INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE ANNULMENT PROCEEDING BETWEEN

AGILITY PUBLIC WAREHOUSING COMPANY K.S.C.P

Applicant

AND

REPUBLIC OF IRAQ

Respondent

ICSID CASE NO. ARB/17/7

DECISION ON ANNULMENT

Members of the ad hoc Committee
Professor Ricardo Ramírez, President of the *ad hoc* Committee
Prof. Dr. Jacomijn van Haersolte-van Hof, Member of the *ad hoc* Committee
Prof. Hi-Taek Shin, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Ms. Patricia Rodríguez Martín/Ms. Jara Mínguez Almeida

Date of dispatch to the Parties: 8 February 2024

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TABLE OF CONTENTS

I. INTRODUCTION AND PARTIES ... 1
II. PROCEDURAL HISTORY ... 3
III. OVERVIEW OF THE AWARD ... 6
IV. ANALYSIS OF THE *AD HOC* COMMITTEE ... 15
A. The Applicable Standard ... 15
(1) Applicable Legal Standard Under Article 52(1)(b) ... 15
a. The Applicant's Position ... 15
b. The Respondent's Position ... 16
c. The Committee's Analysis of the Legal Standard Under Article 52(1)(b) ... 18
(2) Applicable Legal Standard Under Article 52(1)(d) ... 21
a. The Applicant's Position ... 21
b. The Respondent's Position ... 22
c. The Committee's Analysis of the Legal Standard Under Article 52(1)(d) ... 23
(3) Applicable Legal Standard Under Article 52(1)(e) ... 25
a. The Applicant's Position ... 25
b. The Respondent's Position ... 25
c. The Committee's Analysis of the Legal Standard Under Article 52(1)(e) ... 26
B. Ground 1: The Tribunal Manifestly Exceeded its Powers as to the Implementation Claim (52(1)(b)) ... 29
(1) The Applicant's Position ... 29
(2) The Respondent's Position ... 31
(3) Whether the Tribunal Manifestly Exceeded its Powers in the Treatment of the Implementation Claim – The Committee's Analysis ... 33
(4) Whether the Tribunal Exceeded its Powers by Failing to Exercise Jurisdiction over the Corruption Allegations – The Committee's Analysis ... 43
C. Ground 2: The Tribunal Manifestly Exceeded its Powers as to the Denial of Justice Claim (52(1)(b)) ... 47
(1) The Applicant's Position ... 47
(2) The Respondent's Position ... 48
(3) Whether the Tribunal Manifestly Exceeded its Powers as to the Denial of Justice Claim (52(1)(b)) – The Committee's Analysis ... 49
D. Ground 3: The Tribunal Failed to State Reasons as to the Implementation Claim (52(1)(e)) ... 51

(1) The Applicant's Position ... 51

(2) The Respondent's Position ... 52

(3) Whether the Tribunal Failed to State Reasons in its Implementation Claim – The Committee's Analysis ... 53

(4) Whether the Tribunal Failed to State Reasons when Failing to Address Corruption Evidence on the Implementation Claim – The Committee's Analysis ... 57

E. Ground 4: The Tribunal Failed to State Reasons as to the Denial of Justice Claim (52(1)(e)) ... 59

(1) The Applicant's Position ... 59

(2) The Respondent's Position ... 61

(3) Whether the Tribunal Failed to State Reasons as to the Denial of Justice Claim (52(1)(e)) – The Committee's Analysis ... 62

a. Failure to State Reasons in Finding that IT Ltd's Joinder Application "mirrored" Korek's Position ... 62

b. Failure to State Reasons in Determining that the CMC Appeals Board Satisfied the International Law Due Process Standard and the Civil Court Option 64

F. Ground 5: The Tribunal Denied Agility's Procedural rights and its Right to Investigate Corruption Seriously Departing from a Fundamental Rule of Procedure (52(1)(d)) ... 67

(1) The Applicant's Position ... 67

(2) The Respondent's Position ... 68

(3) Whether the Tribunal Seriously Departed from a Fundamental Rule of Procedure by Denying Agility's Procedural Rights and its Right to Investigate Corruption – The Committee's Analysis ... 69

G. Lack of Causation and Damages ... 72

V. COSTS ... 73

A. The Parties' Positions on Costs ... 73

B. The Committee's Decision on Costs ... 74

VI. DECISION ... 76

TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

Applicant	Agility Public Warehousing Company K.S.C.P. or Agility
Applicant's Memorial	Memorial on Annulment submitted by the Applicant on 22 December 2021
Applicant's Reply	Reply on Annulment submitted by the Applicant on 1 July 2022
Award	Award rendered on 22 February 2021 (ICSID Case No. ARB/17/7)
BIT or "2015 BIT"	Agreement between the Government of the State of Kuwait and the Government of the Republic of Iraq for Reciprocal Promotion and Protection of Investments, entered into force on 4 February 2015
C-[#]	Claimants' Exhibit
CLA-[#]	Claimants' Legal Authority
CMC	Iraqi Communications and Media Commission
CMC Order	Decision by the CMC dated 2 July 2014.
Committee	Committee constituted on 22 September 2021
Decision on Jurisdiction	Decision on Jurisdiction rendered on 9 July 2019 (ICSID Case No. ARB/17/7)
Hearing	Hearing on Annulment held on 15-16 November 2022
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Rules or Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
IDRC	International Dispute Resolution Centre

IT Ltd	Iraq Telecom Limited, a company owned by Agility and Orange as a joint venture vehicle
KCR Decree	KRG Directorate of Registration of Local Companies, Administrative Order No. 4961 dated 19 March 2019
Korek	Korek Telecom Company LLC
R-[#]	Respondent's Exhibit
Respondent	Republic of Iraq or Iraq
Respondent's Counter-Memorial	Counter-Memorial on Annulment submitted by Respondent on 22 April 2022
Respondent's Rejoinder	Rejoinder on Annulment submitted by the Respondent on 9 September 2022
RLA-[#]	Respondent's Legal Authority
Tribunal	Tribunal composed of Mr. Cavinder Bull SC (President), Mr. John Beechey and Prof. Sean D. Murphy.

I. INTRODUCTION AND PARTIES

1. This case concerns an application for annulment of the Award rendered on 22 February 2021, in ICSID Case No. ARB/17/7 ("**Award**") between Agility Public Warehousing Company K.S.C.P. ("**Agility**" or the "**Applicant**")[1] and the Republic of Iraq ("**Iraq**" or the "**Respondent**"). The Award was rendered by a tribunal composed of Mr. Cavinder Bull SC (President), Mr. John Beechey and Prof. Sean D. Murphy (the "**Tribunal**").

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

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

4. The dispute in the original arbitration proceeding concerned Agility's investment in an Iraqi telecommunications company, Korek Telecom Company LLC ("**Korek**"). In the original arbitration, Agility challenged an order issued in 2014 by the Iraqi Communications and Media Commission ("**CMC**" and "**CMC Order**") and Iraq's subsequent implementation actions, which on Agility's case, stripped the investment from Agility without compensation. Agility also brought a denial of justice claim.

5. On 9 July 2019, the Tribunal rendered its Decision on Jurisdiction, whereby it: (i) determined that its jurisdiction under Article 10 of the 2015 BIT was limited to disputes that

[1] Agility is also referred to as the "Claimant", when referring to the original proceeding.

arose after the entry into force of that same instrument,[2] (ii) dismissed Respondent's jurisdictional objection *ratione temporis* on Agility's Denial of Justice claim [since it considered the dispute with the CMC was a different dispute from the one concerning Claimant's participation before the Iraqi Administrative court][3]; and (iii) dismissed Respondent's jurisdictional objection *ratione temporis* on the Failure to Implement the CMC Order claim [since it considered such dispute arose after the 2015 BIT entered into force].[4] The Tribunal also found that it did not have jurisdiction over "the collusion dispute" and the "composite breach claim" alleged by Agility.[5]

6. On 22 February 2021, the Tribunal rendered its Award, whereby it analyzed Agility's two remaining claims concerning: (i) the failure to implement the CMC Order and ii) denial of justice.[6] Ultimately, the Tribunal dismissed Agility's claims on the merits.[7]

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[2] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶¶ 156 and 175. The Claimant submitted that there were three disputes that arose after the BIT's entry into force, in particular: (i) the Iraqi Administrative Court's denial of justice to the Claimant; (ii) the Respondent's failure to implement the CMC Order; and (iii) the Respondent's collusion with Korek's Iraqi Shareholders. See ¶ 174.

[3] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶¶ 189-224 and ¶ 274 (1). "[O]ne relates to the access of an entity that is not a licensee before a regulator, whilst the other relates to the access of an entity to the courts of law", "[o]ne was an allegation of legal wrong by […] a regulator. The other allegation is of a legal wrong by the Administrative Court acting as a court of law". See ¶¶ 197 and 198.

In the original proceeding, Agility identified several instances of denial of justice: (i) the CMC's failure to notify of its concerns leading up to the CMC Order and of the CMC Order; (ii) the CMC's failure to provide an opportunity to contest the CMC Order or to be heard in subsequent judicial process; (iii) the Respondent's prevention of the Claimant's participation in the Administrative Court's review of the CMC Order; (iv) the Iraqi Supreme Administrative Court's delay in deciding IT Ltd's appeal against the Administrative Court's dismissal of IT Ltd's Joinder Application; and (v) the inconsistent orders issued by various arms of the Iraqi Government. The Tribunal first determined that the claims based on the CMC's failure to notify the Claimant or on the CMC not affording an opportunity to be heard which arose before the 2015 BIT entered into force, were outside its jurisdiction. See ¶¶ 182 and 183. Subsequently, based on the Claimant's submissions, the Tribunal concluded that Agility was pursuing two denial of justice claims: i) the denial of justice in the rejection by the Administrative Court of IT Ltd's Joinder Application, and ii) the denial of justice in the rejection by the Administrative Court of Korek's challenge to the CMC Order. The latter, which would have to be pleaded with "sufficient particularity" in further submissions. In light of this, the Tribunal examined only the claim pertaining to the rejection of IT Ltd's Joinder Application. See ¶¶ 184-189.

[4] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶¶ 225-238 and ¶ 274 (2). The Tribunal indicated that the correspondence from 2014 revealed a dispute "regarding the legality of the CMC Order", which was the "antithesis of a request for the implementation of the CMC Order". In the Tribunal's view, "the Parties only took opposing positions about the implementation of the CMC Order after the Claimant tried to implement the CMC Order from 17 May 2016 onwards." See ¶¶ 227 and 236.

[5] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶¶ 239-245 and ¶¶ 246-257.

[6] Award, 22 February 2021, **C-253**, ¶¶ 96 and 97.

[7] Award, 22 February 2021, **C-253**, ¶ 279.

7. On 28 May 2021, Agility filed an application for annulment of the Award (the "**Application**" or the "**Application for Annulment**"), together with Exhibits A-1 through A-8 and legal authorities AL-1 through AL-9, pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Rules**" or "**Arbitration Rules**"). In its Application, Agility argued that the Tribunal manifestly exceeded its powers, departed from a fundamental rule of procedure, and failed to state the reasons upon which the Award was based, pursuant to ICSID Convention Article 52(1) (subsections (b), (d) and (e), respectively).[8]

II. PROCEDURAL HISTORY

8. On 4 June 2021, pursuant to Arbitration Rule 50(2)(a) and (b), the Secretary-General of ICSID registered the Application.

9. By letter dated 22 September 2021, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee (the "**Committee**") had been constituted and that it was composed of Prof. Ricardo Ramírez, a national of Mexico, appointed to the ICSID Panel of Arbitrators (the "**Panel**") by the Chairman of the Administrative Council, Prof. Dr. Jacomijn van Haersolte-van Hof, a national of the Netherlands, appointed to the Panel by the Netherlands, and Prof. Hi-Taek Shin, a national of the Republic of Korea, appointed to the Panel by Korea. On the same date, the Parties were notified that Ms. Patricia Rodríguez Martín, ICSID Legal Counsel, would serve as Secretary of the *ad hoc* Committee. Ms. Rodríguez Martín was subsequently replaced by Ms. Jara Mínguez Almeida, ICSID Team Leader/Senior Counsel.

10. On 20 October 2021, the Centre confirmed its receipt of the Applicant's initial advance payment of USD 200,000.

11. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a First Session with the Parties on 22 November 2021 by videoconference.

[8] Application for Annulment, 28 May 2021, ¶¶ 63, 68, 74, 78, 90, 91, 95, 96.

12. On 24 November 2021, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and deciding on matters where the Parties had not managed to reach an agreement. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be London, United Kingdom. Annex B of Procedural Order No. 1 also sets forth the agreed procedural calendar for the annulment proceeding. By email of the same date, the *ad hoc* Committee proposed to reserve two days for the hearing on annulment in this case and invited the Parties to indicate their availability for the week of 14 November 2022.

13. After consulting with the Parties, on 3 December 2021, the *ad hoc* Committee confirmed to the Parties that the hearing on annulment would take place on 15-16 November 2022.

14. On 22 December 2021, the Applicant submitted its Memorial on Annulment ("**Applicant's Memorial**"), in accordance with the timetable set forth in Annex B of PO No.1.

15. On 22 April 2022, the Respondent submitted its Counter-Memorial on Annulment ("**Respondent's Counter-Memorial**"), in accordance with the timetable set forth in Annex B of PO No.1.

16. On 1 July 2022, the Applicant submitted its Reply on Annulment ("**Applicant's Reply**"), in accordance with the timetable set forth in Annex B of PO No.1.

17. On 11 July 2022, the Secretary of the Committee sent a communication to the Parties on behalf of the Committee, inviting the Parties to confer on the format of the hearing and to confirm – in the event the hearing was held in-person – if they agreed to hold the hearing at the International Dispute Resolution Centre ("**IDRC**") in London.

18. On 12 July 2022, the Parties informed the Committee, that subject to any deterioration of the public health situation and associated travel restrictions, they had agreed that the hearing in this case should take place in person in London. Accordingly, on 15 July 2022, the Secretary of the Committee confirmed the Parties' agreement.

19. On 29 July 2022, the Centre confirmed its receipt of the Applicant's second advance payment of USD 200,000.

20. On 9 September 2022, the Respondent submitted its Rejoinder on Annulment (the "**Rejoinder**"), in accordance with the timetable set forth in Annex B of PO No.1.

21. Further to the agreement of the Parties, the Pre-Hearing Organizational Meeting between the Parties and the President of the Committee took place on 13 October 2022 by videoconference.

22. On 17 October 2022 the *ad hoc* Committee issued Procedural Order No. 2 regarding the organization of the hearing.

23. A hearing on annulment was held in London, U.K. at the IDRC from 15-16 November 2022 (the "**Hearing on Annulment**"). The following persons were present at the Hearing on Annulment:

Committee:

Professor Ricardo Ramírez	President
Prof. Dr. Jacomijn van Haersolte-van Hof	Member
Prof. Hi-Taek Shin	Member

ICSID Secretariat:

Ms. Jara Mínguez Almeida	Secretary of the Committee

For the Applicant:

Counsel	
Mr. Bader Abdulmohsen El-Jeaan	Meysan Partners
Mr. Abdulwahab Sadeq	Meysan Partners
Mr. Tim Nelson	Skadden, Arps, Slate, Meagher & Flom LLP
Mr. Daniel Gal KC	Skadden, Arps, Slate, Meagher & Flom (UK) LLP
Mr. David Kavanagh KC	Skadden, Arps, Slate, Meagher & Flom (UK) LLP
Ms. Devika Khopkar	Skadden, Arps, Slate, Meagher & Flom (UK) LLP
Ms. Jessie Barnett-Cox	Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Ms. Quinn Leary	Skadden, Arps, Slate, Meagher & Flom LLP
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Ms. Catherine Amirfar	Debevoise & Plimpton LLP
Ms. Ina C. Popova	Debevoise & Plimpton LLP
Ms. Berglind H. Birkland	Debevoise & Plimpton LLP
Ms. Sarah Lee	Debevoise & Plimpton LLP
Ms. Janine Godbehere	Debevoise & Plimpton LLP
Ms. Prasheela Vara	Debevoise & Plimpton LLP
Mr. James Haase	Immersion Legal

Court Reporter:

Ms. Claire Hill

24. On 13 June 2023, the Centre confirmed its receipt of the Applicant's third advance payment of USD 75,000.

25. The proceeding was closed on 1 December 2023.

26. On 4 December 2023, the Centre confirmed its receipt of the Applicant's fourth advance payment of USD 20,000.

27. The Parties filed their submissions on costs on 11 December 2023.

III. OVERVIEW OF THE AWARD

28. On 22 February 2021, the Tribunal composed of Mr. Cavinder Bull SC (President), Mr. John Beechey and Prof. Sean D. Murphy rendered its Award, whereby it analyzed the remaining claims of the Applicant: (i) the Failure to Implement the CMC Order and (ii) Denial of Justice. As to the first claim, the Tribunal indicated that Agility's "entire failure to implement claim presumes the lawfulness of the CMC Order, as it recognizes that the Tribunal has determined that it has no jurisdiction to make a finding on the lawfulness of

the CMC Order."[9] Therefore, it specified that "the only question before the Tribunal is whether the *manner in which the Respondent has implemented the CMC Order violates the 2015 BIT*."[10]

29. While the Claimant argued that Respondent's implementation of the CMC Order was "partial, improper, discriminatory and unlawful" and that it violated different provisions of the BIT[11], on the other hand, the Respondent argued that:

> "the Claimant is trying to hold '*the Government of Iraq responsible for what comes down to a shareholder dispute*' about how to address financially a government-mandated change in equity ownership in Korek. […] all the CMC Order required was that Korek unwind the share transfer from the Iraqi shareholders to the foreign shareholders […] the CMC Order states nothing about unwinding the various financial arrangements associated with the 2011 Equity Transaction, including any aspects of Korek's debts or financing, or of the KRG Guarantee […] the KCR Decree was not a failure to implement the CMC Order, but rather the opposite; a fulfilment of exactly what the CMC Order required."[12]

30. According to the Tribunal, "[t]he underlying foundation of the Claimant's failure to implement claim is that the CMC Order, when properly interpreted, requires the rescission of the 2011 Equity Transaction and a restoration of the *status quo ante* as at 13 March 2011, and […] the Respondent assumed an obligation to bring about such restoration."[13]

31. The Tribunal first addressed whether Iraq's implementation of the CMC order constituted an unlawful expropriation and began its analysis with the text of Article 7 of the BIT. It emphasized that "the Tribunal has already found that *any claims of expropriation as a result of the CMC Order itself occurred prior to the 2015 BIT and therefore fall outside the scope*

[9] Award, 22 February 2021, **C-253**, ¶ 98.

[10] Award, 22 February 2021, **C-253**, ¶ 98. (Emphasis added)

[11] Award, 22 February 2021, **C-253**, ¶ 99. The Claimant argued that the implementation of the CMC Order constituted: a) an unlawful expropriation of Agility's investment; b) a violation of FET; c) an impairment of Agility's investment by arbitrary and discriminatory measures; d) a failure to accord Agility's investment full protection and security; e) a failure to provide national treatment protections, and f) a breach to MFN.

[12] Award, 22 February 2021, **C-253**, ¶ 101.

[13] Award, 22 February 2021, **C-253**, ¶ 100.

of its temporal jurisdiction."[14] In concluding this, the Tribunal referred in a footnote to paragraph 243 of its Decision on Jurisdiction, stating that:

> "Third, the essence of the claim is that the CMC and the Iraqi Shareholders colluded to cause the expropriation of the Claimant's assets. However, the alleged expropriation occurred prior to the 2015 BIT at the time of the CMC Order. In that sense, the collusion claim adds nothing new to the expropriation claim, other than helping to explain the motivation of the alleged expropriation. In other words, the collusion "dispute" is not actually a new dispute; at best, information about the alleged collusion is simply an explanation for why the dispute concerning expropriation arose in 2014."[15]

32. This particular finding in the Decision on Jurisdiction concerned the allegation submitted by Agility that the CMC Order had been procured by collusion between the CMC and the Iraqi shareholders, a situation that Agility alleged it had learnt long after the BIT's entry into force, materializing the dispute once the discovery of those facts had been known. The Tribunal in this Decision determined that "the collusion dispute" was not a new dispute over which it had temporal jurisdiction.[16]

33. As such, while examining the merits of Agility's claim in its Award, the Tribunal considered that "in order for the Claimant to succeed, it needs to show that there has been an *independently actionable expropriation that does not flow from the alleged unlawfulness of the CMC Order*."[17]

34. The Tribunal considered that in order to determine whether the issuance of the KCR Decree (a measure enacted in 2019) constituted an "independently actionable expropriation" separate from the CMC Order, it had to determine first what the CMC Order required.[18] It

[14] Award, 22 February 2021, **C-253**, ¶ 113. (Emphasis added)

[15] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶ 243.

