INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AHG INDUSTRY GMBH & CO. KG

Claimant

and

REPUBLIC OF IRAQ

Respondent

ICSID Case No. ARB/20/21

AWARD ON THE RESPONDENT'S APPLICATION UNDER ICSID RULE 41(5)

Members of the Tribunal
Dr. Yas Banifatemi, President
Judge Awn Al-Khasawneh
Professor Lucy Reed

Secretary of the Tribunal
Ms. Ella Rosenberg

Assistant to the Tribunal
Mr. André Marini

Date of dispatch to the Parties: 30 September 2022

REPRESENTATION OF THE PARTIES

Representing AHG Industry GmbH & Co. KG:

Mr. Martin Gusy
Ms. Jadranka Jakovcic
Ms. Camille M. Ng
Bracewell LLP
31 West 52nd Street, 19th Floor
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United States of America

Representing the Republic of Iraq:

Dr. Alejandro Escobar
Ms. Dorine Farah
Mr. David Turner
Baker Botts (UK) LLP
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and

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United Kingdom

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TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
EU	European Union
Iraq-France BIT	Agreement for Encouragement and Protection of Investment between the Republic of France and the Republic of Iraq which entered into force on 24 August 2016
Iraq-Germany BIT	Agreement of Encouragement and Reciprocal Protection of Investments and the Protocol Attached Thereto entered into between the Government of the Republic of Iraq and the Government of the Federal Republic of Germany which was signed on 4 December 2010 and incorporated into Iraqi Law through Law No. 60 of 2012
ICSC	Iraqi Cement State Company
Hearing	Hearing on Rule 41(5) held on 29 June 2021
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
Investment Law	Iraq's Investment Law No. 13 of 2006 as amended in 2015
Kurdistan Law No. 4	Law of Investment in Kurdistan Region – Iraq, Law No. 4 of 2006
Law No. 24	Iraq's Law No. 24 of 2012 ratifying the Iraq-France BIT
Law No. 49	Iraq's Law No. 49 of 2013 ratifying the PCA
Law No. 60	Iraq's Law No. 60 of 2012 ratifying the Iraq-Germany BIT
Law No. 64	Law No. 64 of 2012 – Joinder by the Republic of Iraq of the Convention on The Settlement Of Investment Disputes Between States, resolved on 1 October 2012 and published in the Official Gazette of Iraq on 29 July 2013

Rehabilitation Contract or License	Kirkuk Cement Factory Rehabilitation and Operation Contract dated 20 April 2008
PCA	Partnership and Cooperation Agreement between the European Union and its Member States on the one part, and the Republic of Iraq, on the other part as incorporated into Iraqi law by Law No. 49 of 2013 and published in the Official Gazette of Iraq on 19 May 2014
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Tribunal	Arbitral tribunal constituted on 8 March 2021

I. INTRODUCTION AND PARTIES

1. This arbitration concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**"), as well as:

(1) The Agreement of Encouragement and Reciprocal Protection of Investments and the Protocol Attached Thereto entered into between the Government of the Republic of Iraq and the Government of the Federal Republic of Germany which was signed on 4 December 2010 (the "**Iraq-Germany BIT**");

(2) Iraq's Law No. 60 of 2012 ratifying the Iraq-Germany BIT ("**Law No. 60**");

(3) The Partnership and Cooperation Agreement between the European Union ("**EU**") and its Member States on the one part, and the Republic of Iraq, on the other part ("**PCA**");

(4) Iraq's Law No. 49 of 2013 ratifying the PCA ("**Law No. 49**");

(5) The Agreement for Encouragement and Protection of Investment between the Republic of France and the Republic of Iraq (the "**Iraq-France BIT**"), which entered into force on 24 August 2016;

(6) Iraq's Law No. 24 of 2012 ratifying the Iraq-France BIT ("**Law No. 24**");

(7) Law No. 64 of 2012 – Joinder by the Republic of Iraq of the Convention on The Settlement of Investment Disputes Between States, resolved on 1 October 2012 and published in the Official Gazette of Iraq on 29 July 2013 ("**Law No. 64**");

(8) The Kirkuk Cement Factory Rehabilitation and Operation Contract dated 20 April 2008 (the "**Rehabilitation Contract**" or the "**License**");

(9) Iraq's Investment Law No. 13 of 2006 as amended in 2015 ("**Investment Law**"); and/or

(10) Law of Investment in Kurdistan Region – Iraq, Law No. 4 of 2006 (the "**Kurdistan Law No. 4**").

2. The Claimant is AHG Industry GmbH & Co. KG ("**AHG**" or the "**Claimant**"), a company incorporated in the Federal Republic of Germany.

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

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

II. PROCEDURAL HISTORY

5. On 5 June 2020, ICSID received a Request for Arbitration from AHG against Iraq (the "**Request**").

6. On 26 June 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

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

8. On 30 November 2020, the Claimant appointed Professor Lucy Reed, a national of the United States of America as arbitrator. Professor Reed accepted her appointment on 3 December 2020. Together with her acceptance, Professor Reed provided the Parties with a declaration of her independence and impartiality accompanied by a statement.

9. On 22 December 2020, the Respondent appointed Judge Awn Al-Khasawneh, a national of the Kingdom of Jordan, as arbitrator. Judge Al-Khasawneh accepted his appointment on 12 January 2021. Together with his acceptance, Judge Al-Khasawneh provided the Parties with a declaration of his independence and impartiality.

10. On 5 March 2021, in accordance with the method of appointment agreed upon by the Parties, Dr. Yas Banifatemi, a national of France and Iran, was appointed as President of the Tribunal. Dr. Banifatemi accepted her appointment on 6 March 2021. Together with her acceptance, Dr. Banifatemi provided the Parties with a declaration of her independence and impartiality accompanied by a statement.

