss two issues:

- Whether there is a meaningful difference between "adequate" and "full" protection and security; and

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[1156] **Doc. CLA-10.**
[1157] **Doc. CLA-10.**
[1158] **Doc. CLA-133.**
[1159] C I, para. 391, referring to **Doc. CLA-32**, *Al-Warraq*, para. 630; C II, paras. 466-470.
[1160] C I, para. 391; C II, para. 352.
[1161] C I, para. 394; C II, paras. 465, 471-474.
[1162] C I, para. 392.
[1163] R I, paras. 536-538; R II, paras. 507-509.
[1164] R I, paras. 542-543; R II, para. 511.

- Whether this standard covers only the physical integrity of invested capital or also extends to legal security.

841. As regards the first question, the discussion is moot: assuming, *arguendo*, that the FPS standard is higher than the "adequate" protection and security standard, the Tribunal has already established that Claimants can invoke the former via the OIC Agreement's MFN clause and Art. 4(1) of the Saudi Arabia-Austria BIT. In any case, the view of arbitral tribunals tends to be that the semantic variations in the drafting of the protection and security clause do not change the interpretation of the standard[1165].

842. As regards the second question, the historical objective of the protection and security standard was to offer physical protection to investments against interference by use of force or the consequences of armed conflict[1166].

843. As noted by several tribunals and scholars[1167], some investment treaty tribunals have come to assert that the obligation has evolved to include a guarantee of legal or commercial protection and stability for the investment[1168].

844. In the present case, the Saudi Arabia-Austria BIT contains, on the one hand, an FET and non-impairment standard, and, on the other hand, a separate FPS standard. Likewise, the OIC Agreement guarantees adequate protection and security, but not expressly FET. The guarantee to provide legal security to an investment seems to fall under the FET standard, while FPS seems better suited to protect the physical integrity of the investment[1169]. As noted by the *Suez* tribunal[1170]:

[1165] **Doc. CLA-105**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 354; **Doc. CLA-152**, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, para. 260; **Doc. CLA-162**, S. A. Alexandrov, "The Evolution of the Full Protection and Security Standard", *in* M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, p. 319.

[1166] **Doc. CLA-116**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, paras. 483-484; **Doc. CLA-186**, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, paras. 324-325; **Doc. CLA-213/RLA-185**, *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, paras. 157-158; **Doc. RLA-150**, Z. Douglas, "Property, Investment and the Scope of Investment Protection Obligations", *in* Z. Douglas et al (ed), *The Foundations of International Investment Law: Bringing Theory into Practice*, (CUP 2014), p. 379.

[1167] **Doc. CLA-162**, S. Alexandrov, p. 320; **Doc. RLA-150**, Z. Douglas, pp. 379-380; **Doc. CLA-186**, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, paras. 326; **Doc. RLA-216**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, para. 634; **Doc. RLA-183**, *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, para. 622; **Doc. RLA-186**, *AWG Group Ltd v. Argentine Republic*, UNCITRAL Decision on Liability, para. 166.

[1168] See, e.g., **Doc. CLA-101**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, para. 406; **Doc. CLA-79/RLA-197**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para. 729.

[1169] **Doc. RLA-150**, p. 380; **Doc. RLA-182**, *Suez, Sociedad General de Aguas de Barcelona SA & InterAgua Servicios Integrales del Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, paras. 166-168; **Doc. RLA-216**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, paras. 632-634; **Doc. RLA-186**, *AWG Group Ltd v. Argentine Republic*, UNCITRAL Decision on Liability, para. 173.

[1170] **Doc. RLA-182**, *Suez, Sociedad General de Aguas de Barcelona SA & InterAgua Servicios Integrales del Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, para. 168.

> "[…] an overly extensive interpretation of the full protection and security standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable."

845. The obligation incumbent on Saudi Arabia pursuant to the protection and security standard is twofold:

- A negative obligation to refrain from directly harming the investment by acts of violence attributable to the State; and
- A positive obligation to prevent third parties from causing physical damage to such investment.

846. The Parties agree that this is a due diligence standard[1171], which only requires that the State exercise the necessary vigilance and take the necessary measures to protect the investment[1172]. The State has an obligation of means to exercise reasonable care to prevent damages to the investments. This obligation of vigilance does not grant an insurance against damage or a warranty that the investment shall never be occupied or disturbed[1173] – but it requires that the State apply reasonable means to protect foreign property[1174].

D. The obligation to grant Permits

847. Finally, Art. 5 of the OIC Agreement establishes that[1175]:

> "The contracting parties shall provide the necessary facilities and grant required permits for entry, exit, residence and work for the investor and his family and for all those whose work is permanently or temporarily connected with the investment such as experts, administrators, technicians and labourers in accordance with the laws and regulations of the host state." [Emphasis added]

848. Art. 5 is drafted in clear and mandatory terms: Saudi Arabia "shall provide" Qatari investors with entry, exit, residency and work permits (previously defined as "Permits") for "the investor and his family" and for "experts, administrators, technicians and labourers" who are connected to the investment.

849. The Parties do not discuss the scope of the Kingdom's obligation; rather, the discussion hinges on the restriction incorporated in the final words of the provision: "in accordance with the laws and regulations of the host state":

[1171] C I, para. 393; R I, para. 551. See also **Doc. CLA-162**, S. Alexandrov, p. 323: "The upshot of *AAPL v. Sri Lanka* and its progeny was clear: the full protection and security standard demanded that States act with due diligence to protect the interests of foreign investors from physical harm. Subsequent tribunals have universally applied the due diligence standard when applying full protection and security provisions."
[1172] **Doc. CLA-27**, *AAPL*, para. 85(5); **Doc. CLA-163**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, paras. 6.05-6.08.
[1173] **Doc. CLA-27**, *AAPL*, paras. 48-50.
[1174] **Doc. RLA-43**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 523.
[1175] **Doc. CLA-10**.

- The Kingdom argues that the meaning of this provision is that no breach will occur if Permits are denied, provided this is done in accordance with the law of Saudi Arabia then in force[1176];

- Claimants, in turn, say that the Kingdom has failed to indicate which of its "laws and regulations" provided for the blanket prohibition on entry and residency of Qatari citizens – because, according to Claimants, none were issued[1177].

850. In section 3.3B.c *infra* the Tribunal will analyse the Kingdom's defence.

3.3 DISCUSSION

851. Claimants argue that the Measures have destroyed their business in an unfair, inequitable, arbitrary and discriminatory manner, in complete disregard of Saudi Arabia's undertakings under the OIC Agreement, in breach of the FET standard, the prohibition of arbitrary and discriminatory acts, the FPS standard and the obligation to grant Permits. Saudi Arabia denies that it committed any breach, and in any case invokes a defence based on its national security interests.

852. In the previous sections the Tribunal has established the proven facts and the relevant Treaty provisions which create obligations for the Kingdom:

- The obligation to accord FET to the protected investments, including the obligation to abstain from impairing, by arbitrary or discriminatory measures, the management, maintenance, use, enjoyment or disposal of protected investments;

- The obligation to accord FPS to the protected investment, including a negative obligation to refrain from directly harming the investment by acts of violence attributable to the State; and the positive obligation to prevent third parties from causing physical damage to such investment; and

- The obligation to provide Qatari investors with Permits, including family, experts, administrators, technicians and labourers who are connected to the investment.

853. The Tribunal will first analyse the Kingdom's national security defence (**A.**), and then determine whether Saudi Arabia has breached any of its international obligations (**B.**).

A. <u>The level of deference owed to the Kingdom's security interests</u>

854. The Tribunal has already established that[1178]:

[1176] R I, para. 566; R II, para. 520.
[1177] C II, paras. 490-491.
[1178] See section VI.2.3.2 *supra*.

- The Measures did constitute "preventive measures" as required by Art. 10(2)(b) of the OIC Agreement, adopted as a reaction to Qatar's foreign policy and its alleged support for terrorist groups and organizations;

- Even though it does not have access to all relevant information sources (which include secret intelligence at the highest level), the Tribunal is prepared to defer to Saudi Arabia's judgement that the policies adopted by Qatar posed an imminent threat to the Kingdom's national security, that the Measures were "necessary to protect [its] national security interests" and that the Riyadh Agreements authorized their adoption;

- The Measures were properly approved and announced in accordance with municipal law;

- With the consequence that, even assuming *arguendo* that the Measures had resulted in an expropriation of Claimants' investment, in violation of Art. 10(1) of the OIC Agreement, such expropriation would be "permissible" under Art. 10(2)(b).

855. The Kingdom relies on the national security defence not only with regard to the expropriation claim, but also with regard to the other claims submitted by Claimants[1179]. Saudi Arabia says that it is entitled to a significant degree of deference in regulating matters within its own borders, particularly where national security is at stake[1180]:

> "Any measure taken to safeguard national security must therefore be treated with a particularly high level of deference. It is only where such a measure can be considered to be entirely unjustified, wholly disproportionate or arbitrary that the state may be deprived of the benefit of such deference."

856. The Tribunal concurs.

857. Even in the absence of an express provision in the OIC Agreement, under international law States are owed a degree of deference when adopting sovereign decisions. This has been consistently upheld by other investment treaty tribunals. Indeed, when assessing whether there had been a breach of the FET and FPS standards under the North American Free Trade Agreement, the *SD Myers v. Canada* tribunal considered that[1181]:

> "[…] a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. […]" [Emphasis added]

[1179] R I, paras. 18-19, 385.3; R II, para. 356.
[1180] R II, para. 356; see also paras. 352-355.
[1181] **Doc. RLA-138**, *SD Myers Inc v. Government of Canada*, UNCITRAL, Partial Award (Merits), para. 263.

858. This statement has been repeatedly echoed by other arbitral tribunals[1182], including in the *Philip Morris* case[1183]:

> "399. […] The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the 'discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith … involving many complex factors.' As held by another investment tribunal, '[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation.'" [Emphasis added]

859. The margin of deference must be high, but not unlimited. As pointed out by the *Crystallex* tribunal[1184]:

> "583. […] governmental authorities should enjoy a high level of deference for reasons of their expertise and competence […] and proximity with the situation under examination. It is not for an investor-state tribunal to second-guess the substantive correctness of the reasons which an administration were to put forward in its decisions, or to question the importance assigned by the administration to certain policy objectives over others.
>
> 584. That being said, it is equally clear that deference to the primary decision-makers cannot be unlimited, as otherwise a host state would be entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory." [Emphasis added]

860. The *Deutsche Telekom* tribunal came to the same conclusion[1185]:

> "The deference owed to the state cannot be unlimited, as otherwise unreasonable invocations of [security interests] would render the substantive protections contained in the Treaty wholly nugatory."

861. In sum, the Tribunal is convinced that the Kingdom is owed a high degree of deference when adopting measures in response to a perceived national security threat, but that such deference must be limited in cases where the measures adopted by the State had arbitrary or unjustifiable outcomes, having been adopted for a purpose other than the stated protection of the State's security interests.

[1182] **Doc. CLA-147**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, para. 94; **Doc. CLA-116**, *Saluka*, para. 305; **Doc. RLA-123**, *Lemire*, Decision on Jurisdiction and Liability, para. 505; **Doc. CLA-177**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, para. 181; **Doc. CLA-111**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award ["***Unglaube***"], paras. 246-247.

[1183] **Doc. RLA-163**, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) & Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, paras. 398-399.

[1184] **Doc. CLA-108**, *Crystallex Intl. Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, paras. 583-584.

[1185] **Doc. CLA-249**, *Deutsche Telekom*, paras. 238-239; **Doc. CLA-111**, *Unglaube*, para. 247.

B. The Kingdom has breached its treaty obligations

862. Applying the heightened standard of review owed to the Kingdom's invocation of its security interests, the proven facts show that the Kingdom has breached several of its obligations under the OIC Agreement, when it adopted the Measures (**a.**), when it failed to protect QEMS's Warehouse in Riyadh (**b.**) and when it revoked Claimants' Permits (**c.**).

a. When it adopted the Measures the Kingdom breached the FET standard including the non-impairment clause

863. The FET and the non-impairment standards are closely connected. As discussed in section 3.2B *supra*, they protect investors against conduct by the State that is unfair, unreasonable, inequitable, arbitrary or discriminatory. The Tribunal will focus its analysis primarily on the non-impairment standard – but a measure which is arbitrary or discriminatory will also constitute a breach of the FET standard[1186].

864. As noted by Professor Schreuer, a measure should be deemed arbitrary (*inter alia*) if[1187]:

- It inflicts damage on the investor without serving any apparent legitimate purpose (**i**); or
- It is taken in wilful disregard of due process and proper procedure (**ii**).

865. In the present case, the Measures breached both principles.

(i) Claimants suffered damage without a legitimate purpose

866. The proven facts show that the Measures were arbitrary, because they inflicted damage on Claimants without serving any legitimate purpose.

867. The Kingdom adopted the Measures for national security reasons, as a reaction to a perceived threat deriving from Qatar's foreign policy and its support for terrorist and subversive groups, inimical to the interests of the Kingdom. To confront this threat, the Kingdom decided to close the Qatari-Saudi Arabia borders, and particularly the Salwa Crossing, through which Qatar Pharma's product were trucked to the Kingdom.

868. But when enacting the Measures the Kingdom did not decide that there should be a general prohibition for the importation of Qatari pharmaceutical products into Saudi Arabia: Dr. Dahhas, a highly respected officer of the SFDA, who appeared as a witness in these proceedings, was asked by counsel during the Hearing whether the Measures affected the importation of Qatari pharmaceutical into the Kingdom. Under oath Dr. Dahhas said that such "pharmaceutical products were not banned from entering into the Kingdom of Saudi Arabia"[1188]. Counsel for Claimants then asked whether he had seen any "guidance or regulation or memos or anything of

[1186] See para. 826 *supra*.
[1187] **Doc. RLA-96**, *EDF*, para. 303.
[1188] HT, Day 7, p. 1493 (Dr. Dahhas).

any sort telling you whether products from Qatar were banned", to which Dr. Dahhas replied[1189]:

> "We have not received anything that prohibits the entry of any [pharmaceutical] product from Qatar."

869. Dr. Dahhas' deposition proves that, at the level of the SFDA, there was no rule which prohibited the importation of Qatar Pharma's products into the Kingdom. In other words: Qatari pharmaceutical products were not directly affected by the Measures.

870. If this was so, why was Qatar Pharma incapable of bringing its products into the Kingdom?

871. There remained only a practical difficulty: because of the Measures, the Salwa Crossing was closed. But if the importation of Qatari pharmaceutical products remained legal, there should have been an exemption, which authorised trucks with this type of products to enter the Kingdom.

872. Did such exemption exist?

The denial of an exemption

873. The Official Statement does not mention the possibility of obtaining an exemption for this type of situations. Because the underlying legislation is secret, the Tribunal does not know whether it contained any reference to this issue. But the most likely answer is that it did not, because the Saudi authorities, including the SFDA, never discussed the possibility of an exemption, and never granted one – although QEMS submitted a request. The evidence shows that on 3 October 2017, QEMS wrote to the Ministry of Health seeking a partial exemption for already manufactured products, made to the specifications of the Saudi authorities and bearing their logo, and asking that the Ministry[1190]:

> "[…] instruct the parties concerned to exempt these medicines and allow these shipments to cross the Saudi-Qatari land border."

874. The evidence further demonstrates that the Kingdom received this request, but never granted the requested exemption[1191]. It also never offered *sua sponte* any alternative, which would have permitted Qatar Pharma to ship or truck its products across the Qatari-Saudi border.

Arbitrariness

875. The inexistence of an exemption or any other alternative which would have made the importation of pharmaceutical products possible can only be labelled as arbitrary.

[1189] HT, Day 7, pp. 1493-1494 (Dr. Dahhas).
[1190] **Doc. C-94**. See also **Doc. C-520**, with minor differences in the translation.
[1191] **Doc. C-519**; Communication R 89.

876. Neither Dr. Al Sulaiti, nor Qatar Pharma, nor any of its products constituted a threat to Saudi Arabia's national security. The Kingdom has failed to marshal any evidence that either Dr. Al Sulaiti or Qatar Pharma, or the pharmaceutical products that they were selling to Saudi public and private customers, were in any way related to the terrorist and subversive groups allegedly supported by the State of Qatar. There is not even an allegation – let alone any evidence – that Dr. Al Sulaiti, Qatar Pharma or QEMS had any links with the matters of national security that were of concern to the Kingdom. In fact, there is evidence that the Kingdom invited Claimants to invest in Saudi Arabia and gave them the necessary Permits and facilities to conduct their business, because local authorities wished to encourage the creation of subsidiaries by Gulf entrepreneurs and the importation of pharmaceutical products manufactured in other Gulf States[1192].

877. There is an additional reason why the denial of an exemption constituted an arbitrary act: the Measures already include certain exceptions. The Official Statement shows that Qatari citizens on pilgrimage, including to the holy city of Mecca, were exempted from the travel ban[1193].

878. If this exception was possible, a similar exception for a Qatari investor like Dr. Al Sulaiti and Qatar Pharma, who had no link with the underlying causes of the Measures, and who was (legally) trying to ship pharmaceutical products into the Kingdom, could and should have been possible. But none was discussed, and none was granted.

879. In the Tribunal's opinion, there was no security concern that required the Measures to be applied to Qatari investors in Saudi Arabia with no proven relationship with Qatar's foreign policy or its alleged support to terrorist and subversive groups. The collateral effect of these indiscriminate Measures was that the economic interests of all Qatari investors in the Kingdom were affected – even if these investors and their activities did not represent any security threat for the Kingdom. Such a policy runs afoul of the Kingdom's international law obligation to abstain from impairing Qatari investments in Saudi Arabia by way of arbitrary or discriminatory measures.

The Kingdom's defences

880. The Kingdom articulates various defences.

881. First, the Kingdom says that the Measures were legitimate, because[1194]:

> "[…] the Measures were neither draconian nor exceptional; rather they were a [sic] carefully calibrated to be appropriate to achieve the essential security interests of the Kingdom at the time."

882. The Tribunal disagrees with the Kingdom's statement that the Measures were carefully calibrated to achieve the essential security interests of the Kingdom.

[1192] **Doc. C-64**, pp. 38-39 **Doc. C-324**, p. 3. See also CWS-8, paras. 5-8; **Doc. H-5**, slide 10.
[1193] **Doc. R-122.** The land border closed on 18 June 2017 and was temporarily reopened to permit pilgrims to travel to the holy city of Mecca during the Hajj in August 2017; it was subsequently closed again (**Doc. KU-5**; **Doc. C-81**; **Doc. C-82**; CER-2, Ulrichsen, para. 4.5; RER-3, Collis, fn. 2.)
[1194] R II, para. 458.

883. The only published part of the Measures is that contained in the Official Statement, which refers to a single exemption for Qatari pilgrims and Umrah participants. The Official Statement makes no reference whatsoever to Saudi companies owned by Qatari investors, nor to the possibility of obtaining further exemptions, nor does it provide any alleviation to the multiple other hardship situations affecting Qatari investors in Saudi Arabia due to the Measures. This failure, exacerbated by the Saudi authorities' refusal to engage in any meaningful exchange with Claimants, belies the Kingdom's argument that the Measures were "carefully calibrated" and not "draconian".

884. Second, the Kingdom says that a significant impairment is a prerequisite for any claim based on the non-impairment provision, in the absence of which such claim cannot succeed[1195]. According to Saudi Arabia, the Measures have not impaired Claimants' investments; rather, the investments had become fatally impaired long before June 2017, due to Claimants' own ineptitude and failure to abide by Saudi law[1196].

885. The Tribunal again disagrees.

886. Before the adoption of the Measures, Dr. Al Sulaiti owned QEMS[1197], a local establishment in Saudi Arabia, which had an agency contract with Qatar Pharma, pursuant to which it imported and distributed pharmaceutical products in the Kingdom, through three Warehouses and with the support of a Scientific Office[1198]. Once the Measures were adopted, Qatar Pharma could no longer ship pharmaceutical products to Saudi Arabia, and QEMS could no longer receive them. Dr. Al Sulaiti and all other Qatari employees of QEMS were expelled and could not re-enter the Kingdom. QEMS's business activities came to a complete halt, the company eventually collapsed, and Claimants lost their investment. In the Tribunal's opinion, there can be no doubt that the Measures *significantly* affected and impaired Claimants' investment in the Kingdom.

887. Whether prior to June 2017 QEMS's business had been very successful (as argued by Claimants) or not so successful (as defended by the Kingdom) is irrelevant for the adjudication of the merits (it may have an impact on quantum, to be discussed in section VII *infra*): what is relevant is that Claimants owned QEMS, a subsidiary in Saudi Arabia which operated an enterprise, and that as a consequence of the Measures that enterprise was destroyed.