[16] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶ 245.

[17] Award, 22 February 2021, **C-253**, ¶ 113. (Emphasis added)

[18] Award, 22 February 2021, **C-253**, ¶ 115. The KCR Decree was issued on 19 November 2019. In the Decision on Jurisdiction, the Tribunal indicated that according to the Claimant, it had "learned a week before the Hearing on Jurisdiction that the Companies Registrar in Kurdistan had re-registered IH's entire interest in Korek and had done so in a configuration of the Iraqi Shareholders". The Tribunal further indicated that it could see "that this new dispute would relate to some of the claims raised by the Claimant" but that "[i]f the Claimant intends to pursue a new claim arising from these new facts, it will have to plead the claim properly" and it "expresses no view over whether it has jurisdiction over this new issue." Decision on Jurisdiction, 9 July 2019, **C-182**, ¶¶ 258 and 259.

thus proceeded to analyze the text of the Order.[19] The Tribunal considered the differing views of the Parties on the interpretation of the Order. Whereas the Claimant endorsed a "broad interpretation" (that the CMC Order required a reinstatement of the *status quo* as of 13 March 2011 in every aspect, *i.e.,* reinstatement of the percentages of Korek's shares, reversion of the actual number of shares and commercial arrangements between the Parties at the time, and reinstatement of the KRG Guarantee), the Respondent advocated for a "narrow interpretation" (unwinding of the share transfer under the 2011 Equity Transaction).[20]

35. The Tribunal considered that the text and the context in which the CMC Order was issued favored the Respondent's interpretation.[21] In its examination, the Tribunal took into account the wording of the Order, what it expressly required Korek to do, the fact that it did not refer explicitly to the steps alleged by the Claimant and the authority and regulatory role of the CMC.[22] The Tribunal thus indicated that it endorsed "the narrow interpretation advanced by the Respondent […] the CMC Order cannot, and does not, require the reinstatement of Korek's debt position, the reinstatement of the KRG Guarantee, the cancellation of the

[19] Award, 22 February 2021, **C-253**, ¶¶ 116-118.

[20] Award, 22 February 2021, **C-253**, ¶ 119.

[21] Award, 22 February 2021, **C-253**, ¶ 120. The CMC Order stated in its relevant part the following: "We inform you that, after long and deep study of the subject of partnership between your company and the foreign French company France Telecom/Agility, studying its different legal and factual aspects, and in respect of the authority granted to our Commission by virtue of the terms of the meeting which was held on 21/4/2011 between our Commission and your company, and based upon the regulatory role exercised by our Commission within the framework of verifying that the suspension conditions have been met, upon which the partnership was based, and to determine the appropriate legal consequences, including the revocation of the mentioned partnership in light of the fact that the suspension conditions have not been collectively met, the Board of Commissioners decided, in its session held on 24/6/2014, in report No. 19/2014, to consider the approval of our Commission based upon the principle of partnership dated 29/5/2011 as void and null as the suspension conditions, to which you were committed to fully carry out, have not been met by virtue of the report of the meeting dated 21/4/2011 and by virtue of your repetitive letters.

Thus, we inform you by virtue of this letter of the final decision of our Commission by considering the partnership, desired between you and the foreign French company France Telecom/Agility, as void, null and invalid because the related suspension conditions have not been met, and for lack of evidence thereof without any legal or material effects of any type whatsoever. And we warn you in this respect to immediately proceed, within a period of no later than 15 days from the date of this letter, to reinstate the status as it was on 13/3/2011, take the procedures to revoke and terminate any contracts assigning shares in your company's capital that were concluded after 13/3/2011, prove this revocation in the legal entries with the companies registrar and provide our Commission with a new statement proving the return of shares to their original owners. Otherwise, your company shall bear all the legal consequences and necessary procedures will be taken against your company to compel you to obey and execute the content of the decision mentioned above". CMC Order, 2 July 2014, **C-037**.

[22] Award, 22 February 2021, **C-253**, ¶¶ 120-143.

shares issued in connection with the 2011 Equity Transaction, or the return of the payment made to the CMC."[23]

36. Having decided the proper interpretation of the CMC Order, the Tribunal turned to the issue of whether there was a "direct expropriation by virtue of the KCR Decree". Subsequently, the Tribunal stated "[a]s the Tribunal has no jurisdiction over the lawfulness of the CMC Order, the Tribunal similarly has no jurisdiction *over any expropriation claims* that *arise solely as a result of a faithful implementation of the CMC Order*. Put another way, in order to succeed in its expropriation claim, the Claimant needs to show that the KCR Decree was *not a faithful implementation of the CMC Order*."[24]

37. Having examined the text of the KCR Decree,[25] the Tribunal concluded:

> "It is clear from the above that the effect of the KCR Decree is to revoke the transfer of share ownership made under the KCR Order No. 2959[26] (*i.e.* the change from 75%, 20% and 5% split between the Iraqi shareholders to 100% of the shares being owned by IH) and to confirm that the shares had reverted to their original percentage ownerships.
>
> As such, the Tribunal finds that there is no material difference between what was ordered under the CMC Order and what was implemented under the KCR Decree.

[23] Award, 22 February 2021, **C-253**, ¶ 144.

[24] Award, 22 February 2021, **C-253**, ¶ 145. (Emphasis added).

[25] The KCR Decree provided in its relevant part: "1. Order was issued to cancel the administrative order no. (2959), dated 07/20/2011. 2. It was ordered to *restore the company's shares to the period before 03/13/2011*. […] 7. The percentages of shares were changed in the following manner:

Sirwan Saber Mostafa: **75 percent**

Chavshin Hassan Chavshin: **20 percent**

Jaghshi Hamou Mostafa: **5 percent**." KCR Decree, **R-0120 ENG** and **C-102**. (Emphasis added).

[26] This order from 2011 established in its relevant part the following: "*[…] at the request of the shareholders of* ***Korek Telecom Co. Ltd****, registered under the entry no. 167 on 16/8/2000, we issue the following orders based on authorities and responsibilities delegated to us:*

1. Excluding all the shares of Mr. Sirvan Saber Mostafa, equal to 75% of the company shares

2. Excluding all the shares of Mr. Chavoshin Hassan Chavoshin, equal to 20% of the company shares

3. Excluding all the shares of Mr. Jaghsi Hamu Mostafa, equal to 5% of the company shares

4. Registering all the shares of Mr. Sirvan Saber Mostafa, equal to 75%, Mr. Chavoshin Hassan Chavoshin, equal to 20% and Mr. Jaghsi Hamu Mostafa, equal to 5% of the company shares under the new shareholder of the new Emirates International Holdings. […] 6. The number of shares will be as follows: Emirates International Holding Company [i.e. IH] 100% […]" KCR Order No. 2959 dated 20 July 2011, **R-0104** and **C-158**. (Emphasis added).

> Consequently, the Tribunal is of the view that the Claimant's expropriation claim does not succeed."[27]

38. Regarding the "Fair and Equitable Treatment" claim, the Tribunal described the provision at issue and the standard. Subsequently, it found that "[i]n light of the […] decision to reject the broad interpretation of the CMC Order proposed by the Claimant, the portions of the Claimant's case that the FET standard was breached, because the Respondent improperly implemented the CMC Order (based on that same broad interpretation), cannot be made out."[28] Since the Claimant also relied on other grounds for its claim, the Tribunal analyzed: (i) whether the Respondent failed to engage with the Claimant on how to implement the order, (ii) whether the KCR Decree violated due process, and (iii) whether the Claimant's legitimate expectations were frustrated. Ultimately, the Tribunal found that those grounds, either taken individually or as a whole, were insufficient to constitute a violation to the FET standard.[29]

39. The Tribunal continued to address the claims of "Impairment", "Full Protection and Security", as well as the claim regarding "National Treatment", and stated that "[i]n view of the Tribunal's finding that the Respondent's implementation of the CMC Order was neither partial or improper, the Tribunal does not find it necessary to address the Claimants' claims on these separate grounds, given that these claims share the same factual foundation which the Tribunal has already rejected, namely, that the CMC Order required the Respondent to reinstate the *status quo* as of 13 March 2011 in every aspect."[30]

40. With respect to National Treatment, the Tribunal concluded that "[t]o the extent that the Claimant's national treatment protection claim appears to be based on the argument that it was arbitrary and discriminatory for the Respondent to order that Korek's shares be transferred to the Iraqi Shareholders 'for free' under the CMC Order, such an argument

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[27] Award, 22 February 2021, **C-253**, ¶¶ 148 and 149.

[28] Award, 22 February 2021, **C-253**, ¶ 163.

[29] Award, 22 February 2021, **C-253**, ¶¶ 164-173.

[30] Award, 22 February 2021, **C-253**, ¶ 175.

inevitably deals with the merits of the CMC Order, which is an issue that does not fall under the scope of the Tribunal's jurisdiction."[31]

41. The last claim for the "Failure to Implement the CMC Order" related to Most-Favored Nation and the umbrella clause. The Tribunal rejected this claim based on the fact that the Claimant voluntarily exchanged the Convertible Note for Equity and that it was no longer in force following the 2011 Equity Transaction.[32]

42. The second surviving claim was based on "Denial of Justice" allegations. The Tribunal started by setting out the applicable standard and considered that "the Claimant must show that Respondent had not provided a minimally adequate justice system in order to satisfy the high threshold for a claim for denial of justice."[33] The Tribunal analyzed whether the Iraqi Administrative Courts misapplied Iraqi law and breached international law. In this context, it referred to the dismissal by the Administrative Court of IT's Joinder Application, and considered that "[t]he only evidence of the Administrative Court's reasoning [was] set out in the email update from Korek's lawyer (who attended the hearing)."[34] Furthermore, it considered that "[w]hile the documents do not reveal the underlying reasons for the Administrative Court's dismissal of IT Ltd's Joinder Application, the Tribunal is nonetheless persuaded that the Administrative Court's decision […] does not satisfy the extreme test of being an error which no competent judge could reasonably have made."[35]

43. The Tribunal further considered that: "IT Ltd's intervention application effectively sought the exact same relief which was sought in Korek's application, namely an annulment of the CMC Order. In this regard, it is clear from the documentary evidence that IT Ltd's Joinder Application mirrored Korek's application in both form and substance, and that the relief sought by both Parties was identical. In other words, IT Ltd had failed to identify a separate interest which required protecting apart from Korek's interest in its Joinder Application.

[31] Award, 22 February 2021, **C-253**, ¶ 176.

[32] Award, 22 February 2021, **C-253**, ¶¶ 184-192.

[33] Award, 22 February 2021, **C-253**, ¶ 216.

[34] Award, 22 February 2021, **C-253**, ¶ 226.

[35] Award, 22 February 2021, **C-253**, ¶ 227.

[…] the Iraqi Court had a reasonable basis to reject IT Ltd's Joinder Application based on the papers before it."[36]

44. Turning to the issue of Korek's appeal dismissal, the Tribunal considered whether the CMC Appeals Board could be said to constitute the "designated appellate authority" referred to in the relevant statutory provision.[37] It noted that Iraqi courts had "recognized the CMC Appeals Board as an appeal entity presided over by a judge whose decisions are judicial in nature and final."[38] In conclusion, the Tribunal found that the Administrative Court and the Supreme Administrative Court's dismissal fell short of the high threshold for denial of justice.[39]

45. The Tribunal next considered the "second plank" of the Claimant's Denial of Justice claim regarding whether the Iraqi legislative framework breached international law. The claim focused on the alleged failings of the Iraqi legislative framework as the lack of due process afforded to the Claimant.[40] In essence, the Claimant argued that it was denied due process, *i.e.* it was denied the opportunity to challenge the CMC Order as it was "foreclosed from the only forum in which it could have protected its legal and economic rights".[41] The Tribunal concluded that "[a]lthough the CMC Appeals Board is not a court (in the sense that it [sic] not composed only of judges), the Tribunal notes that it is nonetheless presided over by a judge and serves as an appellate body capable of reviewing administrative decisions."[42]

46. Then, it went on to consider that "[i]n any case, it appears to the Tribunal that the Claimant, or at the very least, Korek, could have sought an audience before the Iraqi civil courts (as opposed to the administrative courts)".[43] In this regard, the Tribunal considered

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[36] Award, 22 February 2021, **C-253**, ¶¶ 228 and 229.

[37] Award, 22 February 2021, **C-253**, ¶ 232.

[38] Award, 22 February 2021, **C-253**, ¶ 234.

[39] Award, 22 February 2021, **C-253**, ¶ 242.

[40] Award, 22 February 2021, **C-253**, ¶ 243.

[41] Award, 22 February 2021, **C-253**, ¶ 244.

[42] Award, 22 February 2021, **C-253**, ¶ 246.

[43] Award, 22 February 2021, **C-253**, ¶ 247.

Respondent's expert testimony at the hearing as well as the *Zain FCC Decision* and concluded that "it would have been open to Korek to take the same route as the claimant in *Zain FCC Decision*".[44] In the Tribunal's view, under this scenario it would have been possible for Agility to seek to intervene *vía* IT Ltd (just as it had done before the Administrative Courts).[45] While the Tribunal recognized that it may have been difficult for IT Ltd to bring a contractual claim in civil courts, as it was not a party to the License Agreement, in its view, "this [did not] preclude IT Ltd, or the Claimant for that matter, from bringing a claim for non-contractual harm in the civil courts."[46]

47. Consequently, the Tribunal considered that "Iraqi law offer[ed] an avenue for judicial recourse against the effects of decisions made by the CMC" and thus, found "that the Claimant's second limb of its denial of justice claim cannot stand."[47]

48. Finally, the Tribunal did not find necessary to address the issue of damages, however, it noted that even if the claims had been made out, the issue of damages was not a "straightforward" issue[48] and it expressed "reservations" on the Claimant's proposition for relief, which was contingent on a series of speculative propositions.[49] While adjudicating costs, it considered that "[t]he Respondent overall has prevailed in the present arbitration and succeeded in its argument that the Claimant should be denied the relief it seeks in these proceedings […]. As the Respondent prevailed on the merits and quantum, the Tribunal is of the view that it is reasonable to award the full sum of the total professional fees and administrative costs sought by the Respondent in both the merits and quantum phase".[50]

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[44] Award, 22 February 2021, **C-253**, ¶¶ 248 and 249. The Tribunal also considered the Claimant's expert testimony.

[45] Award, 22 February 2021, **C-253**, ¶ 249.

[46] Award, 22 February 2021, **C-253**, ¶ 250.

[47] Award, 22 February 2021, **C-253**, ¶ 251.

[48] Award, 22 February 2021, **C-253**, ¶ 254.

[49] "With regard to the failure to implement claim, the Claimant seeks a combination of the investment and interest associated with this equity investment and the principal and interest on the Convertible Note. However, this seemingly straightforward proposition is contingent on a series of speculative propositions – the Convertible Note would need to be reinstated by Korek, Korek must then refuse to pay the loan when asked to by Alcazar, and KRG in turn must then refuse to pay the amount owed under the KRG Guarantee when asked to by Alcazar. The Tribunal has reservations about such a basis for a claim for relief." Award, 22 February 2021, **C-253**, ¶ 255.

[50] Award, 22 February 2021, **C-253**, ¶¶ 273 and 275.

IV. ANALYSIS OF THE *AD HOC* COMMITTEE

49. In accordance with Article 52 of the ICSID Convention, we turn now to examine the grounds of annulment put forward by the Applicant, bearing in mind as well the authority vested in committees to annul the Award in its entirety, or any part thereof, as provided by Article 52(3). The Committee will first consider the applicable standard (A) and then turn to the different grounds for annulment raised by the Applicant (B to F).

A. THE APPLICABLE STANDARD

(1) Applicable Legal Standard Under Article 52(1)(b)

a. The Applicant's Position

50. The Applicant submits that excess of powers may include a failure by a tribunal to exercise jurisdiction when such jurisdiction exists.[51] The Applicant relies in this respect on *Vivendi I* and *Malaysian Historical Salvors*, cases in which the respective committees determined that the tribunal had exceeded its powers by failing to exercise jurisdiction and decided to annul,[52] as well as in *Helnan* in which there was a partial annulment.[53]

51. In the Applicants' view, the principle that failing to exercise jurisdiction when it exists constitutes an excess of powers[54] is fully applicable and has been reaffirmed in other cases as well, such as *Orinoco* and *Lucchetti*. It also contends that the ILC's 1958 Model Rules

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[51] Applicant's Memorial, ¶ 96.

[52] "[T]he Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. […] It accordingly annuls the decision of the Tribunal so far as concerns the entirety of the Tucumán claims." *Compañiá de Aguas del Aconquija S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi I***"), **CL-103**, ¶ 115; "The Committee fully appreciates that the ground for annulment set forth in Article 52(1)(b) of the ICSID Convention specifies that 'the Tribunal has manifestly exceeded its powers.' It is its considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it 'manifestly' did so, for these reasons: (a) it altogether failed to take account of and apply the Agreement between Malaysia and the United Kingdom defining 'investment' […] The Committee thus is constrained to annul the Award of the Sole Arbitrator". *Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, **CL-246**, ¶¶ 80 and 81.

[53] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, 14 June 2010, **CL-283**, ¶¶ 46-57.

[54] See also Applicant's Reply, ¶ 20, referring to C. H. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention: A Commentary,* Cambridge University Press, 2009, **RL-107**, p. 947.

of Arbitration, upon which Article 52 of the ICSID Convention is largely based, also recognized an excess of powers as ground of annulment.[55] The Applicant submits that it is not seeking a *de novo* appeal on jurisdiction and distinguishes this case in that the investment was not subject to debate, there was no "meaningful defence to jurisdiction *ratione materiae*" and the Tribunal affirmed it had jurisdiction and then shielded the claims. In consequence, it contends that "if the Tribunal is found to have failed to exercise the powers available to it under the BIT, there can be only one conclusion: it has committed an excess of jurisdiction".[56]

52. Furthermore, it poses that an excess of powers is "manifest" if "it is obvious, self-evident or '*perceived without difficulty*'."[57] In reply to Iraq's arguments on whether a reasoned jurisdictional holding was "tenable", it submits that "[i]n this case it is futile to ask whether the Tribunal's view was 'tenable', because no view was ever expressed."[58] The Applicant distinguishes this case from cases dealing with "a legal controversy that has been the subject of real and legitimate debate" and those in which a "misapplication" of the law is argued to be an excess of power, and posits that "[w]hat the Tribunal *did not do* was to assess whether the independent act of implementing the CMC Order violated the BIT. […] The reason it was never considered is that the Tribunal held that it had no jurisdiction to consider this issue. This omission, glaring in nature, is central to Agility's case on the Implementation Claim, as it gives rise to a manifest excess of powers".[59]

b. The Respondent's Position

53. Iraq contends that a tribunal's decision on the scope of its jurisdiction is not subject to greater scrutiny than a merits finding and that there is a consistent practice by committees

[55] Applicant's Reply, ¶¶ 22 and 23. The Applicant refers as well to *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, **RL-185,** ¶ 59; *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, **CL-289**, ¶ 50 and *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, **CL-280,** ¶ 44.

[56] Applicant's Reply, ¶¶ 25 and 26.

[57] Applicant's Memorial, ¶ 97.

[58] Applicant's Reply, ¶ 28.

[59] Applicant's Reply, ¶¶ 27 and 67.

confirming that annulment committees cannot conduct a *de novo* review of the reasoning underlying a tribunal's jurisdictional decision.[60] According to Iraq, a tribunal has the power "to define the limits of its jurisdiction" and "it does not commit a manifest excess of powers simply by reaching a jurisdictional decision that one party considers to be incorrect".[61]

54. Iraq also submits that "[c]ommittee practice speaks volumes about the vanishingly rare nature of a truly manifest excess of powers on jurisdiction" and the cases relied on by the Applicant are distinguishable from the one at hand and not relevant.[62] Regarding *Vivendi I*, the Respondent submits that the tribunal had indicated first that it had jurisdiction and then declined to exercise it. Regarding *Malaysian Historical Salvors*, it submits that the tribunal failed to apply the provisions of the treaty on the scope of protected investments, and as to *Helnan*, that the tribunal contradicted itself by dismissing a claim based on the fact that local remedies had not been exhausted when neither the relevant treaty nor the ICSID Convention required such exhaustion. [63]

55. The Respondent argues that "[m]inor or inconsequential errors do not undermine the ICSID system's integrity, so should not be annullable"[64] and that Agility's claim "is in reality an attempt to appeal the Tribunal's findings in its […] Decision on Jurisdiction".[65]

56. The Respondent emphasizes that even if an excess of powers exists, it must be "manifest", *i.e.*, "unambiguous" or "unequivocal" and committees have confirmed that there is no manifest excess of powers "where the tribunal's reasoning on jurisdiction is 'tenable'."[66] In

[60] Respondent's Counter-Memorial, ¶ 52.