11. On 8 March 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Ella Rosenberg, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

12. On 6 April 2021, the Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41(5) (the "**Respondent's Rule 41(5) Application**") accompanied by exhibits R-1 to R- 6 and legal authorities RL-1 to RL-34.

13. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 27 April 2021, via video conference.

14. Following the first session, on 3 May 2021, the Tribunal issued Procedural Order No. 1 recording the Parties' agreement on procedural matters. Procedural Order No. 1 provided, *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 Paris (France).

15. On 13 May 2021, the Claimant filed Observations on the Respondent's Rule 41(5) Application (the "**Claimant's Response**") accompanied by exhibits C-10 to C-12 and legal authorities CL-9 to CL-17.

16. On 27 May 2021, the Respondent filed a Reply to the Claimant's Response (the "**Respondent's Reply**") accompanied by legal authorities RL-35 to RL-36.

17. On 10 June 2021, the Claimant filed a Sur-Reply to the Respondent's 41(5) Application (the "**Claimant's Sur-Reply**") accompanied by exhibits C-13 to C-14 and legal authorities CL-18 to CL-19.

18. A hearing on the Application under Rule 41(5) was held on 29 June 2021, via video conference (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Dr. Yas Banifatemi	President
Professor Lucy Reed	Arbitrator
Judge Awn Al-Khasawneh	Arbitrator

Assistant to the Tribunal:

Mr. André Marini	Gaillard Banifatemi Shelbaya Disputes (Paris)

ICSID Secretariat:

Ms. Ella Rosenberg	Secretary of the Tribunal
Ms. Elizabeth Starkey	Paralegal

For the Claimant:

Mr. Martin Gusy	Bracewell LLP (New York)
Ms. Jadranka Jakovcic	Bracewell LLP (New York)
Mr. Lutz Stache	AHG
Ms. Mona Al Janabi	AHG

For the Respondent:

Ms. Dorine Farah	Baker Botts (London)
Dr. Alejandro Escobar	Baker Botts (London)
Mr. David Turner	Baker Botts (London)
Ms. Noor Kadhim	Baker Botts (London)
Mr. Salem Chalabi	Republic of Iraq

Court Reporter:

Ms. Diana Burden

19. On 10 December 2021, the Claimant filed further evidence in opposition to the Respondent's 41(5) Application. The Respondent submitted its observations on 23 December 2021.

20. On 27 December 2021, the Claimant submitted its answer to the Respondent's observations. The Respondent replied to the Claimant's answer on 31 December 2021.

21. On 17 January 2022, the Tribunal informed the Parties that the Claimant's latest submission dated 10 December 2021, as well as the three subsequent letters from the Parties (the Claimant's letter of 27 December 2021 and the Respondent's letters of 23 December and 31 December 2021) were admitted onto the record. The Tribunal advised that it would deal with those submissions in its ruling on the Respondent's Rule 41(5) Application.

22. On 21 January 2022, the Claimant filed a Notice and Request for Voluntary Partial Withdrawal of Claim without Prejudice (the "**Notice for Voluntary Partial Withdrawal**").

23. On 8 February 2022, the Respondent filed its observations on the Claimant's Notice for Voluntary Partial Withdrawal.

24. On 11 February 2022, the Tribunal informed the Parties that any decision on the Claimant's Notice for Voluntary Partial Withdrawal "*will be taken, if necessary, after the Tribunal has ruled on the Respondent's application under Rule 41(5)*".

25. On 21 July 2022, having deliberated, the Tribunal informed the Parties that it expected to issue its ruling in the course of August or September 2022.

26. On 17 August 2022, the Claimant submitted a full memorial on jurisdiction, with accompanying testimonies and exhibits, and requested that the Respondent be ordered to file its "*actual jurisdictional objections*". On the same day, the Respondent objected to the Claimant's unauthorized submission, which it characterized as an "*unacceptable breach of due process and the Tribunal's procedural orders*".

27. On 19 August 2022, the Tribunal noted that, until such time as it has issued its decision on the Respondent's ICSID Rule 41(5) Application, no procedural calendar had been—or could by definition be—fixed, pursuant to which the Claimant would be authorized to file a substantive submission on matters of jurisdiction and/or merits. In the circumstances, the Tribunal found that the Claimant was not authorized to make any submission while the

Parties were awaiting the Tribunal's forthcoming decision in relation to the Respondent's ICSID Rule 41(5) Application. Accordingly, the Tribunal ordered the Claimant to immediately withdraw its memorial on jurisdiction and accompanying materials, and noted that, in the meantime, it had not and would not review either the submission or any of the accompanying materials filed by the Claimant.

28. On 22 August 2022, the Claimant withdrew its 17 August 2022 filing.

29. The Tribunal has reviewed the Parties' respective submissions carefully and thoroughly. The following sections address, in turn, the factual and legal background to the underlying dispute (**III**), the applicable standard under ICSID Rule 41(5) (**IV**), and an analysis of each of the grounds for jurisdiction on which the Claimant has relied to justify this Tribunal's jurisdiction and which the Respondent has challenged (**V**).

III. FACTUAL AND LEGAL BACKGROUND

30. In the following sections, the Tribunal briefly describes the facts having given rise to the present dispute (**A**) and provides background to the various legal instruments on the basis of which the Claimant seeks to establish the Tribunal's jurisdiction (**B**).

A. FACTUAL BACKGROUND

31. The Tribunal notes at the outset that, given the nature of a Rule 41(5) procedure, the Respondent's Rule 41(5) Application addresses the factual background to the dispute in a limited manner, focusing on questions of consent under the various instruments on which the Claimant relies to establish jurisdiction. In the circumstances, the Tribunal sets forth below a brief summary of facts based mostly on the Claimant's account of the underlying facts. The Tribunal makes no factual findings in relation to the merits of the dispute.