* * *

888. In sum, the Measures were arbitrary, and by extension contrary to the FET standard, because they inflicted damage on Claimants, destroying their business in the Kingdom, without serving any legitimate purpose: importation of Qatari pharmaceutical products was not prohibited, but the Measures did not foresee, and the Kingdom did not grant, even when requested, the necessary exemptions for trucks with Qatar Pharma's products to enter via the Salwa Crossing.

[1195] R I, para. 511.1.
[1196] R I, para. 511.1.
[1197] **Doc. VP-26**; CER-1, Figure 5.
[1198] CER-1, Figure 5.

(ii) Lack of due process and transparency

889. The Tribunal also finds that the Measures were arbitrary insofar as they were taken in wilful disregard of due process and proper procedures.

890. The Tribunal accepts that under Saudi municipal law it was rightful for the Royal Decree instituting the Measures to be kept secret, and for the Saudi people to be informed about the existence of these Measures merely through an Official Statement (see section VI.2.3.2B *supra*). But the fact that Saudi citizens were often unaware of the precise scope of the Measures, their consequences, and their reach[1199], did not exempt Saudi authorities from providing adequate information to affected Qatari investors, explaining the scope of the Measures and the legal redress available. There is no evidence that any Saudi authority approached either Dr. Al Sulaiti, Qatar Pharma or QEMS, to do so. There was thus a lack of transparency, leaving investors in a state of uncertainty as to how the Measures would impact their investments and as to how they could seek any form of redress.

Respondent's defence

891. The Kingdom says that it has not breached its due process obligations because the Measures dealt with sensitive sovereign matters such as border closures and national security[1200]. Saudi Arabia argues that the degree of due process depends on the particular type of decision at issue[1201] and that it could not have divulged details of the application of the Measures without giving away sensitive information privy only to its government[1202].

892. The Tribunal agrees that in a case like this, which affects national security concerns, a lowered standard of due process and transparency is warranted. But the Kingdom's argument that to provide transparency would have required divulging sensitive information is a *non sequitur*. The Kingdom was only required to explain the precise impact of the Measures on Claimants' business in Saudi Arabia, the possibility to obtain exemptions from such Measures (similar to those granted to Qatari pilgrims) and their right to challenge the Measures and to obtain redress – and none of this required giving away sensitive information.

b. The SFDA's conduct breached the FET standard, including the prohibition of arbitrary measures, and the FPS standard

893. Claimants argue that the SFDA's conduct with regard to the Riyadh Warehouse was arbitrary, giving rise to a breach of the FET standard[1203], and also constituted a breach of the FPS standard, by violating the physical integrity of their investment, forcibly closing and sealing the premises and denying Claimants access to their products, business records and equipment[1204].

[1199] See, e.g., HT, Day 5, pp. 1145-1146 (Dr. Al-Ahmari); HT, Day 7, p. 1489, ll. 3-13 and pp. 1493-1496 (Dr. Dahhas).
[1200] R I, para. 481.
[1201] R I, para. 482.
[1202] R II, para. 453.
[1203] C I, paras. 368-370; C II, para. 406.
[1204] C I, para. 395; C II, para. 477.

894. The Kingdom denies any wrongdoing and submits that the sealing of the Riyadh Warehouse followed proper procedures, stipulated by Saudi law[1205].

895. The Tribunal has already explained that the SFDA took two measures which directly affected QEMS's Riyadh Warehouse[1206]:

- In September 2017 the SFDA issued a Seizure Order, prohibiting the disposal or destruction of all products stored in the Warehouse, because of excessive temperature (**i**); and

- In April 2018 the SFDA formally closed the Warehouse, by placing Seals on the doors and prohibiting the tampering with these Seals (**ii**).

(i) The Seizure Order

896. In June 2017 the Kingdom enacted the Measures, and in September the SFDA inspected the Riyadh Warehouse, finding that the maximum temperature had been exceeded and issuing a Seizure Order for the totality of product stored, prohibiting its disposal or destruction.

897. The evidentiary record is insufficient for the Tribunal to establish whether the findings of the SFDA and the Seizure Order were *bona fide* measures, adopted by the regulator to defend public health (as argued by the Kingdom[1207]), or whether these measures were improperly applied as a direct consequence of the Measures (as argued by Claimants[1208]).

898. Prior to the adoption of the Measures, the SFDA had conducted inspections of the Riyadh Warehouse and had already detected temperature issues. In April 2017 it considered that QEMS had adequately addressed these issues, renewed the Warehouse Licence, but alerted that it would conduct further visits. The September 2017 inspection by the SFDA was consequently not an unexpected event: it looks like a routine inspection, already foreseen in April 2017.

899. In the absence of clear evidence to the contrary, the Tribunal must pay deference to the SFDA – a respected authority of the Kingdom, entrusted with the supervision of the Saudi pharmaceutical market[1209]. As the tribunal in *Philip Morris* acknowledged, investment tribunals should recognize a margin of appreciation to regulatory authorities especially when making determinations regarding public

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[1205] R II, para. 462.
[1206] See section VI.3.3.1E *supra*.
[1207] R I, para. 501.2; R II, paras. 462, 476.
[1208] C I, para. 368; C II, paras. 420, 434, 477-478; CPHB, paras. 22-26.
[1209] **Doc. RLA-183**, *SD Myers Inc v. Government of Canada*, UNCITRAL, Partial Award (Merits), para. 263. **Doc. CLA-147**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, para. 94; **Doc. CLA-116**, *Saluka*, para. 305; **Doc. RLA-123**, *Lemire*, Decision on Jurisdiction and Liability, para. 505; **Doc. CLA-177**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, para. 181; **Doc. CLA-111**, *Unglaube*, paras. 246-247.

health[1210]. Applying this principle, the Tribunal is unable to find that the issuance of the Seizure Order resulted in a breach of the FET or FPS standards.

(ii) The placement of Seals

900. Upon the enactment of the Measures, Dr. Al Sulaiti and all other Qatari employees of Qatar Pharma and QEMS were expelled from the Kingdom and consequently could not access the Riyadh Warehouse. Qatar Pharma was able to retain some foreign employees, including an Egyptian national, Mr. Ahmed Abdulaziz Mohamed Sallam, who seems to have acted as its representative until February 2018. By April 2018 all business from the Warehouse had ceased, all employees, of whatever nationality, had left, and the premises were not any longer manned. The SFDA visited the Warehouse, and each time found the premises deserted.

901. In April 2018 the SFDA decided to react: it placed Seals on the doors of the Warehouse, requiring QEMS to approach the SFDA within two days. But the Seals also provoked a secondary effect: they included an express prohibition for anyone to tamper with them, under threat of punishment. In practical terms, this requirement equated to a prohibition of access: entrance to the Warehouse could only be gained by breaking the Seals.

902. It is difficult to see the rationale of the SFDA's April 2018 decision. Its stated cause was the absence of any QEMS's employees at the Warehouse. But the regulator must have been perfectly aware of the underlying reasons for the absence: QEMS was owned and managed by Qatari nationals, and due to the Measures, all Qatari citizens had been expelled from and were prohibited from re-entering into the Kingdom. To place a Seal on the door of a Warehouse in Riyadh seems a bizarre procedure to establish contact with persons who had been obliged to leave the country.

903. The prohibition of access is even more difficult to explain. If the issue to be resolved was the absence of employees, and the purpose of the decision was to establish contact with the owners of the enterprise, to impose an absolute prohibition of access to the premises does not seem to satisfy any purpose – and no explanation has been offered by the SFDA. After placing the Seals, neither the SFDA, nor the police, which had been informed by the SFDA, took any active measure to protect the premises. Somebody not afraid of tampering with the Seals took advantage of this situation, accessed the premises, ransacked the offices and withdrew documentation and computers.

904. Under the OIC Agreement, in conjunction with the Saudi Arabia-Austria BIT, the Kingdom was obliged to grant FET to the Riyadh Warehouse, a protected investment, and to abstain from impairing its use and enjoyment by arbitrary measures; but it also had to accord such investment FPS, which implied that the Kingdom had the obligation of means to prevent third parties from causing physical damage to the Warehouse. The SFDA's decision to place Seals on the Riyadh

[1210] **Doc. RLA-163**, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) & Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, paras. 398-399.

Warehouse, coupled with the SFDA's and the police's failure to adopt any measure to protect the Warehouse, are incompatible with these obligations.

c. The obligation to grant Permits

905. One of the main consequences of the Measures was the travel ban to and expulsion from Saudi territory of all Qatari citizens. Dr. Al Sulaiti, who had a residency Permit, was denied permission to enter Saudi Arabia and his Permit was terminated without notice or explanation. The same happened to other QEMS's employees of Qatari nationality; non-Qatari employees were equally affected, because they could no longer renew their multi-entry business visas sponsored by QEMS.

906. It follows that the Measures breached Saudi Arabia's obligation under Art. 5 of the OIC Agreement to grant required Permits for entry, exit, residence and work for the investor and his family and for all those whose work is permanently or temporarily connected with the investment.

Respondent's defence

907. The Kingdom argues that the obligation to grant Permits must be carried out "so long as the entry is regulated in accordance with the laws and regulations of the host state"[1211]. And that, considering that the Measures were taken in accordance with its "laws and regulations", there can be no breach of Art. 5[1212]. Saudi Arabia further argues that the burden of proof on this issue lies with Claimants[1213].

908. The Tribunal is unconvinced.

909. Art. 5 of the OIC Agreement requires that Permits be issued "in accordance with the laws and regulations of the host state".

910. Before the adoption of the Measures, Saudi Arabia complied with its obligation under Art. 5 of the OIC Agreement and granted Permits to Dr. Al Sulaiti and QEMS's other Qatari employees. Then in June 2017 the Measures were enacted. The underlying regulation remains secret. The only publicly known information is that contained in the Official Statement, which merely says that the Measures[1214]:

> "[…] unfortunately prevent […] Qatari citizens' entry to or transit through the Kingdom of Saudi Arabia and those Qatari residents and visitors have to leave Saudi territories within 14 days […]."

911. There is no reference to any law or regulation. And in the course of the arbitration, the Kingdom has not identified "the laws and regulations" which support the withdrawal of Permits granted to Dr. Al Sulaiti and the other QEMS's officers. Having failed to do so, the Kingdom is precluded from invoking the defence that the withdrawal of Permits complied with its laws and regulations. The withdrawal of the Permits constitutes a breach of Art. 5 of the OIC Agreement.

[1211] R I, para. 490.
[1212] R II, paras. 520-522.
[1213] R II, para. 521.
[1214] **Doc. R-122**, p. 2.

C. Conclusion

912. In view of the above, the Tribunal concludes that the Kingdom has breached:

- Art. 8 of the OIC Agreement, by according Claimants a treatment less favourable to that accorded to Austrian investors in accordance with the Saudi Arabia-Austria BIT, and Art. 2 of the Saudi Arabia-Austria BIT (imported via Art. 8 of the OIC Agreement), by failing to provide FET and impairing Claimants' investments by arbitrary measures;

- Art. 2 of the OIC Agreement and Art. 4(1) of the Saudi Arabia-Austria BIT (imported via Art. 8 of the OIC Agreement) by failing to provide FPS to Claimants' investments; and

- Art. 5 of the OIC Agreement, by revoking the work and residency Permits of Dr. Al Sulaiti and the other QEMS's employees.

VI.4. ANCILLARY CLAIMS

913. Claimants have put forward two other claims:

- First, that Saudi Arabia breached Art. 2 of the OIC Agreement, which guarantees the free transfer of capital between OIC Member States,
  - by denying Claimants access to QEMS's Saudi bank account and preventing the free transfer of monies from that account to Qatar, and
  - by failing to pay the amounts owed for products delivered under the contracts with the Ministry of Health, thus denying Claimants the ability to transfer their capital to Qatar[1215]; and
- Second, that Saudi Arabia failed to observe the contractual obligations that it had assumed *vis-à-vis* Claimants' investments, in breach of the umbrella clause contained in Art. 8(2) of the Saudi Arabia-Austria BIT ["**Umbrella Clause**"], which is imported by way of the MFN clause in Art. 8 of the OIC Agreement[1216].

914. The Tribunal notes, however, that in their request for relief Claimants only ask that the Tribunal[1217]:

> "DECLARE that Respondent is in breach of its obligations under Articles 2, 5, 8 and 10 of the OIC Agreement." [Emphasis added]

915. The Tribunal has already found that Saudi Arabia breached its obligations under:

- Art. 2 of the OIC Agreement, when it failed to protect Claimants' investments; and
- Art. 8 of the OIC Agreement, when it failed to accord FET to Claimants' investments and it impaired those investments.

916. The Tribunal is already in a position to make the declaration that Claimants seek. Consequently, the discussion regarding the breach of any additional standards is moot, particularly considering that the additional breaches invoked by Claimants have no impact on the decision on compensation.

917. Likewise, in view of the previous findings (and of the highly unlikely prospect of Claimants re-entering the Saudi market[1218]), and considering that no additional relief is requested with regard to the alleged tax assessments and penalties imposed by ZATCA in 2019 (which do not form part of the losses quantified by Claimants in this arbitration), the Tribunal finds it unnecessary to engage in a discussion of whether these liabilities were legitimately imposed or not[1219].

[1215] C I, paras. 402 *et seq.*; C II, paras. 483 *et seq.*
[1216] C I, paras. 384 *et seq.*; C II, paras. 435 *et seq.*
[1217] CPHB, para. 244. See also C I, para. 461; C II, para. 575; C III, paras. 114-115.
[1218] As will be seen in para. 1038 *infra*.
[1219] See the Parties' discussion, *inter alia*, at CPHB, paras. 33-34; RPHB, 78-80.

VII. QUANTUM

918. In this section, the Tribunal will adjudicate Claimants' request for compensation of the damage caused by the Kingdom's breach of its Treaty obligations.

Claimants' position

919. Claimants request that the Kingdom indemnify the damages they allegedly have suffered, and categorize these losses in various separate heads of loss[1220]:

920. (i.) The first head of loss refers to the valuation of Qatar Pharma's lost business in the Kingdom ["**Loss of Enterprise Value**"]. Claimants propose two valuations, one as of 30 September 2022 (as proxy for the date of the Award) [the "***Ex Post* Valuation**"] and another as of 5 June 2017 (the date when the Measures were adopted) [the "***Ex Ante* Valuation**"]:

- For the *Ex Post* Valuation, Claimants use a DCF analysis developed by their experts, and submit that the Loss of Enterprise Value amounted to QAR 943 million ["**M**"][1221];
- For the *Ex Ante* Valuation, Claimants assume a multiples methodology, and offer two valuations:
  - under Option A, the Loss of Enterprise Value amounts to QAR 679 M[1222],
  - while under Option B it amounts to QAR 713 M[1223].

921. (ii.) The second category refers to additional dividends ["**Loss of Dividends**"] that Qatar Pharma would have received from QEMS between the date of the Measures and 30 September 2022, and which it failed to receive, due to the breach by the Kingdom of its obligations under the Treaty, in an amount of QAR 221.6 M[1224].

922. (iii.) The third category of losses refers to unpaid receivables by two types of Saudi clients ["**Loss of Receivables**"]:

- The Saudi Ministry of Health, in an amount of SAR 89.1 M, after taking into account all payments made by the Ministry during the Arbitration[1225];

[1220] CPHB, para. 184.
[1221] QAR 942.8 M. C I, para. 450. This figure is obtained by subtracting Qatar Pharma's Actual Equity Value of QAR 463.5 M from Qatar Pharma's But-for Equity Value of QAR 1,406.3 M.
[1222] CPHB, para. 226.
[1223] CPHB, para. 229.
[1224] **Doc. H-5**, slide 21.
[1225] CPHB, para. 188 (SAR 89,105,217.94). See also CER-1, Secretariat I, para. 133, Table 6; **Doc. H-5**, slide 21.

- Saudi private clients, in an amount of SAR 10.6 M, also after deducting subsequent payments[1226].

923. (iv.) The fourth category of losses refers to the destruction of two inventories ["**Loss of Inventory**"]:

- The inventory which remained stranded in Saudi Arabia after the Measures, amounting to QAR 4.6 M[1227];
- The undelivered inventory, manufactured in Qatar to Saudi specifications and destroyed upon expiration[1228], in the amount of QAR 88.4 M[1229].

924. (v.) The final category refers to the lost time value of any award of damages ["**Loss due to Lack of Reinvestment**"]. Claimants say that they would have been able to reinvest the cash flows generated from their investments in their business or in other investment opportunities. At the very least, they could have earned a return on such cash flows by investing them in risk free alternatives such as Saudi Arabia sovereign *sukuk*[1230]. Claimants submit that the *sukuk* is the correct instrument to compensate Claimants for that loss. *Sukuk* are instruments akin to bonds that are compliant with Islamic principles and are thus appropriate to measuring this head of damage[1231].

Claimants' expert: Secretariat

925. Claimants' position is based upon the reports prepared by Claimants' experts, Messrs. Kiran P. Sequeira and Bryan D'Aguiar, of Versant Partners, a firm which in August 2021 was acquired by Secretariat International (and to which the Tribunal will refer as "**Secretariat**"). The First Report was submitted in 2021[1232] and the Second Report in November 2022[1233]. Messrs. Kiran P. Sequeira and Bryan D'Aguiar signed the Reports, made a presentation during the Hearing[1234] and were examined by Counsel to both Parties and by the Tribunal.

Respondent's position

926. The Kingdom's position is that Claimants have suffered no, or at best very limited, damage:

927. (i.) As regards the Loss of Enterprise Value, Saudi Arabia contends that an *Ex Ante* Valuation, as of the date of the alleged breach[1235], is preferable, because this remains the dominant practice of international courts and tribunals, including

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[1226] CPHB, para. 189 (SAR 11.4 M minus SAR 800,000 already paid). See also CER-1, Secretariat I, para. 133, Table 6; **Doc. H-5**, slide 21.
[1227] CPHB, para. 191; CER-3, Secretariat II, para. 217; **Doc. H-5**, slide 21.
[1228] CPHB, para. 192.
[1229] QAR 88,442,228. CPHB, para. 192; CER-3, Secretariat II, para. 216; **Doc. H-5**, slide 21.
[1230] CPHB, para. 231.
[1231] CPHB, para. 232.
[1232] CER-1, Secretariat I, p. 1.
[1233] CER-3, Secretariat I, p. 1. For ease of reference, these reports shall be referred to as "CER-1, Secretariat I" or "First Secretariat Report", and "CER-3, Secretariat II" or "Second Secretariat Report".
[1234] **Doc. H-5.**
[1235] RPHB, para. 184; RER-2, Hern II, paras. 196-205.

investment arbitration tribunals[1236], which customarily reject *Ex Post* Valuations where there is uncertainty about the future profitability of the investment[1237].

928. Applying an *Ex Ante* Valuation, Saudi Arabia's valuation expert, Dr. Hern, says that the Loss of Enterprise Value does not exceed QAR 1.6 M[1238].

929. (ii.) The Kingdom also rejects Claimants' claim for Loss of Dividends[1239]. Since the Kingdom supports an *Ex Ante* Valuation, this implicitly entails that no Loss of Dividends between the date of the breach and the date of the award can accrue[1240].

930. (iii.) The Kingdom says that the Tribunal should reject in its entirety Claimants' claim for Loss of Receivables, because Claimants have not proven that the claimed receivables exist[1241]. The Kingdom adds that, even if Claimants could show that there were outstanding receivables, they have not proven that these receivables have been lost as a result of the Measures[1242].

931. (iv.) As for the Loss of Inventory, the Kingdom submits that the Tribunal should reject Claimants' case in its entirety, there being no evidence that there was saleable inventory either in the Saudi Warehouses[1243] or in Doha[1244]. Furthermore, the Kingdom adds that Claimants have not established that the Measures caused any loss to inventory, whether stored in Saudi Arabia or in Doha[1245].

932. (v.) Lastly, with regard to Loss due to Lack of Reinvestment, the Kingdom asserts that interest is illegal under Saudi law and impermissible under the Islamic Sharia. The OIC Agreement must be construed in accordance with Islamic Sharia, which strictly prohibits payment of interest[1246]. The Kingdom adds that the return rate on an Islamic *sukuk* would not be an appropriate proxy for an interest rate in this case and the existence of *sukuk* is not a justification for charging interest[1247].