[61] Respondent's Counter-Memorial, ¶ 52.

[62] Respondent's Counter-Memorial, ¶ 54.

[63] Respondent's Counter-Memorial, ¶ 64.

[64] Respondent's Counter-Memorial, ¶ 57.

[65] Respondent's Counter-Memorial, ¶ 58.

[66] Respondent's Counter-Memorial, ¶ 55. The Respondent relies on *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, **CL-155**, ¶ 100; *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 181; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, **RL-185**, ¶ 59*; Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, 30 July 2021, **RL-192**, ¶ 154.

this regard, it also relies on *Helnan* and points that in that case the committee considered that an *ad hoc* committee "will not annul an award if the Tribunal's disposition is tenable, even if the committee considers that it is incorrect as a matter of law".[67] The Respondent also contends that the excess must be "both 'textually obvious *and substantively serious.*'"[68] In its view, even if the Tribunal had exceeded its powers, it would not have been manifest because there was no causation and no damages, it would have been inconsequential. Thus, it submits that "annulling the Award on a point that makes no difference to the overall outcome […] does not justify exercising the Committee's discretion to annul" and would "erode" the finality of ICSID Awards.[69]

c. The Committee's Analysis of the Legal Standard Under Article 52(1)(b)

57. The Committee begins with the legal standard set forth by Article 52(1)(b). This provision establishes the following:

> Article 52
> "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> […]
>
> (b) that the Tribunal *has manifestly exceeded its powers*;" (emphasis added).

58. According to the text of this provision, this ground of annulment comprises two elements that must be fulfilled: (i) the existence of an excess of powers and (ii) that such excess is "manifest". The Committee understands that "to exceed" its powers is "to go beyond" [70] its

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[67] Respondent's Counter-Memorial, ¶ 64, referring to *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, 14 June 2010, **CL-283**, ¶ 55.

[68] Respondent's Counter-Memorial, ¶ 57. The Respondent relies, among others, on *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, **CL-280**, ¶ 40; *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 98; *Tenaris S.A. & Talta – Trading e Marketing Sociedade Unipessoal LDA. v Bolivarian Republic of Venezuela II,* (*Tenaris II),* ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, **RL-180**, ¶ 74 and *UP and C.D Holding* Decision on Annulment, **RL-193**, ¶ 164.

[69] Respondent's Counter-Memorial, ¶¶ 73 and 74, referring to *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application by Parties for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Respondent for Annulment of the Supplemental Award of October 17, 1990, 17 December 1992, **CL-276**, ¶ 1.20.

[70] "1. to be greater than or superior to; 2. to go beyond a limit set by; 3. to extend outside of". "exceed." *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/exceed. (06 November 2023)

authority or its mandate and that such overreach must be easily noticed in order to be "manifest".[71] Within investment case law, the latter element has been taken to mean "something which is 'plain', 'clear', 'obvious', 'evident' *i.e.* easily understood or recognized by the mind"[72] or "perceived without difficulty".[73]

59. Regarding the first element, and as plainly put in *Soufraki v. United Arab Emirates*, this ground relates to whether a tribunal exceeded the scope of its powers. "[I]t can be said that there is an excess of power if a tribunal acts 'too much'" and "it has also been considered that there is an excess of power if a tribunal acts 'too little'". The "non-exercise of one's full powers […] is as much a disregard of the power as the overstepping of the limits of that power."[74]

60. As to the contours of this ground of annulment, committees have considered that a failure to apply the applicable law can give rise to annulment whereas an erroneous application of law cannot.[75] In *Occidental Petroleum v. Republic of Ecuador*, the tribunal indicated that "[i]n exceptional circumstances […] a gross or egregious error of law could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment" being this a very high threshold.[76] On the other hand, the committee in *Perenco v. Ecuador* understood the limited scope of Article 52(1)(b) to mean that a committee "cannot annul an award based on the fact that it has a different understanding of the facts, interpretation of the law, or appreciation of the evidence from that of the Tribunal," since

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[71] "1. readily perceived by the senses and especially by the sense of sight; 2. easily understood or recognized by the mind: obvious". "manifest". *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/manifest. (06 November 2023)

[72] *Sempra Energy Int'l v. Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, **CL-284**, ¶ 211.

[73] *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, **CL-289**, ¶ 57.

[74] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, **CL-280**, ¶¶ 42 and 43. See also *Compañiá de Aguas del Aconquija S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi I***"), **CL-103**, ¶ 86.

[75] *Sempra Energy Int'l v. Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, **CL-284**, ¶ 205.

[76] *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, **CL-289**, ¶ 56.

this would be equivalent to acting as a court of appeals. In this sense, the committee indicated that: "the Legal Committee of the ICSID Convention confirmed that even a 'manifestly incorrect application of the law' is not a ground for annulment [...] It is not for an *ad hoc* committee to determine whether there was a misapplication or misinterpretation of the law agreed to by the parties or whether such misapplication or misinterpretation was gross or minor".[77]

61. Regarding the first element of Article 52(1)(b), *i.e.* the excess of powers, while the text of this provision does not specifically refer to a failure in the exercise of jurisdiction by a tribunal, the Committee observes that pursuant to Article 25 of the ICSID Convention "[t]he jurisdiction of the Centre *shall extend* to any *legal dispute arising directly* out of an investment, between a Contracting State [...] and a national of another Contracting State [...]".[78] Additionally, Article 42(1) establishes the obligation of tribunals to decide the dispute in accordance with the rules of law agreed by the parties or in their absence, the law of the Contracting State and such rules of international law that may be applicable. Paragraph (2) of this provision clarifies further that tribunals "may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law".

62. In the Committee's view, these provisions establish core elements regarding *dispute resolution* in the ICSID system. If a tribunal were to disregard these fundamental provisions by not exercising jurisdiction despite such jurisdiction existing or, if a tribunal disregarded the application of the law agreed by the parties, such situations could give rise to annulment. This goes in line with the interpretation provided by other *ad hoc* committees that failure to exercise jurisdiction is also a form of "excess of powers".[79] The Committee also notes that, even though the Respondent contests the Applicant's arguments indicating that the Tribunal did examine the matter and rejected the claims on the merits,[80] it refrains from taking a view

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[77] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 96.

[78] Article 25 of the ICSID Convention (Emphasis added).

[79] See *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, **CL-280**, ¶¶ 42 and 43; *Compañiá de Aguas del Aconquija S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi I***"), **CL-103**, ¶ 86.

[80] Respondent's Counter-Memorial, ¶¶ 59, 61.

that a *failure* to exercise jurisdiction, as determined in other investment cases, is not within the purview of this provision.[81] In this sense, the Committee agrees with the Applicant that not exercising jurisdiction over a matter in which a tribunal has such power is a form of "excess of power" that falls within Article 52(1)(b).

63. As to the second element of the provision, the Committee considers that an interpretation according to the Vienna Convention, indicates that such omission (as in the case of an overreach) must be "obvious", "clear" or "perceived without difficulty" in order to be "manifest".[82] Finally, it is important for the Committee to point that it is well aware of the boundaries of its mandate, not only with respect to ruling on errors on the application of the law, but also on not acting as a court of appeal.

(2) Applicable Legal Standard Under Article 52(1)(d)

a. The Applicant's Position

64. The Applicant submits that the legal standard under Article 52(1)(d) requires that there is a fundamental rule of procedure and a serious departure from that rule. Such rules, as identified by several committees include "(i) the equal treatment of the parties; (ii) the right to be heard; (iii) an independent and impartial tribunal; (iv) the treatment of evidence and burden of proof; and (v) deliberations amongst members of the tribunal."[83] As to the "seriousness" of the departure, the Applicant indicates that, while some decisions have required a material effect on the outcome, other committees have adopted a more flexible approach. In this regard, it relies on *TECO v. Guatemala* to show that "an applicant is not required to show positively that it would have won the arbitration or that the result would

[81] The Respondent does not contest that a failure to address a claim by a Tribunal over which it has jurisdiction constitutes an excess of jurisdiction, but rather contends that the Tribunal did address the claim challenged by the Applicant. Respondent's Counter-Memorial, ¶¶ 59-64. The Tribunal also observes that, while the Respondent has qualified these cases as not relevant for the present dispute, it has acknowledged that on three instances committees have annulled decisions due to a tribunal's failure to exercise jurisdiction. See ¶ 54.

[82] *See Sempra Energy Int'l v. Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, **CL-284**, ¶ 211; *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, **CL-289,** ¶ 57.

[83] Applicant's Memorial, ¶ 106. The Applicant refers to *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 120.

have been different", rather the test is whether it "could potentially have affected the award".[84]

b. The Respondent's Position

65. Iraq submits that fundamental rules of procedure are "minimum standards of procedure to be respected as a matter of international law" and those minimum standards are "essential to the integrity of the arbitral process and […] must be observed by all ICSID tribunals."[85] In this regard, the Respondent stresses that Article 52(1)(d) does not allow a review of the substance of an award.[86]

66. As to the "seriousness" of the departure, it indicates that "[a] 'serious' departure is not one that is 'slight', 'negligible', or 'minimal'," and that recent decisions have concluded that "the departure must have 'caused the Tribunal to reach a result *substantially different* from what it would have awarded' to be annullable".[87] In Iraq's view, "[e]ven committees that have applied a looser standard have not lowered that standard to merely whether the issue 'could potentially have affected the award'."[88] In this regard, it submits that the *Perenco* decision does not help Agility as the Applicant "has the burden to demonstrate that there is a distinct possibility that the departure may have *made a difference on a critical issue* of the [t]ribunal's decision."[89]

[84] Applicant's Memorial, ¶ 107. (Emphasis omitted). See *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶¶ 85, 193 and 195.

[85] Respondent's Counter-Memorial, ¶ 107. The Respondent relies on *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, **CL-277**, ¶ 57 and *Pey Casado. v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012 ("***Pey Casado I***"), **CL-286**, ¶ 73.

[86] Respondent's Counter-Memorial, ¶ 107.

[87] Respondent's Counter-Memorial, ¶ 109. The Respondent relies, among others, on *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, **CL-290**, ¶ 45; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, **RL-170**, ¶ 264; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, 1 February 2016, **RL-171**, ¶ 308, *Flughafen Zürich AG and Management and Engineering IDC SA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, 15 April 2019, **RL-183**, ¶ 117.

[88] Respondent's Counter-Memorial, ¶ 109.

[89] (Emphasis added). Respondent's Counter-Memorial, ¶ 109, quoting *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 137.

c. The Committee's Analysis of the Legal Standard Under Article 52(1)(d)

67. The Committee begins with the text of the relevant provision. Article 52(1)(d) establishes the following:

> Article 52
> "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> […]
>
> (d) That there has been a *serious departure* from a *fundamental rule of procedure*;"
> (Emphasis added)

68. This ground of annulment necessarily requires two elements: (i) the existence of a fundamental rule of procedure, and (ii) a "serious" departure from it.

69. As to the first element, the Committee agrees that "[f]undamental rules of procedure are procedural rules that are essential to the integrity of the arbitral process and must be observed by all ICSID tribunals."[90] Such rules have been considered to include: equal treatment of the Parties, the right to be heard, an independent and impartial tribunal, the treatment of evidence and burden of proof, as well as the deliberations among members of the tribunal.[91]

70. Regarding the second element, the text of the provision refers to a "departure". The ordinary meaning attributed to this term is a "divergence".[92] In the Committee's view, such word would indicate a "deviation", in this case from a fundamental rule of procedure. The word "departure" is also qualified, it must be "serious". The Committee observes that among the connotations of this adjective is "of or relating to a matter of importance […] having

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[90] *Pey Casado. v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012 ("***Pey Casado I***"), **CL-286**, ¶ 73.

[91] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 120.

[92] "departure". *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/departure. (06 November 2023). See also "depart", "[…] 2. To turn aside: deviate". *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/departing. (06 November 2023). In turn, "divergence" means "1. a drawing apart; difference, disagreement; 2. a deviation from a course or standard […]". *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/divergence. (06 November 2023).

important or dangerous possible consequences […] excessive or impressive in quality, quantity, extent, or degree".[93]

71. As to the consequences of this departure, the committee in *Occidental Petroleum v. Ecuador* considered that "the violation must have produced a material impact on the award; the applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied."[94] In similar terms, the committee in *Perenco v. Ecuador* considered that for a departure to be serious "it must have deprived the rule of its intended effect"; however, "the Committee need not determine if the outcome of the decision would have been different. Such analysis would be highly speculative […] a breach is serious if the Tribunal's decision would have been *potentially* different had the breach not been committed."[95] On the other hand, the committee in *Wena Hotels v. Egypt* considered that "the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."[96] The Committee notes that these interpretations have certain nuances that differentiate them as to the "effects".

72. The Committee agrees with the *Perenco* committee in that a departure from a fundamental rule of procedure is serious if, *but for* the departure, the decision would have been *potentially* different. This does not necessarily imply that an Applicant must prove with certainty that a specific result would have been achieved, yet the effect from the deviation must be a distinct possibility.

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[93] "serious". *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/serious. (06 November 2023).

[94] *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, **CL-289**, ¶ 62.

[95] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 133. In similar terms see *Pey Casado v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012 ("***Pey Casado I***"), **CL-286**, ¶ 78.

[96] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, **CL-277**, ¶ 58.

(3) Applicable Legal Standard Under Article 52(1)(e)

a. The Applicant's Position

73. The Applicant submits that the obligation to give reasons stems from Article 48(3) of the ICSID Convention requiring an award to "deal with every question submitted to the Tribunal" and "state the reasons upon which it is based", as well as Arbitration Rule 47(1)(i).[97] The Applicant relies on *Pey Casado I* in support of its contention that an award should be annulled under this ground if there is "no express rationale for the conclusions with respect to a pivotal or outcome-determinative point […] whether the lack of rationale is due to a complete absence of reasons or the result of frivolous or contradictory explanations."[98]

74. The Applicant also submits that "annulment can ensue where there are inconsistent, frivolous or contradictory reasons", as well as "insufficient reasons."[99] While the Applicant recognizes that a tribunal is not obliged to address every argument, it contends that a failure to deal with an important issue or question that "might have affected" the tribunal's conclusion could constitute "a failure to state reasons."[100]

75. In this regard, the Applicant relies on *TECO v. Guatemala* to show that a failure to give reasons may result from the failure of a tribunal to observe evidence that has the potential to be relevant for the outcome of the case.[101]

b. The Respondent's Position

76. Iraq submits that the requirement to state reasons is satisfied even if the tribunal made an error of fact or law and this ground of annulment "concerns the 'absence' or 'essential lack'

[97] Applicant's Memorial, ¶ 98.

[98] *Pey Casado. v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012 ("***Pey Casado I***"), **CL-286**, ¶ 86.

[99] Applicant's Memorial, ¶¶ 101-103. The Applicant relies in this regard on *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989 (*MINE v. Guinea)*, **CL-274,** ¶¶ 5.09, 6.107, and *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶ 249.

[100] Applicant's Memorial, ¶ 103.

[101] Applicant's Memorial, ¶ 103.

of *any* reasons."[102] It contends that the reasons provided by the tribunal may be implicit and inferred from the decision and the record. Additionally, it indicates that Article 52(1)(e) does not allow a committee to assess the quality of a tribunal's reasoning. In particular, it alleges that the Applicant is wrong to consider that insufficient reasons can amount to a failure to state reasons, in this sense, it is the Respondent's opinion that such situation would allow the review of the quality of the award, something that has been rejected by *ad hoc* committees and "assessing whether reasons are 'frivolous' is no different from assessing whether they are 'inadequate'", an assessment that "shades easily into an appeal." Iraq has also indicated that a failure to state reasons *must* be "essential to the outcome of the case."[103]

77. In the Respondent's view, annulment will not be warranted under Article 52(1)(e) if the two conditions above mentioned are not clear, *i.e.* that the failure leaves the decision on a particular point "essentially lacking in any expressed rationale" and that such point is "necessary" to the decision.[104]

78. The Respondent argues that "[n]ot every 'gap' in reasoning constitutes a failure to state reasons"[105], that a tribunal does not fail to state reasons "simply because it fails to expressly mention evidence that one party subjectively 'deem[s] to be highly relevant' to its case"[106] and that "reasons can be inferred from the record before the Tribunal."[107]

c. The Committee's Analysis of the Legal Standard Under Article 52(1)(e)

79. Article 52(1)(e) establishes the following:

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[102] Respondent's Counter-Memorial, ¶ 77. The Respondent relies on *AES Summit Generation Limited and AES-Tisza Eromti Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Decision on Annulment, 29 June 2012, **CL-285**, ¶ 17; *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("**Vivendi I**"), **CL-103**, ¶ 64.

[103] Respondent's Counter-Memorial, ¶¶ 78-81. See *Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("**Vivendi I**"), **CL-103**, ¶ 65.

[104] Respondent's Counter-Memorial, ¶ 84.

[105] Respondent's Counter-Memorial, ¶ 78.

[106] Respondent's Counter-Memorial, ¶ 82.

[107] Respondent's Counter-Memorial, ¶ 87.

> Article 52
> "(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> […]
>
> (e) That the award has *failed to state the reasons* on which it is *based.*" (Emphasis added)

80. The text of this provision refers to a "failure". The ordinary meaning of this term is an "omission of occurrence or performance […], lack of success, a falling short: deficiency […]".[108] In this case, in providing the reasons on which the award is based. Regarding the word "based", the Committee observes that such term has a wide range of connotations, such as "the bottom of something considered as its support**:** foundation […]; the fundamental part of something: groundwork, basis […]; root."[109] The Committee understands that this last word conveys the meaning of a "foundation".

81. This ground of annulment finds its roots as well in Article 48(3) of the ICSID Convention which also provides that an award "shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." While Article 52(1)(e) provides no further indication as to what is to be understood by "failure to state reasons", within investment case law this has been understood to concern "a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons […] [p]rovided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point."[110]

82. In *CDC v. Seychelles*, the committee straightforwardly indicated "the more recent practice among *ad hoc* Committees is to apply Article 52(1)(e) in such a manner that the Committee does not intrude into the legal and factual decision-making of the Tribunal […] [it] does not

[108] "failure". *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/failure. (06 November 2023).

[109] "base". *Merriam-Webster.com*. 2023. https://www.merriam-webster.com/dictionary/base. (06 November 2023).

[110] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("**Vivendi *I***"), **CL-103**, ¶ 64.

provide us with the opportunity to opine on whether the Tribunal's analysis was correct or its reasoning persuasive."[111]

83. When referring to this ground of annulment, the committee in *MINE v. Guinea* considered this requirement to be fulfilled as long as "the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law."[112] Such lack of reasons can be the result of frivolous or contradictory explanations.[113]

84. The committee in *Perenco v. Ecuador* not only considered that premises leading to a decision could be "implicit or explicit", but also that "irrelevant or absurd arguments apparently supporting a conclusion do not amount to reasons" and "contradictory reasons could amount to a failure to state reasons […] when two (or more) contradictory premises supporting a conclusion cannot stand together and cannot both be true [and that] such failure must be critical to the Tribunal's decision."[114]

85. Furthermore, in *TECO v. Guatemala* the committee considered that: "insufficiency of reasons can lead to annulment only when a tribunal did provide some explanations for its decision, but these are insufficient from a logical point of view to justify the tribunal's conclusion […] insufficiency of reasons does not warrant annulment if the tribunal did not address every argument, piece of evidence or authority in the record." In the same token, it considered: "'inadequate' reasons may justify annulment only if they cannot logically

[111] *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, **CL-278**, ¶ 70.

[112] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, **CL-274**, ¶ 5.09. In a similar way "as long as reasons have been stated, even if incorrect, unconvincing or non-exhaustive, the award cannot be annulled on this ground […] the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion". *Occidental Petroleum Corp. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, **CL-289**, ¶¶ 64 and 66.

[113] *Pey Casado. v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, 18 December 2012 ("***Pey Casado I***"), **CL-286**, ¶ 86.

[114] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶¶ 166-170.

explain the decision they are purportedly supporting […] 'inadequate' reasons are frivolous reasons, and not incorrect or unconvincing reasons."[115]

86. The Committee agrees that the correctness of reasons is not to be assessed under this standard and, in particular, with the committee in *MINE v. Guinea* that this requirement is satisfied as long as "the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law."[116] In other words, if an award does not enable to follow how the steps taken by a tribunal lead to its conclusion, the requirement to state reasons would not be fulfilled.