32. The Claimant alleges that it was one of the very first investors in the post-Saddam Hussain Iraq, and that it made an investment in response to Iraq's invitation and solicitation of foreign investments.[1]

33. The Claimant states that it took the first steps to invest in Iraq between mid-2007 and April 2008, when it received and responded to tender documents for an opportunity to rehabilitate and operate a Cement Plant in Kirkuk.[2] The Claimant also alleges that, during this period, it attended meetings with Iraqi Government officials to discuss the tender for the operation and rehabilitation of the Kirkuk Cement Plant.[3] The Claimant states that, at around the same time, Iraq was soliciting foreign direct investment and negotiating various investment treaties.[4]

34. On 20 April 2008, the Iraqi General Company for Cement on the one hand, and the Middle East Company, Salahaddin Holding Company, and AHG on the other hand, entered into the so-called "Kirkuk Cement Factory Rehabilitation and Operation Contract".[5] The Claimant alleges that "*Iraq (acting through ICSC* [the Iraqi Cement State Company]*, an instrumentality of the MOI and of the Iraqi state) signed the License in the presence of the then Iraqi Minister of Industry and Minerals, Minister Hariri, and Dr Al Araji*".[6] The

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1 Request, ¶ 2. In this regard, the Claimant alleges that "*Iraq motivated Claimant into becoming one of the very first investors in post-Saddam Hussein Iraq and to invest in Iraq in response to Iraq's invitation and solicitation of foreign investment based on its national Investment Law. This was also expressed when AHG's Mr. Stache travelled to Baghdad together with the then Germany Minister of the Economy, Mr. Michael Glos in July 2008, a trip that laid the foundation for and eventually resulted in the conclusion of the German BIT. Iraq then followed through on signing the international agreements and multilateral international agreements referenced in Iraq's 2006 Investment Law*." (Claimant's Response, ¶ 22).

2 Request, ¶ 27.

3 Request, ¶ 27.

4 Request, ¶ 25.

5 The Rehabilitation Contract (**Exhibit C-1**).

6 Request, ¶ 29. The Claimant further contends that "*as set out in the recitals of the License, the Iraqi 'Ministry of Industry and Minerals announced its intention to rehabilitate, operate, renovate and develop Kirkuk Cement Factory according to the general conditions advertised for the interested applicants' and 'the Middle East Company submitted the offer to rehabilitate, renovate and develop the factory as per the advertised conditions of the Ministry of Industry and Minerals.' The Ministry of Industry and Minerals approved and controlled the License, participated in negotiations and*

Respondent alleges that Iraq is not a party to the Rehabilitation Contract.[7] The matter is the subject of a factual dispute between the Parties, as emphasized by counsel for the Claimant at the Hearing.[8]

35. Under the Rehabilitation Contract, on the one hand, the Iraqi General Company for Cement had the obligation to hand over the Kirkuk Cement Plant to the Middle East Company, Salahaddin Holding Company and AHG under certain conditions.[9] On the other hand, the Middle East Company, Salahaddin Holding Company and AHG undertook to perform certain activities such as the rehabilitation of the factory and to manage and operate it throughout the lifetime of the Contract.[10]

36. The Claimant states that the Kirkuk Cement Plant was handed over to it on 20 August 2008 and AHG began undertaking several rehabilitation measures and making significant investments.[11] The Claimant further alleges that, despite the progress it made rehabilitating the Kirkuk Cement Plant during the first three months after the handover, Iraq complained about the lack of progress and issued a formal notice in this regard on 20 January 2009.[12]

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solicitations relating to the License, provided the English translation of the Investment Law to AHG with the tender documents, and ultimately determined and controlled the termination of the License. Indeed, Iraq expelled AHG from the Cement Plant, Pipe Plant and the country." (Claimant's Response, ¶ 50). In its Sur-Reply, the Claimant further argued that "*there is ample reference to the Iraqi state in such contracts themselves and ICSC's letterhead states:* 'Republic of Iraq, Ministry of Industry, Iraqi Cement State Company'" (Claimant's Sur-Reply, ¶ 29).

7 Respondent's Rule 41(5) Application, ¶ 39.

8 Hearing Transcript, p. 59, lines 14-24 ("*You have heard from the Respondent that it argues Iraq is not a party to the agreement. If anything again I highlight based on what we have stated in the Request for Arbitration that there is a factual dispute on the issue because it was Minister Hariri as the Minister of Industry that has stated to have entered into agreements in Dubai in April 2008, including the agreement you are looking at, the licence, and then later on the extended licence, thereby binding the Republic of Iraq*.").

9 The Rehabilitation Contract, Article 6 (**Exhibit C-1**).

10 The Rehabilitation Contract, Article 3 (**Exhibit C-1**).

11 Request, ¶ 31.

12 Request, ¶ 36.

37. According to the Claimant, a few days thereafter, on 5 February 2009, Iraq terminated the Rehabilitation Contract and "*stated that the Kirkuk Cement Plant was being taken from AHG*".[13] The Claimant states that, still in February 2009, Iraq forced AHG's foreign workers to resign.[14] At that time, according to the Claimant, AHG had invested approximately US$ 47 million.[15]

38. The Claimant contends that following the termination of the Rehabilitation Contract, litigation began before the Iraqi courts, which led to discussions between AHG, the Ministry of Industry and Minerals of Iraq and the Iraqi General Company for Cement in late August/early September 2015.[16] The Claimant states that an agreement was reached and memorialized in the Addendum to the Rehabilitation Contract executed on 5 January 2016.[17]

39. Following the execution of the Addendum to the Rehabilitation Contract, the Claimant states that it resumed its activities and investments in the Kirkuk Cement Plant.[18] The Claimant alleges that, beginning in March 2017, Iraq failed to provide security around the Kirkuk Cement Plant and engaged in arbitrary, discriminatory and abusive conduct that culminated in the expulsion of AHG from the Kirkuk Cement Plant and the outright expropriation of AHG's investment.[19]

40. The Claimant further alleges that Iraq targeted AHG's employees unfairly, issuing arrest warrants against the Claimant's owner, Mr. Stache, and AHG's Office Manager,

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13 Request, ¶ 37.