Respondent's expert: Dr. Hern

933. Saudi Arabia's position is supported by the reports of its expert, Dr. Richard Seymour Hern, of Nera Consulting. Dr. Hern has submitted two expert reports in 2022 and 2023[1248]; he made a presentation during the Hearing[1249]; and was examined by Counsel to both Parties and by the Tribunal.

* * *

[1236] RPHB, para. 185.
[1237] RPHB, para. 186.
[1238] RPHB, para. 121; **Doc. H-6**, slides 7-8.
[1239] RPHB, para. 157.
[1240] HT, Day 9, p. 2168, ll. 12-21.
[1241] RPHB, paras. 123-134.
[1242] RPHB, paras. 135-139.
[1243] RPHB, paras. 141-145.
[1244] RPHB, paras. 146-148.
[1245] RPHB, paras. 149-151.
[1246] RPHB, para. 201.
[1247] RPHB, para 202.3.
[1248] RER-1, Hern I; RER-2, Hern II.
[1249] **Doc. H-6.**

Discussion

934. The Tribunal has already concluded (in section VI.3.3.3C *supra*) that the Kingdom breached:

- Art. 8 of the OIC Agreement, by according to Claimants a treatment less favourable to that accorded to Austrian investors in accordance with the Saudi Arabia-Austria BIT, and Art. 2 of the Saudi Arabia-Austria BIT (imported via Art. 8 of the OIC Agreement), by failing to provide FET and impairing Claimants' investments by arbitrary measures;

- Art. 2 of the OIC Agreement and Art. 4(1) of the Saudi Arabia-Austria BIT (imported via Art. 8 of the OIC Agreement) by failing to provide FPS to Claimants' investments; and

- Art. 5 of the OIC Agreement, by revoking the work and residency Permits of Dr. Al Sulaiti and the other QEMS's employees.

935. In this section the Tribunal must establish the legal consequences of the breach by the Kingdom of its obligations under the OIC Agreement. For this purpose, the Tribunal will first briefly explain the applicable legal standards (**1.**), and thereafter it will address:

- The Loss of Enterprise Value (**2.**),

- The Loss of Dividends (**3.**),

- The Loss of Receivables (**4.**),

- The Loss of Inventory (**5.**), and

- The Loss due to Lack of Reinvestment (**6.**).

1. APPLICABLE LEGAL STANDARDS

936. Unlike other investment treaties, the OIC Agreement includes a specific regulation of the relief which an aggrieved investor can seek vis-à-vis a delinquent State. Art. 13 reads as follows:

> "1. The investor shall be entitled to compensation for any damage resulting from any action of a contracting party or of its public or local authorities or its institutions in the following cases:
>
> (a) Violation of any of the rights or guarantees accorded to the investor under the Agreement;
>
> (b) Breach of any international obligations or undertakings imposed on the contracting party and arising under the Agreement for the benefit of the investor [...];
>
> 2. The compensation shall be equivalent to the damage suffered by the investor depending on the type of damage and its quantum.

> 3. The compensation shall be monetary if it is not possible to restore the investment to its state before the damage was sustained.
>
> 4. The assessment of monetary compensation shall be concluded within 6 (six) months from the date when the damage was sustained and shall be paid within a year from the date of agreement upon the amount of compensation or from the date when the assessment of compensation has become final."

937. Under Art. 13, the Kingdom, which has breached its obligations under the OIC Agreement, is obliged to pay monetary compensation to Claimants (none of the Parties having proposed to restore the investment to its state before the Measures), and the amount of the compensation "shall be equivalent to the damage suffered by the investor". The compensation must be assessed within six months from the date when the damage was suffered and must be paid within one year.

938. Art. 13 of the OIC Agreement reflects the well-known and widely accepted principle of international law that the purpose of compensation must be to place the investor in the same pecuniary position in which it would have been, if the State had not violated its obligations under the treaty[1250]. In the seminal *Case Concerning the Factory at Chorzów* the PCIJ found that[1251]:

> "[…] reparation must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. […]" [Emphasis added]

939. This principle has been reflected in the ILC's ARSIWA, which state, in Art. 31(1), that[1252]:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

940. The standard is thus that of full reparation ("wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed"), which can be obtained through restitution in kind or, if this is not possible or not requested by claimant, payment of compensation[1253].

941. In the present case, Claimants only seek reparation in the form of compensation.

942. Under Art. 36(2) of the ARSIWA, damage is due "insofar as it is established". This means that the existence of a damage must be proven with reasonable certainty,

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[1250] **Doc. CLA-184**, *Lemire*, Award, para. 149; **Doc. CLA-169**, S. Ripinsky & K. Williams, p. 89, referring to *AMT v. Zaire*, para. 6.21; *SD Myers v. Canada*, para. 315 and *Petrobart v. Kyrgyz Republic*, para. 78.
[1251] **Doc. CLA-173**, *Case concerning the Factory at Chorzów*, p. 47.
[1252] **Doc. RLA-214**, Art. 31(1).
[1253] **Doc. RLA-214**, Art. 34: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

even if the precise quantification of such damage may be subject to some degree of approximation[1254], especially in cases where the claimant is trying to prove loss of profits. In the words of the *Lemire* tribunal[1255]:

> "[…] it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."

943. To ascertain the existence of a damage, the investor who seeks reparation must also prove that there is a direct causal link between the State's wrongful act (cause) and the damage suffered (effect). Indeed, as established in Art. 31(1) of the ARSIWA, it is only the "injury caused by the internationally wrongful act" that can be compensated[1256].

944. As to the calculation of the amount of compensation owed, the Tribunal has a degree of flexibility to define the appropriate financial methodology[1257], which is best suited for the determination of a financial amount which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, "but for" the State's breach[1258].

945. There is another principle which the Tribunal must apply: the Tribunal has already decided that minor breaches of municipal law do not lead to the *ex ante* dismissal of claims, but should be taken into consideration when assessing damages and costs[1259] (see section V.2.3.3 *supra*).

946. Having established the applicable legal standards, the Tribunal will now adjudicate the different heads of loss put forward by Claimants.

2. LOSS OF ENTERPRISE VALUE

947. Claimants' main head of compensation is the Loss of Enterprise Value: Claimants say that they owned QEMS, an enterprise incorporated in Saudi Arabia, which distributed its medical products in the Kingdom, and that because of the Measures they have been deprived of this enterprise. The damage suffered is equivalent to the

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[1254] **Doc. CLA-181**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, paras. 144-148; **Doc. RLA-216**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 867-868.
[1255] **Doc. CLA-184**, *Lemire*, Award, para. 246.
[1256] **Doc. RLA-214**, Commentaries 9-10 to Art. 31.
[1257] **Doc. CLA-169**, S. Ripinsky & K. Williams, pp. 90-91: "The customary rule of full compensation is of a very general nature and it does not offer a conceptual framework for the recovery of damages that would be comparable in specificity to the 'value' approach generally applicable in expropriation cases. […] The generality of the customary rule provides tribunals with flexibility as to what the precise methodology for assessing damages should be in a specific case."
[1258] **Doc. CLA-184**, *Lemire*, Award, para. 152; **Doc. CLA-169**, S. Ripinsky & K. Williams, p. 89.
[1259] **Doc. RLA-255**, Dumberry, p. 243.

value of QEMS, *i.e.*, the price which a reasonable buyer, with full knowledge of the asset being sold, would be prepared to pay to Qatar Pharma for QEMS' business.

948. The Kingdom, for its part, argues that the value of the enterprise was very low and that considering that the Measures have been superseded by the Al-Ula Declaration, Claimants are entitled to resume their business activities in Saudi Arabia.

949. To adjudicate this question, the Tribunal will:

- Summarize Claimants' and Respondent's positions (**2.1** and **2.2**),
- Establish the proven facts (**2.3**),
- Define the proper date of valuation (**2.4**) and methodology (**2.5**), and
- Finally perform its own valuation (**2.6**).

2.1 CLAIMANTS' POSITION

950. As the procedure developed, Claimants' position as regards the Loss of Enterprise Value changed.

A. Statement of Claim

951. In their Statement of Claim, and based on Secretariat's expert opinion, Claimants proposed that the Loss of Enterprise Value be calculated not by looking at the value of the QEMS business, but at the reduction in the value of Qatar Pharma's business in its totality. Claimants also proposed that the "**Valuation Date**" be 1 April 2021, thus favouring an *Ex Post* Valuation, made, not on the date when the Measures were issued, but when the expert report was prepared.

952. Assuming this methodology, Claimants submitted that the Loss of Enterprise Value could be calculated in two steps:

- First, by determining the "**But-for Value**" of Qatar Pharma's total business, *i.e.*, the value such business would have reached, but for the breaches committed by the Kingdom; and
- Second, deducting therefrom the "**Actual Value**" of Qatar Pharma's business (a value reduced because of the Measures)[1260].

953. Claimants used a DCF valuation to calculate the But-for Value of Qatar Pharma's business, based on the management's projections and business plans prepared by Qatar Pharma and by Qatar National Bank (a bank retained to analyse Qatar Pharma's intended, but subsequently aborted, IPO). Both projections envisioned significant growth for the business. The projections ran until 31 December 2024 and were complemented by a terminal value, to represent the additional cash flows Qatar Pharma would have generated in 2025 and beyond. All future cash flows were discounted at a WACC of approximately 12%, and the net debt was discounted.

[1260] C I, para. 441.

The But-for Value of Qatar Pharma as of 1 April 2021 was thus calculated to amount to QAR 1,406.3 M[1261].

954. The Actual Value of Qatar Pharma was determined applying a different methodology. Secretariat first established the median of trailing Enterprise Value relative to EBITDA ["**EV/EBITDA**"] multiples for two sets of comparable publicly traded companies, which amounted to 14.3x. This multiple was applied to Qatar Pharma's actual EBITDA in 2020, the net debt was then deducted, and the Actual Value was established as QAR 463.5 M[1262].

955. The Loss of Enterprise Value was the result of deducting the Actual Value from the But-for Value; the resulting amount was QAR 942.8 M[1263].

B. Statement of Reply

956. In their Reply, Claimants revised their calculation:

- The But-for Value came down from QAR 1,406.3 M to QAR 1,304.3 M[1264];
- The Actual Value also decreased from QAR 463.5 M to QAR 396 M[1265]; and
- The Loss of Enterprise Value was reduced from QAR 942.8 M to QAR 908.3 M[1266].

957. The underlying reasons for this new calculation were:

- The change of the Valuation Date from 1 April 2021 to 30 September 2022, used as a proxy for the date of the Award;
- Adjustments to Qatar Pharma's actual performance through the revised Valuation Date; and
- The application of a higher discount rate (of 13%[1267]) to reflect market information[1268].

958. In its second report, Secretariat also reduced the EV/EBITDA multiple used to calculate Qatar Pharma's Actual Value from 14.3x (in its first report) to 11.6x, based on a peer group of companies[1269].

959. Claimants insist that in this case the correct Valuation Date should be the date of the Award (or a proxy thereof). To give effect to the principle of full reparation under international law, arbitral tribunals, when determining the measure of damages payable to the investor, should consider all facts known at the date of the

[1261] C I, paras. 442-446; CER-1, Secretariat I, para. 208.
[1262] C I, para. 449; CER-1, Secretariat I, para. 225.
[1263] C I, para. 450; CER-1, Secretariat I, para. 233.
[1264] CER-3, Secretariat II, para. 237.
[1265] CER-3, Secretariat II, para. 256.
[1266] C II, para. 547; CER-3, Secretariat II, para. 256.
[1267] CER-3, Secretariat II, para. 237.
[1268] C II, para 547.
[1269] CER-3, Secretariat II, para. 238.

award. Because reparation must "wipe out all the consequences of the illegal act", the injured party must be compensated for the value of the investment at the time of the illegal conduct, plus, to the extent that value would have increased but for the illegal conduct, the greater value the investment would have gained up to the date of the award[1270].

C. Post-Hearing Brief

960. In their PHB Claimants reiterate that the proper methodology to assess the damages suffered by Qatar Pharma is to value the entire business, rather than its Saudi operation alone, because it allows the Tribunal to account for some diminution in value of other markets that were impacted by losing access to Saudi Arabia. When Saudi Arabia was lost to Claimants there were collateral impacts to other aspects of Claimants' business as well[1271], since Qatar Pharma's ability to supply its markets was critically dependent on road access to Saudi Arabia[1272]. Valuing Qatar Pharma's business as a whole also enables the Kingdom to enjoy the benefit of any mitigation that Qatar Pharma was able to accomplish by pivoting to new markets[1273].

Ex Ante vs. *Ex Post* Valuation

961. Claimants also say that an *Ex Post* Valuation, with a Valuation Date which is a proxy for the date of the Award, is necessary to accurately calculate Claimants' losses. Investment treaties typically contain a standard for compensation that is applicable to lawful expropriation, but not to unlawful expropriation or non-expropriatory breaches. The standard in these cases must be drawn from customary international law[1274].

962. Claimants explain that in certain circumstances tribunals have permitted the investor to choose between an *Ex Ante* and an *Ex Post* Valuation. According to Claimants, there is logic to offering the investor such a choice: if the value of the expropriated investment increases after the expropriation, investors must enjoy the benefits of that higher value and that can best be captured by an *Ex Post* methodology; conversely, when the value of the investment decreases after the expropriation, investors should not bear the risk of such lower value and are better served by the *Ex Ante* method[1275].

963. Valuing the investment on the date of the award further enables a tribunal to consider all information available to place a claimant in the situation it would have

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[1270] C II, para. 567.
[1271] CPHB, paras. 196-197.
[1272] CPHB, para. 198.
[1273] CPHB, para. 199.
[1274] CPHB, paras. 201-202, referring to **Doc. CLA-173**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, 13 September 1928, PCIJ Rep. Series A. – No. 17; **Doc. CLA-113**, *ADC Affiliate Ltd. and ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006; **Doc. CLA-119**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015.
[1275] CPHB, para. 206.

been in real life, and to value claimant's loss with increased precision, because actual information is better than simple projections[1276].

964. Claimants reiterate that in their opinion a DCF valuation is the best method to calculate Claimants' damages, but they acknowledge that a multiples valuation is a valid and recognized means of valuation and that Secretariat used multiples valuations to establish the Actual Value and to confirm its DCF valuation[1277]. Claimants explain that in this case a forward-looking DCF methodology is the best way to accurately capture the growth opportunities that Qatar Pharma was poised to realize in the Saudi market, because the multiples method is principally a backwards-looking analysis[1278].

965. Applying an *Ex Post* Valuation and using the DCF methodology developed by its expert Secretariat, Claimants submit that the Loss of Enterprise Value amounts to QAR 943 M[1279] (the figure proposed in their Statement of Claim).

Multiples

966. Claimants acknowledge that Secretariat used an EV/EBITDA multiple of 11.6x, as calculated on 30 September 2022, when valuing Qatar Pharma's Actual Value[1280].

967. Claimants also acknowledge that the EBITDA of Qatar Pharma in 2016 was QAR 30.98 M[1281], and that Saudi's share of total revenue reached 71.48%[1282], so that the 2016 EBITDA obtained by Qatar Pharma in the Kingdom [the "**Saudi EBITDA**"] amounted to QAR 22.14 M, and that this Saudi EBITDA could be used by the Tribunal as the basis for calculating the Loss of Enterprise Value[1283]. In such case, Claimants submit that the multiple of 11.6x would not be appropriate, because such calculation would deprive Claimants of the economic benefit that they reasonably anticipated[1284].

968. As an alternative, Claimants propose two different calculations:

- First, the Tribunal could use the implied multiples which can be derived from Qatar National Bank's and Deloitte's valuations in 2016 and 2017 of Qatar Pharma; these implied multiples were 21.8 and 30.7 respectively[1285]; in such case, the Loss of Enterprise Value would amount to QAR 679 M[1286];

- Alternatively, the Tribunal could use the multiple of 13, as proposed by Qatar National Bank and Deloitte for Qatar Pharma's peer companies, thus reaching

[1276] CPHB, para. 207.
[1277] CPHB, paras. 216-217.
[1278] CPHB, para. 218.
[1279] QAR 942.8. CER-3, Secretariat II, para. 239.
[1280] CPHB, para. 219.
[1281] QAR 30,978,521. CER-1, Secretariat I, Appendix D.4, Updated Historical of Financial Statements.
[1282] CER-1, Secretariat I, Appendix D.5, Income Statement.
[1283] (QAR 30.98 M x 71.48) / 100. CER-1, Secretariat I, Appendix D.5, Income Statement; CPHB, para. 226, fn. 470.
[1284] CPHB, para. 220.
[1285] CPHB, paras. 222-226.
[1286] CPHB, para. 226.

the sum of QAR 287.8 M[1287], and then add in an additional sum representing the incremental value of lost opportunity, calculated by multiplying the incremental EBITDA projected by Secretariat from the new business in Saudi Arabia (QAR 32.7 M) by the multiple of 13[1288]; the result would be that the Loss of Enterprise Value would amount to QAR 713 M[1289].

2.2 RESPONDENT'S POSITION

A. Statement of Defence

969. The Kingdom says that Qatar Pharma's business in Saudi Arabia was modest, had declining revenue and a bleak outlook in terms of future business. The Kingdom underlines that Qatar Pharma's total revenues (not profits) from Saudi Arabia for 2016 were around USD 13 M[1290] – with the caveat that Qatar Pharma's revenues by country are unaudited, so that Claimants' case as to the size of their business in Saudi Arabia is pure assertion[1291].

970. The Kingdom says that the Valuation Date proposed by Claimants is arbitrary, with no connection to the alleged breach, the financial information available or any other relevant events in the case. Respondent proposes as Valuation date 5 June 2017, which is the date on which the Kingdom imposed the Measures[1292].

Causation

971. The Kingdom adds that Claimants cannot show any link between the Measures and the alleged Loss of Enterprise Value. Any loss sustained by Qatar Pharma was caused by its own poor performance – not by the actions of the Kingdom[1293].

Projections

972. The Kingdom explains that the projections of Qatar Pharma's future cashflows assume a pace of growth which far outstrips anything which it managed to achieve in the past. Claimants' submission that they would have expanded their business enormously into new products and markets is unproven and no explanation has been given why the Claimants would have suddenly undertaken that course, having failed to do so in the prior five years[1294]. The underlying problem with the projections is that they are based on speculative and unreliable management predictions[1295]. Additionally, the projections also contain several methodological errors in their expense assumptions[1296] and at least five methodological approaches which do not withstand scrutiny[1297].

[1287] Calculated by multiplying the 2016 EBITDA in Saudi Arabia (QAR 22.14 M) x 13. CPHB, para. 227.
[1288] CPHB, paras. 227-229.
[1289] (QAR 287.8 M + QAR 425 M). CPHB, para. 229.
[1290] R I, para. 570.
[1291] R I, para. 571.2.
[1292] R I, paras. 622-623.
[1293] R I, para. 571.
[1294] R I, para. 571.3.
[1295] R I, paras. 617-622.
[1296] R I, paras. 623-631.
[1297] R I, paras. 638-647.

Resumption of business

973. The Kingdom says that Claimants overlook the effect of the Al-Ula Declaration of 2021, which reversed the Measures. Claimants are now free to return to Saudi Arabia and resume their business[1298].

B. Statement of Rejoinder

974. In its Rejoinder, the Kingdom states that considering only the financial data contained in primary documentation produced by Claimants, Dr. Hern, the Kingdom's expert, estimates that Claimants' losses cannot be greater than QAR 1.6 M[1299].

975. Saudi Arabia continues to dispute that the date of the Award (or a proxy thereof) is the appropriate Valuation Date, because there is no connection between the alleged breach and that date. The date of breach is an appropriate Valuation Date, precisely because it allows the calculation of losses prior to the alleged breach with some degree of certainty, while properly accounting for the uncertainty as to the lost future revenues[1300].

Causation

976. As regards causation, Saudi Arabia reiterates that losses suffered in other countries, as a consequence of similar measures against Qatar imposed in these countries, cannot have been caused by the Kingdom[1301].

Projections

977. The Kingdom reiterates that the 2017 management projections are deeply suspect and require heavy downward adjustment, because the revenue projections advanced by Claimants far exceed the historical growth rate of the business. Claimants are still unable to explain why their business would suddenly have performed exponentially better from 2017 onwards[1302].

Resumption of business

978. The Kingdom submits that numerous Qatari businesses are successfully operating in the Kingdom after the Al-Ula Declaration, and that IMF data show that Qatari exports into Saudi Arabia are higher now than they were before the Measures, indicating that there is no barrier to Qatari businesses accessing the Saudi Arabian market[1303].

[1298] R I, para. 571.4.
[1299] R II, para. 527.
[1300] R II, para. 550.4.
[1301] R II, para. 553.
[1302] R II, para. 550.1.
[1303] R II, para. 558.