B. Ground 1: The Tribunal Manifestly Exceeded its Powers as to the Implementation Claim (52(1)(b))

(1) The Applicant's Position

87. The Applicant argues that the Tribunal treated Iraq's actions as "immune" from scrutiny.[117] In its view, the Tribunal "never exercised the jurisdiction it had to scrutinise Iraq's implementation of the CMC Order in light of the BIT. It never reached that point, having concluded that a '*faithful implementation*' of the CMC Order was outside the jurisdiction of the Tribunal and thus shielded from review."[118] More specifically, it contends that "[i]t improperly failed to ask the most basic of questions – whether the act(s) of implementation (whether faithful or otherwise) violated the protections by then afforded under the BIT."[119] The Applicant submits that "[o]nce the BIT was in force, the State's ability to act to implement the Order was constrained, at international law, by the obligations voluntarily

[115] *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292,** ¶¶ 249 and 250.

[116] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, **CL-274**, ¶ 5.09.

[117] Applicant's Memorial, ¶ 108.

[118] Applicant's Memorial, ¶ 110; See also Applicant's Reply, ¶ 72 and 78.

[119] Applicant's Memorial, ¶ 110. "The mere fact that the Tribunal had no jurisdiction under the BIT in respect of the lawfulness of the CMC Order, because […] that Order pre-dated the BIT entering into force, says nothing about whether the subsequent implementation of that Order (faithfully or otherwise) ***after*** the BIT had entered into force was consistent with the protections then afforded under the BIT." See also ¶ 111. "What the Tribunal ***did not do*** was to assess whether the independent act of implementing the CMC Order violated the BIT." Applicant's Reply, ¶ 67.

assumed by the State in the BIT."[120] Therefore, in its opinion, the inquiry was improperly framed by the Tribunal.[121] In the Applicant's view, although the Tribunal's holding was made in respect of the expropriation claim, it tainted the analysis of all other claims.[122]

88. The annullable error invoked by the Applicant is that "[t]he Award thus contains the kind of excess of jurisdiction – a failure to exercise jurisdiction actually available to the Tribunal under the BIT."[123] In its Reply, Agility submits that since the Tribunal "*did* possess jurisdiction to scrutinise Iraq's post-February 2015 conduct, annulment of the Award must inevitably follow" as the result of such excess went to "a core issue."[124]

89. The second annullable error invoked by the Applicant is that by failing to investigate the corruption allegations, the Tribunal also failed to exercise jurisdiction available to it, *i.e.* to apply "an inherent power (and duty) to examine corruption."[125] Agility contends that it adduced "a substantial amount of evidence […] in support of its corruption allegations",[126] that such evidence revealed unexplained real estate purchases by and for the benefit of two key CMC officials (one of whom was later dismissed from his position), that the impact of these allegations on the implementation claim was "unscrutinised" and that "[t]he Award ignored this issue outright, without any discernible basis or explanation."[127] The Applicant contends that "[n]othing in the Award actually holds that the corruption allegations […] were beyond the Tribunal's jurisdiction."[128]

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[120] Applicant's Memorial, ¶ 112.

[121] "The enquiry was not some binary choice between faithful and unfaithful implementation of the CMC Order, but (regardless of how the CMC Order was construed) whether implementation of that Order after the coming into force of the BIT was consistent with the obligations then binding upon Iraq under that treaty." Applicant's Memorial, ¶ 113.

[122] Applicant's Reply, ¶ 59.

[123] Applicant's Memorial, ¶ 118 (comparing this excess of jurisdiction to the one that led to annulment in *Vivendi I* and *Malaysian Historical Salvors*). See also Applicant's Reply, ¶¶ 4 a), 55-63, 70, 79, 80.

[124] Applicant's Reply, ¶ 68. The Applicant relies on *Vivendi I, Occidental, Fraport* and *Sempra* to show that when there is annullable error, "the usual course is to annul the award". See ¶ 53.

[125] Applicant's Reply, ¶ 4 b). "The failure even to address these allegations, and the seeming assumption that they were jurisdictionally immune from review, is a second, and separate, breach of Article 52(1)(b)." See ¶ 100.

[126] Applicant's Reply, ¶ 98. See also Applicant's Memorial, ¶¶ 57 and 58.

[127] Applicant's Reply, ¶¶ 99 and 110.

[128] Applicant's Reply, ¶ 103.

90. The Applicant maintains that it does not "seek[] to 'appeal' the merits of the Award or to re-argue evidence; rather, [it] has presented straightforward grounds for annulment."[129]

(2) The Respondent's Position

91. The Respondent argues that the Applicant's "claim that the Tribunal manifestly exceeded its powers by 'adopting a restrictive approach to jurisdiction over the Implementation Claim' […] is in reality an attempt to appeal the Tribunal's findings."[130] In Respondent's opinion, Agility "recasts its case" and ignores both the findings in the Award as well as in the Decision on Jurisdiction.[131] According to the Respondent, "the only claims that were within the Tribunal's jurisdiction to decide were Agility's derivative 'implementation' allegations that the Republic breached the Treaty by failing to implement the CMC Order in the specific manner Agility claimed the Order itself required."[132]

92. The Respondent contends that the Tribunal did examine "at length" and "extensively considered" whether the implementation of the CMC Order breached the 2015 BIT,[133] however, it rejected all of the claims "on their merits." It indicates that the Tribunal concluded that "nothing in the issuance of the KCR Administrative Order constituted an independent 2015 BIT breach, whether of expropriation, fair and equitable treatment, national treatment, full protection and security, impairment, or discrimination; that there was no breach of due process in enforcing the CMC Order […] that the Republic did not frustrate Agility's legitimate expectations by enforcing the CMC Order without first reinstating the KRG Guarantee […] that the Republic's failure to respond to letters sent after Agility had threatened proceedings was '[in]sufficient to make out a claim for breach

[129] Applicant's Reply, ¶ 69.

[130] Respondent's Counter-Memorial, ¶ 58.

[131] Respondent's Rejoinder, ¶ 9. "[…] [T]he Tribunal found that the dispute in which Agility claimed the CMC Order was unlawful and should not be implemented at all fell outside its temporal jurisdiction." See ¶ 12.

[132] "It was on that basis that Agility argued to the Tribunal that the CMC Order allegedly "required" Iraq to take certain specific steps, for example: reducing Korek's share capital before reregistering the shares (even though the CMC Order said nothing about that) by paying out on the KRG Guarantee (even though Agility had relinquished it in 2011 and the CMC had no purview over Korek's financing) and imposing 'negative consequences' against Agility's fellow shareholders to give Agility leverage in its ongoing contractual dispute with them." Respondent's Rejoinder, ¶ 14.

[133] Respondent's Counter-Memorial, ¶ 59. "[T]he Tribunal extensively considered, a variety of claims relating to the *manner* in which the CMC Order was implemented". See ¶ 60.

of the FET standard;' and that the Republic had not violated the Japan-Iraq BIT's umbrella clause by repudiating the KRG Guarantee because, among other things, Agility voluntarily relinquished that Guarantee several years earlier."[134] According to it, "[t]he CMC Order required the shares in Korek to be reregistered in the names of their previous owners; the CMC and the Ministry of Justice directed the KCR to do so back in 2014; and that is exactly what the KCR subsequently did, albeit after the entry into force of the 2015 BIT."[135]

93. The Respondent also argues that "the Tribunal's findings on 'whether the subsequent implementation of [the CMC] Order (faithfully or otherwise) after the BIT had entered into force was consistent with the protections then afforded under the BIT' account for over one third of the Award—in addition to 13 paragraphs of the Decision on Jurisdiction that preceded it", that "[a] tribunal does not exceed its powers by deciding a matter submitted to it, even if one Party thinks it did so incorrectly"[136] and that the Committee "*cannot*— decide whether the Tribunal's jurisdictional analysis was correct, because Article 52 forbids it from sitting as a court of appeal to agree or disagree with the Tribunal's jurisdictional holding."[137]

94. It also alleges that the Tribunal's conclusion is not (and Agility has not demonstrated it is) "untenable", therefore any excess of powers would not have been manifest.[138]

[134] Respondent's Counter-Memorial, ¶ 61. See also Respondent's Rejoinder, ¶ 7.

[135] Respondent's Counter-Memorial, ¶ 66.

[136] Respondent's Counter-Memorial, ¶¶ 62, 63 and fn 156. The Respondent relies on *Perenco* ("Under the principle of *compétence de la compétence*, a tribunal is the judge of its own competence and has the power to determine whether it has jurisdiction under the parties' arbitration agreement. ICSID annulment proceedings do not avail for a *de novo* review of jurisdiction. That would be tantamount to an appeal.") and *Blue Bank* ("Although the *Kompetenz-Kompetenz* principle does not exempt the Tribunal's decision on its own jurisdiction from being reviewed, and the alleged duty of deference cannot be understood as a limitation in that sense either, the Committee is of the opinion that, to the extent that the decision on jurisdiction is reasonable, and furthermore, considering the limited nature of the annulment remedy, the Committee cannot make a *de novo* review of the Tribunal's decision on jurisdiction.") (Unofficial translation). *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 94 and *Blue Bank International & Trust Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on Annulment, 22 June 2020, **RL-188**, ¶ 182. See also *UP and C.D Holding Internationale (formerly Le Chèque Déjeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Annulment, 11 August 2021, **RL-193**, ¶ 166.

[137] Respondent's Rejoinder, ¶ 22.

[138] Respondent's Counter-Memorial, ¶¶ 64-66, referring to *Helnan*: "[…] the excess must be obvious or clear. An *ad hoc* committee will not annul an award if the Tribunal's disposition is tenable, even if the committee considers that it is incorrect as a matter of law." *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, 14 June 2010, **CL-283**, ¶ 55.

95. Furthermore, in the Respondent's view, Agility's implementation claims "were not outcome-determinative because those claims also failed for lack of causation and a failure of proof on damages"[139] and "annulling the Award on a point that makes no difference to the overall outcome 'would unwarrantably erode the binding force and finality of ICSID Awards'."[140]

96. As to the issue of corruption, it maintains that Agility did not advance any allegations "impacting the 'implementation of the CMC Order.'"[141] The Respondent also submits that committees consistently refuse to second-guess tribunals' determination of what is relevant evidence, and that Agility has not explained how a deficiency in the Tribunal's treatment of its collusion allegations could justify exercising the discretion to annul the award.[142]

(3) Whether the Tribunal Manifestly Exceeded its Powers in the Treatment of the Implementation Claim – The Committee's Analysis

97. The Committee recalls that the Tribunal began by indicating: "the only question [] is whether the *manner* in which the Respondent has implemented the CMC Order *violates the 2015 BIT*."[143] In the Respondent's view, this was "the only question that the Tribunal reviewed on the merits."[144] Then, the Tribunal set out to examine the Expropriation claim and stated two things: (i) any claims of expropriation resulting from the CMC Order occurred prior to 2015 and, thus, fell outside the scope of jurisdiction, and (ii) Claimant needs to show an "*independently actionable expropriation that does not flow from the alleged unlawfulness of the CMC Order*."[145]

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[139] Respondent's Counter-Memorial, ¶ 69. See also ¶¶ 70-73. Respondent's Rejoinder, ¶¶ 24-27.

[140] Respondent's Counter-Memorial, ¶ 74; Respondent's Rejoinder, ¶ 28.

[141] Respondent's Counter-Memorial, ¶ 68. "[A]ll of Agility's unsubstantiated and untested corruption allegations related to how the CMC Order had allegedly been 'procured'—not how it was subsequently implemented—and challenged the lawfulness of the CMC Order, a dispute that had arisen before 4 February 2015 and thus fell outside the Tribunal's temporal jurisdiction." See also Respondent's Rejoinder, ¶¶ 67 and 68.

[142] See also Respondent's Rejoinder, ¶¶ 74 and 77.

[143] Award, 22 February 2021, **C-253**, ¶ 98. (Emphasis added)

[144] Respondent's Counter-Memorial, ¶ 59.

[145] Award, 22 February 2021, **C-253**, ¶ 113. (Emphasis added). In its Decision on Jurisdiction, the Tribunal indicated "[…] the Tribunal concludes that its jurisdiction under Article 10 of the 2015 BIT is limited to disputes which arose

98. The Tribunal approached its analysis of whether there was an independently actionable expropriation by analyzing the text of both the CMC Order and the KCR Decree. The CMC Order established in the relevant part:

> "We inform you that, after long and deep study of the subject of partnership between your company and the foreign French company France Telecom/Agility, studying its different legal and factual aspects, and in respect of the authority granted to our Commission by virtue of the terms of the meeting which was held on 21/4/2011 between our Commission and your company, and based upon the regulatory role exercised by our Commission within the framework of verifying that the suspension conditions have been met, upon which the partnership was based, and to determine the appropriate legal consequences, including the revocation of the mentioned partnership in light of the fact that the suspension conditions have not been collectively met, the Board of Commissioners decided, in its session held on 24/6/2014, in report No. 19/2014, *to consider the approval of our Commission based upon the principle of partnership dated 29/5/2011 as void and null* as the suspension conditions, to which you were committed to fully carry out, have not been met by virtue of the report of the meeting dated 21/4/2011 and by virtue of your repetitive letters.
>
> Thus, we inform you by virtue of this letter of the *final decision of our Commission by considering the partnership, desired between you and the foreign French company France Telecom/Agility, as void, null and invalid* because the related suspension conditions have not been met, and for lack of evidence thereof without any legal or material effects of any type whatsoever. And we warn you in this respect to *immediately proceed*, within a period of no later than 15 days from the date of this letter, *to reinstate the status as it was on 13/3/2011, take the procedures to revoke and terminate any contracts assigning shares in your company's capital that were concluded after 13/3/2011, prove this revocation in the legal entries with the companies registrar and provide our Commission with a new statement proving the return of shares to their original owners.* Otherwise, your company shall bear all the legal consequences and necessary procedures will be taken against your company to compel you to obey and execute the content of the decision mentioned above."[146]

99. It is uncontested that the determination of the legality or illegality of this Order was outside the Tribunal's jurisdiction. The Tribunal recognized this when stating "the Tribunal has no jurisdiction over the *lawfulness* of the CMC Order, the Tribunal similarly has no jurisdiction

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only after the entry into force of the 2015 BIT" and "However, the alleged expropriation occurred prior to the 2015 BIT at the time of the CMC Order." Decision on Jurisdiction, ¶¶ 156, 243.

[146] CMC Order, **C-037**; Award, 22 February 2021, **C-253**, ¶ 118. (Emphasis added)

over any expropriation claims that arise solely as a result of a faithful implementation of the CMC Order."[147]

100. The KCR Decree provided:

> "1. Order was issued to cancel the administrative order no. (2959), dated 07/20/2011
> 2. It was ordered to *restore the company's shares to the period before 03/13/2011*.
>
> […]
>
> 7. The percentages of shares were changed in the following manner:
> Sirwan Saber Mostafa: **75 percent**
> Chavshin Hassan Chavshin: **20 percent**
> Jaghshi Hamou Mostafa: **5 percent**."[148]

101. The Committee observes that before analyzing the KCR Decree, the Tribunal established a legal test to determine whether there was an "independently actionable expropriation *not flowing from the unlawfulness* of the CMC Order" and framed it in the following terms: "Claimant needs to show that the KCR Decree was *not a faithful implementation of the CMC Order*."[149] The Tribunal then found that: "there is no *material difference* between *what was ordered under the CMC Order and what was implemented under the KCR Decree*. Consequently, the Tribunal is of the view that the *Claimant's expropriation claim does not succeed.*"[150]

102. The Applicant takes issue not only with this approach but also with the conclusion reached based on its application.

103. With respect to the approach, the Applicant alleges that the Tribunal's "enquiry was not some binary choice between faithful and unfaithful implementation of the CMC Order, but (regardless of how the CMC Order was construed) whether implementation of that Order

[147] Award, 22 February 2021, **C-253**, ¶ 145. (Emphasis added)

[148] KCR Decree, **R-0120 ENG** and **C-102**, (Emphasis added); Award, 22 February 2021, **C-253**, ¶ 146. Through the referred Order 2959, 100% of Korek's shares were registered to the Company IH. In turn, IH was held indirectly on one hand by Agility and Orange and on the other, by Iraqi shareholders. See Applicant's Memorial, ¶ 31.

[149] Award, 22 February 2021, **C-253**, ¶ 145. (Emphasis added)

[150] Award, 22 February 2021, **C-253**, ¶ 149. (Emphasis added)

after coming into force of the BIT was consistent with the obligations then binding upon Iraq under that treaty."[151] During the Annulment hearing, the Respondent indicated that the Tribunal's approach derived from the manner in which Agility pleaded its case.[152]

104. However, as stated by the Respondent, "Agility itself argued that its claims fell within the Tribunal's jurisdiction only because they *created a new, independent dispute about the manner in which the Republic implemented the CMC Order*, and only because Agility was no longer challenging the decision to implement it."[153] This is also consistent with what the Applicant argued before the Tribunal which was that "Iraq's obstruction of the CMC Order's implementation is a *distinct breach* from any dispute over the CMC Order's legality because implementation presumes the Order's legality" and "[e]ven assuming the CMC Order was lawful (which it was not), that it was not procured by corruption between the Iraqi Shareholders and two of the most senior officials of the CMC (which it was), and that it was consistent with both Iraqi law and international law for Agility to be foreclosed from challenging the validity of the CMC Order (which it was not), *it is the manner in which Respondent has implemented the CMC Order— partially and unlawfully—that is a direct expropriation of Claimant's investment (as well as a breach of other Treaty obligations).* It was incumbent on Iraq to implement the CMC Order both properly and completely if it was going to do so at all. But it did not."[154] Thus, rather than a dispute on whether the CMC Order had been implemented faithfully (a term used by the Tribunal), it was a dispute about

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[151] Applicant's Memorial, ¶ 113.

[152] "[…] this failure to implement dispute 'presumed that the CMC Order is valid'. Thus, any decision to implement the CMC Order by necessary extension must be presumed valid. […] Agility's claims all presumed that it should have been implemented; in fact, the very premise of Agility's claims was the idea the Republic breached the Treaty by failing to implement the CMC Order […] Agility has spent a lot of time complaining about how the Tribunal decided the failure to implement claims within this faithful implementation framework, as if that was wrong. It wasn't wrong. That's how Agility argued the case." Hearing Transcript (Annulment), Day 1, p. 102 (15-18); p. 105 (10-14); p. 109 (1-2). (Emphasis added)

The Tribunal notes that Agility pled in the arbitration that there were three disputes that arose after the BIT's entry into force, that such breaches were different from the dispute regarding the legality of the CMC Order and were result of the failure to implement the CMC Order. Claimant's Observations on Request for Bifurcation, 17 September 2018, **C-205**, ¶¶ 19, 22, 26, 48. After the Decision on Jurisdiction, Agility pled as well that there was a partial and improper implementation and that even assuming the CMC Order was lawful, that manner of implementation was a direct expropriation of its investment. Claimant's Reply on the Merits, 17 July 2020, **C-217**, ¶¶ 108, 125, 126.

[153] Respondent's Rejoinder, ¶ 17. See also ¶¶ 13 and 14.

[154] Claimant's Counter-Memorial on Preliminary Objections *Ratione Temporis*, 10 January 2019, **C-207**, ¶ 96. (Emphasis added). Claimant's Reply on the Merits, 17 July 2020, **C-217**, ¶ 126. See also, ¶¶ 125, 129-132.

the *manner*, i.e., the way in which it was implemented and whether that was consistent with the 2015 BIT. The Committee fails to see how a claim on the consistency of the manner of implementation of an order (with respect to a particular set of obligations acquired) would amount to a claim on whether the implementation was faithful or not.

105. First and foremost, it is difficult to grapple with the Tribunal's analysis when no definition or clarification is provided with respect to "proper interpretation" or "faithful implementation." Particularly since this is the main element in the Tribunal's approach.

106. With respect to the conclusion and as a result of the approach, the Applicant contends that the Tribunal seemed "to have adopted […] Iraq's arguments: (i) that '*no substance*' should be given to the '*intervening five years*' between the issuance of the CMC Order in 2014 and the KCR Decree in 2019 (despite the fact that the BIT had entered into force during that time); and (ii) once the CMC Order was issued, 'the Republic [of Iraq] wasn't concerned with what should have happened'."[155] At the outset, the Committee notes that although the Tribunal began the section on "Expropriation" by establishing the relevant provision of the BIT, no standard or legal test for determining compliance with that provision was developed and, more importantly, of why the KCR Decree did not violate the BIT.

107. While it is not for us to opine on whether we consider the approach taken by the Tribunal appropriate or not, the approach had the consequence of focusing its analysis exclusively on the "proper interpretation" of the CMC Order and disregarding the relevant inquiry, which had initially been framed as "whether the manner in which the Respondent has implemented the CMC Order violates the 2015 BIT."[156]

108. This is clear from the outset of the Tribunal's analysis: "[t]o determine whether the issuance of the KCR Decree can constitute an independently actionable expropriation separate from the CMC Order, the Tribunal first has to determine what the CMC Order, when properly interpreted, required."[157] The approach adopted by the Tribunal was the

[155] Applicant's Memorial, ¶ 116.