14 Request, ¶ 37.

15 Request, ¶ 38.

16 Request, ¶¶ 39-42.

17 Request, ¶ 43. The Addendum to the Rehabilitation Contract states: "*Pursuant to the Parties' agreement under the minutes of meeting signed between them on 1/9/2015, ratification of the joint minutes dated 4/10/2015 by His Excellency the Minister of Industry and Minerals, approval of re-activation of Kirkuk Cement Plant Investment Contract pursuant to letter no. 42305 dated 6/10/2015 of the Ministry of Industry and Minerals/ Investment Department and pursuant to duly signed addendum to contract between the Parties*." (Addendum to the Rehabilitation Contract, Preamble (**Exhibit C-8**)).

18 Request, ¶ 45.

19 Request, ¶ 46.

Ms. Al Janabi. The Claimant states that, "*during this time* [April 2017]*, the homes of these personnel were also targeted and shot at, and an employee was threatened by telephone that her house and her family would be razed to the ground if they did not leave Iraq*".[20]

41. The Claimant states that, in December 2017 and January 2018, it met with the Ministry of Industry and Minerals of Iraq and the Iraqi General Company for Cement in Berlin in order to find a solution to the issues with the Kirkuk Cement Plant.[21] The Claimant alleges that, during these meetings, Iraq reassured AHG that its investment would be protected and that Iraq would live up to its promises.[22]

42. According to the Claimant, in February 2018, Mr. Stache was removed without his knowledge or consent from the position of the managing director of the Kirkuk Cement Plant. Around the same time, the Claimant notes that the Fifth Iraqi Army Division under the orders of Major Khalid Baizz Binian took control of the Kirkuk Cement Plant.[23]

43. The Claimant alleges that, on 4 April 2018, the Ministry of Industry and Minerals of Iraq decided that the Kirkuk Cement Plant would not be returned to AHG and entered into new production sharing agreements with other companies to operate the Kirkuk Cement Plant.[24]

44. Separately from the above, the Claimant alleges that it invested an additional US$ 17 million in Iraq, building a PVC and HDPE pipe plant and an associated 4 MW power plant in Erbil (the "**Erbil Pipe Plant**"), Kurdistan.[25] According to the Claimant, Iraq failed to provide security for the Erbil Pipe Plant, which had been taken over by a certain

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20 Request, ¶ 47.

21 Request, ¶ 48.

22 Request, ¶ 48.

23 Request, ¶ 50.

24 Request, ¶ 51.

25 Request, ¶ 52.

Mr. Najjar[26] with the support of an armed group in March 2017.[27] The Claimant states that in May 2017, AHG's Mr. Stache and Ms. Al Janabi went to the police station in the vicinity of the Erbil Pipe Plant to file a complaint, but they were arrested and taken to court. After leaving court, they are alleged to have both left Iraq, fearing for their physical safety.[28]

45. On 5 September 2018, AHG notified Iraq of a dispute relating "*to AHG's investment in late 2007/early 2008 in the Kirkuk Cement Plant in The Republic of Iraq*".[29] The notification stated that it was "*made pursuant to the Investment Law No. 13 of 2006 of Iraq, as amended*, […] *and pursuant to Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*".[30] The Claimant further alleged that it incurred several losses, including a loss of US$ 861,045,813.35 in respect of the Kirkuk Cement Plant and out of pocket costs in the amount of over US$ 17 million regarding the Erbil Pipe Plant.[31]

46. The Claimant states that, following this notice, it met with the Ministry of Industry and Minerals of Iraq and the Iraqi General Company for Cement in Istanbul from 2 to 4 May 2019 to try to settle the dispute, without an amicable resolution being reached.[32]

47. It is following these events that, on 5 June 2020, the Request for Arbitration was filed by AHG against Iraq.

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26 As regards the capacity in which Mr. Najjar is alleged to have acted, the Claimant states that "*In February 2016, AHG Iraq and ZAIN Middle East for Commercial Agencies ("ZAIN"), represented by Mr. Mohammed Kaka Ahmed Hussein Najjar ("Mr Najjar"), entered into an agreement for ZAIN to take over the operation and management of the Pipe Plant in return for ZAIN receiving 30% of its net profit*" (Request, ¶ 53).

27 Request, ¶ 54.

28 Request, ¶ 55.

29 K&L Gates letter to the President of the Republic of Iraq and the Prime Minister of the Republic of Iraq, dated 5 September 2018, ¶ 1 (**Exhibit C-9**).

30 K&L Gates letter to the President of the Republic of Iraq and the Prime Minister of the Republic of Iraq, dated 5 September 2018, ¶ 3 (**Exhibit C-9**).

31 K&L Gates letter to the President of the Republic of Iraq and the Prime Minister of the Republic of Iraq, dated 5 September 2018, ¶¶ 46-47 (**Exhibit C-9**).