C. Post-Hearing Brief

979. In its PHB the Kingdom reiterates that Dr. Hern's calculation of the Loss of Enterprise Value is QAR 1.6 M[1304] – while the calculation made by Claimants is based on the foundational premise that the 2017 management projections are realistic, which they are not. In fact, they are entirely divorced from reality and are fantasy figures Qatar Pharma could never have achieved[1305]. Claimants' calculation also includes losses allegedly suffered in other countries – which cannot have been caused by the Measures[1306].

980. As regards the Valuation Date, the Kingdom insists that the date of the breach is the appropriate determination. It is the dominant practice in cases of expropriation, especially in cases of indirect or creeping expropriation[1307].

981. After the Al-Ula Declaration there are no barriers for Qatari companies to re-enter the Saudi market. The need to re-acquire product registrations is not a barrier, but merely a cost of re-entry. There is no evidence that the Saudi market remains hostile to Qataris generally, as shown by the Qatari trade with Saudi Arabia. The duty to mitigate is a duty to take reasonable steps; Dr. Al Sulaiti's unreasonable refusal to do business in Saudi Arabia cannot justify a damage award on the basis that the Claimants are unable to do business in the Kingdom[1308].

2.3 PROVEN FACTS

A. Qatar Pharma's entry into the Saudi market

982. Qatar Pharma's production started in 2009, when its first products were registered in Qatar. Initially, there were only two production lines, but by 2016 the number had increased to 14[1309]. Once Qatar Pharma's facilities and products had been approved by the SFDA, sales into the Kingdom of Saudi Arabia started in 2011, under a commercial agency contract with Banaja, a Saudi import company[1310].

983. In 2013 Qatar Pharma decided to terminate this agency structure and to create QEMS, a branch registered at the Saudi Commercial Register[1311], which in 2014 was converted into a "local establishment" in Saudi Arabia[1312]. Qatar Pharma appointed QEMS as its "sole representative and distributor" in Saudi Arabia[1313]. QEMS imported, sold and distributed in Saudi Arabia the pharmaceutical solutions produced by Qatar Pharma[1314].

[1304] RPHB, paras. 154, 182.
[1305] RPHB, paras. 156-177.
[1306] RPHB, paras. 194-197.
[1307] RPHB, para. 185.
[1308] RPHB, para. 193.
[1309] **Doc. C-59.**
[1310] See section III.1.B *supra*.
[1311] **Doc. VP-24**; **Doc. VP-25**; CER-1, para. 69(ii)(1).
[1312] **Doc. C-51**; **Doc. C-413**, p. 17 of PDF; CER-1, Secretariat, para. 69(ii)(2). See also CWS-8, para. 15.
[1313] **Doc. VP-86**, Art. 2.
[1314] **Doc. VP-86**, Preface.

A medium-sized but profitable enterprise

984. In the five-year period between 2012-2016, Qatar Pharma developed into a medium-sized, but successful and profitable enterprise, as its audited accounts show[1315]:

- Its revenues (or sales) increased from QAR 40 M[1316] in 2012 to QAR 66 M[1317] in 2016; but the revenues for 2014, 2015 and 2016 were practically stagnant (QAR 64 M[1318], 65 M[1319] and 66 M[1320], respectively); this seems to indicate that Qatar Pharma's sales had reached a plafond;

- EBITDA also grew, from QAR 21 M[1321] in 2013 (there is no figure for 2012), to QAR 25 M[1322], 26 M[1323] and 31 M[1324] in the subsequent years (2014, 2015, 2016); note that the company was highly profitable, obtaining an EBITDA in the QAR 30 M range with sales in the QAR 60 M range[1325]; and

- Its total assets also increased significantly, from QAR 221 M[1326] in 2012 to QAR 343 M[1327] in 2016.

Revenues in Saudi Arabia

985. The audited financial statements of Qatar Pharma do not show a breakdown of revenues by geographical markets. But the company had internal accounts, which have been reviewed by Secretariat, and which, in the Tribunal's opinion, are sufficiently robust. The revenues obtained in Saudi Arabia through QEMS, in absolute figures and as a percentage of the total, are the following:

- 2012: QAR 13 M (33%[1328])

- 2013: QAR 36 M (65%[1329])

- 2014: QAR 49 M (76%[1330])

- 2015: QAR 45 M (69%[1331])

[1315] All figures are taken from CER-1, Secretariat I, Appendix D.4, Updated Historical Financial Statements.
[1316] QAR 40,415,505.
[1317] QAR 65,559,748.
[1318] QAR 63,796,417.
[1319] QAR 64,531,843.
[1320] QAR 65,559,748.
[1321] QAR 21,241,242.
[1322] QAR 25,009,082.
[1323] QAR 26,012,986.
[1324] QAR 30,978,521.
[1325] Confirmed by Respondent's expert Dr. Hern (HT, Day 9, p. 2143, ll. 2-5).
[1326] QAR 220,289,359.
[1327] QAR 342,578,006.
[1328] (QAR 13,470,475/QAR 40,415,505) x 100.
[1329] (QAR 36,401,940/QAR 55,820,605) x 100.
[1330] (QAR 48,603,988/QAR 63,796,417) x 100.
[1331] (QAR 44,683,618/QAR 64,531,843) x 100.

- 2016: QAR 47 M (71%[1332])

986. The figures show that, upon the creation of QEMS in 2013, the sales in Saudi Arabia in the years 2014, 2015 and 2016 increased significantly, reaching approximately QAR 45 M and representing roughly 70% of the total revenues.

Valuations of Qatar Pharma

987. Sometime around 2016, Qatar Pharma began contemplating the possibility of an IPO[1333] and it hired Qatar National Bank Capital to conduct a readiness assessment. In June 2016 the Bank concluded that the value of Qatar Pharma (with a DCF point estimate) amounted to QAR 564 M[1334], but that the company was not yet ready to issue an IPO[1335]. It calculated an EV/EBITDA multiple of 12.5x-13.5x for peer companies[1336].

988. In April 2017 Deloitte carried out a separate valuation of Qatar Pharma, and its conclusion was even more optimistic: it estimated that the value was in the range of QAR 900 M to QAR 1,000 M[1337] and it confirmed that the EV/EBITDA margin of peer companies was 13x[1338].

B. The impact of the Measures

989. The Kingdom adopted the Measures on 5 June 2017. The main consequences of the Measures were that the Kingdom closed all land, sea and air communications to and from Qatar, prevented crossing from Qatar into Saudi territory, airspace and waters and ordered Qatari citizens residing in Saudi territory to leave within 14 days[1339].

990. The closure of borders immediately impacted upon QEMS' business[1340]. The Al Qima trucks, which used to transport products between Qatar and Saudi Arabia, were not authorized to pass the Salwa Crossing and the supply of medical products stopped[1341]. All employees of Qatari nationality who were working for QEMS in Saudi Arabia were forced to leave the country within 14 days[1342]. The effect on QEMS's workforce was reinforced, because most of its Saudi employees decided to leave their employment with a Qatari company[1343].

991. The necessary consequence was that QEMS' sales in the Kingdom collapsed. In 2017, before the Measures had been adopted, Qatar Pharma was still able to

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[1332] (QAR 46,860,410/QAR 65,559,748) x 100.
[1333] **Doc. VP-38**, p. 4. See also CWS-3, paras. 57-64; CER-1, Secretariat I, para. 96(a).
[1334] **Doc. VP-17**, p. 22.
[1335] **Doc. C-64**, pp. 25-26, 103, 122-123.
[1336] **Doc. VP-17**, p. 22, using the actual 2015 EBITDA.
[1337] **Doc. VP-43**, p. 22.
[1338] **Doc. VP-43**, p. 32.
[1339] **Doc. R-122**; CER-2, Ulrichsen, paras. 4.1-4.4; RER-3, Collis Report, para. 24. See also HT, Day 6, p. 1387, ll. 7-11 (Dr. Harris); RPHB, para. 93.
[1340] See section VI.3.3.1 *supra*.
[1341] CWS-3, paras. 69, 80, 83.
[1342] CWS-2, para. 2; CWS-3, paras. 71, 80-83; CWS-5, paras. 42-45.
[1343] CWS-3, para. 87; CWS-5, para. 37; HT, Day 4, pp. 982-983 (Mr. Kotb).

generate revenues in Saudi Arabia of QAR 15 M. In 2018 and subsequent years there was no revenue at all coming from that market[1344].

992. As a consequence of the collapse of its Saudi business, Qatar Pharma suffered an overall drop in sales. In the last pre-Measures year, 2016, revenues had been QAR 66 M. In the five subsequent years, total revenues failed to reach the level of 2016, they were[1345]:

- QAR 52 M[1346] in 2017, raising to
- QAR 60 M[1347] in 2018, raising to
- QAR 63 M[1348] in 2019 and raising to
- QAR 67 M[1349] in 2020 (for the first time reaching again the pre-Measures level), but then falling to
- QAR 59 M[1350] in 2021.

993. Qatar Pharma's overall EBITDA also suffered. Having reached QAR 31 M in 2016, it fell to QAR 20 M in 2017, and then stayed in the QAR 25-30 M range in the subsequent years[1351].

C. The end of the Measures

994. On 5 January 2021 the GCC States signed the Al-Ula Declaration[1352], the Qatar-Saudi land, air and sea borders reopened and trade and commercial relations between both States were restored[1353].

995. Qatar Pharma has not re-entered the Saudi market. There is no evidence that Qatar Pharma has any plans to re-enter the Saudi market in the future.

2.4 VALUATION DATE

996. The Parties hold opposite positions as regards the proper Valuation Date. Claimants, in their Statement of Claim proposed 1 April 2021, and then in their Statement of Reply changed their position to 30 September 2022, used as a proxy

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[1344] In 2018 there was a revenue of only QAR 73,394, corresponding to a small delivery, and in subsequent years the revenue was nil.
[1345] All figures are taken from CER-1, Secretariat I, Appendix D.4, Updated Historical Financial Statements.
[1346] QAR 52,052,761.
[1347] QAR 60,430,703.
[1348] QAR 62,623,847.
[1349] QAR 67,022,055.
[1350] QAR 59,678,201.
[1351] QAR 24 M in 2018, QAR 26 M in 2019, QAR 31 M in 2020, QAR 27 M in 2021.
[1352] **Doc. RLA-79/KU-101**, p. 7. See also **Doc. C-206**; CER-2, Ulrichsen, para. 4.87; RER-3, Collis, paras. 110-112.
[1353] **Doc. RLA-79/KU-101**, p. 7; CER-2, Ulrichsen, para. 4.90; RER-3, Collis, paras. 117-130. See also RPHB, para. 81.

for the date of the Award[1354]. The Kingdom has continuously held that the proper Valuation Date is the day when it adopted the Measures, *i.e.*, 5 June 2017[1355].

997. The Tribunal sides with the Kingdom: the Valuation Date should be 5 June 2017.

998. The Tribunal has found that the adoption of the Measures resulted in a breach of the OIC Agreement: the Kingdom has failed to provide FET and FPS, has impaired the investments by arbitrary measures and has improperly revoked work and residency Permits of Dr. Al Sulaiti and the other QEMS's employees. These breaches were committed on 5 June 2017, when the Measures were adopted (or shortly thereafter), and that is the appropriate date to establish the damage caused to Claimants and the compensation which the Kingdom must satisfy.

Case law

999. Claimants invoke certain investment arbitration cases, in which the tribunals accepted an *ex post* valuation[1356].

1000. The leading case for this proposition is *Quiborax*, a decision in which the tribunal found that Bolivia had committed an unlawful expropriation, not merely because compensation had not been paid, but also for other reasons. The tribunal (by majority) decided that such an unlawful expropriation merited an *ex post* valuation, *i.e.*, valuing the damage on the date of the award and taking into consideration all information generated until that date[1357]. The case can be distinguished from the present one, because the international delinquency was unlawful expropriation – not the breach of certain standards of treatment under the relevant treaty.

1001. The same reasoning applies to *Saipem*[1358] and to *ADC*[1359].

1002. That said, the award in *Novenergía* supports Claimants' position. In *Novenergía* the tribunal found that Spain had incurred a breach of FET and accepted the claimant's *ex post* DCF valuation, which used the date of the expert report as a proxy for the valuation date[1360]. The Tribunal remains unconvinced by this isolated decision. Furthermore, the overwhelming majority of investment arbitration awards use the date of breach by the State as the date for the valuation of the compensation[1361].

[1354] C II, para. 570.
[1355] R I, paras. 622-623; R II, para. 550.4; RPHB, para. 185.
[1356] CPHB, paras. 203-205.
[1357] **Doc. CLA-119**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 370.
[1358] **Doc. CLA-94**, *Saipem S.p.A v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, para. 201.
[1359] **Doc. CLA-113**, *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, para. 497.
[1360] **Doc. CLA-263**, *Novenergía II, Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Arbitration (2015/063), Final Award, para. 814.
[1361] **Doc. CLA-173**, I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2nd ed., 2017, para. 3269; **Doc. RLA-328**, N. Rubins et al., *Approaches to Valuation in Investment Treaty Arbitration*, ed. 2018, p. 176; **Doc. RLA-143**, *Infracapital F1 Sàrl & Infracapital Solar BV v Kingdom of Spain*, ICSID Case No ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, paras. 818-819; **Doc. CLA-170**, *Greentech Energy Systems A/S et al. v. Italian Republic*, SCC Case No. V 2015/095, Final Award, para. 565; **Doc. CLA-178**, *Gemplus S.A. et al. v. United Mexican*

2.5 METHODOLOGY

1003. Claimants' expert, Secretariat, has proposed an idiosyncratic methodology to establish the Loss of Enterprise Value in which the Tribunal is called to establish the loss in value which the totality of Qatar Pharma's business suffered as a result of the Measures and which requires that two calculations of the total value of Qatar Pharma's businesses be performed:

- A DCF valuation as of 30 September 2022, to establish the But-for Value, *i.e.*, the value that Qatar Pharma would have achieved, assuming that the breach had not occurred and that it had been able to meet its management projections and achieve a promethean growth;

- A multiples valuation to establish Qatar Pharma's Actual Value, *i.e.*, the real value of the company, reduced as a consequence of the Measures; the expert determined that the EV/EBITDA multiple for comparable companies amounted to 11.6x[1362], and applied this factor to Qatar Pharma's EBITDA in 2020[1363].

Once both calculations had been performed, the Loss of Enterprise Value is equal to the difference between the But-for Value and the Actual Value of Qatar Pharma.

1004. During the examination of the experts at the Hearing, an alternative, much simpler methodology was discussed: this would only require calculating the value of QEMS, *i.e.*, of the Saudi business of Claimants (not of the totality of the company in two scenarios), a task which could be performed by applying an EV/EBITDA multiple to the Saudi EBITDA in the fiscal year preceding the Valuation Date[1364].

1005. In their PHB, Claimants further developed this alternative methodology. They acknowledged that Secretariat had used a multiple of 11.6x to calculate Qatar Pharma's Actual Value but asserted that such multiple would not be appropriate in the alternative methodology, because it would deprive Claimants of the economic benefit of the anticipated growth in QEMS's business[1365]. To avoid this result, Claimants proposed two solutions:

- The Tribunal could use the implied multiples which can be derived from Qatar National Bank's and Deloitte's valuations in 2016 and 2017 of Qatar Pharma; these implied multiples were 21.8x and 30.7x, respectively[1366];

- Alternatively, the Tribunal could use the multiple of 13x, as proposed by Qatar National Bank and Deloitte for Qatar Pharma's peer companies, and

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States and *Talsud S.A v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, para. 12.43.

[1362] In the First Report, Secretariat used the factor 14.3x; it was reduced to 11.6x in the Second Report.

[1363] CER-3, Secretariat II, para. 231.

[1364] HT, Day 9, p. 1963 (Secretariat), pp. 2159, 2161, 2162 (Dr. Hern).

[1365] CPHB, para. 220.

[1366] CPHB, paras. 222-226.

then add in an additional sum representing the value of the anticipated growth[1367].

1006. The Kingdom, on its side, has criticized Secretariat's basic methodology as being highly speculative, because the DCF analysis assumes a pace of growth which far outstrips anything which Qatar Pharma managed to achieve in the past[1368] and, furthermore, the calculation contains numerous methodological errors[1369].

Discussion

1007. The Tribunal, without hesitation, adopts the alternative methodology, discussed during the Hearing and further developed in Claimants' and Respondent's PHBs.

1008. There are multiple reasons which support this decision:

- First, the methodology developed by Secretariat is highly speculative, requiring the valuer to predict the development of Qatar Pharma in a simulated scenario: that the Kingdom had not breached its international obligations and that QEMS would be able to achieve a promethean growth – while in the last five years it had only managed a moderate growth, and in the last three years growth had even been stagnant;

- Second, the methodology developed by Secretariat is extremely complex, requiring a double valuation of Qatar Pharma's business, applying two totally different methodologies; the more complex the methodology, the higher the risk of errors; and

- Third, the decision to value the totality of Qatar Pharma's business implies that losses suffered in other countries are also considered; as the Kingdom has convincingly shown, on 5 June 2017 the UAE and Bahrain imposed the same measures on Qatar as the Kingdom of Saudi Arabia, but Secretariat attributes all lost revenue across all three jurisdictions as losses for which Saudi Arabia is responsible[1370].

2.6 CALCULATION

1009. The Tribunal is now capable of making a precise calculation of the Loss of Enterprise Value suffered by Claimants, applying the alternative methodology. Under this methodology, the Tribunal has to establish the value of QEMS's business in the Kingdom of Saudi Arabia using the Saudi EBITDA achieved by Qatar Pharma and applying an appropriate EV/EBITDA multiple.

1010. The first step in the calculation is the determination of Qatar Pharma's total EBITDA in the fiscal year preceding the Valuation Date (*i.e.*, in 2016), which

[1367] CPHB, paras. 227-229.
[1368] R I, para. 571.3.
[1369] R I, paras. 638-647.
[1370] R I, para. 601.

amounted to **QAR 30,978,521** – the figure derives from Qatar Pharma's audited accounts[1371].

1011. The second step requires that the Tribunal calculate the proportion of EBITDA generated by QEMS in the Kingdom (this is the already defined "Saudi EBITDA"). The task can be done by applying the percentage of revenues generated by Qatar Pharma in the Kingdom in 2016, vis-à-vis the totality of revenues. Qatar Pharma's total revenues amounted to QAR 65,559,748, while revenues in Saudi Arabia amounted to QAR 46,860,410[1372] – the first figure derives from the audited accounts, the second from Qatar Pharma's management accounts, but has been accepted by Secretariat[1373]. The percentage of Saudi business is thus 71.48%[1374], and if this percentage is applied to Qatar Pharma's total EBITDA in the fiscal year 2016, the resulting Saudi EBITDA amounts to **QAR 22,142,645**[1375].

1012. The final step requires the determination of the appropriate EV/EBITDA multiple. Various financial experts have proposed figures based on peer companies:

- Claimants' expert has used such a multiple to calculate the Actual Value of Qatar Pharma's business: in its First Report, Secretariat used a multiple of 14.3x[1376], but in its Second Report it reduced the multiple to 11.6x[1377];

- In June 2016, Qatar National Bank Capital calculated an EV/EBITDA multiple in the 12.5x-13.5x range[1378];

- In April 2017, Deloitte in its valuation of Qatar Pharma accepted that the EV/EBITDA multiple of peer companies was 13x[1379];

- The Kingdom's expert, Dr. Hern, agreed that a multiple of between 8x and 14x would constitute a "reasonable range"[1380]:

> "Presiding arbitrator: [...] So you would agree that for a business of this type, roughly a 10 to 15 times EBITDA valuation would be within reason?
>
> Dr. Hern: I think that is what the evidence suggests. I think it suggests maybe 8 to 14, something like that, as a reasonable range."

1013. Drawing on the opinions of the various experts, and considering that minor breaches of municipal law should be taken into consideration when assessing damages (see section V.2.3.3 *supra*), the Tribunal, by majority, finds that in order to value Qatar

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[1371] CER-1, Secretariat I, Appendix D.4, Updated Historical Financial Statements.
[1372] CER-1, Secretariat I, Appendix D.4, Updated Historical Financial Statements.
[1373] CER-1, Secretariat I, Appendix D.4, Updated Historical Financial Statements.
[1374] (QAR 46,860,410/QAR 65,559,748) x 100.
[1375] (QAR 30,978,521 x 71.48) / 100.
[1376] CER-1, Secretariat I, para. 216, Table 23; C I, para. 449.
[1377] CER-3, Secretariat II, para. 238; by reducing the multiple, Secretariat reduced the Actual Value and increased the Loss of Enterprise Value.
[1378] **Doc. VP-17**, p. 22, using the actual 2015 EBITDA.
[1379] **Doc. VP-43**, p. 32.
[1380] HT, Day 9, p. 2159, ll. 3-8 (Dr. Hern).