[156] Award, 22 February 2021, **C-253**, ¶ 98.

[157] Award, 22 February 2021, **C-253**, ¶ 115.

result of the jurisdictional finding that the dispute which arose concerning the lawfulness of the CMC Order was outside the scope of its jurisdiction, yet the Tribunal fails to explain why the "proper interpretation" of a measure which was outside the scope of its jurisdiction, would assist the Tribunal in determining whether the "*manner*" i.e. a way to proceed or act, in which the relevant measure (issued by a different authority in a subsequent time) was implemented would be consistent with the BIT. Something that the Committee also observes is that, in its Decision on Jurisdiction, the Tribunal had stated regarding the "new dispute" (i.e. the decision by the KCR regarding the registry of shares) that "[t]he Tribunal can see that this new dispute would relate to some of the claims raised by the Claimant. However, the Tribunal's decision on jurisdiction can only be made on the basis of claims raised by the Claimant in its Memorial. If the Claimant intends to pursue a new claim arising from these new facts, it will have to plead the claim properly. Until the Claimant does so, the Tribunal is constrained to limit its decision to the matters that are properly before it at present. The Tribunal therefore expresses no view over whether it has jurisdiction over this new issue."[158]

109. The Tribunal seemed to equate the measure at issue (the KCR Decree) with the CMC Order, without explaining why the jurisdictional preclusion of the latter (the CMC Order) would extend to the former. Once it determined what the "proper interpretation" of the CMC Order was, the Tribunal took the view that there was no "material difference between what was ordered under the CMC Order and what was implemented under the KCR Decree",[159] and thus, that there was no need to examine the consistency of the KCR Decree with the BIT. This was essentially a *de facto* jurisdictional ruling as to the KCR Decree since ultimately it did not conduct an analysis on whether that measure breached the provisions of the 2015 BIT. The Tribunal had in fact indicated "[a]s the Tribunal has no jurisdiction over the lawfulness of the CMC Order, *the Tribunal similarly has no jurisdiction over any*

[158] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶ 259.

[159] Award, 22 February 2021, **C-253**, ¶ 149.

expropriation claims that arise solely as a result of a faithful implementation of the CMC Order."[160]

110. The conclusion reached by the Tribunal was based on the text of the KCR Decree in relation to the KCR Order from 2011.[161] However, there is no examination, no discussion of its content but a sole conclusion on the effect of one aspect of the KCR Decree related to the reversion of the shares.[162] From that conclusion the Tribunal made an overall extrapolation that "there is no material difference" between the CMC Order (another measure whose lawfulness was outside the scope of jurisdiction) and the KCR Decree (the measure at issue).[163] Additionally, there is no explanation as to what the Tribunal understood as "material difference." This is particularly relevant since the analysis provided by the Tribunal on the measure at issue is so limited.

111. The Committee does not lose sight of the fact that the CMC Order was outside of the Tribunal's jurisdiction because it was issued before the BIT entered into force. There is no finding of consistency or inconsistency of the CMC Order with the BIT and that was not the issue. Thus, even if both measures were identical, there is no explanation as to why a measure that was clearly under its purview (the KCR Decree) and issued by a different authority would be tainted by the same jurisdictional fault. As pointed out by the Applicant, "[w]hat the Tribunal did not do was to assess whether the independent act of implementing the CMC Order violated the BIT."[164] In this regard, the Committee cannot discern why an ultimate finding that the KCR Decree was a "faithful" implementation of the CMC Order would preclude the Tribunal from addressing or disposing of the relevant inquiry already identified, i.e. "whether the *manner* in which the Respondent *has implemented* the CMC Order violate[d] the 2015 BIT."[165] The only possible explanation on the Tribunal's jurisdictional approach with respect to the KCR Decree is that once it found that there was

[160] Award, 22 February 2021, **C-253**, ¶ 145. (Emphasis added)

[161] Award, 22 February 2021, **C-253**, ¶¶ 146-148.

[162] Paragraph 148 of the Award begins with: "[i]t is clear from the above…".

[163] Award, 22 February 2021, **C-253**, ¶¶ 148-149.

[164] Applicant's Reply, ¶ 67.

[165] Award, 22 February 2021, **C-253**, ¶ 98. (Emphasis added)

"no material difference" between the measure outside of its scope of jurisdiction and the Decree, it equated them and extended the jurisdictional decision to the latter.

112. The Applicant submits that "the Tribunal fell into manifest excess of jurisdiction because it never analyzed whether Iraq's actions, in implementing the CMC Order and enacting the KCR Decree, violated the BIT's substantive protections, but instead treated them as jurisdictionally immune from scrutiny."[166] As already stated, there is no analysis under the Tribunal's own interpretation, as to how the "proper interpretation" of the CMC Order necessarily led to a conclusion that the measure at issue would be *tainted* by the same jurisdictional impediment that the CMC Order.

113. Once the Tribunal found no "material difference", it indicated that the expropriation claim did not succeed. Thus, in effect, the analysis stopped there. The Tribunal failed to exercise jurisdiction over a measure for which it clearly had jurisdiction; it did not answer whether the *manner* in which the Respondent *had implemented* the CMC Order violated the BIT. What is apparent from the Award, is that the Tribunal analyzed whether the implementation was consistent with the CMC Order whose lawfulness determination was beyond its jurisdiction, but the lawfulness, the consistency of the KCR Decree towards the BIT was not examined at all. In this regard, the Committee agrees that "[t]his omission, glaring in nature, is central to Agility's case on the Implementation Claim".[167]

114. When analyzing an excess of power on jurisdiction *ratione personae*, *materiae* and *voluntatis*, the committee in *Soufraki* mentioned: "this means also, as far as a question posed to the tribunal is concerned, that a manifest excess of power would consist in answering some other question not raised by the parties, or in answering only a part of a question in fact raised by the parties."[168] In *Vivendi*, the committee stated:

> "It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to

[166] Applicant's Reply, ¶ 70.

[167] Applicant's Reply, ¶ 67.

[168] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, **CL-280**, ¶ 44.

> exercise a jurisdiction which it possesses under those instruments. *One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power*. Subject to that qualification, *however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b).*
>
> No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal *and that all questions submitted to a tribunal are expressly or implicitly dealt with.*"[169]

115. In this regard, by focusing solely on the "expropriation claims that arise solely as a result of a faithful implementation of the CMC Order," the Tribunal failed to address or scrutinize the way in which the CMC Order was implemented by Iraq and thus, committed an excess of powers.

116. As to whether the excess is "manifest", the Committee recalls that in the Applicant's view, manifest is "obvious" or "self-evident".[170] The Applicant has alleged that there was "no scrutiny by the Tribunal of the consistency of the implementation of a narrowly construed CMC Order with the terms of the BIT",[171] that "the excess in this case was manifest", that "it is futile to ask whether the Tribunal's view was 'tenable', because no view was ever expressed" and that although "the Tribunal in this case had already ruled on Iraq's temporal objections and found that the Implementation Claim and Denial of Justice Claim were within its jurisdiction", "the Award does not contain any reasoned holding as to why the implementation of the CMC Order was shielded from review […]."[172] The Respondent has considered "unambiguous" to be a synonym of "manifest", that an excess of powers is not

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[169] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi I***"), **CL-103**, ¶¶ 86 and 87. (Emphasis added)

[170] Applicant's Memorial, ¶ 97.

[171] Applicant's Memorial, ¶ 115. "To borrow the words of the *Malaysian Historical Salvors ad hoc* committee, a failure to '*consider, let alone apply*', the terms of a binding treaty is '*a gross error that [gives] rise to a manifest failure to exercise jurisdiction*'." See, ¶ 118, referring to *Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, **CL-246**, ¶ 74.

[172] Applicant's Reply, ¶¶ 26, 28, 30. (Emphasis omitted)

manifest if the reasoning is "tenable" and that the excess must be "textually obvious *and substantively serious*".[173]

117. The Committee finds that the omission to examine the consistency of the implementation of the CMC Order with the BIT is evident and easily identifiable from a plain reading of the Award. In this sense, it is textually obvious. Moreover, it considers it to be substantively serious as it was meant to address the "only question before the Tribunal", *i.e.,* "whether the manner in which the Respondent […] implemented the CMC Order violate[ed] the 2015 BIT".[174] Thus, such excess of powers is "manifest" in the sense of Article 52(1)(b) of the ICSID Convention.

118. The Committee considers that this finding is reinforced by the fact that, not exercising jurisdiction over the matter of consistency with the BIT in terms of the expropriation claims had also rippling effects on the other claims raised by Agility, which ultimately rendered all of them unresolved.[175]

> "In light of the Tribunal's decision to reject the broad interpretation of the CMC Order proposed by the Claimant, the portions of the Claimant's case that the FET standard was breached, because the Respondent improperly implemented the CMC Order (based on that same broad interpretation), cannot be made out."[176]
>
> "In view of the Tribunal's finding that the Respondent's implementation of the CMC Order was neither partial or improper, the Tribunal does not find it necessary to address the Claimants' claims on these separate grounds, given that these claims share the same factual foundation which the Tribunal has already rejected, namely, that the CMC Order required the Respondent to reinstate the *status quo* as of 13 March 2011 in every aspect.
>
> To the extent that the Claimant's national treatment protection claim appears to be based on the argument that it was arbitrary and discriminatory for the Respondent to order that Korek's shares be transferred to the Iraqi Shareholders "for free" under the CMC Order, such an argument inevitably deals with the merits of the CMC

[173] Respondent's Counter-Memorial, ¶¶ 55 and 57.

[174] Award, 22 February 2021, **C-253**, ¶ 98.

[175] "[W]hilst it is rejected that the Tribunal's failure to state reasons in respect of its assessment of the expropriation claim needed to have an impact on the remainder of Agility's implementation-related claims to be annullable under Article 52(1)(e), it is nonetheless true that this failure did have a ripple effect in the Award." Applicant's Reply, ¶ 88.

[176] Award, 22 February 2021, **C-253**, ¶ 163.

Order, which is an issue that does not fall under the scope of the Tribunal's jurisdiction."[177]

119. In consequence, the Committee finds that the Tribunal did ultimately shield the manner in which the CMC Order was implemented from review as to the consistency with any provision of the BIT alleged by the Applicant and in doing so committed an annullable error by manifestly exceeding its powers as provided by Article 52(1)(b) of the ICSID Convention. In this regard, the Committee recalls that under Article 52(3) of this instrument it shall "have the authority to annul the award or any part thereof"[178] and that, in this case, the error seemed to materially affect the outcome as to the central question to be answered.

(4) Whether the Tribunal Exceeded its Powers by Failing to Exercise Jurisdiction over the Corruption Allegations – The Committee's Analysis

120. Regarding the corruption allegations put forward by Agility pertaining to a bribery scheme involving two key CMC officials, unexplained real estate purchases and the dismissal of one of those officials due to investigation proceedings,[179] the Committee observes that the Award indeed makes no mention of the allegations raised by the Applicant. At the outset, the Committee agrees with the statement made in *Glencore v. Colombia* that "*corruption is morally odious*."[180] It is also this Committee's view that a tribunal should accord the appropriate seriousness and importance to an allegation of this kind. However, while a

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[177] Award, 22 February 2021, **C-253**, ¶¶ 175 and 176.

[178] Both Parties have alluded to the committees' discretion to annul awards under the ICSID Convention. See Respondent's Counter-Memorial, ¶ 50; Respondent's Rejoinder, ¶ 28; Applicant's Memorial, ¶ 95 and Applicant's Reply, fn. 84. "The plain wording of Art. 52(3) provides that a committee '*shall have the authority to annul the award*'. It does not say '*shall annul the award*'. This suggests that a committee has '*the authority*' to determine whether or not to annul an award based upon its discretion. The discretion of committees is well-established. […] The Committee agrees that the discretion should be subject to reasonable limits and that various factors should be taken into consideration when exercising this discretion. As listed in *Pey Casado v. Chile II*, factors to be considered include '*the gravity of the circumstances which constitute the ground for annulment*', and, '*whether they had – or could have had – a material effect upon the outcome of the case*'. *CEAC v. Montenegro* also cites (1) '*the importance of the finality of the award*' and (2) '*the overall question of fairness to both Parties'*." *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, **RL-195**, ¶¶ 498, 499.

[179] Applicant's Memorial, ¶¶ 57 and 58; Applicant's Reply, ¶ 98.

[180] *Glencore International AG & CI Prodeco Sav. Republic of Colombia,* ICSID Case No. ARB/16/6, Decision on Annulment dated 22 September 2021, (*Glencore v. Colombia (Annulment)),* **CL-300**, ¶ 360.

tribunal should certainly not shy away from addressing allegations on corruption, it is not obliged to assign a fixed or predetermined weight to such evidence.

121. We recall that this ground of annulment requires that there is an excess of powers (whether in the form of going beyond what is required or of not exercising the powers inherent to the tribunal), and that it must be "manifest", *i.e.* clear, obvious. The Committee notes that, while the Award makes no mention of these allegations, the Decision on Jurisdiction contains the Tribunal's reasoning on the collusion "dispute" as advanced by Agility in light of the jurisdictional restriction towards the events prior to the BIT entering into force:

> "First, the Claimant has not produced any authority in support of its proposition that a dispute arises only at the time of the discovery of additional facts that shed light on the nature or extent of a dispute. Such authority would have been of assistance to the Tribunal but without it, the precise legal basis for such an argument remains unclear.
>
> Second, even if the Tribunal were to accept such a proposition, there is no evidence before the Tribunal regarding what elements of the collusion were known (or unknown) to the Claimant prior to the 2015 BIT's entry into force. This lack of clarity makes it difficult for the Tribunal to conclude that all the elements of the collusion did not exist prior to the entry into force of the 2015 BIT.
>
> Third, the essence of the claim is that the CMC and the Iraqi Shareholders colluded to cause the expropriation of the Claimant's assets. However, the alleged expropriation occurred prior to the 2015 BIT at the time of the CMC Order. In that sense, the collusion claim adds nothing new to the expropriation claim, other than helping to explain the motivation of the alleged expropriation. In other words, the collusion "dispute" is not actually a new dispute; at best, information about the alleged collusion is simply an explanation for why the dispute concerning expropriation arose in 2014."[181]

122. In the Committee's view, the first element required to succeed in this ground of annulment, *i.e.* an excess of powers, has not been met. The Tribunal did not fail to exercise its jurisdiction on this issue, rather, it considered that due to the connection between these allegations and the CMC Order (which was out of the jurisdictional scope), they were not relevant. The Applicant's annulment submissions reinforce this point when indicating the content of the evidence. For example, it mentions that the unexplained real estate purchases

[181] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶¶ 241-243.

were made "by and for the benefit of [] two key CMC officials" and their relatives "around the time of the CMC Order".[182] The Applicant refers to a scheme of bribery involving those officials and Korek in 2013 and 2014; it mentions the purchase of properties during that time, as well as in 2016, the actions by the Iraqi Parliament in 2017 to dismiss one of those officials as Director General of the CMC on the basis of an investigation proceeding and later indicate that the same year a formal complaint was brought.[183] The Committee agrees with the Applicant that these allegations raise "red flags", however, they raise red flags towards a measure that was outside the scope of inquiry.

123. The Applicant argues that "[i]f […] the CMC Order was the product of corruption before February 2015, it is myopic in the extreme to suppose that this was irrelevant to the question of how the CMC Order should be implemented."[184] This may well be true, however, the Committee fails to identify in Agility's arguments how those red flags "connect" to the KCR Decree, a measure enacted by a different authority in subsequent years to implement the CMC Order. In this regard, while the Applicant has made factual allegations related to corruption, the Committee considers that it failed to present a legal analysis properly sustaining those allegations, their connection to the KCR Decree and, more importantly, how they constituted a "manifest excess" of powers as per the legal standard discussed.

124. The Committee observes that in its Decision on Jurisdiction, the Tribunal "emphasized" that "it [was] not discounting the possibility that information about the alleged collusion could be relevant to the two disputes discussed [] that arose after the 2015 BIT's entry into force" and that "[t]he Claimant [was] free to adduce evidence of such collusion if it [was] relevant to the claims over which the Tribunal ha[d] temporal jurisdiction".[185] Notwithstanding this statement, the Award does not touch upon the issue and no explanation is given as to whether Agility submitted further evidence or if the record simply did not support its allegations.

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182 Applicant's Reply, ¶ 98.

183 Applicant's Memorial, ¶¶ 55-59.

184 Applicant's Reply, ¶ 105.

185 Decision on Jurisdiction, 9 July 2019, **C-182**, ¶ 244.

125. Whilst it is disconcerting that the Tribunal did not address this in the Award, since it was an allegation of clear importance to Agility,[186] we consider that the Tribunal's brief analysis on its Decision on Jurisdiction and the Applicant's submissions in the current proceeding, do not point towards a situation in which the Tribunal did not answer a fundamental question related to those allegations (as opposed to the first claim analyzed on a manifest excess of powers concerning the Failure to Implement the CMC Order). Rather, it is an issue related to the weighing of the evidence, however, we recall that while an *ad hoc* committee may have its own views on a given fact, "it cannot annul an award based on the fact that it has a different understanding of the facts, interpretation of the law, or appreciation of the evidence from that of the Tribunal."[187]

[186] In its Reply on the Merits, Agility argued before the Tribunal: "Claimant has recently learned that the judge presiding over the CMC Appeals Board Decision—Jafar Mohsen Al-Khazraji—was compromised. Mr. Khazraji has been the subject of multiple detailed allegations of corruption both in his role within the CMC and as president of the Al Rusafa Court of Appeal and a member of the Supreme Judicial Council (he held these positions concurrently). These allegations were made public between 2015 and 2018, and published by prominent Iraqi media outlets. Among other things, he has been specifically accused of accepting bribes from telecommunications companies, including Korek. Claimant has also recently discovered that Mr. Khazraji is allied with Medhat Al- Mahmoud, chief justice of the Iraqi Federal Supreme Court. Media reports allege that Judge Mahmoud's protection of Mr. Khazraji has enabled Mr. Khazraji to receive bribes from telecommunications companies with impunity and exercise partisan control over the CMC. It has also been widely reported that Judge Mahmoud exonerated Mr. Khazraji of corruption charges levied by the Iraqi judiciary, and that Judge Mahmoud himself has been accused of accepting millions of dollars of bribes from telecommunications companies. At the Federal Supreme Court, Judge Mahmoud presided over at least *six cases* wherein the CMC was a defendant, siding with the CMC on all occasions." Claimant's Reply on the Merits, 17 July 2020, **C-217**, ¶¶ 60, 61. Within its FET challenge on the rejection of Korek's appeal to the Administrative Court it indicated: "[m]oreover, the Iraqi cases on which Dr. Al-Kabban relies should be considered with skepticism given that Judge Al-Mahmoud presided over least (sic) six cases in which the CMC was a defendant. In *all six* cases, Judge Al-Mahmoud decided in the CMC's favor. As detailed in the Second Report of Raedas Consulting Limited ("**Second Raedas Report**"), Judge Al-Mahmoud is a close ally of Mr. Khazraji, the presiding judge who drafted and signed the 2014 CMC Appeals Board Decision. At the time the Administrative Court was deciding whether to accept jurisdiction to consider Mr. Khazraji's Appeals Board Decision, Judge Al-Mahmoud was aware Mr. Khazraji was facing various corruption allegations (including that he had been bribed by Korek), and Judge Al-Mahmoud was reportedly responsible for closing down a corruption investigation into Mr. Khazraji by the Supreme Judicial Council in April 2016. It has further been reported that Judge Al-Mahmoud colluded with Mr. Khazraji to accept bribes from telecommunications companies, and that Judge Al-Mahmoud received USD 3 million into his account at Bank Audi each time he cleared Mr. Kharaji of corruption charges levied by the Iraqi judiciary." Additionally, it alleged that: "[m]oreover, the presiding judge on the CMC Appeals Board's '*review*' of the CMC Order has since been dismissed by the Supreme Judicial Council for corruption". See ¶¶ 294, 307. At the hearing, Agility indicated: "it seems to the Claimant that in assessing whether this Order was implemented in a fair and equitable way, it might be relevant to consider the fact that the two people in charge of that implementation were on the take, if I can put it that way." Hearing Transcript, **C-197**, p. 46 (03-08).

[187] *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 96.

126. Since the Applicant has not demonstrated an excess of powers related to the corruption allegations, the question of whether such excess was "manifest" becomes moot. Therefore, the Committee does not see necessary to address the second prong of the analysis.

127. In light of the above, we conclude the Tribunal did not manifestly exceed its powers by failing to exercise jurisdiction over the corruption allegations.