32 Request, ¶ 86.

B. THE PRINCIPAL LEGAL INSTRUMENTS RELIED ON BY THE CLAIMANT

48. For ease of reference throughout this Award, the Tribunal provides at the outset a brief summary of the various instruments on the basis of which the Claimant is seeking to establish the Tribunal's jurisdiction:

	Title of Legal Text	Brief Summary
1	Agreement for Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Iraq and the Government of the Republic of Germany ("**Iraq-Germany BIT**").[33]	Investment protection treaty between Iraq and Germany signed on 4 December 2010 and ratified only by Iraq on 1 October 2012 through Law No. 60 of 2012.
2	Iraq's Law No. 60 of 2012 ("**Law No. 60**").[34]	Iraq's law of 2012 ratifying the Iraq-Germany BIT.
3	Partnership and Cooperation Agreement between the European Union and its Member States on the one part and the Republic of Iraq on the other part ("**PCA**").[35]	Agreement establishing a partnership between the European Union, its Member States and Iraq with the objective of, among other things, promoting trade and investment and harmonious economic relations between the Parties and fostering their sustainable economic development dated 31 July 2012.
4	Iraq's Law No. 49 of 2013 ("**Law No. 49**").[36]	Iraq's law of 2013 ratifying the PCA.
5	Agreement for the Encouragement and Protection of Investments between the Republic of Iraq and the Republic of France ("**Iraq-France BIT**").[37]	Investment protection treaty between Iraq and France signed on 31 October 2010 and entered into force on 24 August 2016.
6	Iraq's Law No. 24 of 2012 ("**Law No. 24**").[38]	Iraq's law of 2012 ratifying the Iraq-France BIT.

33 Law No. 60 of 2012 and the Germany-Iraq BIT, dated 4 December 2010 (**Exhibit CL-4**).

34 Law No. 60 of 2012 and the Germany-Iraq BIT, dated 4 December 2010 (**Exhibit CL-4**).

35 PCA and Law No. 49 of 2013 (**Exhibit CL-6**).

36 PCA and Law No. 49 of 2013 (*see* PDF p. 112) (**Exhibit CL-6**).

37 Law No. 24 of 2012 and the French-Iraq BIT, dated 31 October 2010 (**Exhibit CL-5**).

38 Law No. 24 of 2012 and the French-Iraq BIT, dated 31 October 2010 (**Exhibit CL-5**).

	Title of Legal Text	Brief Summary
7	Iraq's Law No. 64 of 2012 ("**Law No. 64**").[39]	Iraq's law authorizing Iraq's accession to the ICSID Convention.
8	The Kirkuk Cement Factory Rehabilitation and Operation Contract between AHG, the Iraqi State Cement Company, the Salahaddin Investment Holding Company and the Middle East Company, dated 20 April 2008 (the "**Rehabilitation Contract**" or the "**License**").[40]	Agreement through which the Claimant alleges it has made qualifying investments.
9	Iraq's Law No. 13 of 2006 ("**Law No. 13**" or "**Investment Law**").[41]	Iraq's Investment Law.
10	Kurdistan Law No. 4 of 2006 ("**Kurdistan Law No. 4**").[42]	Kurdistan Regional Investment Law of 2006.

IV. THE APPLICABLE STANDARD UNDER ICSID RULE 41(5)

49. The Respondent requests that the Tribunal dismiss the Claimant's case pursuant to Rule 41(5) of the ICSID Arbitration Rules due to a manifest lack of jurisdiction to hear the Claimant's claims.

50. Rule 41 (5) provides:

> "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the

39 Law No. 64 of 2012 and the ICSID Convention (**Exhibit CL-1**), also produced as **Exhibit R-6**.

40 The Rehabilitation Contract (**Exhibit C-1**).

41 The Claimant produced two versions of this law, one non amended (**Exhibit CL-3**) and another one as amended with Law No. 2 of 2010 and the Law No. 50 of 2015 (**Exhibit CL-3A**). The Respondent also produced a copy of the amended version of the Law No. 13 containing an Arabic version (**Exhibit R-2**).

42 Kurdistan Regional Investment Law No. 4 of 2006 (**Exhibit CL-8**), also produced as **Exhibit R-3** containing the Arabic version.

> objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit".

51. Both Parties agree that the threshold under a Rule 41(5) application is high.[43] In essence, the Parties agree that an arbitration can only be summarily disposed of based on Rule 41(5) when it is "*clear*" and "*certain*" that the case is without legal merit.[44]

52. Both Parties cite specifically to the standard adopted by the tribunal in *Trans-Global v. Jordan*, stating that the plain language of "*manifestly*" in Rule 41(5) requires "*the respondent to establish its objection clearly and obviously, with relative ease and despatch*".[45]

53. At the Hearing, the Claimant further argued:[46]

> "So citing from *Trans-Global Petroleum /v Jordan* which interpreted the requirement of the manifest without legal merit part, the word has been interpreted to mean self-evident, clear, plain on its face or certain, as distinct from the product of elaborate interpretations one way or the other, or susceptible to argument, or being necessary to engage in elaborate analyses".

54. The Respondent concurs, having referred to "*a Rule 41(5) dismissal* [being] *appropriate when the claims being pursued are so obviously without legal merit that a full proceeding would be unduly burdensome and costly*",[47] or to the claim needing to "*be dismissed for manifest lack of legal merit if it cannot succeed, no matter what evidence is adduced,*

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43 Claimant's Sur-Reply, ¶ 8; Respondent's Reply, ¶ 8.

44 Claimant's Sur-Reply, ¶ 8; Respondent's Reply, ¶ 5(a).

45 Claimant's Response, ¶ 4; Respondent's Rule 41(5) Application, ¶ 11. *See also* Hearing Transcript, p. 8, lines 12-15, citing to *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 ("***Trans-Global v. Jordan***"), ¶ 88 (**Exhibit RL-3**).