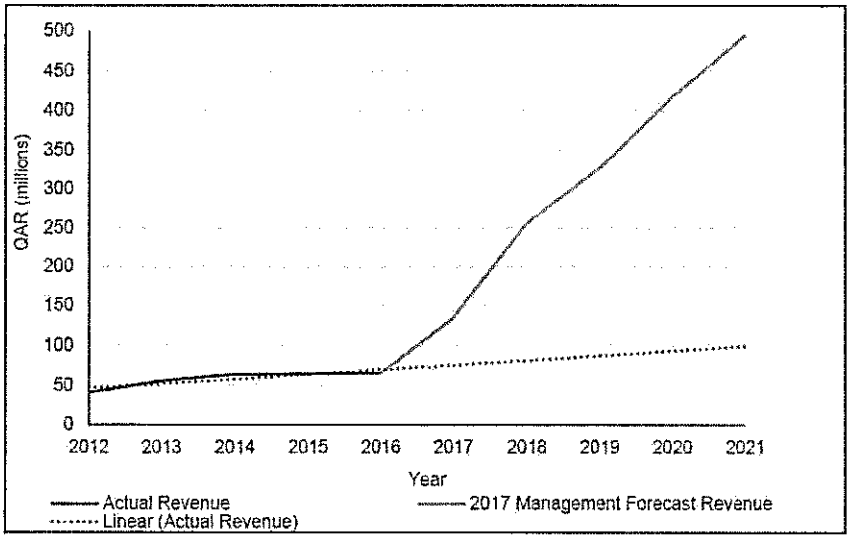
Pharma's Saudi business, a multiple of **12.5x**, which is in the middle of the range, seems reasonable.

1014. Applying this multiple to the Saudi EBITDA of QAR 22,142,645 results in **QAR 276,783,057**[1381] – this is the proper calculation of the Loss of Enterprise Value suffered by Claimants[1382].

A. Claimants' counterarguments

1015. Claimants allege that if the Tribunal were to use a 11.6x multiple (as Secretariat did in its Second Report), the result would be inappropriate, because it would not reflect the expected growth in Qatar Pharma's and QEMS's business. Claimants propose that the Tribunal use multiples in the 20x to 30x range or that it add a certain sum, increasing the valuation[1383].

1016. The Tribunal did not use the 11.6x multiple proposed by Secretariat in its Second Report, and rather settled for a higher number (12.5x), which also considers the opinions voiced by other experts. But the Tribunal does not see fit to increment the multiple (or to add an additional amount) on the assumption that Qatar Pharma and QEMS would have suddenly been able to achieve the promethean growth which had evaded them in the past. Dr. Hern has graphically shown the projections of revenue upon which Claimants base their case[1384]:



1017. Qatar Pharma's past performance in the five-year period which precedes the Valuation Date simply does not support Claimants' averment that, beginning in

[1381] QAR 22,142.644.53 x 12.5.
[1382] In its calculation to arrive at Qatar Pharma's Actual Value, Secretariat deducted the net debt of the company, in an amount of QAR 23.2 M (CER-1, Secretariat I, para. 225, Table 28); such deduction does not seem applicable when calculating the value of Qatar Pharma's Saudi business, as no specific net debt has been assigned to such business; a prospective buyer would take over the business without debt, and consequently would not make any deduction.
[1383] CPHB, para. 220.
[1384] **Doc. R-161**; RER-1, Hern I, Table 5.1.

2017, they would have been able to achieve a "hockey stick growth"[1385]. Qatar Pharma's actual performance in the five-years which succeeded the Valuation Date also does not support such assumption.

1018. The promethean growth, upon which Secretariat and Claimants base their exaggerated requests for compensation, is nothing but an unproven myth.

B. Respondent's counterarguments

1019. The Kingdom submits two counterarguments:

a. Lack of causation

1020. The first is that there is no causation,

- because the Loss of Enterprise Value was not caused by the Measures, but by Claimants' own lack of competence[1386]; and

- because the losses suffered in other countries as a consequence of similar measures imposed against Qatar, cannot have been caused by the Kingdom[1387].

1021. The Tribunal, by majority, disagrees.

1022. The evidence shows that before the Measures Claimants had been able to develop a successful business in Saudi Arabia, from which they were obtaining a significant profit (of more than QAR 29 M per year[1388]). Because of the Measures, the business was destroyed, and Claimants ceased to obtain this flow of benefits. There is direct causation between the Measures and the Loss of Enterprise Value.

1023. Saudi Arabia places a lot of emphasis on the fact that Qatar Pharma had been excluded from participating in the 2016 tenders (and failed to disclose this information to its experts in this arbitration)[1389]. It is true that Qatar Pharma was excluded and did not participate in the 2016 public tenders. However, this exclusion was temporary and there is no evidence that it would be imposed again in the future; on the contrary, Qatar Pharma did participate in the 2017 tenders and won several of them[1390]. The 2016 exclusion was circumstantial and had no impact on the intrinsic value of the company. As regards Claimants' failure to voluntarily reveal this information to their experts, the Tribunal is not privy to the precise questions put by the experts and answers provided by Claimants. In any case, the Tribunal has not adopted the valuation of the Enterprise Value proposed by Secretariat.

1024. As regards the second argument, the Kingdom is right that the methodology originally proposed by Secretariat committed the mistake of including losses

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[1385] **Doc. H-1**, slide 40.
[1386] R I, para. 571.1.
[1387] R II, para. 553.
[1388] CER-1, Secretariat I, Appendix D.4, Updated Historical Financial Statements.
[1389] R II, paras. 21.1, 547-548, 550.1; RPHB, para. 168.
[1390] See paras. 125-126 *supra*.

suffered in other countries and attributing these losses to the Kingdom. The methodology adopted by the Tribunal avoids this error.

b. The possibility to re-enter the Saudi market

1025. The second counterargument is that upon the adoption of the Al-Ula Declaration in 2021, the Measures have been reversed and Claimants are now free to return to Saudi Arabia and resume their business[1391]. The Kingdom submits that numerous Qatari businesses are now successfully operating in the Kingdom, and that IMF data show that Qatari exports into Saudi Arabia are higher now than they were before the Measures, indicating that there is no barrier to Qatari businesses accessing the Saudi Arabian market[1392].

1026. The Tribunal is unconvinced.

1027. There are unsurmountable difficulties for Claimants to re-enter the Saudi market.

1028. (i.) The first is that in 2021 the approval of Qatar Pharma's factory and the registration of its products by the SFDA expired[1393]. Shortly after the signature of the Al-Ula Declaration, Qatar Pharma wrote to the SFDA, asking for an extension of its factory's registration certificate (which had been issued in November 2016 for a period of five years) for a period equivalent to the embargo[1394]. However, in February 2021 the SFDA denied the requested extension and noted that Qatar Pharma had to pay the inspection service fee, after which the SFDA would conduct a new inspection, which could eventually result in a new registration[1395]. The same applies to the registration of the various products manufactured by Qatar Pharma.

1029. In other words: if Qatar Pharma decided to re-enter the Saudi market, it would have to start the administrative process with the SFDA from scratch – a complex, lengthy and expensive process, which requires the cooperation and goodwill of the SFDA; and there is no evidence that the SFDA and the other Saudi authorities would take any step to simplify or accelerate Qatar Pharma's new applications.

1030. (ii.) The second is Dr. Al Sulaiti's justified reluctance to return to Saudi Arabia.

1031. The Tribunal put the question directly to him, after recalling him to the witness stand[1396]:

> "Presiding arbitrator: So my question to you is the following, sir. Does it come into your plans to enter again the Saudi market and try to register your plant and obtain new registrations for your products in order to reach the amount of sales for which the plant was designed?"

[1391] R I, para. 571.4.
[1392] R II, para. 558.
[1393] CER-1, Secretariat I, para. 107; CWS-4, paras. 57-58. See also HT, Day 1, p. 300, l. 7 to p. 301, l. 11 (Dr. Harris).
[1394] **Doc. C-209**; **Doc. C-210**. See also **Doc. C-211**; CWS-3, para. 138; CWS-4, para. 58.
[1395] **Doc. C-208**; **Doc. C-209**. See also CWS-3, para. 138; CWS-4, paras. 59-60.
[1396] HT, Day 10, p. 2276, ll. 18-23.

1032. Under oath, Dr. Al Sulaiti declared that he would not be willing to go back to Saudi Arabia, either in a personal capacity or with his business, for fear of reprisals for his pursuit of legal claims against the Kingdom[1397]:

> "Dr. Al Sulaiti: To go back is not in our scope again to Saudi as we found it is not stable and dangerous [...]
>
> I don't think from my side to go again. I am sure, if I go again next day it will be something with me I will be in a jail. [...]
>
> No, it is not safe from my side to go there."

1033. Arbitrator Professor Ziadé asked him[1398]:

> "Professor Ziadé: Is it your position, Dr. Al Sulaiti, that because you brought this case against Saudi Arabia you have reached a point of no return and you can't go back?"

to which Dr. Al Sulaiti answered[1399]:

> "Dr. Al Sulaiti: This is one main issue [...]."

1034. Upon a further question of arbitrator Professor Ziadé, Dr. Al Sulaiti denied that to his knowledge Qatari private companies had returned to Saudi Arabia[1400]. Answering a question from arbitrator Dr. Poncet, he explained that the increase in commerce between Qatar and Saudi Arabia was due to government and semi-government players – not to private commerce[1401].

1035. In sum, Qatar Pharma's business in Saudi Arabia has been destroyed and there is no evidence that it could easily be restarted. Qatar Pharma would have to undertake significant investments to be able to re-enter the Saudi market with questionable results[1402].

1036. There is evidence, as the Kingdom has shown, that trade between Saudi Arabia and Qatar has resumed, and has reached pre-Measures levels. But this does not prove that a private investor as Dr. Sulaiti could easily restart a business in the pharmaceutical sector – one of the most regulated markets, where registrations and authorizations are dependent on the goodwill of the SFDA and other authorities.

1037. In any case, Dr. Al Sulaiti has declared under oath that he would not be willing to go back to Saudi Arabia, either in a personal capacity or with his business, for fear of reprisals because of his pursuit of legal claims against the Kingdom[1403].

[1397] HT, Day 10, p. 2277, l. 2 to p. 2281, l. 2 (Dr. Al Sulaiti). See also CWS-3, para. 140; CWS-8, para. 52.
[1398] HT, Day 10, p. 2283, ll. 10-13.
[1399] HT, Day 10, p. 2283, l. 14.
[1400] HT, Day 10, p. 2281, ll. 12-13.
[1401] HT, Day 10, p. 2282, l. 4 to p. 2283, l. 6.
[1402] CWS-3, para. 138; CWS-4, para. 58. See also CER-1, Secretariat I, para. 107; C I, paras. 165-166; CPHB, paras. 77-78; CHT, p. 2443, l. 12 to p. 2444, l. 4 (Mr. Walsh).
[1403] HT, Day 10, p. 2277, l. 1 to p. 2284, l. 8 (Dr. Al Sulaiti). See also CWS-3, para. 140; CWS-8, para. 52.

1038. In view of the evidence, the Tribunal concludes that there is no realistic possibility for Claimants to re-enter the Saudi pharmaceutical market in the foreseeable future.

* * *

1039. The Tribunal, by majority, concludes that to compensate for the Loss of Enterprise Value which Qatar Pharma has suffered, the Kingdom must pay to Qatar Pharma[1404] the sum of **QAR 276,783,057**.

3. LOSS OF DIVIDENDS

1040. The second head of losses claimed by Qatar Pharma is the so-called Loss of Dividends: the profits which Qatar Pharma would have received from QEMS between the date of the Measures and 30 September 2022 (the Valuation Date proposed by Claimants), and which Qatar Pharma failed to receive, due to the breach by the Kingdom of its obligations under the Treaty. In accordance with the calculation made by Secretariat the Loss of Dividends amount to QAR 221.6 M[1405].

1041. The Tribunal, without hesitation, dismisses this claim.

1042. Dismissal is the immediate and necessary consequence of the decision adopted in section 2.4 *supra* regarding the Valuation Date. The Tribunal has decided that the Valuation Date should coincide with 5 June 2017, the date when the Measures were adopted (and not with 30 September 2022, as proposed by Claimants).

1043. Claimants say that the Loss of Dividends represent the additional profits which Qatar Pharma would have generated between 5 June 2017 and the Valuation Date, which in Claimants' understanding is 30 September 2022. Since the Tribunal has determined that the Valuation Date should be 5 June 2017, there is no time span during which these additional profits could have accrued.

1044. There is a second reason: the claim for Loss of Dividends presupposes that the Tribunal adopts the methodology proposed by Secretariat, based on Qatar Pharma's projected cash flows. But in the preceding section, the Tribunal has rejected this methodology, and has opted for a multiples valuation of QEMS's business. Under this methodology, an additional claim for Loss of Dividends does not make sense.

[1404] Claimants have made a generic request for damages to be paid to Claimants (CPHB, para. 244.3). The Tribunal has the power to allocate damages to the specific Claimant who has suffered the loss – in this case, Qatar Pharma.

[1405] **Doc. H-5**, slide 21.

4. LOSS OF RECEIVABLES

4.1 CLAIMANTS' POSITION

1045. Claimants contend that they are owed:

- SAR 89.1 M[1406] in receivables from the Ministry of Health[1407], an amount allegedly not disputed by the Ministry[1408]; and
- SAR 10.6 M in uncollected receivables from Saudi private clients[1409].

(These figures reflect the collection of small sums from public and private customers after the Measures had been adopted[1410]).

1046. These receivables date from 2015, 2016 and the first half of 2017 and they remain unpaid by the relevant Saudi debtors. An informed buyer would therefore conclude that these receivables are worthless[1411]. The reason why most customers refused to pay is because they knew that QEMS had little recourse in the event of non-payment. The anti-sympathy measures scared all Saudi customers[1412]. No government entity wanted to answer or do business with QEMS, for fear of the law forbidding business with Qataris[1413].

4.2 RESPONDENT'S POSITION

1047. The Kingdom maintains that the Tribunal must dismiss Claimants' case since[1414]:

- Claimants have not demonstrated that these receivables existed in the amounts claimed (**A.**);
- Claimants have not proven that, if there were any uncollected receivables, they were lost, rather than delayed, because of the Measures[1415] (**B.**); and
- Since QEMS has assigned the Saudi receivables to a separate company, in which Dr. Al-Sulaiti only holds a 70% interest, compensation must be reduced in that same proportion (**C.**).

A. No evidence that the receivables exist

1048. According to the Kingdom, Claimants have failed to prove their case by not producing any reliable document to support their position concerning the alleged

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[1406] The Tribunal notes that the requested amount in the CPHB is in SAR unlike in CER-3, which is in QAR.
[1407] CPHB, para. 188 (SAR 89,105,217.94). See also CER-1, Secretariat I, para. 133, Table 6; **Doc. H-5**, slide 21.
[1408] HT, Day 9, p. 2010, ll. 22-23.
[1409] CPHB, para. 189 (QAR 11.4 M minus QAR 800,000 already paid). See also CER-1, Secretariat I, para. 133, Table 6; **Doc. H-5**, slide 21.
[1410] CPHB, paras. 185-188.
[1411] CER-3, Secretariat II, para. 110.
[1412] CWS-6, para. 39.
[1413] CWS-6, para. 42.
[1414] RPHB, para. 122.
[1415] HT, Day 9, p. 1953, ll. 5-7.

amount owed by the Saudi Ministry of Health to QEMS[1416]. The statements of account sent to the Saudi Ministry of Health showing a balance of roughly SAR 90 M[1417] on which Claimants base their case, is unreliable for several reasons[1418]:

- Despite having extensive electronic records, Claimants have not produced any material underlying their claim;
- Claimants' expert has admitted that he did not undertake any forensic exercise to verify the receivables;
- The opening balances of the statement filed by Claimants and the one filed by the Kingdom are different;
- The statements contain errors, such as the inclusion of items that are not debits or credits to the Ministry of Health;
- The statements do not record any credits after 25 October 2017, even though QEMS's bank statements show payments from the Ministry of Health until December 2017;
- The statements say that the total credits for the period 1 January 2016 to 7 March 2018 were SAR 28,922,756 and such figure includes not just payments from the Ministry of Health, but also credits given for discounts and stock returns; but QEMS's bank statements show that the total payments from the Ministry of Health between 1 January 2016 and 31 December 2017 were SAR 39,907,701; therefore, the former figure must be erroneous; and
- Claimants have failed to produce QEMS's bank statement from 2018 to 2020, thus hiding from the Tribunal any further payments received by the Ministry of Health.

Receivables from Saudi private customers

1049. The Kingdom avers that Claimants have also failed to adduce any evidence to support the receivables allegedly due by Saudi private customers[1419]. Claimants' expert relied exclusively on the word of their Finance Manager, Mr. Antar[1420]. Claimants have produced no other evidence supporting this figure[1421].

1050. On the contrary, the Kingdom contends that Qatar Pharma has indeed received payment for the sum it claims, since QEMS's bank statements show that Qatar Pharma received SAR 7,087,848 between June 2017 and December 2017, which amounts to over 50% of the alleged balance[1422].

1051. Lastly, the Kingdom submits that since Claimants have not produced QEMS's bank statements from 2018 onwards, there is no evidence that private customers withheld

[1416] RPHB, paras. 123 and 129.
[1417] **Doc. C-220.**
[1418] RPHB, paras. 123-129.
[1419] RPHB, para. 130.
[1420] RPHB, para. 132.
[1421] RPHB, para. 131.
[1422] RPHB, para. 132.

payment from January 2018 onwards. In fact, if they did continue paying at the previous rate, Qatar Pharma's private sector receivables must have been fully paid by the end of 2018, and certainly by now[1423].

1052. Summing up, Saudi Arabia argues that Claimants have failed to prove that there are any unpaid receivables owed to Qatar Pharma by either the Ministry of Health or private customers.

B. Loss suffered by Claimants cannot be attributed to the Measures

1053. The Kingdom submits that even if Claimants could adduce sufficient evidence as to the outstanding receivables, they have not provided proof that these receivables have been lost as a result of the Measures[1424]:

- Even though Claimants had the opportunity to claim their debts by suing before the Saudi Courts, they chose not to do so[1425];
- The Measures did not prevent Claimants from receiving payments from their customers; QEMS's bank statements show conclusively that it received payments from the Ministry of Health and Saudi private customers after the adoption of the Measures and until at least December 2017[1426]; and
- The Measures did not cause any debts owed by any of QEMS's customers to be extinguished[1427].

C. Assignment to Al Sulaiti Holding

1054. Finally, the Kingdom says that since the uncollected Saudi receivables have been assigned to a separate company, Al Sulaiti Holding, in which Dr. Al Sulaiti – a Claimant in this arbitration – owns a 70% participation, any compensation awarded must be reduced in line with his participation[1428].

4.3 DISCUSSION

1055. The Tribunal is called to decide whether Claimants are entitled to an additional compensation on account of certain receivables held vis-à-vis the Saudi Ministry of Health and vis-à-vis certain Saudi private clients, which Claimants say they have not been able to collect due to the Measures and the hostile climate created against Qataris.

1056. The Tribunal will in turn analyse the receivables from Saudi private clients (**A.**) and thereafter those from the Saudi Ministry of Health (**B.**).

[1423] RPHB, para. 133.
[1424] RPHB, para. 135.
[1425] RPHB, para. 136.
[1426] RPHB, para. 137.
[1427] RPHB, para. 138.
[1428] RER-1, Hern I, paras. 71-73; RER-2, Hern II, para. 224.

A. Receivables from Saudi private customers

1057. Claimants say that they are owed SAR 10.6 M in uncollected receivables from private Saudi clients[1429], while the Kingdom argues that Claimants have failed to adduce evidence to support their claim.

1058. The Tribunal sides with the Kingdom.

1059. The only evidence that in June 2017 Saudi private clients owed QEMS SAR 11,363,319 is an averment by Mr. Antar, Qatar Pharma's Finance Manager, in his second witness statement[1430]. Secretariat simply relied on the word of Mr. Antar[1431]. Claimants could and should have produced additional evidence supporting the figure put forward by Mr. Antar.