C. Ground 2: The Tribunal Manifestly Exceeded its Powers as to the Denial of Justice Claim (52(1)(b))

(1) The Applicant's Position

128. The Applicant submits that "the Tribunal treated the corrupt provenance of the CMC Appeals Board Decision as shielded from scrutiny"[188] and in doing so, it manifestly exceeded its jurisdiction. Agility argues that the Tribunal upheld jurisdiction over the Denial of Justice claim and stated in its Decision on Jurisdiction that information about the alleged collusion could be relevant. It further contends that it "filed evidence, following that decision, which indicated corruption on the part of the judge who presided over the CMC Appeals Board Decision", however, the Tribunal failed "to consider the impact of such evidence" on its Denial of Justice claim.[189]

129. In the Applicant's view, "the Tribunal had jurisdiction and was furthermore duty bound to consider the impact of such evidence when determining whether recourse to the CMC Appeals Board alone could satisfy the international law standard of due process,"[190]

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[188] Applicant's Memorial, p. 74.

[189] Applicant's Memorial, ¶¶ 187-189. The first plank of the Denial of Justice claim analyzed by the Tribunal was whether the Iraqi Administrative Courts misapplied Iraqi law when: i) the Iraqi Administrative Court denied IT Ltd's joinder application, and ii) the Iraqi Administrative Court dismissed Korek's claim for lack of jurisdiction, and the Iraqi Supreme Administrative Court denied Korek's appeal. The second plank focused on whether the Iraqi legislative framework breached international law as a result of the lack of due process afforded to Agility.

[190] Applicant's Reply, ¶ 177. Agility submits that the evidence presented "raised questions about the integrity and independence of the CMC Appeals Board and thus went directly to the question of whether recourse to the CMC Appeals Board alone was capable of satisfying the international law due process standard". See ¶ 180.

therefore, this constitutes a further failure to exercise jurisdiction under Article 52(1)(b) of the ICSID Convention.[191]

130. The Applicant maintains that the issue of corruption was "squarely put in issue during the Arbitration, both in relation to the Implementation Claim and the Denial of Justice Claim"[192] and that "the Tribunal's failure calls into question whether [it] would have concluded that the CMC Appeals Board was capable of satisfying the international law due process standard of providing access to an '*independent and impartial judge*', had it in fact exercised its jurisdiction to consider the evidence impugning Mr Al-Khazraji's integrity."[193]

(2) The Respondent's Position

131. The Respondent contends that "a tribunal does not manifestly exceed its powers by taking a view of the relevance of alleged 'evidence' that is different from one of the parties", that "none of the allegations on collusion made in the arbitration concerned the CMC Appeals Board Decision", and that "a committee has no authority […] to second-guess the tribunal's own assessment of that evidence."[194]

132. Iraq submits that Agility never argued that the CMC Appeals Board Decision "was procured by collusion or had a 'corrupt provenance'," its allegations were "that Mr. Al-Khazraji had 'been the subject of … allegations of corruption' wholly unrelated to the specific Appeals Board Decision at issue in this case" and an annulment procedure is not a forum for new arguments not made in the original proceeding.[195]

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[191] "The Tribunal's failure to consider the impact of such evidence of corruption on Agility's Denial of Justice Claim therefore amounts to a failure to exercise jurisdiction under Article 52(1)(b) of the Convention." Applicant's Memorial, ¶ 189. "The failure even to address these allegations, and the seeming assumption that they were jurisdictionally immune from review, is a second, and separate, breach of Article 52(1)(b)." Applicant's Reply, ¶ 100.

[192] Applicant's Reply, ¶ 187 (within the context of the second limb of its Denial of Justice claim). "[I]t cannot be suggested that corruption on this Board was irrelevant to the Denial of Justice Claim." "The Tribunal's failure to consider, let alone even mention, the existence of the allegations of corruption impacting Agility's Denial of Justice Claim was an obvious and self-evident excess of power." See ¶¶ 189, 190.

[193] Applicant's Reply, ¶ 190.

[194] Respondent's Counter-Memorial, ¶ 138. See also Respondent's Rejoinder, ¶ 111.

[195] Respondent's Counter-Memorial, ¶ 139. See also Respondent's Rejoinder, ¶ 112.

133. In the Respondent's view, even if the issue had been argued, the question was beyond the Tribunal's temporal jurisdiction.[196] In its Rejoinder, Iraq maintains that even if there was an annullable error, Agility has not explained why the Committee should exercise its discretion to annul and that the alleged errors had no impact on the implementation claims.[197]

(3) Whether the Tribunal Manifestly Exceeded its Powers as to the Denial of Justice Claim (52(1)(b)) – The Committee's Analysis

134. In the Arbitration, Agility had made an alternative claim should the Tribunal reject its main claim based on the failure to implement the CMC Order. This alternative claim concerned the FET standard and in particular "denial of justice". In relation to this claim, the Tribunal analyzed in the Award whether the Iraqi legislative framework violated international law and concluded that "the Tribunal is of the view that Iraqi law offers an avenue for judicial recourse against the effects of decisions made by the CMC" and "[a]s such, […] Claimant's second limb of its denial of justice claim cannot stand".[198]

135. In a similar way to its Failure to Implement the CMC Order claim, the Applicant contends that the Tribunal committed an annullable error since, despite finding that it had jurisdiction over the Denial of Justice claim, and despite Agility filing evidence "following the Decision on Jurisdiction, which supported its allegations of corruption on the part of the judge who presided over the CMC Appeals Board Decision", the Tribunal failed to "exercise its jurisdiction to consider the relevance of the corruption evidence."[199]

136. The Committee is puzzled by the fact that the Award makes no mention of the allegations of corruption raised by Agility that directly involved the judge presiding the CMC Appeals Board Decision, particularly, since Agility was arguing before the Tribunal "that due

[196] Respondent's Counter-Memorial, ¶ 140. Additionally, the Respondent contends that Agility's claim must fail since it "cannot prove that whatever disagreement it has with the Tribunal's reasoning […] had any relevant impact on the Award, given that [it] failed to show causation and the Republic 'prevailed on . . . quantum'." See also ¶ 143 and Respondent's Rejoinder, ¶ 115.

[197] Respondent's Rejoinder, ¶ 116.

[198] Award, 22 February 2021, **C-253**, ¶ 251.

[199] Applicant's Reply, ¶ 177-179.

process under international law requires private individuals to be given an opportunity to have administrative decisions revisited by an *independent and impartial judge*" within its claim of lack of due process and violation to international law.[200] While the Committee cannot determine its impact, such allegations had at least the potential of being relevant for the analysis of whether the Iraqi legislative framework and, more specifically, whether recourse to the CMC Appeals Board satisfied the international standard for due process. In this sense, they were, *at the very least*, worthy of being examined.

137. That being said, we understand that the basis of this annulment allegation ultimately rests on the importance that the Tribunal accorded to Agility's evidence, *i.e.* on whether it had an impact on the Denial of Justice claim. As in the case of the allegation addressing corruption within the Failure to Implement the CMC Order claim, this issue rather than pertaining to a failure to exercise jurisdiction by the Tribunal on the question of denial of justice, pertains to the evaluation of evidence and the analysis made by the Tribunal. Thus, it is not within the Committee's mandate to substitute the Tribunal's analysis with its own.

138. Moreover, while Agility made factual allegations on corruption related to due process, the Committee considers that the Applicant has failed to demonstrate that the findings made by the Tribunal and the fact that certain evidence was not given the weight expected translates into a manifest excess of powers by the Tribunal.

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[200] Award, 22 February 2021, **C-253**, ¶ 245. (Emphasis added). Within its FET claim, Agility argued before the Tribunal that "there was a systemic breakdown in Iraq's judicial system, which precluded Agility from accessing the Iraqi courts *at all*. […] That Agility had no access to an independent and impartial decision-maker (let alone a substantive and formal adversarial procedure) constitutes a denial of justice and a failure to accord Agility's investment due process". In the prong related to Korek's appeal, Agility argued that "even if ***Agility's*** interests could, in theory, have been represented by ***Korek*** in the Administrative Court (and they could not), the Iraqi Administrative Court denied jurisdiction over Korek's Appeal anyway, foreclosing Agility's right to be heard either directly or indirectly […] The failure to provide access to a bona fide *judicial* proceeding is a denial of justice. […] The fact that the CMC Appeals Board has only one judge (out of three members), ***who is appointed by the CMC Commissioners***, does not transform it from a regulatory body created as part of the executive branch, to an independent judicial body, whose decisions are precluded from judicial review […] Judge Al-Mahmoud is a close ally of Mr. Khazraji, the presiding judge who drafted and signed the 2014 CMC Appeals Board Decision. At the time the Administrative Court was deciding whether to accept jurisdiction to consider Mr. Khazraji's Appeals Board Decision, Judge Al-Mahmoud was aware Mr. Khazraji was facing various corruption allegations (including that he had been bribed by Korek), and Judge Al-Mahmoud was reportedly responsible for closing down a corruption investigation into Mr. Khazraji by the Supreme Judicial Council in April 2016. It has further been reported that Judge Al-Mahmoud colluded with Mr. Khazraji to accept bribes from telecommunications companies, and that Judge Al-Mahmoud received USD 3 million into his account at Bank Audi each time he cleared Mr. Kharaji of corruption charges levied by the Iraqi judiciary." Claimant's Reply on the Merits, 17 July 2020, **C-217**, ¶¶ 264, 280, 282, 288, 294.

139. Consequently, the Committee concludes that the Tribunal did not manifestly exceed its powers by failing to exercise jurisdiction over the corruption allegations concerning the denial of justice claim.

D. Ground 3: The Tribunal Failed to State Reasons as to the Implementation Claim (52(1)(e))

(1) The Applicant's Position

140. Hand in hand with its claim based on "manifest excess of powers", the Applicant also argues that the approach taken by the Tribunal whereby it failed to test whether the implementation of the CMC Order had been made in accordance with the BIT, "lacks any discernible rationale within the Award"[201] and that the Award does not contain "any explanation as to *why* Iraq's actions in implementing the CMC Order – through the issuance of the KCR Decree, an independent act of the Iraqi State that occurred several years after the BIT had entered into force – should not be reviewed in order to ascertain whether they were consistent with the BIT."[202]

141. In this regard, the Applicant contends that the Tribunal failed to explain "*why* Iraq […] was immune from review by choosing the most extreme (and expropriatory)" of the options to implement the CMC Order.[203] Additionally, it submits that the Tribunal did not consider the evidence on corruption and that "[e]vidence that CMC officials were known to have been bribed by the Iraqi Shareholders, in order to help confiscate Agility's shareholding […] [was] relevan[t] in considering whether the implementation of the CMC Order was conducted in good faith, in a non-discriminatory manner and consistent with Iraq's other BIT obligations."[204] The Applicant argues that the Tribunal offered no explanation for "failing to analyse the impact of Iraqi State corruption […] on the Implementation Claim" and this is a "failure to state reasons requiring annulment under Article 52(1)(e) of the

[201] Applicant's Memorial, ¶ 123.

[202] Applicant's Memorial, ¶ 124.

[203] Applicant's Memorial, ¶ 125.

[204] Applicant's Memorial, ¶ 126.

ICSID Convention."[205] In response to Iraq, Agility also submits that "parties cannot be put in the position of having to guess what the Tribunal thought about a key issue."[206]

(2) The Respondent's Position

142. Iraq submits that the Tribunal explained clearly which claims fell within its jurisdiction and why those claims "failed on the merits."[207] In particular, it stresses the fact that "[t]he Tribunal found that Agility's claim failed because all that the KCR Administrative Order did was to revert Korek's shares back to the Iraqi Shareholders, which was no more and no less than what the CMC Order itself required."[208] According to the Respondent, "the Tribunal *did* state reasons for rejecting Agility's new expropriation claim. The fact that those reasons agreed with the Republic's submissions and not Agility's is not an annullable error."[209] The Respondent contends that "Agility is simply wrong", indicating that "the decision to implement the CMC Order was outside [the Tribunal's] temporal jurisdiction, and only the manner of implementing it could be challenged, and only if it resulted in an independently actionable breach that did not put at issue the legality of the CMC Order itself" and that it "attempt[s] to dismiss this central tenet of the Decision on Jurisdiction […]."[210]

143. As to the issue of corruption, the Respondent maintains that "[n]o such 'evidence' was ever before the Tribunal on the merits, because it lacked jurisdiction to entertain these allegations" [on the procurement of the CMC Order], that Agility did not introduce evidence

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[205] Applicant's Reply, ¶ 111. The Applicant differentiates this case on the grounds that the corruption issue was not addressed "at all". See also ¶ 112.

[206] Applicant's Reply, ¶ 114.

[207] Respondent's Counter-Memorial, ¶ 85. "[T]he Tribunal addressed and assessed every single one of Agility's implementation claims over almost *one hundred paragraphs* of its Award." See ¶ 86.

[208] Respondent's Counter-Memorial, ¶ 92.

[209] Respondent's Counter-Memorial, ¶ 93. "In 30 paragraphs of its Award, the Tribunal went through the text of the CMC Order and the scope of the CMC's regulatory authority under Iraqi law to conclude that all that the CMC Order could, and did in fact, require was the transfer of Korek's shares back to their original Iraqi Shareholders. In five paragraphs, the Tribunal then assessed what the KCR Administrative Order did and concluded that it revoked the transfer of Korek's shares made in 2011, such that 'there is no material difference between what was ordered under the CMC Order and what was implemented under the KCR Decree.' Hence, the Tribunal held that 'the Claimant's expropriation claim does not succeed.'" See ¶ 92.

[210] Respondent's Rejoinder, ¶¶ 16, 17. (Emphasis omitted).

of wrongdoing supporting its post-CMC Order implementation claims and that "the Committee cannot entertain a rehearing on the facts."[211] The Respondent also argues that "Agility never actually argued—let alone demonstrated—how its references to media rumors about former Judge Al-Khazraji's allegedly corrupt reputation were in any way relevant to either limb of its surviving denial of justice claims" and that "Agility cannot attempt to replead its case before this Committee as a means to obtain annulment."[212]

144. Finally, Iraq indicates that even if the Tribunal had reached a different decision as to the second expropriation claim, "it would not have made any difference to the outcome of that claim, because Agility *also* failed to prove any causation or damages stemming from that alleged breach"[213] and that "Agility has not explained why annulment of the entire Award is the necessary result of an alleged annullable error on one discrete claim."[214]

(3) Whether the Tribunal Failed to State Reasons in its Implementation Claim – The Committee's Analysis

145. We begin by recalling that the Tribunal initially framed its inquiry as follows: "the *only question* before the Tribunal is whether the *manner* in which the Respondent has *implemented the CMC Order violates the 2015 BIT*."[215] In this regard, the Committee also finds useful to recall the Decision on Jurisdiction, whereby the Tribunal found that:

> "In 2014, the correspondence from the Claimant, Orange, IT Ltd and Korek evidences a dispute regarding the legality of the CMC Order. *Protests against the legality of the CMC Order are the antithesis of a request for the implementation of the CMC Order*. The record shows that it was only after the Iraqi Administrative Court's dismissal of Korek's claim in the Administrative Court Proceedings and denial of standing for IT Ltd to be heard as an interested party in the Administrative Court Proceedings that the Claimant started to attempt to implement the CMC Order.
>
> It is true that the Parties were in a dispute prior to 17 May 2016, but that was a *different dispute concerning the validity and the merits of the CMC Order*. It was in

[211] Respondent's Counter-Memorial, ¶¶ 97 and 98.

[212] "Agility does not dispute the point—and even retracts its attempts to rely on entirely new factual allegations and new cases for the first time before this Committee". See Respondent's Rejoinder, ¶ 103.

[213] Respondent's Counter-Memorial, ¶ 101. See also, Respondent's Rejoinder, ¶¶ 24-28.

[214] Respondent's Counter-Memorial, ¶ 102; Respondent's Rejoinder, ¶¶ 29 and 30.

[215] Award, 22 February 2021, **C-253**, ¶ 98. (Emphasis added).

essence a challenge by the Claimant to the CMC Order. By contrast, *the dispute that arose after 17 May 2016 was premised on the validity of the CMC Order, and instead was a dispute about the implementation of the CMC Order. The two disputes are different.*

In light of the above, the Tribunal finds that it has temporal jurisdiction in respect of the claim concerning an alleged failure to implement the CMC Order."[216]

146. Additionally, as to the KCR Decree (implementing the CMC Order), which the Claimant had learned about before the hearing, the Tribunal considered that:

"The Tribunal can see that this *new dispute would relate to some of the claims raised by the Claimant*. […] If the Claimant intends to pursue a new claim arising from these new facts, it will have to plead the claim properly. Until the Claimant does so, the Tribunal is constrained to limit its decision to the matters that are properly before it at present. The Tribunal therefore expresses no view over whether it has jurisdiction over this new issue."[217]

147. The Applicant has argued that the Tribunal failed to state reasons "for its conclusion that the manner of implementing the CMC Order (eventually, by means of the KCR Decree) was not an independently actionable wrong, separate from the enactment of the CMC Order" and why "Iraq's actions […] through the issuance of the KCR Decree, an independent act of the Iraqi State that occurred several years after the BIT had entered into force – should not be reviewed." The Applicant alleges that the reader is left with no idea on "why the BIT obligations did not inform the policy choices available to Iraq in implementing the CMC Order" and that the Tribunal did not explain or examine why "Iraq, when faced with an array of options in how to handle the situation – including the choice not to implement the CMC Order at all if no BIT-compliant method of implementation was feasible – was immune from review by choosing the most extreme (and expropriatory) of those options."[218]

148. The Committee makes two observations. *First*, despite finding that the dispute on the validity of the CMC Order was different from the dispute regarding the *implementation* of

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[216] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶¶ 227, 237 and 238. (Emphasis added)

[217] Decision on Jurisdiction, 9 July 2019, **C-182**, ¶ 259. (Emphasis added)

[218] Applicant's Reply, ¶63 b); Applicant's Memorial, ¶¶ 124 and 125.

the CMC Order, when analyzing the Decree that materialized that implementation, the Tribunal determined that there was no "material difference" between what was ordered under the CMC Order and what was implemented under the KCR Decree.[219]

149. *Second*, even though the Tribunal clearly framed its inquiry as whether the manner in which the CMC Order had been *implemented breached the BIT*, the Tribunal's analysis was different. The Tribunal did not analyze whether the implementation through the KCR Decree breached any provision of the BIT. Rather, the analysis solely focused on whether the KCR Decree was similar to the CMC Order and thus the inquiry was left unanswered.

150. The Committee understands that the Tribunal framed its examination under the premise that "[h]aving decided the proper interpretation of the CMC Order, the Tribunal now turns to the issue of whether there was a direct expropriation by virtue of the KCR Decree as alleged by the Claimant. As the Tribunal has no jurisdiction over the lawfulness of the CMC Order, the Tribunal similarly has no jurisdiction over any expropriation claims that arise solely as a result of a *faithful implementation of the CMC Order*. Put another way, in order to succeed in its expropriation claim, the Claimant needs to show that the KCR Decree was not a *faithful implementation of the CMC Order*."[220] Regardless of our opinion on whether this "approach" was correct or not, the Committee struggles to find a logic thread in the Tribunal's reasoning that would take us from point A to point B. In this case, we fail to see: (i) how from identifying its inquiry as to whether the *implementation* of the CMC Order was consistent with the BIT, the Tribunal devoted major part of its decision to analyzing the CMC Order (which was outside its jurisdiction), and more importantly, (ii) how its determination that there was no "material difference" between the KCR Decree and the CMC Order led to concluding that the *implementation*, *through the KCR Decree* (a different act enacted by a different authority after the BIT's entry into force) was out of the Tribunal's jurisdiction and, in consequence, that Agility's claim failed.

151. In this regard, the Committee sees a contradiction between indicating *first* the need to analyze whether the way in which the CMC Order was *implemented* was *consistent* with

[219] Award, 22 February 2021, **C-253**, ¶ 149.

[220] Award, 22 February 2021, **C-253**, ¶ 145. (Emphasis added)

the *BIT* and *then,* not addressing in any way this basic premise, but instead analyzing the consistency of that implementation with an Order whose lawfulness determination was out of the scope of the Tribunal. The Committee also sees a contradiction between the Tribunal's conclusion that, since the legality of the CMC Order was out of its jurisdiction, then the KCR Decree, by not being "materially different" was also out of its jurisdiction and therefore no analysis on the consistency of that measure with the BIT was undertaken. This is the unequivocal result of its statement in paragraph 145 of the Award that "*[a]s the Tribunal has no jurisdiction over the lawfulness of the CMC Order*, the Tribunal *similarly has no jurisdiction* over any *expropriation claims* that arise solely *as a result of a faithful implementation of the CMC Order*. Put another way, *in order to succeed* in its expropriation claim, the Claimant needs to show that *the KCR Decree was not a faithful implementation of the CMC Order*" *vis-à-vis* its finding of the KCR Decree not being materially different.