46 Hearing Transcript, p. 44, lines 6-13.

47 Respondent's Rule 41(5) Application, ¶ 13.

because there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal".[48]

55. Further, both Parties agree that a claim's manifest lack of merit cannot require a detailed examination of the facts of the dispute,[49] even though the Parties disagree as to whether the Respondent's objections actually require a detailed examination of the facts.[50] In this regard, the Tribunal finds that to the extent the Respondent's objections go to matters of jurisdiction, the Tribunal is not, even on a *prima facie* basis, to be concerned with the facts relevant to the merits of the dispute; rather, it must concern itself with the *legal* merit of the Claimant's claims to jurisdiction and the Respondent's objections to the same.

56. Relatedly, the claim that the dispute raises, in the Claimant's case, allegedly egregious injustice requiring a full and complete proceeding,[51] does not alter the applicable standard under Rule 41(5), namely that if an objection is made by the Respondent that the Tribunal manifestly lacks jurisdiction, the Tribunal is duty-bound to address that question, regardless of the Claimant's case as made on the merits.

57. It is on the basis of this high standard that the Tribunal has reviewed and determined the Respondent's objections based on ICSID Rule 41(5). In doing so, the Tribunal has been mindful of the multiple grounds for jurisdiction put forward by the Claimant and has found

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48 Hearing Transcript, p. 8, lines 24-25 and p. 9, lines 1-4. *See also* Respondent's Rule 41(5) Application, ¶ 11 ("*the claim's manifest lack of merit must be apparent without requiring a detailed examination of the facts of the dispute*"); Respondent's Reply, ¶ 5(a) ("*the Claimant's case on jurisdiction is* 'obviously defective'"); Hearing Transcript, p. 9, lines 4-7 ("*there can be no arguable argument for a success, or as the Claimant puts it, no tenable arguable case*").

49 Claimant's Response, ¶ 8; Respondent's Rule 41(5) Application, ¶ 11; Hearing Transcript, p. 8, lines 18-20 ("*it requires an examination without dealing with contested facts*").

50 Claimant's Response, ¶ 8; Respondent's Reply, ¶ 8.

51 Claimant's Response, ¶ 12; *See also* Hearing Transcript, p. 43, lines 11-19 ("*The scope of Respondent's Rule 41(5) objections to be determined here at this hearing and thereafter simply involve arguments on* ratione voluntatis*. There is no argument presented on the merits; there is no argument presented on* ratione personae*, which is relevant for purposes of the PCA. There is equally no argument presented addressing* ratione materiae").

the arguments built around those grounds often to be intricate.[52] In the Tribunal's view, however, the intricacy of the arguments is to be distinguished from the question of whether a claim—here, a claim to the Tribunal's jurisdiction on each and all of the grounds put forward by the Claimant—is "*manifestly*" without legal merit. The *Trans-Global Petroleum v. Jordan* case, to which both Parties refer, distinguishes what is "*self-evident, clear, plain on its face or certain*" from what is "*the product of elaborate interpretations one way or the other, or susceptible to argument, or being necessary to engage in elaborate analyses*".[53] That distinction, however, was made in relation to the specific use, by *ad hoc* committees, of the word "*manifestly*" in the context of Article 52(1)(b) of the ICSID Convention.[54] More relevant to ICSID Rule 41(5), the *Trans-Global* tribunal stated, in its repeatedly cited observation:

> "[…] the ordinary meaning of the word requires the respondent to establish its objections clearly and obviously, with relative ease and despatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple, requiring (as in this case), successive rounds of written and oral submissions by the parties, together with questions addressed by the Tribunal to those

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52 The Claimant's Response, at ¶¶ 10-11, is particularly telling of this approach: "*More specifically, this Tribunal would be inappropriately required to interpret and analyze, amongst other things, the interplay of the following: 1) the Partnership and Cooperation Agreement between the European Union and its Members States and Iraq (the "**PCA**") along with its related most favoured nation ("**MFN**") provisions and the bilateral investment treaty ("**BIT**") between France and Iraq (the "**French BIT**"); 2) multiple articles of Iraqi national law including Article 22 of the Investment Law (Law No. 13 of 2006) and Law No. 60 of 2012 ratifying the BIT between Germany and Iraq (the "**German BIT**") and Law No. 64 of 2012 on the ICSID Convention; 3) one of the investment's underlying contracts, the Kirkuk Cement Factory Rehabilitation and Operation Contract dated 20 April 2008 and 5 January 2016 (the "**License**", and "**Extended License**", respectively); and 4) the Kurdish Investment Law with respect to the Pipe Plant. The Claimant has provided multiple pathways which lead to a plausible finding of jurisdiction in this matter. It is a mistake to present the complexities of these pathways, and Respondent's objections to them, as '*so clearly and unequivocally unmeritorious*' to survive a Rule 41(5) proceeding such that Claimant would not have '*a tenable arguable case*'. In fact, it is clear from the nature of Respondent's Rule 41(5) Objections that the issue of jurisdiction will indeed require extensive argument to be disposed of and clearly fall short of Rule 41(5)'s high standard.*" (Emphasis in original). *See also* Respondent's Reply, ¶ 3: "*The convoluted manner in which the Claimant has presented its jurisdictional '*pathways*' does not mean that they are plausible, or that '*extensive analysis*' is required to dispose of them. Complexity should not be mistaken for viability.* […]".

53 Reference to *Trans-Global v. Jordan* by the Claimant, Hearing Transcript, p. 44, lines 6-13.

54 *Trans-Global v. Jordan* (cited above at ¶ 52 and note 45), ¶ 84 (**Exhibit RL-3**).