1060. Claimants have also failed to ascertain the amounts which Saudi private clients have actually paid to QEMS after the enactment of the Measures. They acknowledge that payments have been received and estimate them in "the approximate amount of QAR (sic) 800,000"[1432]. The Kingdom has made a more precise calculation: after reviewing QEMS's bank statements, the Kingdom states that QEMS has received at least SAR 7,087,848 between June and December 2017[1433]. This seems to indicate that Saudi private customers have actually paid significant amounts, and that it is well possible that QEMS's private sector receivables have by now been fully paid – as Saudi Arabia rightly suspects[1434].

1061. The burden of proving its damages rests with Claimants; in the absence of convincing evidence, the Tribunal must dismiss Claimants' claim.

B. Receivables from the Saudi Ministry of Health

1062. Claimants' second head of loss are the receivables from the Saudi Ministry of Health, which Claimants say the Ministry has failed to pay. The Tribunal must establish various aspects:

- First, the precise amount of receivables owed by the Ministry of Health, and whether this amount has been duly proven (**a.**);
- Second, whether the lack of payment is a consequence of the Measures (**b.**); and
- Third, the impact of the fact that the receivables were assigned to Al Sulaiti Holding, a company in which the Claimant Dr. Al Sulaiti holds a 70% interest (**c.**).

[1429] C I, para. 436; CER-3, Secretariat II, para. 36; CPHB, para. 189 (QAR 11.4 M – QAR 800,000 = QAR 10.6 M). Claimants have quantified these amounts in QAR, even though all payments by Saudi clients were made in SAR.
[1430] CWS-6, para. 32.
[1431] CER-1, Secretariat I, fn. 120; HT, Day 9, pp. 2098-2104.
[1432] CPHB, para. 189. Claimants have quantified this amount in QAR, even though payments by Saudi clients were made in SAR.
[1433] RPHB, para. 132.
[1434] RPHB, para. 133.

a. Quantification and evidence

1063. Claimants say that there is a statement of account, sent by QEMS to the Ministry of Health nine months after the adoption of the Measures, which was duly received and filed by the Ministry, and which shows that the outstanding balance of unpaid receivables by the public sector amounted to approximately SAR 90 M; Claimants underline that the Ministry never reacted[1435]. The Kingdom denies the accuracy of the statement of account.

1064. The Tribunal sides with Claimants. The proven facts support their case.

1065. It is a proven fact that nine months after the adoption of the Measures, on 13 March 2018, QEMS sent a letter to the Saudi Ministry of Health, requesting payment of the outstanding receivables, and attaching a statement of account[1436]. Claimants were unable to submit this attachment, but it has been produced by the Kingdom[1437]. The statement of account was generated and stamped by QEMS on 7 March 2018[1438] (*i.e.*, a week before its delivery to the Ministry) and shows that the outstanding amount owed by the Ministry of Health amounted to SAR 90,015,682[1439]. The statement of account[1440]:

- Starts as of 1 January 2016 with an opening balance of SAR 62,404,454, and
- Continues until 25 October 2017, showing that certain payments were made after 7 June 2017 and continuing until 25 October 2017.

1066. A few days thereafter, Mr. Antar, Qatar Pharma's Finance Manager, sent an email to the Ministry of Health again attaching a statement of account, again for SAR 90,015,682, but this time with an opening balance as of 1 January 2015 of SAR 18,210,570[1441]. No explanation has been given as to why the two statements of account (with different dates for the opening balance) were sent to the Ministry of Health within one week – a possibility is that the relevant civil servants requested further detail of the invoices submitted by QEMS during the year 2015 and that Mr. Antar complied.

1067. The Ministry of Health never reacted to the delivery of the letter and of the email which incorporated the analogous statements of account; there is no evidence that the Ministry at any time disputed the accuracy of any of these two statements of account[1442]. To the contrary, the Ministry of Health continued making certain small payments in favour of QEMS[1443] – but no explanation has been given by the

[1435] CPHB, para. 187.
[1436] **Doc. C-155**, this letter was signed by Mr. Antar on behalf of the director of the Scientific Office, Mr. Al-Amari, and has been discussed above (see section V.2.3.2.c).
[1437] **Doc. R-194**.
[1438] HT, Day 9, p. 2017, ll. 21-23 (Dr. Harris).
[1439] Respondent has not acknowledged that this statement of account was the one attached to QEMS's letter dated 13 March 2018, but the proximity of dates and the existence of a stamp by QEMS makes this deduction highly likely.
[1440] **Doc. R-194**.
[1441] **Doc. C-220**.
[1442] CWS-6, para. 42.
[1443] CPHB, para. 188; CHT, pp. 2348-2350, 2383-2384 and 2410.

Kingdom as to the reasons that led the Ministry to make certain small payment, and to resist payment of the bulk.

1068. What is the precise amount of these small payments? There is little information regarding the precise quantification. In their PHB:

- Claimants say that QEMS's bank statements show that since the Ministry of Health received the statements of account in March 2018, it made additional payments to QEMS in the amount of SAR 910,464[1444];

- Claimants add that between 1 July 2017 to 31 December 2021 the Ministry of Health made total payments of SAR 1,257,200; according to Claimants, 31 December 2021 is the final date of the most recent QEMS bank statement provided to Claimants by SAAB[1445]; as evidence, Claimants allege that Secretariat has confirmed this calculation on the basis of Claimants' bank statements, but no written statement from Secretariat is in the record.

1069. The Tribunal has reviewed QEMS's bank statements marshalled on the record, but these are only available until December 2017[1446] – and are therefore not helpful to determine what happened after March 2018, when Qatar Pharma last sent its statement of account to the Saudi Ministry of Health. Be that as it may, the Kingdom, which has full access to all payments made by the Ministry of Health in the relevant period, has not contradicted the figure of SAR 910,464 put forward by Claimants for the period between March 2018 until the end of 2021[1447].

1070. In sum, by March 2018 the Ministry of Health owed SAR 90,015,682 in receivables to Qatar Pharma. Thereafter, the Ministry of Health made payments in the sum of SAR 910,464.

Respondent's counterarguments

1071. The Kingdom has put into doubt the reliability of the statements of account of March 2018 submitted by QEMS to the Ministry of Health, saying that[1448]:

- Secretariat had not undertaken any forensic exercise to verify the sums;

- Claimants have failed to produce the invoices underlying the statements of account;

- The statements contain errors;

- The statement filed by Claimants does not record any credits after 25 October 2017; and

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[1444] CPHB, para. 188.
[1445] CPHB, fn. 397.
[1446] **Doc. R-191.**
[1447] Respondent says that the Ministry of Health made payments of SAR 39,907,701 between 1 January 2016 and 31 December 2017 (RPHB, para. 128.4); but this figure is irrelevant; the relevant figure are payments after March 2018.
[1448] RPHB, paras. 124-129.

- Claimants have failed to produce QEMS's bank statements from 2018 to 2020, thus hiding from the Tribunal any further payments received from the Ministry of Health.

1072. The Tribunal sees matters differently:

- It is true that Secretariat has not undertaken a forensic exercise and that Claimants have not produced individual invoices; but Secretariat has reviewed Claimants' positions and have confirmed their findings; furthermore, there are two detailed statements of account, both for the same amount of SAR 90,015,682 (one for the period from 1 January 2015 to 31 December 2017, and another for the period from1 January 2016 to 7 March 2018)[1449], detailing hundreds of outstanding invoices, prepared by QEMS and received by the Ministry of Health, without the Ministry of Health having disputed, *in tempore insuspecto*, the accuracy of the statements or the lack of propriety of the amounts claimed;

- The Kingdom says that the statements of account contain errors, because on 27 July 2017 there is a payment of SAR 1,877,700 labelled "transfer to Dr. Ahmed account"[1450]; the accuracy of this movement was discussed during the Hearing[1451], without reaching a conclusion; there is no evidence that the movement was a mistake, but even if it were so, the alleged error would reduce (not increase) the outstanding amounts of receivables and the compensation due;

- The Tribunal agrees with the Kingdom that the statement of account does not record any credits after 25 October 2017; Claimants aver that these payments amount to SAR 910,464[1452]; Saudi Arabia, which has full access to the payments made by the Ministry of Health and could easily have provided an alternative figure, has failed to do so; in these circumstances, the Tribunal sees no reason to doubt Claimants' figure;

- The same argument applies to subsequent periods: if the Ministry of Health had actually made some payment to Qatar Pharma between March 2018 and 2021, Respondent, who is the Kingdom of Saudi Arabia and controls the Ministry, could easily have obtained and submitted evidence to prove the disbursements; in the absence of such evidence, the Tribunal accepts the figure of SAR 910,464 put forward by Claimants.

1073. In sum, the Tribunal concludes that Claimants have proven that the total outstanding balance of QEMS's receivables vis-à-vis the Saudi Ministry of Health amounts to **SAR 89,105,218**[1453].

[1449] **Doc. C-220**; **Doc. R-194**. See paras. 1065-1066 *supra*.
[1450] RPHB, para. 128.2, fn. 343.
[1451] HT, Day 9, pp. 2015-2016.
[1452] CPHB, para. 188.
[1453] SAR 90,015,682 - SAR 910,464. See also CPHB, para. 188.

b. The Ministry's failure to pay is a consequence of the Measures

1074. The Kingdom says that the Measures did not extinguish any commercial debts owed to QEMS, that the Measures did not prevent Claimants from receiving payments from Saudi sources and that QEMS was entitled to collect the debts vis-à-vis the Ministry by suing through the Saudi Courts.

1075. It is true that the Measures did not include an express prohibition for the Saudi public sector to trade with Qatari companies, nor did it extinguish the receivables which the Saudi public sector owed to Qatari companies. But in the Tribunal's opinion, there is a direct cause-effect relationship between the Measures and the Ministry's failure to pay the bulk of QEMS's outstanding receivables. Before the Measures, there is no evidence that the Ministry had declined to pay QEMS's receivables. It was suddenly after the adoption of the Measures that payments (for all practical purposes) stopped, without the Ministry nor the Kingdom ever providing an alternative reasoning, which would justify the freeze of payments. What the evidence shows is that the Ministry of Health before the Measures regularly settled its debts vis-à-vis QEMS, and that immediately after the Measures it ceased to do so. In this case *post hoc ergo propter hoc* is not a fallacy, but the only reasonable explanation for the Ministry's behaviour.

c. The assignment of the receivables to Al Sulaiti Holding

1076. The Kingdom says that Qatar Pharma assigned the uncollected Saudi receivables to a separate company, Al Sulaiti Holding, in which Dr. Al Sulaiti owns a 70% participation, and that any compensation awarded must be reduced in line with his participation.

1077. The Tribunal agrees.

1078. By the end of 2017 Dr. Al Sulaiti, aware that the non-payment of the receivables would generate heavy losses for QEMS and for Qatar Pharma, arranged for the Saudi receivables in an amount of SAR 109,340,251 to be transferred to another company under his control – Al Sulaiti Holding, in which he owns a 70% participation[1454]. The receivables were said to be owed "by the Ministry of Health in the Kingdom of Saudi Arabia and others", the purchase price was not disclosed, but seems to have been at par[1455], and although the transfer was with recourse to the seller[1456], there is no evidence that Al Sulaiti Holding ever demanded that Qatar Pharma repurchase any of the outstanding receivables.

1079. The evidence thus shows that the receivables against the Saudi Ministry of Health are now held by Al Sulaiti Holding, a company different from Qatar Pharma, in which Dr. Al Sulaiti holds a 70% participation. The rest is apparently owned by his direct family members[1457].

[1454] **Doc. C-167** ***bis***, Art. 2; **Doc. VP 30** and **VP-31**; CWS-3, para. 109.
[1455] HT, Day 9, p. 2009, ll. 12-21 (Mr. D'Aguiar).
[1456] **Doc. C-167** ***bis***, Art. 2.
[1457] **Doc. VP-30**, Commercial Registration; the fact that Dr. Al Sulaiti may control Al Sulaiti Holding is irrelevant – Art. 1, definition 6 "Investor" of the OIC Agreement requires that the investor "owns the capital"; and Dr. Al Sulaiti only owns 70% of Al Sulaiti Holding (*contra* CER-3, Secretariat II, para. 121).

1080. Consequently, as the Kingdom rightly says, the compensation for Loss of Receivables must be reduced in the same proportion, because otherwise it would also benefit the 30% minority shareholders in Al Sulaiti Holding, who are not claimants in the present arbitration and have no standing to be compensated (and who may, or not, be entitled to the protection of the OIC Agreement).

1081. Summing up, the compensation for Loss of Receivables must be paid to Dr. Al Sulaiti, who, as a 70% shareholder, has suffered a reflective loss equal to the reduction in value of his shareholding in Al Sulaiti Holding; that reflective loss amounts to 70% of the Loss of Receivables suffered by that corporation[1458].

* * *

1082. The Tribunal concludes that to compensate for the Loss of Receivables which Dr. Al Sulaiti[1459] has suffered, the Kingdom must pay Dr. Al Sulaiti the sum of **SAR 62,373,653**[1460].

5. LOSS OF INVENTORY

5.1 CLAIMANTS' POSITION

1083. Claimants submit two separate claims under this heading, one for inventory lost in Saudi Arabia (**A.**) and the other for product specifically manufactured for the Saudi market, and which eventually had to be destroyed in Qatar (**B.**).

A. Inventory lost in Saudi Arabia

1084. Claimants seek to recover damages incurred for loss of inventory which remained stranded in Saudi Arabia after the Measures were adopted. Claimants submit that the lost inventory amounts to QAR 4.6 M[1461]; Claimants have marshalled inventory statements for their Dammam, Jeddah and Riyadh Warehouses, which allegedly support this figure[1462].

B. Product destroyed in Qatar

1085. Claimants also seek damages for product manufactured to fit Saudi specifications but destroyed in Qatar upon expiration[1463]. Claimants have adduced the following evidence in support of the destruction of this inventory and its value:

[1458] Claimants have made a generic request for damages to be paid to Claimants (CPHB, para. 244.3). The Tribunal has the power to allocate damages to the specific Claimant who has suffered the loss – in this case, Dr. Al Sulaiti.

[1459] The Tribunal notes that Claimants' request for monetary relief is generic and does not distinguish between Qatar Pharma and Dr. Al Sulaiti (see para. 167 *supra*). The Tribunal, nevertheless, in the exercise of its broad discretion when awarding compensation, determines that only Dr. Al Sulaiti is entitled to compensation for the Loss of Inventory.

[1460] (SAR 89,105,218 x 70) / 100.

[1461] QAR 4,601,468. CER-3, Secretariat II, para. 218, Table 5. Secretariat reduced the value of this inventory in the Second Secretariat Report to account for new evidence regarding additional sales made by Claimants following the Measures (the value was reduced from QAR 5.1 M to QAR 4.6 M).

[1462] CER-3, Secretariat II, fn. 107, citing to **Docs. VP-109, VP-110** and **VP-111.**

[1463] CPHB, para. 192.

- A contract to sell goods between Qatar Pharma and Al Sulaiti Holding [the "**Sale Contract**"][1464], which values the products intended for the Saudi market, which Qatar Pharma sells, and Al Sulaiti Holding buys, at QAR 88.4 M[1465]; and

- The "**Boom Waste Certificates**" issued by a specialized contractor upon destruction of the products[1466], which enclose a table listing the type of destroyed product and the customer for which each destroyed product was manufactured[1467].

1086. Claimants add that they could not have mitigated these losses by repurposing or repackaging the products for other markets – had this been possible, they would not have allowed their product to expire[1468].

5.2 RESPONDENT'S POSITION

1087. The Kingdom rejects Claimants' Loss of Inventory claims.

A. Inventory in Saudi Arabia

1088. Saudi Arabia argues that the only evidence presented by Claimants are single-page printouts from Qatar Pharma's electronic stock management system, which cannot support Claimants' position[1469]:

- First, the printouts are unreliable; of the sixteen pages of record that exist, only three were produced, failing to provide a comprehensive updated view of the inventory status in the Saudi warehouses[1470];

- Second, the printouts do not verify whether the stock was current and saleable; the documents included batch numbers, but no electronic records relating to the individual batches were provided, thus leaving unclear whether the stock was in-date or expired; this omission raises doubts about the actual condition of the inventory[1471]; and

- Third, the printouts do not establish the claimed value of the alleged stock; the listed prices per unit lack a clear source or validation, making it impossible to confirm if they reflect accurate market values[1472].

B. Product destroyed in Qatar

1089. Further, the Kingdom highlights the dubious basis of the QAR 88.4 M figure. This figure is allegedly the amount Al Sulaiti Holding paid to buy the products from Qatar Pharma, which is more than double the asserted production value of these

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[1464] **Doc. C-168.**
[1465] QAR 88,442,288. CPHB, para. 192; CER-3, Secretariat II, Table 8; CWS-6, para. 50.
[1466] **Docs. C-89, C-90, C-91** and **C-93.**
[1467] CPHB, para. 194.
[1468] CPHB, para. 195; CER-3, Secretariat II, para. 37; HT, Day 9, p. 1953, ll. 16-19.
[1469] RPHB, para. 141.
[1470] RPHB, para. 142.
[1471] RPHB, para. 143.
[1472] RPHB, para. 144.

products, of QAR 34,489,724[1473]. According to the Kingdom, this discrepancy suggests that the sales price was artificially inflated to support the claim[1474].

1090. The Kingdom adds that there is no evidence supporting Claimants' claim that the destroyed product was worth QAR 88.4 M; Claimants rely on the Boom Waste Certificates of product destruction, but these records were based on information provided by Claimants themselves, and not independently verified[1475].

1091. The Kingdom further argues that, even if such product did exist and was destroyed, Claimants have not proven that it was lost as a result of the Measures[1476].

1092. The Kingdom also rejects Claimants' assertion that once a product is labelled, it cannot be relabelled and sold elsewhere. The Kingdom relies on the testimony from Dr. Dahlhas[1477], who states that re-labelling is permissible within the GCC, provided that local regulators are informed[1478], and the sterility of the product is preserved[1479]. Thus, according to the Kingdom, Qatar Pharma could have mitigated its losses in Qatar, by repurposing this inventory for other markets[1480].

1093. Finally, the Kingdom reiterates its argument that, since the destroyed products were purchased by Al Sulaiti Holding and Dr. Al Sulaiti only owns 70% of the capital of this company, any compensation must be reduced accordingly[1481].

5.3 DISCUSSION

1094. Claimants request that the Tribunal admit two separate claims:

- One in the amount of QAR 4.6 M for inventory stored in QEMS's Warehouses in the Kingdom, and which was lost following the imposition of the Measures (**A.**); and

- A second one for QAR 88.4 M for pharmaceutical products manufactured and labelled specifically for the Saudi market, which could not be delivered in Saudi Arabia due to the closure of the border, which Qatar Pharma sold to Al Sulaiti Holding through a Sale Contract and which Al Sulaiti Holding eventually had to destroy, using the services of a specialized contractor (**B.**)[1482].

1095. The Kingdom rejects both of Claimants' requests[1483].

[1473] CWS-6, para. 18.
[1474] RPHB, para. 148.
[1475] RPHB, paras. 146-147.
[1476] RPHB, para. 140.
[1477] RWS-13.
[1478] RWS-13, para. 7.
[1479] RPHB, para. 151.2.
[1480] RER-1, Hern I, para. 74.
[1481] RER-1, Hern I, paras. 71-73; RER-2, Hern II, para 224.
[1482] CPHB, paras. 191-192.
[1483] RPHB, para. 140.

A. Inventory in Saudi Arabia

1096. The Kingdom asks that the Tribunal reject Claimants' first claim regarding Loss of Inventory for lack of evidence: Claimants have only adduced three single-page printouts from Qatar Pharma's electronic stock management system, which are incomplete and patently insufficient to support their claim[1484].

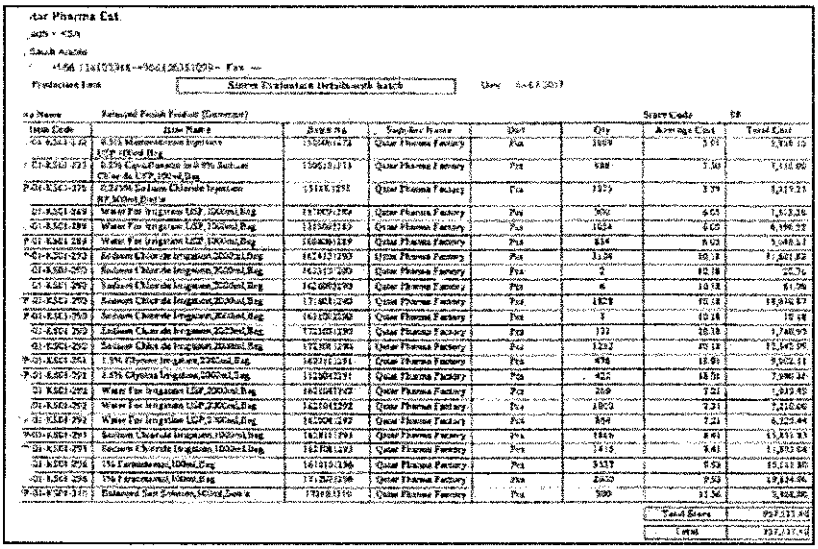
1097. The Tribunal concurs.