152. We find ourselves in a similar scenario to the committee in *TECO v. Guatemala*: "the Tribunal's reasoning on the loss of value claim is not clear at all, such that the Committee, despite having had the benefit of the Parties' submissions and of the entire record before it, has struggled to understand the Tribunal's line of reasoning."[221]

153. In our view, the thread in the Award that should enable to follow the Tribunal's reasoning and how it proceeded in these fundamental points up to the conclusion, which was meant to address the core of the claim, is missing. Ultimately as we have determined above, the Tribunal did not address the question it framed as the main inquiry; thus, the inquiry was left open.

154. For these reasons, the Committee considers that the Tribunal committed an annullable error by failing to state reasons as to the Implementation Claim within the meaning of Article 52(1)(e).

[221] *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶ 128.

(4) Whether the Tribunal Failed to State Reasons when Failing to Address Corruption Evidence on the Implementation Claim – The Committee's Analysis

155. The Applicant argues that "the Tribunal excluded from consideration all evidence that the CMC Order and CMC Appeals Board Decision were the product of corruption" and that evidence of the CMC officials being bribed was relevant in considering whether that order was implemented in a manner consistent with the obligations under the BIT.[222] In its Reply, the Applicant indicates that the Tribunal "never offered a word of explanation for failing to analyse the impact of Iraqi State corruption (as alleged by Agility) on the Implementation Claim."[223]

156. The Committee has determined that the Tribunal failed to state reasons as to the Implementation claim since the thread that must allow an award to follow how a tribunal proceeded is not present. We have stated that the Award makes no mention of the allegations of corruption or of the evidence provided by Agility in support of its claims and that we find this situation to be troubling,[224] particularly in light of the seriousness that these allegations entail, as well as the fact that it was a claim of clear importance to Agility.

157. However, while the Committee could not find the logical thread within the Tribunal's analysis, the Committee observes that, as in the other allegations involving corruption, Agility's annulment contention on this point focuses on the fact that the Tribunal did not consider the evidence on corruption, did not analyze corruption or did not analyze its impact on the claim.[225] In this regard, not addressing a specific piece of evidence or argument raised is not in and of itself a ground for annulment. We observe that the committee in *TECO v. Guatemala*, indicated that: "a tribunal is not under an obligation to address every piece of

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[222] Applicant's Memorial, ¶ 126.

[223] Applicant's Reply, ¶ 111.

[224] See fn 186. Also, Claimant's Memorial, 30 April 2019, **C-203**, ¶¶ 72-87; Claimant's Reply on the Merits, 17 July 2020, **C-217**, ¶¶ 60, 61, 82, 294, 307; First Raedas Report, **C-231**; Second Raedas Report, **C-233**; Complaint No. 85974, Corruption Investigation Court, dated 20 June 2017, **C-084**; Iraqi Parliamentary Session, 11 March 2017, Statement of Dr Hanan Al Fatlawi, **C-169**. In the arbitration proceeding Agility sought disclosure through document production requests in connection with its claims. Claimant's Requests for Documents, 24 April 2020, **C-188**.

[225] Applicant's Memorial, ¶ 126 ("excluded from consideration all evidence"; "[t]he evidence of corruption, and the submissions about corruption, are simply ignored", ¶ 127); Applicant's Reply, ¶ 111 ("failing to analyse the impact"); ("failed to analyse corruption at all", ¶ 112).

evidence in the record or every single argument made by the parties."[226] The committee in that case also indicated that: "[i]nsufficiency of reasons is not a ground for annulment where a tribunal did not explain why it rejected arguments, evidence or authorities that were not relevant or necessary for its analysis. Similarly, insufficiency of reasons does not warrant annulment if the tribunal did not address every argument, piece of evidence or authority in the record."[227]

158. Additionally, we observe that the Applicant's arguments seem to focus mainly on the fact that there was alleged corruption in the provenance of the CMC Order. At the Annulment hearing, the Applicant argued that "if a bribe was issued in 2013 and 2014 to get the CMC Order, that money wasn't well spent until it was implemented, until the scheme was consummated, and so the bribery remains relevant all the way through to the point of the KCR Decree."[228] While this may be the case, Agility's arguments do not seem to reflect a direct connection between this alleged corruption to enact the CMC Order and the KCR Decree. The Committee agrees with *TECO v. Guatemala* that not being required to address every piece of evidence "cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis",[229] notwithstanding this, we consider this situation to be different from the one in *TECO* since in that case the tribunal expressly considered that the record contained no evidence on how the transaction price had been determined, yet evidence related to the transaction price in fact existed and the expert testimonies that the tribunal failed to address "*directly pertained*" to the issue of the loss of value.

159. In light of the above, the Committee considers that the Tribunal did not fail to state reasons when failing to address evidence of alleged corruption on the Implementation claim.

[226] *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶ 125. See also: "[A] tribunal cannot be required to address within its award each and every piece of evidence in the record". *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶ 131.

[227] *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶ 249.

[228] Hearing Transcript (Annulment) Day 1, p. 45 (19-24).

[229] *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶ 131.

E. GROUND 4: THE TRIBUNAL FAILED TO STATE REASONS AS TO THE DENIAL OF JUSTICE CLAIM (52(1)(E))

(1) The Applicant's Position

160. The Applicant contends that the Tribunal committed annullable errors in the dismissal of its Denial of Justice claim. In particular, it contends that it failed to state reasons regarding the following findings: (i) that the Iraqi courts did not act unreasonably in dismissing IT's application since it mirrored Korek's, (ii) that the CMC Appeals Board was capable of satisfying the international law due process standard, and (iii) in any case, it could have sought to intervene through IT or Korek before civil courts.[230]

161. As to the first finding, Agility argues that the record showed that "the interests of the stakeholders in Korek were in fact highly divergent",[231] that the Award "offers no reasoned basis for treating Korek and IT Ltd's interests as fully aligned," and that there is no explanation as to why allegations of corruption on the Iraqi shareholders were not evaluated.[232]

162. The Applicant maintains that this is not an issue on whether the Tribunal's reasoning on a specific point was "correct" or "convincing", but that the Tribunal did not address the evidence and arguments at all. The issue of a separate interest, in turn, was "highly relevant" for its case that the Iraqi Administrative Court had misapplied Iraqi law.[233]

163. Regarding the second finding, Agility had argued in the Arbitration that it was "foreclosed from the only forum in which it could have protected its legal and economic rights"[234] and relied in *Glencore v. Colombia* to indicate that due process required that "[t]he private

[230] Applicant's Memorial, ¶¶ 160 and 161.

[231] Applicant's Memorial, ¶ 168. "Korek's majority shareholders (*i.e.* the Iraqi Shareholders) were the beneficiaries of the CMC Order. They did not have an incentive to make anything more than a token objection to it. Only Agility, *via* IT Ltd, had a complete incentive to overturn the CMC Order." See ¶ 170; Applicant's Reply, ¶ 152.

[232] Applicant's Memorial, ¶ 171.

[233] Applicant's Memorial, ¶¶ 172 and 173. See also Applicant's Reply, ¶ 155.

[234] Award, 22 February 2021, **C-253**, ¶ 244.

individual must have an opportunity to have the case revisited, this time by an independent and impartial judge [...]."[235] Agility contends that the Tribunal failed to give reasons as to why "a single appeal to the CMC Appeals Board" satisfied the international due process standard.[236] It also contends that the Tribunal reached its conclusion that, although the CMC Appeals Board was not a court it served as an appellate body, without addressing the issues of a summary procedure conducted by the CMC Appeals Board without a hearing and not adversarial, the impartiality of the CMC Appeals Board members since two of the three members were appointed, supervised and compensated by the executive, rather than the Supreme Judicial Council, the lack of opportunity for Agility to participate in the procedure either before the CMC or the CMC Appeals Board and the evidence of corruption on the only judge presiding over the CMC Appeals Board Decision.[237]

164. Agility submits that the Tribunal's omission to address the issues and evidence that were highly relevant to its denial of due process claim amounts to a failure to state reasons under Article 52(1)(e) of the ICSID Convention.[238]

165. As to the third finding, the Applicant argues that the Award "fails to engage" with the issue of "whether seeking relief before the Iraqi civil courts was in fact a viable path for Agility to pursue."[239] Specifically, the Tribunal held that Korek could have sought relief in civil courts and IT could have sought to intervene, although acknowledging that the latter may have difficulties bringing a contractual claim.[240] The Applicant argues that "[t]he Award fails to inform the reader of how Agility could have received an effective civil remedy, had

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[235] Applicant's Memorial, ¶ 178, referring to *Glencore International AG & CI Prodeco SA v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ("*Glencore v. Columbia (Award)*"), **CL-236**, ¶ 1319.

[236] Applicant's Memorial, ¶ 176. "[T]he Award does not analyse the international due process standard". Applicant's Reply, ¶ 163.

[237] Applicant's Memorial, ¶¶ 179, 180 and 184. Applicant's Reply, ¶ 164.

[238] Applicant's Memorial, ¶ 185. Agility also contends that the Award fails to mention expert testimony by two experts on why "recourse to the CMC Appeals Board alone did not amount to a *bona fide* judicial process, capable of satisfying the international law due process standard". ¶ 181.

[239] Applicant's Memorial, ¶ 190. Applicant's Reply, ¶ 195.

[240] Applicant's Memorial, ¶¶ 192 and 193.

it filed such a claim", taking into account the Tribunal's conclusion that decisions by the CMC Appeals Board were "final and binding."[241]

(2) The Respondent's Position

166. The Respondent argues that the Tribunal dismissed Agility's claim on IT's application since it was "substantively wrong" and both applications mirrored each other in form and substance,[242] additionally, the Iraqi system allowed Korek to seek an audience before civil courts.[243] In its view, the Tribunal "stated its reasons for dismissing Agility's denial of justice claim: it explained the legal standard, it set out the considerations it took into account in applying that standard, and it even cited and quoted the specific evidence and testimony that it found convincing (or not)."[244]

167. In its Rejoinder, the Respondent argued that the Tribunal did provide explanations on why it considered that the civil court offered an avenue, that it addressed the international due process standard and analyzed whether the Iraqi legislative framework breached international law.[245] Thus, "Agility can undeniably follow the Tribunal's reasoning, even though it disagrees with it."[246]

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[241] Applicant's Memorial, ¶¶ 194 and 196. (Emphasis omitted). Applicant's Reply, ¶¶ 194, 198, 200.

[242] Respondent's Counter-Memorial, ¶ 147. Respondent's Rejoinder, ¶ 83.

[243] Respondent's Counter-Memorial, ¶ 149.

[244] Respondent's Counter-Memorial, ¶ 151.

[245] The Respondent argued, first, that the Tribunal did provide reasons for rejecting each limb of Agility's claim and that "Agility repeatedly refers to—and even quotes from—the Tribunal's reasons on each of these points"; second, that IT Ltd.'s rejection fell short of the high standard, the decisions were correct according to Iraqi administrative law and ultimately administrative courts had no jurisdiction to award the relief that IT Ltd. sought; third, that the CMC Appeals Board served as an appellate body and recourse to civil courts could have been sought; fourth, the tribunal addressed in a separate section of the award the international due process standard and an avenue for judicial recourse was offered by Iraqi law. Respondent's Rejoinder, ¶¶ 80-88. The Respondent also contends that "Agility again does not deny that whether or not the Tribunal's reasons and conclusions were correct is totally irrelevant for Article 52(1)(e)", that "Agility's argument […] of an alleged 'contradiction' between the Tribunal's finding that the CMC Appeals Board decision was final and binding and its finding that Iraqi law provided sufficient avenues for relief against CMC decisions misrepresents both the Tribunal's Award and the record [...] The fact that a CMC decision can only be annulled by the CMC Appeals Board is congruent with the fact that the CMC Appeals Board itself provides an avenue of relief, and that other kinds of relief are available from other fora under Iraqi law." See ¶¶ 93, 95.

[246] Respondent's Rejoinder, ¶ 89.

168. Iraq also submits that Agility's claims fail since they challenge the "*sufficiency* and *quality*" of the reasons and not the absence thereof, that a tribunal does not commit an annullable error for failing to address "every piece of evidence",[247] and that "Agility simply went to the *wrong* forum. Exclusive jurisdiction to annul CMC administrative decisions resided with the CMC Appeals Board […] Iraqi law provided several other avenues for different forms of relief, including the civil and constitutional courts".[248] As to the corruption allegations, Iraq argues that Agility never demonstrated how "references to media rumors about former Judge Al-Khazraji[] […] were in any way relevant to either limb of its surviving denial of justice claims."[249]

(3) Whether the Tribunal Failed to State Reasons as to the Denial of Justice Claim (52(1)(e)) – The Committee's Analysis

a. Failure to State Reasons in Finding that IT Ltd's Joinder Application "mirrored" Korek's Position

169. The Applicant alleges that the Award provides "no reasoned basis for treating Korek and IT Ltd's interests as fully aligned" and "[t]he reader is given no explanation as to why the allegations of corruption (on the part of the Iraqi Shareholders) should not be evaluated."[250] In Agility's view, by failing to address the outcome-determinative evidence showing that IT Ltd had a "serious interest" different from Korek's, the reader is left "without any idea of why the claim was dismissed" and this constitutes a "failure to state reasons."[251]

170. When analyzing whether Iraqi Administrative Courts had misapplied Iraqi law and violated international law, the Tribunal considered that "the Administrative Court's dismissal of IT Ltd's Joinder Application on 18 January 2016 was done orally. The only evidence of the Administrative Court's reasoning is set out in the email update from Korek's lawyer (who

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[247] Respondent's Counter-Memorial, ¶¶ 152 and 154.

[248] Respondent's Counter-Memorial, ¶ 164. Respondent further argues that Agility's claim fails since it has not shown that the "gaps" concern essential issues for the outcome of the case nor has it justified the exercise of the discretion to annul, particularly Agility did not prove causation and damages. See ¶¶ 168-172.

[249] Respondent's Rejoinder, ¶ 103. With regards to this claim, Respondent also argues that the Applicant has not shown the claims concern issues essential to the outcome of the case nor that the entire award should be annulled. See ¶¶ 105-109.

[250] Applicant's Memorial, 22 December 2021, ¶ 171.

[251] Applicant's Reply, ¶ 153.

attended the hearing) […]."[252] The Tribunal further considered that "[w]hile the documents do not reveal the underlying reasons for the Administrative Court's dismissal of IT Ltd's Joinder Application, the Tribunal is nonetheless persuaded that the Administrative Court's decision to dismiss IT Ltd's Joinder Application does not satisfy the extreme test of being an error which no competent judge could reasonably have made."[253]

171. It is not entirely clear to the Committee what the "extreme test of being an error which no competent judge could reasonably have made" is and how it was applied by the Tribunal. We understand the "persuasion" indicated by the Tribunal derived from the fact that it accorded a significant value to IT Ltd's and Korek's applications, and more specifically, the relief sought, *i.e.* the annulment of the CMC Order.[254] The Committee notes that this was central in the Tribunal's examination to determine that no separate interest had been identified and that it was persuaded by "Respondent's argument that the Administrative Court could have had a valid basis to find that IT Ltd […] lacked a 'serious interest' […] which merits intervention."[255]

172. In this regard, we are not convinced by the Applicant's argument that a failure to refer to the evidence it presented showing that there was a serious and separate interest rises to the level of a failure to state reasons. Rather, this contention goes to the quality of reasons, which is not a basis for annulment in accordance with Article 52(1)(e).[256] As the committee in *Vivendi* stated "Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons […] an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the

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[252] Award, 22 February 2021, **C-253**, ¶ 226.

[253] Award, 22 February 2021, **C-253**, ¶ 227.

[254] Award, 22 February 2021, **C-253**, ¶ 228.

[255] Award, 22 February 2021, **C-253**, ¶ 228.

[256] "[…] It is not on an *ad hoc* committee to assess the quality, extension, or correctness of the reasons provided by a tribunal, much less to annul an award on that basis." *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, **CL-297**, ¶ 164; "the committee […] cannot look into their correctness" […] "The Committee […] is not authorised to qualify the Tribunal's reasoning as deficient, superficial or wrong". *Victor Pey Casado v. Republic of Chile (Pey Casado II)*, ICSID Case No. ARB/98/2, Decision on Annulment, 18 June 2020, **CL-296**, ¶¶ 204 and 205.

point […]."[257] This goes hand in hand with the test set out in *MINE v. Guinea*, we can discern the thread that the Tribunal followed, the "adequacy of the reasoning is not an appropriate standard of review" and it is another issue we cannot delve into.[258]

173. In consequence, the Committee finds that the Tribunal did not fail to state reasons in finding that IT Ltd's Joinder Application mirrored Korek's.

b. Failure to State Reasons in Determining that the CMC Appeals Board Satisfied the International Law Due Process Standard and the Civil Court Option

174. According to Agility, the Tribunal "failed to give reasons as to how a single appeal to the CMC Appeals Board could be viewed as satisfying the international due process standard."[259] Agility submits that "due process under international law requires that private individuals be afforded an opportunity to have administrative decisions revisited by an independent and impartial judge, in a formal adversarial procedure" and that Iraqi law did not provide a judicial forum to review the CMC Order.[260]

175. In the Applicant's view, the Tribunal failed to address its arguments on how the CMC Appeals Board conducted its procedure and on the impartiality and independence of members.[261] In this regard, it also contends that the Award did not mention Agility's evidence that the Presiding Member of that board had been bribed by Korek on another occasion.[262] As to the civil court option, the Applicant contends that the Tribunal failed to engage with the key issue of "whether seeking relief before the Iraqi civil courts was in fact a viable path for Agility to pursue."[263]

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[257] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi I***"), **CL-103**, ¶ 64.

[258] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, **CL-274**, ¶ 5.08.

[259] Applicant's Memorial, 22 December 2021, ¶ 176.

[260] Applicant's Reply, ¶¶ 161 and 162.

[261] Applicant's Memorial, 22 December 2021, ¶ 180.

[262] Applicant's Memorial, 22 December 2021, ¶ 184.

[263] Applicant's Memorial, 22 December 2021, ¶ 190.

176. The Committee considers it appropriate to address the Applicant's allegations on the CMC Appeals Board and the civil court option together since the Tribunal's analysis on both issues is related. At the outset, we recall that the Tribunal framed its standard as "the Claimant must show that Respondent had not provided a *minimally adequate justice system* in order to satisfy the *high threshold* for a claim for denial of justice."[264]

177. In the Award, the Tribunal considered that while the CMC Appeals Board was not a court, it was still "presided over by a judge and serve[d] as an appellate body capable of reviewing administrative decisions."[265] The Committee notes that the Tribunal referred to Agility's reliance on *Glencore v. Colombia* but did not indicate whether in fact "due process under international law require[d] private individuals to be given an opportunity to have administrative decisions revisited by an independent and impartial judge" and how the CMC Appeals Board constitutes "an independent and impartial judge." While those points may lack clarity, the Committee notices that when addressing if the Iraqi Administrative Courts had misapplied the law regarding the dismissal of Korek's appeal, the Tribunal determined whether the CMC Appeals Board could be the "designated appellate authority" under the State Shoura Council Law, taking into account the recognition of that body as an appeal entity by Iraqi courts and the Federal Supreme Court.[266] The Committee also recalls the high standard relied on by the Tribunal and the fact that it determined other avenues for relief were available.

178. Also related to the due process standard and the impartiality of the judge, are the corruption allegations made by the Applicant which were also not addressed in the Award.[267] The allegations referred to the judge presiding the entity, who signed the decision and who was allegedly dismissed by the Supreme Judicial Council for corruption. Even though the Respondent has argued that "Agility never actually argued—let alone demonstrated—how its references to media rumors about former Judge Al-Khazraji's allegedly corrupt reputation were in any way relevant to either limb of its surviving denial of justice

[264] Award, 22 February 2021, **C-253**, ¶ 216. (Emphasis added).

[265] Award, 22 February 2021, **C-253**, ¶ 246.

[266] Award, 22 February 2021, **C-253**, ¶¶ 232-239.

[267] See fn 186.

claims",[268] in the Committee's view such allegations should have at least raised "red-flags" and were worthy of being at least addressed due to their importance for Agility.[269] Corruption allegations are to be taken seriously and as indicated in *TECO v. Guatemala*:

> "While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record […] A tribunal is duty bound to the parties to *at least address those pieces of evidence that the parties deem to be highly relevant to their case* and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[270]

179. The Committee has already voiced its reservations regarding the treatment given to this evidence. It must do so again with respect to this allegation.