> parties. The exercise may thus be complicated; but it should never be difficult".[55]

58. This Tribunal, too, finds that the high threshold inherent in the word "*manifest*" does not imply that an ICSID Rule 41(5) procedure somehow proscribes extended and even elaborate arguments by the parties. What is the subject of the inquiry under this provision is not the length or complexity of the parties' arguments, as it would then be enough, for a party resisting such an objection, to create a number of convoluted and complex defenses in order to justify that the "*manifest*" threshold is not met under the provision; rather, the subject of the inquiry is the claim itself and whether that claim is, on its face, legally meritless. Here, the subject of the Tribunal's inquiry is whether, as the Respondent argues, the Claimant's claim to the Tribunal's jurisdiction—in relation to each of the instruments invoked by the Claimant, on a standalone basis or in combination with other instruments —is lacking on its face, or if the Claimant has, in the words of the *PNG* tribunal, a "*tenable arguable case*".[56] It does not matter whether, for that purpose, in invoking each ground or in resisting the Respondent's challenge, the Claimant's argument or the Respondent's defense is elaborate or intricate. In other words, the elaborate or intricate nature of the Parties' arguments is no reason, as such, to dismiss the Respondent's Application out of hand. The Respondent will prevail if it appears that the Claimant has no tenable arguable case and that the absence of legal merit in each of the Claimant's claims to jurisdiction is clear and obvious.

V. THE TRIBUNAL'S ANALYSIS

59. In the following sections, the Tribunal examines and decides, in turn, each of the Respondent's objections to the Claimant's different alleged pathways to jurisdiction. The Tribunal will also address the Claimant's argument that, in addition to each of the separate grounds it has put forward to establish the Tribunal's jurisdiction, the interplay between

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55 *Trans-Global v. Jordan*, ¶ 88 (**Exhibit RL-3**).

56 *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Tribunal's Decision on the Respondent's Objections Under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2014, ¶ 88 (**Exhibit CL-10**) stating: "*In the opinion of the Tribunal, a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case*".

those different jurisdictional pathways further establishes the Tribunal's jurisdiction to hear the present dispute.

60. For clarity, in each of the following eight sections, the Tribunal will first summarize the Parties' positions on each jurisdictional ground put forward by the Claimant, followed by its analysis and decision on that ground. In doing so, the Tribunal has followed the general sequencing of the Respondent's objections,[57] while also following, where possible, the internal logic of each ground for jurisdiction as put forward by the Claimant and maintaining the logical sequence in light of the interplay between the various instruments invoked by the Claimant.

A. WHETHER THE TRIBUNAL HAS JURISDICTION BASED ON LAW NO. 60 OF 2012 RATIFYING THE IRAQ-GERMANY BIT

(1) Brief Summary of the Parties' Positions

61. On 1st October 2012, the President of the Republic of Iraq issued Law No. 60 of 2012 ratifying the Iraq-Germany BIT. This Law provides in full:

> "Article 1- The Republic of Iraq hereby ratifies the Agreement of Encouragement and Reciprocal Protection of Investments And the Protocol Attached Thereto Entered into between the Government of the Republic of Iraq and the Government of the Federal Republic of Germany signed in Bagdad on 4/12/2010.
>
> Article 2- This Law shall come into force as of the date of publication in the Official Gazette".[58]

62. Law No. 60 attaches the Iraq-Germany BIT, which was signed by both Iraq and Germany on 4 December 2010.[59] This BIT sets out, among other things, certain protections for foreign investors and a dispute settlement mechanism through arbitration. In this respect, Article 11(4) of the Iraq-Germany BIT provides that:

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57 *See* in particular the Respondent's Rule 41(5) Application, ¶ 5.

58 Law No. 60 of 2012 dated 4 December 2010 (**Exhibit CL-4**).

59 Law No. 60 of 2012 dated 4 December 2010 (**Exhibit CL-4**).

> "In the event of both Contracting States having become Contracting States of the Convention of the eighteenth March 1965 on the Settlement of Investment Disputes Between States and Nationals of other States, the disputes arising between the dispute parties under this Article shall be submitted for arbitration under the aforementioned Convention, unless otherwise agreed by the dispute parties, each Contracting State herewith declares its acceptance of such procedure".[60]

63. Separately, Article 14(2) of the Iraq-Germany BIT sets out the conditions for the BIT's entry into force:

> "This Agreement shall enter into force one month after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years […]".[61]

64. It is uncontested between the Parties that the Iraq-Germany BIT never came into force and that, therefore, it is not internationally binding on either of the two Contracting States.[62]

65. The Claimant argues that "*Law No. 60 of 2012 provides consent because it forms part of Iraqi national law. Iraq's intention to be bound by the BIT is readily apparent*".[63] In addition, the Claimant argues that the issuance of Law No. 60 and its precise terms constitute a unilateral declaration under which Iraq manifested its intention to be bound by the terms of the Iraq-Germany BIT.[64] In this regard, the Claimant focuses in particular on the wording of Article 11(4) of the Iraq-Germany BIT.[65]

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60 Iraq-Germany BIT, Article 11(4) (**Exhibit CL-4**).

61 Iraq-Germany BIT, Article 14(2) (**Exhibit CL-4**).

62 Respondent's Reply, ¶ 13; Hearing Transcript, p. 97, lines 2-6.

63 Claimant's Response, ¶ 30.

64 Hearing Transcript, p. 58, lines 16-25, p. 59, lines 1-3. *See also*, p. 93, lines 7-21 and Claimants' Sur-Reply, ¶ 18 and *seq.* ("*consent to arbitration in a typical BIT constitutes an obligation of the signatory State to arbitrate whether or not it is ever perfected, i.e. unilateral declarations are binding as a matter of international law, if they project the will of the State to be bound*").