1098. Claimants say that as of 13 July 2017 their Warehouses in the Kingdom had the following inventories[1485]:

- Dammam QAR 957,137;
- Riyadh QAR 2,117,364; and
- Jeddah QAR 1,993,532.

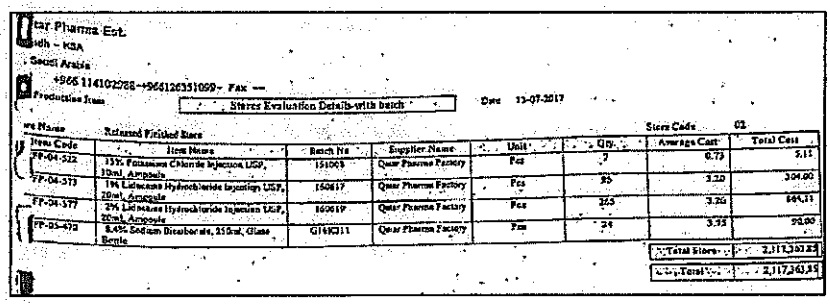
1099. The only evidence adduced by Claimants for these figures are three single-page documents, which purport to show the Dammam[1486], Riyadh[1487] and Jeddah[1488] inventories as of 13 July 2017:

Doc. VP-109:

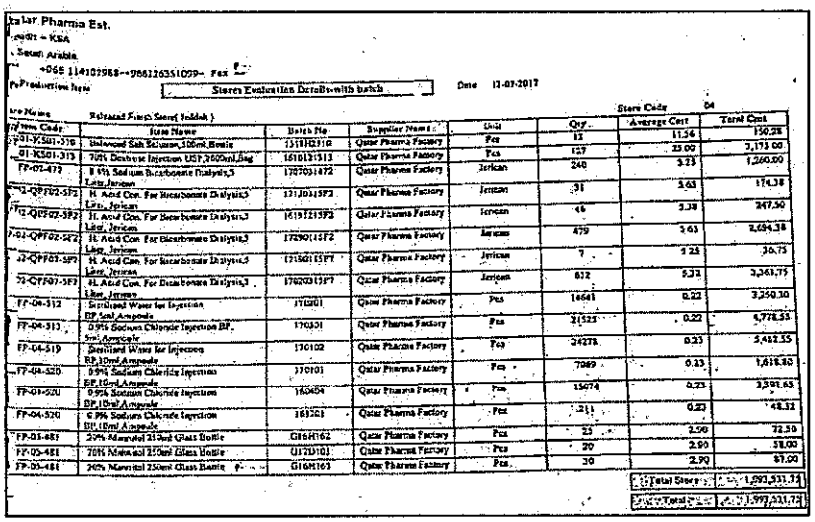


[1484] RPHB, para. 141.
[1485] CER-3, Secretariat II, Tables 5 and 14, and Appendix M, with reference to **Docs. VP-109**, **VP-110** and **VP-111**.
[1486] **Doc. VP-109.**
[1487] **Doc. VP-110.**
[1488] **Doc. VP-111.**

Doc. VP-110



Doc. VP-111



1100. Dr. Harris, counsel for Respondent, extensively cross-examined Mr. D'Aguiar, Claimants' expert, on the completeness and accuracy of these figures[1489]. In the course of the examination, it became clear that the documents submitted were only a part of the original document (in the Damman inventory only one page out of three was presented, in the Riyadh inventory only one page out of nine, and in the Jeddah inventory only one page out of four)[1490]. Mr. D'Aguiar also acknowledged that he had "not asked to see the underlying proof of this inventory"[1491] and that he had not verified the average cost for the products ("We do not have data that give us the costing per product")[1492].

1101. The three pages from an internal computer system submitted by Claimants are clearly insufficient to prove the existence and correct valuation of the product inventories in the three Saudi Warehouses operated by QEMS.

1102. Summing up: Claimants had the burden to prove the existence and value of the inventories in Saudi Arabia, which they aver were lost as a consequence of the

[1489] HT, Day 9, pp. 2105-2117.
[1490] HT, Day 9, p. 2107.
[1491] HT, Day 9, p. 2106, ll. 21-22.
[1492] HT, Day 9, p. 2108, ll. 5-6.

Measures. Claimants have not been able to meet their burden, and consequently their claim for that part of the Loss of Inventory cannot succeed.

B. Products destroyed in Qatar

1103. On 30 December 2017 Qatar Pharma and Al Sulaiti Holding, a company controlled by Dr. Al Sulaiti in which he holds a 70% participation, entered into a Sale Contract, under which Qatar Pharma sold, and Al Sulaiti Holdings bought, goods "stored in the Company's warehouses in the State of Qatar" which "bear the logo and emblem pertaining to the tenders of the Ministry of Health in the Kingdom of Saudi Arabia and the NUPCO tenders" and "cannot be marketed in any other country", for the "agreed price" of QAR 88.4 M[1493].

1104. Four years later, in June 2021, the Boom Waste Treatment Company, a specialist firm located in Qatar, collected certain "expired/damaged items" from Qatar Pharma, which were "destructed by thermal treatment process in the Incineration Plant" located in Mesaieed Industrial City. Boom Waste formalized the process by issuing five Boom Waste Certificates, each identifying the product destroyed, the quantity and the customer names – but not the value of the product:

- Boom Waste Certificate C1[1494] identifies destroyed product intended for private sector customers, including 888 items, and a total quantity of 2,855,115 destroyed products;

- Boom Waste Certificate C2[1495] identifies destroyed product manufactured pursuant to non-tender sales to government customers, including 146 items, and a total quantity of 2,773,148 destroyed products;

- Boom Waste Certificate C3[1496] identifies destroyed products that had been manufactured pursuant to the NUPCO 2017 tender, including 28 items, but without stating the total quantity;

- Boom Waste Certificate C4[1497] identifies destroyed products that had been manufactured pursuant to the GHC 12/2017 tender, including 10 items and a total quantity of 1,235,334 destroyed products; and

- Boom Waste Certificate C5[1498] identified destroyed products that had been manufactured pursuant to the GHC 39/2017 tender including 36 items, and a total quantity of 17,663,889 destroyed products.

1105. The Kingdom has not put into doubt the existence and accurateness of the Boom Waste Certificates; and Claimants have convincingly shown that the products listed

[1493] **Doc. C-168**, Art. 4.
[1494] **Doc. C-89**.
[1495] **Doc. C-90**.
[1496] **Doc. C-91**.
[1497] **Doc. C-92**.
[1498] **Doc. C-93**.

in the Boom Waste Certificates are equivalent to those listed on Qatar Pharma's 2017 sales forecasts[1499].

1106. The Tribunal consequently accepts Claimants' averment that a very high number of Qatar Pharma products, manufactured in 2017 and intended for the sale in the Kingdom of Saudi Arabia, had to be destroyed four years later, in 2021, and that this task was properly performed by Boom Waste Treatment Company.

The value of the destroyed products

1107. The question is not so much whether products were destroyed (there is solid evidence that they were), but rather what the value of such products was. Since the destroyed products formed part of an inventory, they should be valued at cost[1500].

1108. The Tribunal is confronted with two figures:

- The first is that contained in Art. 4 of the Sale Contract between Qatar Pharma and Al Sulaiti Holding which simply states that "both Parties have agreed that the agreed upon price of the goods is a total sum of [QAR] 88,442,288"[1501] – no further explanation or break down is provided;

- The second is given by Mr. Antar in his second witness statement, where he, in his role as Finance Manager of Qatar Pharma, certifies that "the total value of the stock produced by us [for delivery in the Kingdom] was QAR 34,489,724"[1502].

1109. The first figure looks questionable. In the three years before the Measures QEMS had sold in Saudi Arabia QAR 48.7 M in 2014, QAR 44.7 M in 2015 and QAR 46.9 M in 2016[1503]. In line with previous years, and considering the evidence available on the record, it seems extremely unlikely that in 2017 it could have produced QAR 88.4 M in anticipation of its expected sales in the Kingdom.

1110. Mr. Antar's figure seems much more reasonable; it fits with the overall pattern of sales in Saudi Arabia, Respondent has referred to it[1504], and the Tribunal accepts it.

Respondent's counterarguments

1111. The Kingdom submits a number of counterarguments.

1112. First, the Kingdom says that, even if such products did exist and were destroyed, Claimants have not proven that the loss was caused by the Measures[1505].

1113. The Tribunal does not share the argument. The destroyed products were labelled for the Saudi market, and as a consequence of the Measures the Qatari-Saudi frontier was closed and these products could neither be exported to the Kingdom,

[1499] CPHB, para. 193; HT, Day 9, p. 1957, ll. 1-9; **Doc. C-387.**
[1500] CER-3, Secretariat II, para. 127; HT, Day 9, p. 2116, ll. 9-22.
[1501] **Doc. C-168**, p. 3, Art. 4.
[1502] CWS-6, para. 18.
[1503] CER-1, Secretariat I, Appendix D.4, Updated Historical Financial Statements.
[1504] RPHB, para. 148.
[1505] RPHB, para. 140.

nor be re-exported to other countries, due to their specific labelling, and eventually had to be destroyed. The cause-effect relationship is established.

1114. Second, Saudi Arabia invokes the testimony of Dr. Dahhas[1506], who states that relabelling is permissible within the GCC, provided that local regulators are informed[1507], and the sterility of the product is preserved[1508]. Thus, according to the Kingdom, Qatar Pharma could have mitigated its losses in Qatar, by repurposing this inventory for other markets[1509].

1115. The Tribunal again disagrees with the Kingdom. Dr. Dahhas, a very trustworthy witness, may be right that from a theoretical perspective relabelling is possible – but that does not prove that such a procedure would have been possible in Qatar Pharma's case. Mr. Abdul Haliem Jaffar, in his witness statements[1510], has emphasized that Qatar Pharma was obliged to affix particular labels to its products, which could not be altered *a posteriori* without destroying the products[1511].

1116. The economic impact of relabelling and repackaging must also be considered. The Kingdom's expert, Dr. Hern, has recognized that he has not analysed the cost of the product repackaging[1512], but it is likely that the costs (and risks, as emphasized by Mr. Jaffar) of this procedure would have been significant.

1117. In sum, there is no convincing evidence that by trying to relabel and repackage its products, Qatar Pharma could have mitigated the damage caused by their destruction.

1118. Finally, the Kingdom raises the argument that Dr. Al Sulaiti, one of the Claimants, only owns 70% of Al Sulaiti Holdings, which purchased the products and suffered the loss, and that consequently the compensation must be reduced in the same proportion.

1119. The Tribunal has already accepted this argument as regards the Loss of Receivables (see section 4.3B.c *supra*), and since the factual situation in this claim is analogous, the same solution must be applied, and only 70% of the proven Loss of Inventory can be awarded.

* * *

1120. The Tribunal concludes that to compensate for the Loss of Inventory that Dr. Al Sulaiti has suffered, the Kingdom must pay Dr. Al Sulaiti[1513] the sum of **QAR 24,142,807**[1514].

[1506] RWS-13.
[1507] RWS-13, para. 7.
[1508] RPHB, para. 151.2.
[1509] RER-1, Hern I, para. 74.
[1510] CWS-4, para. 31; CWS-9, para. 28.
[1511] CER-3, Secretariat II, paras. 114-115.
[1512] HT, Day 9, p. 2184, ll. 4-8.
[1513] Claimants have made a generic request for damages to be paid to Claimants (CPHB, para. 244.3). The Tribunal has the power to allocate damages to the specific Claimant who has suffered the loss – in this case, Dr. Al Sulaiti.
[1514] (QAR 34,489,724 x 70) / 100.

6. LOSS DUE TO LACK OF REINVESTMENT

6.1 CLAIMANTS' POSITION

1121. Claimants maintain that under international law they are entitled to receive compensation for the lost time-value of the award on damages[1515]. According to Claimants, it is well recognized that this head of damages is an integral part of the reparation under international law. Claimants say that Saudi Arabia's argument that interest cannot be awarded because it is prohibited under Sharia law is inaccurate[1516]. In any case, this Tribunal is called upon to decide the issues in accordance with international law, not national law of Saudi Arabia[1517], and a number of BITs entered into by the Kingdom do include interest[1518].

1122. According to Claimants, but-for the Measures and the lack of payment of the compensation due, they would have been able to reinvest the cash flows in their business, in other investment opportunities or at least in risk free alternatives which would have guaranteed a return[1519]. Claimants submit that a *sukuk* issued by the Kingdom of Saudi Arabia would have been the appropriate alternative, since *sukuks* are akin to bonds, are compliant with Islamic principles and are valued at the time of purchase and time of redemption, with the difference in value representing economic return to their holder[1520].

1123. Invoking the agreement between Secretariat and Dr. Hern, Claimants submit that the appropriate *sukuk* to consider would be one issued by Saudi Arabia in April 2017 (*i.e.*, shortly before the Measures were adopted), which had a return of 2.82% p.a. commencing on the Valuation Date and expiring in April 2022[1521]. Thereafter, the Tribunal should award the one-year generic Bloomberg yield, which would be adjusted on each anniversary (the yield was 2.71% in April 2022 and 4.62% in April 2023)[1522].

6.2 RESPONDENT'S POSITION

1124. The Kingdom argues that interest is not due because it is illegal under Saudi law and impermissible under the Islamic Sharia[1523]. The OIC Agreement must be construed in accordance with the Islamic Sharia, and as such the Tribunal must not use its jurisdiction to order the Kingdom to do something contrary to its own laws and religion[1524].

[1515] CPHB, para. 230.
[1516] HT, Day 1, p. 137, ll. 8-25; HT, Day 10, p. 2272, ll. 11-25.
[1517] HT, Day 1, p. 138, ll. 1-10; HT, Day 10, p. 2274, ll. 9-12.
[1518] HT, Day 1, p. 138, l. 18 to p. 139, l. 1, referring to the BITs between the Kingdom and Italy (**Doc. RLA-32**), Sweden (**Doc. RLA-117**) Indonesia (**Doc. RLA-118**), Austria (**Doc. RLA-119**) and Luxembourg (**Doc. RLA-120**).
[1519] CPHB, para. 231.
[1520] CPHB, para. 232.
[1521] CPHB, paras. 234-235.
[1522] CPHB, paras. 236-237.
[1523] RPHB, para. 201.
[1524] RPHB, para. 201.

1125. The Kingdom strongly insists that using the return rate on an Islamic *sukuk* issued by the Saudi government is not an appropriate proxy for an interest rate since[1525]:

- The return on an Islamic *sukuk* reflects a return on a proprietary interest in an underlying commercial venture, and as such this return does not constitute interest, but rather involves an actual investment and actual risk;

- Given the careful structuring of *sukuks*, Islamic authorities have found them to comply with the Islamic Sharia since they do not involve any element of usury, but this does not mean that the Kingdom's use of *sukuks* constitutes payment of interest, it does not; and

- Hence, the Tribunal should not treat the return on a *sukuk* as either a justification for charging interest, or a proxy for the rate which such interest is charged.

6.3 DECISION

A. The discussion regarding interest is moot

1126. The Parties dispute whether a tribunal constituted under the OIC Agreement is entitled to award interest, to be added to the compensation due in favour of an investor.

1127. Claimants argue that OIC tribunals must apply international law, and that under international law the principle of full reparation requires that the investor be indemnified for the delay in collecting the compensation. Claimants also indicate that in a number of BITs the Kingdom has accepted that compensation awarded to investors "shall carry a rate of return until the time of payment"[1526], and that in an investment arbitration procedure the Kingdom requested and was awarded interest on the amounts of costs due to it[1527].

1128. The Kingdom categorically avers that interest cannot be awarded, because it is impermissible under the Islamic Sharia, and the OIC Agreement must be construed in accordance with those principles. The Kingdom refers to the Holy Qur'an, Surat Al-Baqarah, Verse 278 ("O you who believe! Be afraid of Allah and give up what remains (due to you) from Riba (usury), if you are (really) believers")[1528] and Verse 279 ("If you do not, then beware of a war with Allah and His Messenger! But if you repent, you may retain your principal—neither inflicting nor suffering harm")[1529].

1129. Claimants' position as regards their claim for interest has evolved in the course of the arbitration. In the Terms of Appointment and Reference, in their Statement of Claim and in the Statement of Reply, Claimants were seeking compound interest

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[1525] RPHB, para. 202.
[1526] Article 4 of the BITs between the Kingdom of Saudi Arabia and Italy (**Doc. RLA-32**), Sweden (**Doc. RLA-117**) Indonesia (**Doc. RLA-118**), Austria (**Doc. RLA-119**) and Luxembourg (**Doc. RLA-120**).
[1527] **Doc. CLA-346**, *Makae v. Saudi Arabia*, ICSID Case No. ARB/17/42, Award, para. 203.
[1528] **Doc. RLA-306**.
[1529] **Doc. RLA-307**.

on amounts to be awarded as damages[1530]. In their PHB[1531], however, Claimants abandoned this claim for interest[1532]:

> "244.3. ORDER Respondent to pay to Claimants damages constituting full reparation in connection with Saudi Arabia's breaches of Articles 2, 5, 8 and 10 of the OIC Agreement, as set forth in Paragraphs 239 and 240 above, or in the alternative at Paragraphs 241 and 243 above, or in the further alternative at 242 and 243 above;"

1130. In paras. 239 through 243 of their PHB, Claimants do not claim interest on amounts awarded as damages, but submit a claim for the "lost time-value of money" between the Date of Valuation and the date of payment[1533]. Claimants calculate the "lost time-value of money" by reference to the return they would have been able to obtain by reinvesting the compensation in a risk-free security issued by the Kingdom of Saudi Arabia; that is what in this Award the Tribunal has defined as "Loss due to Lack of Reinvestment". In their PHB, Claimants have provided the following explanation[1534]:

> "But-for the Coercive Measures, Claimants would have been able to reinvest the cash flows generated from their investments in their business or in other investment opportunities. At the very least, they could have earned a return on such cashflows by investing them in risk free alternatives such as a Saudi Arabia sovereign bond or security. Both the Claimants' and Respondent's experts agree that the sukuk is the correct instrument to compensate the Claimants for that loss."

1131. The Tribunal is thus not called upon to solve the generic question of whether claims for interest are admissible under Sharia law and/or the OIC Agreement[1535]: in their PHB[1536], Claimants, who are also nationals of an Islamic State, have abandoned their original claim for interest on damages and have substituted it by a claim to be compensated for the lost time-value[1537], *i.e.*, the Loss due to Lack of Reinvestment.

[1530] Terms of Appointment and Reference, para. 45(v); C I, para. 461(iii); C II, para. 575(iii).
[1531] CPHB, para. 244.3.
[1532] Claimants maintained a claim for interest as regards costs and expenses (CPHB, para. 244.5). This claim is moot because the Tribunal will not be awarding costs and expenses to Claimants (see section VIII.4 *infra*).
[1533] CPHB, paras. 240 and 243: "Any Award issued on this basis would also need to reflect the lost time-value of money between 12 September 2023 and payment of that Award. To the extent that any Award is not issued or satisfied before April 2024, such amount should be calculated, as described above, with reference to the 1-year generic Bloomberg yield then in existence".
[1534] CPHB, paras. 231-232.
[1535] The Tribunal nevertheless notes that other arbitral tribunals constituted under the OIC Agreement have awarded interest (**Doc. CLA-52**, *Itisaluna*, para. 261 – the tribunal ordered the payment of interest on the costs of the arbitration; **Doc. CLA-51**, *Kontinental Conseil Ingénierie S.A.R.L. v. Gabon Republic*, PCA Case No. 2015-25, Final Award, paras. 286-288 – the tribunal ordered the payment of interest over the amounts awarded as compensation; **Doc. CLA-54**, *Navodaya Trading*, p. 6 – the tribunal ordered the payment of interest on the costs of the arbitration).
[1536] Respondent had the opportunity to respond to Claimants' PHB during the Closing Hearing. At the Closing Hearing Claimants repeated the argument that: "It is, moreover, possible to compensate Claimants for the lost time value of money in accordance with Sharia law" (CHT, p. 2356, ll. 3-5).
[1537] CPHB, paras. 230-238, 240, 243.