180. However, notwithstanding the Tribunal's failure to address the issues already pointed out, the Committee cannot opine on the correctness of the Tribunal's analysis, nor can it annul an award based on an error of fact or law made by the Tribunal.[271] The Committee recalls that "*as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion*",[272] the requirement is satisfied. In this case, the Tribunal provided its reasons as to why the CMC Appeals Board was the "designated appellate authority". Moreover, the Tribunal considered that Iraqi civil courts provided

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[268] Respondent's Rejoinder, ¶ 103.

[269] At the Hearing on Annulment, Agility pointed that: "If Al-Khazraji was removed for corruption in 2017, that does undermine fatally any confidence one can have in decisions he took in 2014 as the presiding judge of the CMC Appeals Board […] Those are red flags in and of themselves of corruption. To learn he was dismissed by the Supreme Judicial Council for corruption in 2017 is a major red flag that indicates there is ground for doubting his integrity across the board, and yet, as I say, the Award never treats either of these issues in any respect, the CMC officials or the CMC Appeals Board". Hearing Transcript (Annulment) Day 2, p. 28 (04-08) (14-20). "The Supreme Judicial Council is one of Iraq's state organs. If Judge Al-Khazraji was a judge in good standing, and had been promoted for good conduct, we would have heard about it. If the Supreme Judicial Council had not in fact removed him in 2017, Iraq had the means of so proving. It chose not to." Hearing Transcript (Annulment) Day 2, p. 29 (05-11).

[270] *TECO v. Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶ 131. (Emphasis added).

[271] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("Vivendi I"), **CL-103**, ¶ 64. *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, **CL-278**, ¶ 70. "[…] [A]s long as reasons have been stated, even if incorrect, unconvincing or non-exhaustive, the award cannot be annulled on this ground." *Occidental Petroleum Corp. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, **CL-289**, ¶ 64. See also *TECO v. Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, **CL-292**, ¶¶ 249 and 250.

[272] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, **CL-274**, ¶ 5.09. (Emphasis added).

another forum to seek relief for Agility, therefore, there was no foreclosure from the only forum that could have protected its legal rights. The Tribunal reached this conclusion based on the "*Zain FCC Decision*" and Claimant's expert testimony that Korek could have gone to civil courts and potentially IT could have tried to join or could have sought redress through a claim for non-contractual harm.[273] To this end, the Tribunal performed its analysis and provided its reasons for its conclusion.

181. In this sense, the Committee finds that the Tribunal did not fail to state reasons as to the Denial of Justice claim.

F. Ground 5: The Tribunal Denied Agility's Procedural rights and its Right to Investigate Corruption Seriously Departing from a Fundamental Rule of Procedure (52(1)(d))

(1) The Applicant's Position

182. The Applicant submits that, by denying its document production requests, the Tribunal denied its procedural rights and its right to investigate corruption. In its view, the 16 document production requests were relevant to the merits of its case since they focused on the corrupt circumstances in which the CMC Order was procured, but also on whether the implementation of that Order was part of "a corrupt scheme", thus, they were relevant to assist the Tribunal in determining whether Iraq had conspired with the Iraqi shareholders and the motivations of Iraq in failing to implement completely the CMC Order.[274]

183. Agility argues that the Tribunal rejected the requests without a "substantively reasoned justification", based on a lack of jurisdiction, and in doing so "[it] apparently considered that even if the implementation of the CMC Order fulfilled a corrupt scheme, or, even if the acts undertaken in fulfilment of the Order were themselves corrupt, evidence of corruption was irrelevant because the faithful implementation of the Order was immune."[275] In consequence, the Applicant contends that the Tribunal "restricted Agility's ability to present, develop, and be heard on its case on corruption and how that corruption impacted

[273] Award, 22 February 2021, **C-253**, ¶¶ 247-252.

[274] Applicant's Memorial, ¶¶ 129-132.

[275] Applicant's Memorial, ¶ 137.

the implementation of the CMC Order"[276] for the purpose of the merits phase and tainting the Award.[277] In its view, this constitutes a ground for annulment under Article 52(1)(d) of the ICSID Convention as a "serious departure from a fundamental rule of procedure."[278]

184. The Applicant contends that the Tribunal also denied Agility its procedural right to investigate corruption, that "the issue of corruption is so vital that the denial of the right to investigate that fundamental issue is serious",[279] that "the duty of arbitral tribunals to investigate allegations of corruption has also been upheld in the ICSID context",[280] and that "[t]he Tribunal abdicated its adjudicative responsibility by upholding Iraq's objections to the disclosure of documents which were relevant and material to pleaded issues of bribery and corruption of State officials."[281] Agility argues that while there is discretion in dealing with evidence, the exercise of this discretion (when not substantively reasoned) and which has the potential to impact the award, constitutes an annullable error as well under Article 52(1)(d).[282]

(2) The Respondent's Position

185. The Respondent contends that "Agility's argument now appears to be that the Tribunal seriously departed from a fundamental rule of procedure by rejecting, as irrelevant to the case and immaterial to its outcome, Agility's fishing expedition for documents from the Republic regarding unsubstantiated collusion allegations that the Tribunal had already ruled were beyond its jurisdiction."[283] Iraq also argues that the right to be heard does not require

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[276] Applicant's Memorial, ¶ 138; Applicant's Reply, ¶ 119. "[T]he denial of the right to investigate corruption raises a fundamental rule of procedure because, by refusing inquiry into this issue at the disclosure phase, the Tribunal restricted Agility's ability to present, develop, and be heard on its case on corruption and how that corruption had impacted the implementation of the CMC Order." Applicant's Reply, ¶ 133.

[277] Applicant's Memorial, ¶ 140.

[278] Applicant's Memorial, ¶ 140.

[279] Applicant's Memorial, ¶ 141. Applicant's Reply, ¶ 134.

[280] Applicant's Memorial, ¶ 144.

[281] Applicant's Memorial, ¶ 146.

[282] Applicant's Memorial, ¶¶ 148, 149 and 151.

[283] Respondent's Counter-Memorial, ¶¶ 104. "In essence, Agility's complaint is simply that the Tribunal was wrong when it 'considered that evidence of corruption . . . was irrelevant.' But the *substance* of the Tribunal's decision on the relevance of evidence cannot give rise to an annullable error, still less under Article 52(1)(d)." See ¶ 123.

the tribunal to agree with the submissions made, that the standard requires that the departure be serious, *i.e.* that it must have caused the tribunal to reach a result "substantially different", and that a Party cannot seek annulment on this ground if, contrary to Arbitration Rule 27, it failed to promptly raise that alleged departure before the tribunal, *i.e.* it "waived its right to object".[284]

186. In Iraq's view, the Tribunal did not depart from a fundamental rule of procedure since the fact that the document production requests were denied does not mean that "Agility was denied the right to be heard on the substance of those claims", the Tribunal invited Agility to adduce further evidence and Agility had an opportunity to brief the issue. The Respondent submits in this regard that the right to be heard entails a reasonable opportunity to be heard but not an unlimited one.[285]

187. Finally, the Respondent contends that "Agility has no 'right to investigate' issues outside a tribunal's jurisdiction, be they allegations of corruption or otherwise", that "[t]ribunals, and still less annulment committees, are not omnipotent supranational authorities with universal jurisdiction and unfettered 'investigative' power", and that Agility has no support for the existence of a procedural right to use the procedural tools under ICSID to investigate State corruption.[286]

(3) Whether the Tribunal Seriously Departed from a Fundamental Rule of Procedure by Denying Agility's Procedural Rights and its Right to Investigate Corruption – The Committee's Analysis

188. Agility's claim is based on three premises, namely that (i) the Tribunal effectively denied Agility's right to investigate corruption, (ii) by treating corruption as jurisdictionally irrelevant, the Tribunal denied Agility's procedural rights, and (iii) the denial of the

[284] Respondent's Counter-Memorial, ¶¶ 108-110, 112, 113. See also Respondent's Rejoinder, ¶¶ 34-37.

[285] Respondent's Counter-Memorial, ¶¶ 115-117. See also Respondent's Rejoinder, ¶ 47.

[286] Respondent's Counter-Memorial, ¶¶ 124 and 125. The Respondent contends as well that even if the requests had been capable of affecting the analysis, they would not have affected the outcome since the claims failed for lack of causation and damages. Additionally, it has not showed that the Committee should exercise its discretion to annul all or part of the Award. See ¶¶ 132 and 133. On the issue of a procedural right to investigate corruption, see also Respondent's Rejoinder, ¶¶ 49-53.

corruption document requests was a denial of Agility's fundamental procedural right to investigate corruption.[287]

189. Agility argues that it submitted 16 document production requests relating to the issue of corruption which were relevant to its claims on the merits. These requests not only focused on the circumstances in which the CMC Order was procured, but on the implementation of that Order as part of a corrupt scheme.[288] According to Agility, the Tribunal's reasoning for rejecting these requests was "limited" and "simply restated a blanket decision."[289]

190. At the outset, we note that the Applicant's arguments are ultimately based on the fact that the Tribunal did not consider the requests for documents "relevant".[290] Indeed, in Agility's view "the Tribunal considered that evidence of corruption – whether going to the circumstances in which the CMC Order was procured or the circumstances in which it was then implemented – was irrelevant"[291] and since that position was adopted during the disclosure phase, it denied Agility's procedural rights.[292] In particular, the Applicant argues that the Tribunal restricted Agility's ability to present, develop, and be heard on its case of corruption and how it impacted the implementation of the CMC Order.[293]

191. The Committee is not persuaded that the rejection of these document production requests in Procedural Order No. 8 had the effect of restricting Agility's ability to present, develop and be heard on its case of corruption in such a way that this amounts to a departure from a fundamental rule of procedure. While Agility was able and did present its arguments on corruption in its submissions, as well as evidence in this regard,[294] the Tribunal did not

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[287] Applicant's Reply, 1 July 2022, ¶ 119.

[288] Applicant's Memorial, ¶ 129.

[289] "*Denied. The Tribunal does not have jurisdiction over the collusion dispute and is not persuaded that the requested documents are prima facie relevant to the Claimant's existing denial of justice claim and/or its failure to implement claim*". Applicant's Memorial, 22 December 2021, ¶ 133.

[290] Applicant's Memorial, ¶¶ 129, 132, 133, 135-137.

[291] Applicant's Memorial, ¶ 136.

[292] Applicant's Memorial, ¶ 138.

[293] Applicant's Memorial, ¶ 138.

[294] Claimant's Memorial, 30 April 2019, **C-203**, ¶¶ 72-87; Claimant's Reply on the Merits, 17 July 2020, **C-217**, ¶¶ 60, 61, 82, 294, 307; First Raedas Report, **C-231**; Second Raedas Report, **C-233**; Complaint No. 85974, Corruption

accord these submissions and arguments the weight Agility expected. The Committee does not consider the Tribunal's actions amount to procedural unfairness. Although allegations of corruption require due consideration, it is within the Tribunal's powers to assess and evaluate the evidence before it. According to Arbitration Rule 36 (1) "[t]he Tribunal shall determine the admissibility and probative value of the evidence adduced."[295] Moreover, "reasons may be stated succinctly or at length".[296] In this regard and as we have already stated, it is not within our mandate to assess the correctness of those reasons.

192. Additionally, while the Committee agrees that corruption allegations must be taken seriously,[297] we do not consider the "duty to investigate corruption allegations", that the Applicant refers to, can be taken to mean that any corruption allegation must be investigated regardless of its connection to the matter at issue.[298] In the same vein, it is unclear to us that there is an inherent procedural right to investigate corruption as it seems to be alleged by the Applicant and in any given case, that such right is autonomous from the Tribunal's assessment as to the relevance of evidence.

193. Since we have not found a fundamental rule of procedure from which the Tribunal has departed, we do not take further the analysis of the second element as to this ground of annulment.

194. In light of the above, the Committee considers that the Tribunal did not seriously depart from a fundamental rule of procedure.

Investigation Court, dated 20 June 2017, **C-084**; Iraqi Parliamentary Session, 11 March 2017, Statement of Dr Hanan Al Fatlawi, **C-169**.

[295] ICSID Arbitration Rules (2022). This provision reflects Rule 34 (1) of the 2006 Arbitration Rules.

[296] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi I***"), **CL-103**, ¶ 64.

[297] The Committee has expressed its agreement with the statement made in Glencore v. Colombia that "*corruption is morally odious*". *Glencore International AG & CI Prodeco Sav. Republic of Colombia,* ICSID Case No. ARB/16/6, Decision on Annulment dated 22 September 2021, (*Glencore v. Colombia (Annulment)),* **CL-300**, ¶ 360.

[298] See Applicant's Memorial, ¶ 144; Applicant's Reply, ¶ 4 b).

G. Lack of Causation and Damages

195. The Committee has analyzed the grounds of annulment put forward by the Applicant. Notwithstanding this, we observe that the Respondent contended that there was a "lack of causation and a failure of proof on Damages" on Claimant's Claim[299] and that the Parties disagreed as to whether certain statements by the Tribunal in its Award are *obiter dicta*, in particular:

> "254. Given that the Tribunal has dismissed the Claimant's claims in their entirety, the Tribunal **does not find it necessary to address the issue of damages**. That said, the Tribunal notes that even if the Claimant's claims had been made out, **the issue of damages is not a straightforward one.**
>
> 255. With regard to the failure to implement claim, the Claimant seeks a combination of the investment and interest associated with this equity investment and the principal and interest on the Convertible Note. However, **this seemingly straightforward proposition is contingent on a series of speculative propositions** – the Convertible Note would need to be reinstated by Korek, Korek must then refuse to pay the loan when asked to by Alcazar, and KRG in turn must then refuse to pay the amount owed under the KRG Guarantee when asked to by Alcazar. **The Tribunal has reservations about such a basis for a claim for relief. […]**
>
> 275. **As the Respondent prevailed on the merits and quantum**, the Tribunal is of the view that it is reasonable to award the full sum of the total professional fees and administrative costs sought by the Respondent in both the merits and quantum phase." (Emphasis added)

196. The Committee considers that the text of the Award is clear. The Tribunal did not analyze damages and did not engage in a factual analysis. The statements made on the issue of damages not being a "straightforward one" or on its "reservations" would be therefore *obiter dicta*. The fact that, while allocating costs the Tribunal mentioned Respondent "prevailed" on merits and quantum relates precisely to the allocation of costs. We consider that the arguments presented by Respondent do not affect our analysis on the grounds of annulment.

[299] Respondent's Counter-Memorial on Annulment, ¶¶ 69, 131 and 169. Respondent's Rejoinder on Annulment, ¶¶ 55, 107 and 108.

V. COSTS

A. THE PARTIES' POSITIONS ON COSTS

197. The Parties filed Statements of Costs in the format agreed to between the Parties, namely, limited to giving details of the amounts claimed without detailed commentary on whether and to what extent the Parties' fees and costs should be allocated, save for that the Parties may refer back to the Requests for Relief already made during the proceeding.

198. In this regard, the Applicant requested in its Memorial on Annulment that the Committee order "within 21 days of the Committee's Final Decision, the Respondent pay the Applicant the entirety of the Applicant's costs, expenses and fees incurred in connection with this Application for Annulment."[300] The Applicant's total fees and costs are the following:

DESCRIPTION	AMOUNT
PROFESSIONAL FEES[1]	
Attorneys' Fees	
Skadden, Arps, Slate, Meagher & Flom LLP	$4,546,843.00
TOTAL ATTORNEYS' FEES	**$4,546,843.00**
ADMINISTRATIVE COSTS[2]	
Skadden, Arps, Slate, Meagher & Flom LLP	$66,443.28
ARBITRATION COSTS	
ICSID Lodging Fee	£25,000.00
ICSID Advance Payments[3]	$495,000.00
AGILITY'S TOTAL COSTS	**$586,443.28**
AGILITY'S TOTAL FEES & COSTS	**$5,133,286.28**

[300] Applicant's Memorial, ¶ 203(c).

199. The Respondent requested that the Committee order the Applicant to bear the administrative costs of the proceeding and to reimburse the entirety of the Respondent's costs, with interest thereon at a rate corresponding to the six-month USD denominated SOFR (as a substitute for LIBOR) on the date of the annulment decision plus two percentage points, compounded semi-annually, and applied at the Committee-determined rate until full and final payment.[301] The Respondent's Statement of Costs is the following:

DESCRIPTION	AMOUNT (USD)
PROFESSIONAL FEES[1]	
Attorneys' Fees	
Debevoise & Plimpton LLP	US$2,250,000.00
TOTAL ATTORNEYS' FEES	**US$2,250,000.00**
ADMINISTRATIVE COSTS[2]	
Debevoise & Plimpton LLP	US$108,645.02
TOTAL COSTS	US$108,645.02
THE REPUBLIC'S TOTAL FEES & COSTS	**US$2,358,645.02**

B. THE COMMITTEE'S DECISION ON COSTS

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

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

201. This provision is applicable to annulment procedures by virtue of Article 52(4) of the Convention, which indicates the following:

[301] Respondent's Counter-Memorial on Annulment, ¶ 176; Respondent's Rejoinder on Annulment, ¶ 119.

> *"The provisions of Articles 41-45, 48, 49, 53 and 54*, ***and of Chapters VI and VII shall apply*** mutatis mutandis *to proceedings before the Committee."*[302] (Emphasis added)

202. The Committee has thus, in accordance with the foregoing articles, discretion in the assessment and the decision regarding the costs of an annulment proceeding. In the case at hand, both Parties have presented their position regarding the costs and expenses incurred. The Committee notes however, that both Parties have prevailed to certain extent within the claims and defences made.

203. While the Applicant has succeeded in demonstrating an annullable error on the Implementation claim, the rest of the grounds of annulment have been dismissed. The claims put forward have not been frivolous and, in the Committee's view, both Parties have conducted themselves properly.

204. In light of the circumstances of the case as well as the discretion granted by the ICSID Convention, the Committee considers appropriate that each Party bears its own legal costs and expenses.

205. The costs of the annulment proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):

Committee's fees and expenses	
Prof. Ricardo Ramírez	163,388.18
Prof. Dr. Jacomijn van Haersolte-van Hof	101,550.00
Prof. Hi-Taek Shin	79,571.81
ICSID's administrative fees	126,000.00
Direct expenses	29,800.36
Total	**500,310.35**

206. The above costs have been paid out of the advances made by the Applicant pursuant to Administrative and Financial Regulation 15(5). Given the circumstances of the case, the

[302] See also Arbitration Rules 53 and 47(1)(j).

Committee considers appropriate that these costs are shared equally by the Parties. Accordingly, the Respondent shall pay the Applicant USD 250,155.18.

VI. DECISION

207. For the reasons set forth above, the Committee by majority decides as follows:

(1) The Committee partially annuls the Award on the grounds of manifest excess of powers and failure to state reasons as to the Implementation claim [ICSID Convention Articles 52(1)(b) and 52(1)(e)].

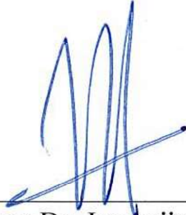
(2) For the avoidance of doubt, paras. 98-176 and para. 279(1), insofar as it refers to the claims discussed in paras. 98-176 of the Award, are annulled. The rest of the Award remains unaffected.

208. For the reasons set forth above, the Committee unanimously decides as follows:

(1) All other grounds for annulment are dismissed.

(2) Each Party shall bear its legal costs and fees.

(3) The costs of the annulment proceeding shall be equally shared. The Respondent shall pay the Applicant USD 250,155.18 within 40 days from the issuance of this Decision.



Professor Dr. Jacomijn van Haersolte-van Hof
Member of the Committee

Subject to the attached Dissenting Opinion

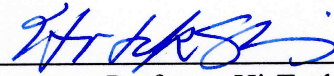
Date: 25 January 2024

Professor Hi-Taek Shin
Member of the Committee

Date:

Professor Ricardo Ramírez
President of the Committee

Date:



Professor Dr. Jacomijn van Haersolte-van Hof
Member of the Committee

Subject to the attached Dissenting Opinion

Date:

Professor Hi-Taek Shin
Member of the Committee

Date: 15 January 2024

Professor Ricardo Ramírez
President of the Committee

Date:

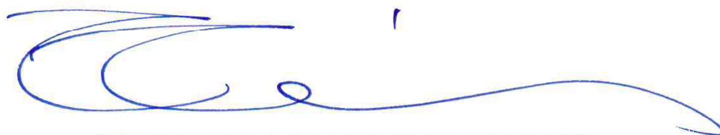
Professor Dr. Jacomijn van Haersolte-van Hof
Member of the Committee

Subject to the attached Dissenting Opinion

Date:

Professor Hi-Taek Shin
Member of the Committee

Date:



Professor Ricardo Ramírez
President of the Committee

Date: January 26, 2024