B. Claim for Loss due to Lack of Reinvestment

1132. Under their claim for Loss due to Lack of Reinvestment Claimants say that, if the Kingdom had paid the compensation due to them, they would have reinvested the moneys received by acquiring a *sukuk*, and this *sukuk* would have produced a return. Claimants submit that the principle of full compensation requires that the payment by the Kingdom be increased with the return which Claimants would have been able to generate as a consequence of the *sukuk*.

1133. *Sukuks* are financial instruments issued by Islamic States and enterprises, akin to bonds, compliant with Sharia law[1538], which represent an ownership interest (not a loan) and are valued at the time of purchase and at the time of redemption, with the difference in value representing the economic return to their holder.

Reinvestment in *sukuks*

1134. Claimants say that they would have invested any compensation received in a *sukuk* issued by the Kingdom of Saudi Arabia[1539].

1135. The Tribunal accepts that, if the Kingdom had not delayed complying with its Treaty obligations, Claimants would have had the opportunity to invest the proceeds in some venture. Among the alternatives available to Claimants, the safest and most conservative would have been to purchase an Islamic *sukuk*, expressed in the currency of the country where the impaired investment was held – *i.e.*, a *sukuk* issued by the Kingdom. Claimants say that this would have been a reasonable and likely prospect; the Respondent has not referred to any other alternative investment.

1136. The Tribunal sees no reason to put Claimants' choice in doubt, because *sukuks* issued by the Kingdom are Sharia compliant and their return is very moderate, due to the Kingdom's low credit risk. Secretariat and Dr. Hern have reviewed the publicly available information[1540], and both agree that an appropriate *sukuk*, in which the reinvestment could have been channelled, would have been an instrument issued by the Kingdom in April 2017, with an expiry in April 2022 and with a return of 2.82% p.a.[1541]. Assuming that Claimants had decided to purchase this *sukuk*, they would have obtained such annual return.

1137. In the Tribunal's opinion, to fully indemnify Claimants, the Kingdom must be ordered to pay an additional compensation to cover this Loss due to Lack of Reinvestment, equal to the return that the *sukuk* would have generated between:

- (i) the date when the Kingdom should have paid the compensation, and
- (ii) the date when the Kingdom actually complies with this obligation.

[1538] RPHB, para. 202.2.
[1539] CPHB, paras. 231-232.
[1540] Thomson Reuters publishes a page setting forth the returns offered by *sukuks* issued by the Kingdom – see **Doc. VP-61.**
[1541] CER-1, Secretariat I, para. 238; RER-1, Hern I, para. 219, where he accepts Secretariat's calculation and rounds up the return to 2.9%.

1138. (i) When should the Kingdom have paid the compensation owed to Claimants?

1139. The OIC Agreement has a specific temporal regulation for the assessment of damage and the payment of compensation. Art. 13(4) reads as follows[1542]:

> "4. The assessment of monetary compensation shall be concluded within 6 (six) months from the date when the damage was sustained and shall be paid within a year from the date of agreement upon the amount of compensation or from the date when the assessment of compensation has become final."

1140. Under this rule, the Kingdom should have assessed the compensation within six months from the date when the damage was suffered (*i.e.*, from 5 June 2017, the date of adoption of the Measures), and payment should have been made within a year from the assessment. Consequently, to comply with Art. 13(4) of the OIC Agreement, the Kingdom was not obliged to pay the compensation on the very Valuation Date, but was entitled to assess such compensation for six months, and then to pay the compensation up to one year thereafter – thus postponing payment until 5 December 2018. It is on this date when, in the but-for scenario, Claimants should have received the funds and could have used these proceeds to purchase a *sukuk* issued by the Kingdom, which from that date would have accrued a return of 2.82% p.a.[1543].

1141. (ii) And upon expiration of the initial *sukuk*, Claimants would have been able to reinvest in a new *sukuk* issued by the Kingdom, obtaining an equivalent return, which would continue to accrue until the Kingdom of Saudi Arabia has fully complied with its obligations under this Award.

Respondent's defence

1142. Could this Loss due to Lack of Reinvestment, calculated on the basis of the return generated by a *sukuk*, be construed as representing interest for the purposes of Sharia law?

1143. The Kingdom acknowledges that the return on a *sukuk* "is not interest: it is not compensation to a lender for being kept out of money, but a return involving actual investment and actual risk"[1544]. The Kingdom adds[1545]:

> "It would be wrong to conclude from the Kingdom's use of Sukuks that the Kingdom permits or engages in the payment of interest: it does not."

[1542] **Doc. CLA-10.**
[1543] The Tribunal is aware that there is a temporal mismatch between the date of the *sukuk* chosen by the experts, the date when Claimants would have invested in such *sukuk*, and the maturity of the title; but the impact of the mismatch is not significant, because Claimants say in their CPHB (para. 237) that in April 2022 the return of a one-year *sukuk* was 2.71% – very close to the 2.82% awarded; the Tribunal prefers to use a *sukuk* which has been reviewed and accepted by both experts, even at the expense of incurring a financial mismatch. The same reasoning applies upon the expiration of the initial *sukuk*; the Tribunal assumes that Claimants could reinvest in new *sukuks* yielding the same return.
[1544] RPHB, para. 202.1.
[1545] RPHB, para. 202.2.

1144. But the Kingdom also warns that "this Tribunal should not treat the return rate on a Sukuk as [...] a proxy for the rate at which such interest is charged"[1546].

1145. The Tribunal is not convinced by this last reasoning.

1146. Unlike bonds, *sukuks* are not interest bearing, but instead are valued at the time of purchase and the time of redemption, with the difference in value representing economic return to their holder[1547]. If the *sukuk* does not represent compensation to a lender for being kept out of money, but rather a return involving actual investment and actual risk, the hypothetical purchase of a *sukuk* can also not be considered as an interest-bearing loan. *Sukuks* are compliant with Islamic principles and are thus appropriate to measure the Loss due to Lack of Reinvestment suffered by Islamic Claimants against an Islamic State.

7. SUMMARY

1147. For the reasons set forth in the preceding sections, the Tribunal, by majority[1548], orders the Kingdom of Saudi Arabia to pay the following amounts:

- **QAR 276,783,057** to Claimant Qatar Pharma to compensate for the Loss of Enterprise Value which it has suffered;

[1546] RPHB, para. 202.3.

[1547] CPHB, para. 232.

[1548] Professor Ziadé disagrees with the amounts awarded to the Claimants in compensation:
"Apart from my reservations on jurisdiction in the present case [see footnote 387], and my belief that the Claimants committed serious irregularities by not acting in a transparent manner and by making fraudulent misrepresentations [see footnote 641], I do not believe that the Claimants should be deprived of compensation. However, any compensation must be mitigated considering the Claimants' business practices that did not comply with Article 9 of the OIC Agreement either in its letter or in its spirit, as well as Qatar Pharma's performance issues.
The Claimants' engagement in fraudulent misrepresentations was addressed in footnote 641 *supra*.
As to Qatar Pharma's performance issues, it may be recalled that even before the Measures were adopted, Qatar Pharma was not performing in a consistent manner, and it generated fewer revenues in Saudi Arabia in 2015 (QAR 45 M) and 2016 (QAR 47 M) than it did in 2014 (QAR 49 M) [see paragraph 985 of the Award]. Qatar Pharma's revenues were stagnant in the years preceding the Measures around QAR 65 M for all its operations in all geographical areas [see paragraph 984 of the Award]. The Measures did not significantly impact Qatar Pharma's revenues beyond 2017, since it was able in later years to reach the same level of revenues in all its operations as those before the Measures, with QAR 60 M in 2018, QAR 63 M in 2019, and QAR 67 M in 2020 [see paragraph 992 of the Award]. Qatar Pharma's revenues dropped again in 2021, more than four years after the Measures, to QAR 59 M [see paragraph 992 of the Award], which indicates that fluctuations in Qatar Pharma's revenues should be mainly attributed to its own performance rather than to the Measures.
It should also be mentioned in this respect that Qatar Pharma was excluded from participating in tenders in 2016 (the year immediately preceding the adoption of the Measures) and it failed to secure any tender business in 2016. The Claimants' failure to disclose to their expert what happened in 2016 is a further indication of the lack of transparency with which they conduct their business.
The Tribunal's majority does not account for Qatar Pharma's performance issues in the years leading up to the adoption of the Measures. It rather seems to assume that Qatar Pharma would have been able to consistently improve its performance. The majority should have put less reliance on the Claimants' own estimation of their business in Saudi Arabia and adopted a reduced EDIBTA as well as a lower multiplier that would have accounted for Qatar Pharma's own performance issues and the non-transparent manner in which the Claimants conducted their business."

- **SAR 62,373,653** to Claimant Dr. Al Sulaiti to compensate for the Loss of Receivables which he has suffered;

- **QAR 24,142,807** to Claimant Dr. Al Sulaiti to compensate for the Loss of Inventory which he has suffered;

- A **return of 2.82% p.a.**, calculated:

  - in the case of Qatar Pharma on QAR 276,783,057,

  - in the case of Dr. Al Sulaiti on SAR 62,373,653 and on QAR 24,142,807,

which will start to accrue on 5 December 2018 and continue to accrue until payment in full by the Kingdom of all amounts owed under this Award, to compensate for the Loss due to Lack of Reinvestment.

VIII. COSTS

1148. Pursuant to Art. 38(4) of the ICC Rules, in the final award the Tribunal shall fix the costs of the arbitration [the "**Costs**"] and decide which of the Parties shall bear them or in what proportion they shall be shared[1549].

1149. Art. 38(1) of the ICC Rules establishes that the Costs shall include:

> "[…] the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scales in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration." [Emphasis added]

1150. Therefore, the Costs can be split into two categories:

- The fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court ["**Administrative Costs**"]; and
- The "reasonable" legal and other costs incurred by the Parties for the arbitration ["**Legal Costs**"].

1151. Both Parties have asked that the Tribunal order the counterparty to pay all Costs associated with this arbitration, including all legal and expert fees and expenses[1550].

1152. Claimants and Respondent have each filed statements of costs[1551]. The Kingdom then presented comments to Claimants' costs statement[1552], while Claimants rested on their previous submissions[1553].

1153. The Tribunal will summarise the Parties' respective requests (**1.** and **2.**) and then adopt its decision (**4.**).

1. CLAIMANTS' REQUEST

1154. Claimants request that the Tribunal award them all costs associated with this arbitration (with interest[1554]) since Claimants would not have incurred such costs if Saudi Arabia had complied with its obligations under the OIC Agreement[1555].

1155. Claimants submit that, as established in the *ADC* case, the successful party should receive reimbursement from the unsuccessful party[1556]. An award of costs would place Claimants in the same position they would have been in had Saudi Arabia not

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[1549] Art. 38(4) of the ICC Rules: "The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties".
[1550] C I, paras. 457 *et seq.*; C II, para. 575(v); C III, para. 114.2; CPHB, para. 244.5; R I, para. 654.4; R II, para. 562.4.
[1551] Communication C 100; Communication R 96.
[1552] Communication R 97.
[1553] Communication C 101.
[1554] C I, paras. 460, 461.v.
[1555] C I, para. 457.
[1556] C I, para. 458, citing to **Doc. CLA-113**, *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, para. 533.

breached its international obligations and is thus consistent with the principle of full reparation[1557].

1156. Claimants' costs amount to a total of USD 18.43 million[1558], divided as follows[1559]:

DLA Legal Fees and Expenses[1560]	
Constitution of Tribunal	USD 1,601,439
Bifurcation	USD 333,659
Interim Measures	USD 848,935
Main Submissions	USD 8,087,229
Hearings (Interim Measures and Merits)	USD 4,158,286
Document Requests	USD 286,183
Document Review & Production	USD 650,997
Total	*USD 15,966,728*
Experts' Fees & Expenses[1561]	
Written Expert Reports	USD 1,321,208
Merits Hearing	USD 476,105
Total	*USD 1,797,313*
Other fees and expenses	
Travel expenses	USD 65,510
Deloitte Costs and Expenses	USD 55,765
Total	*USD 121,275*
ICC & Tribunal Fees and Expenses	
Advance on costs	*USD 545,000*
TOTAL	***USD 18,430,316***

2. RESPONDENT'S REQUEST

1157. The Kingdom argues that Claimants should not be entitled to the reimbursement of any costs[1562].

1158. Saudi Arabia concurs that the successful party should be reimbursed by the unsuccessful party but argues that this is still subject to the Tribunal's discretion[1563]. The Kingdom submits that when exercising this discretion, the Tribunal should consider that:

- Claimants acted dishonestly when conducting their business in the Kingdom and have also withheld documentary evidence from the Tribunal[1564];

- Claimants claimed over USD 300 million, when there was never any reasonable prospect of them proving losses anywhere near that amount – and

[1557] C I, paras. 458-460.
[1558] All figures have been rounded.
[1559] Claimants' Statement of Costs.
[1560] Composed of the fees applicable to Partners, Associates, Paralegals, Litigation Support, and other administrative costs and expenses.
[1561] Composed of the fees and expenses incurred by Mr. Sequeira and Mr. D'Aguiar, and by Dr. Ulrichsen.
[1562] R I, para. 653.
[1563] Communication R 97, para. 1.1.
[1564] Communication R 97, para. 2. See also section V.2.1 *supra*.

should therefore reduce their costs commensurately with the reduction in the value of their claim[1565];

- Claimants' costs are grossly disproportionate and exaggerated: they amount to more than double what the Kingdom incurred and are beyond what could be considered reasonable in a dispute of this nature[1566]; Saudi Arabia considers that reasonable costs would have been in the region of USD 7.5 million, and Claimants should only be permitted to recover a percentage of that should they win[1567].

1159. The Kingdom invites the Tribunal to order Claimants to pay all the Kingdom's costs and expenses associated with these proceedings[1568]. The Kingdom's total costs amount to USD 9.36 million[1569], as follows[1570]:

Counsel fees	
Bifurcation	USD 599,772
Written Submissions	USD 3,037,659
Document Production	USD 1,639,338
Merits Hearing	USD 1,780,277
Post-Hearing submissions	USD 514,889
Total	*USD 7,571,936*
Expert costs	
Written Expert Reports	USD 543,452
Document Production	USD 217,230
Merits Hearing	USD 205,092
Total	*USD 965,774*
Other expenses	
Hearing costs	USD 220,165
Post-Hearing expenses	USD 33,376
Additional costs for costs submissions	USD 25,000[1571]
Total	*USD 273,541*[1572]
ICC & Tribunal Fees and Expenses	
Advance on costs	*USD 545,000*
TOTAL	***USD 9,356,251***

3. ADMINISTRATIVE COSTS

1160. On 3 December 2020 the Court fixed the advance on costs at USD 320,000, subject to later readjustments, pursuant to Art. 37(2) of the ICC Rules[1573]. The Parties paid the advance on costs in equal parts[1574]. On 30 June 2022 the Court readjusted the

[1565] Communication R 97, para. 3.
[1566] Communication R 97, paras. 1,2 and 4.
[1567] Communication R 97, para. 5.
[1568] R I, para. 654.4; R II, para. 562.4.
[1569] All figures have been rounded.
[1570] Respondent's Statement of Costs.
[1571] Respondent's Statement of Costs, para. 10.
[1572] Respondent's total calculation of "Other costs" in para. 11 of its Statement of Costs does not correspond exactly to the amounts that seem to have been incurred.
[1573] Communication of the Secretariat to the Parties and co-arbitrators of 3 December 2020.
[1574] Financial Table of 11 January 2021.

advance on costs and increased it to USD 1,090,000. The Court also granted the members of the Tribunal a first advance on fees[1575]. The Parties paid the increased advance in equal parts[1576].

1161. On 11 September 2024 the Court fixed the costs of the arbitration at USD 1,090,000[1577].

4. DECISION OF THE ARBITRAL TRIBUNAL

1162. Art. 61(5) of the English Arbitration Act 1996[1578] establishes that, unless the parties otherwise agree, the tribunal shall award Costs on the general principle that costs should follow the event, except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

1163. The terms agreed upon by the Parties regarding Costs are those of Art. 38 of the ICC Rules[1579], including Art. 38(5), which provides the Tribunal with ample discretion when deciding on the allocation of Costs:

> "In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."

1164. Among the circumstances that tribunals generally take into consideration in ICC arbitrations is precisely the principle that "costs follow the event"[1580]; but tribunals have the power to consider any other relevant circumstances. In the present case, the Tribunal has already established that minor breaches of municipal law should be taken into consideration when assessing costs (see section V.2.3.3 *supra*).

1165. As regards the principle "costs follow the event" both Parties have at least partially prevailed. Claimants succeeded as regards jurisdiction and admissibility, the Tribunal having dismissed Respondent's positions; but Respondent's objection based on Art. 17 of the OIC Agreement was a serious defence, based on a tenable interpretation of the Treaty, which a majority of the Tribunal eventually did not share. The result as regards the merits was more balanced, Respondent succeeding in having the expropriation claim dismissed, but Claimants prevailing with their FET, FPS and Permits claims. Finally, as regards compensation, the Tribunal found for Claimants, but significantly reduced the amounts awarded.

1166. Furthermore, the Tribunal finds that Counsel to both Parties acted professionally and in good faith throughout all the proceedings.

[1575] Communication of the Secretariat to the Parties and co-arbitrators of 1 July 2022 and Financial Table of 1 July 2022.
[1576] Financial Table of 13 September 2024.
[1577] Financial Table of 13 September 2024.
[1578] Applicable by virtue of the fact that the place of arbitration is London, United Kingdom.
[1579] By virtue of their agreement to submit this arbitration to the ICC Rules (Terms of Appointment and Reference, para. 54).
[1580] J. Fry, S. Greenberg, F. Mazza, *The Secretariat Guide to ICC Arbitration*, para. 3-1488.

1167. In view of these circumstances, the Tribunal decides that the Administrative Costs shall be split equally between Claimants and Respondent, and that each Party shall bear its own Legal Costs.

IX. DECISION

1168. For the reasons given above, the Arbitral Tribunal:

1. **Declares** that it has jurisdiction to decide the present dispute.

2. **Declares** that the claims of Qatar Pharma for Pharmaceutical Industries, W.L.L. and Dr. Ahmed Bin Mohammad Al Haie Al Sulaiti are admissible.

3. **Declares** that the Kingdom of Saudi Arabia is in breach of its obligations under Arts. 2, 5 and 8 of the OIC Agreement.

4. **Dismisses** the claim that the Kingdom of Saudi Arabia is in breach of its obligations under Art. 10 of the OIC Agreement.

5. **Orders** the Kingdom of Saudi Arabia to pay the following sums as compensation in connection with its breaches of Arts. 2, 5 and 8 of the OIC Agreement:

   - QAR 276,783,057 to Qatar Pharma for Pharmaceutical Industries, W.L.L. to compensate for the Loss of Enterprise Value which it has suffered;
   - SAR 62,373,653 to Dr. Ahmed Bin Mohammad Al Haie Al Sulaiti to compensate for the Loss of Receivables which he has suffered;
   - QAR 24,142,807 to Dr. Ahmed Bin Mohammad Al Haie Al Sulaiti to compensate for the Loss of Inventory which he has suffered;
   - A return of 2.82% p.a., calculated:
     - in the case of Qatar Pharma for Pharmaceutical Industries, W.L.L. on QAR 276,783,057,
     - in the case of Dr. Ahmed Bin Mohammad Al Haie Al Sulaiti on SAR 62,373,653 and on QAR 24,142,807,

     which will start to accrue on 5 December 2018 and continue to accrue until payment in full by the Kingdom of Saudi Arabia of all amounts owed under this Award, to compensate for the Loss due to Lack of Reinvestment.

6. **Orders** that the Administrative Costs be split equally between Claimants (jointly 50%) and Respondent (50%), and that each Party assumes its own Legal Costs.

7. **Dismisses** any other prayers for relief made by the Parties.

1169. All Decisions are taken unanimously, except for Decisions 1. and 5. *supra*, which are taken by a majority comprising the President and one arbitrator, with the other arbitrator dissenting. The latter has also expressed a concurring opinion as to Decision 2.

Place of Arbitration: London, United Kingdom
Date: 23 October 2024

THE ARBITRAL TRIBUNAL

Charles Poncet
Arbitrator

Nassib G. Ziadé
Arbitrator

Juan Fernández-Armesto
Presiding Arbitrator