65 Claimant's Response, ¶¶ 31-32.

66. The Respondent argues that Law No. 60 does not provide consent to ICSID arbitration because it has no legal effect other than providing Iraq's ratification of the Iraq-Germany BIT.[66]

67. The Respondent further argues that the Claimant's suggestion that Law No. 60 constitutes a unilateral declaration "*misses the point that Iraq's consent to arbitration remains conditioned on the BIT's mutual ratification*",[67] a condition that was not fulfilled due to the absence of ratification by Germany.

(2) The Tribunal's Analysis

68. To the extent the Claimant is a German national, the most logical basis for it to find consent to arbitration in the present case is the Iraq-Germany BIT, which does contain, in its Article 11(4), reference to ICSID arbitration. This, however, assumes that the BIT is in force, which it is not.

69. Indeed, Article 14(2) of the Iraq-Germany BIT requires an "*exchange of the instruments of ratification*" for it to enter into force one month following such exchange. Given that Germany never ratified the BIT, such an exchange never occurred, and the BIT could not and did not enter into force. The Claimant accepts as much.[68]

70. Given that, due to Germany's failure to ratify it, the Iraq-Germany BIT has not entered into force, it cannot bind Iraq (or Germany) internationally and any consent to ICSID arbitration under Article 11(4) cannot, as a result, produce any effects. Nor can Article 11(4) somehow

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66 Respondent's Rule 41(5) Application, ¶ 21.

67 Respondent's Reply, n. 26; Respondent's Rule 41(5) Application, ¶ 21.

68 Hearing Transcript, p. 97, lines 2-9, stating with reference to the Iraq-Germany BIT that "[b]y *means of the issuance of Law No 60 it was turned into Iraqi domestic law, and we have a separate nature of Iraq's promises made, which are not an international treaty in force and we have conceded that point of course. This is not in force on the international plane because of its similarity to the French BIT when it comes to the consent to ICSID*." (Emphasis added). In its written pleadings, the Claimant justified as follows the lack of ratification by Germany: "*The German government's ratification of the German BIT was put on hold in favor of the European treaty signed and provisionally in force since 1 August 2012. In fact, in 2018, the German government stated that it was required to obtain the EU Commission's approval in order to continue the ratification of the German-Iraq BIT.*" (Claimant's Response, ¶ 23).

override Article 14(2) of the Treaty as being allegedly "*more specific and differently conditioned than Article 14 of the German BIT*".[69] For Article 11(4) to produce any effect, the Treaty must have come into life in the first place, pursuant to the requirements under Article 14(2) of the Treaty. This not being the case, Article 11(4) simply cannot operate.

71. This conclusion ends the matter, as the Claimant cannot rely on a provision in the Iraq-Germany BIT that is not in force (namely, reference of disputes to ICSID arbitration under Article 11(4)) to establish consent; nor can any other German or Iraqi national, for the same reason.

72. Notwithstanding that, the Tribunal addresses the Claimant's additional argument based on Iraq's alleged "unilateral declaration" contained in Law No. 60.

73. The notion of unilateral declaration does not assist the Claimant, however, as contrary to the Claimant's allegation, Law No. 60 does not "*literally contain* […] *Iraq's offer to arbitrate at ICSID*"; nor does it contain Iraq's "*acceptance of the* [ICSID] *procedure should Germany and Iraq become Contracting States to the ICSID Convention, which occurred in* 2015".[70] Law No. 60 is merely the domestic procedure enabling Iraq to become internationally bound by the Iraq-Germany BIT, subject to the conditions for the entry into force of the BIT to be met. The Claimant also maintains that "*any State consent to ICSID Convention arbitration, by itself a unilateral act of a State, is a distinct provision to be perfected by the investor's consent*".[71] However, Iraq's consent to ICSID arbitration in Article 11(4) of the Iraq-Germany BIT cannot be characterized as a unilateral act of Iraq, given that it is contained in a treaty provision in which each of Iraq and Germany has reciprocally agreed to ICSID arbitration in favor of its respective nationals. For such treaty undertakings (and the consents they contain) to produce effect, the treaty in question must be in force. If one were to follow the Claimant's logic, this would mean that no treaty would ever need to come into force, as any State's undertaking in a treaty would be sufficient as a unilateral act and would be an internationally binding obligation as such, notwithstanding that such

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69 Claimant's Response, ¶ 31. *See also* Respondent's Reply, ¶ 14.

70 Claimant's Response, ¶ 51.

71 Claimant's Sur-Reply, ¶ 22.

treaty is not in force. This proposition is not only illogical, but it is wrong as a matter of international law.

74. As regards Law No. 60, its language is clear:

> "Article 1- The Republic of Iraq hereby ratifies the Agreement of Encouragement and Reciprocal Protection of Investments And the Protocol Attached Thereto Entered into between the Government of the Republic of Iraq and the Government of the Federal Republic of Germany signed in Bagdad on 4/12/2010.
>
> Article 2- This Law shall come into force as of the date of publication in the Official Gazette". (Emphasis added)

75. *First*, Law No. 60 merely serves to ratify the Iraq-Germany BIT. It constitutes the domestic procedure required by Article 14(1) of the Iraq-Germany BIT ("*The Agreement shall be subject to ratification*") to enable the entry into force of the Treaty once both States have completed the required procedure and exchanged their instruments of ratification, pursuant to Article 14(2) of the Treaty. Even though Iraq has proceeded with such ratification, Germany's failure to do so and to exchange its instrument of ratification with Iraq prevents any national, be it German or Iraqi, to rely on the Treaty.

76. *Second*, Law No. 60 does not create any rights or obligations (including a right to ICSID arbitration); nor does it contain specific consent to ICSID arbitration on which the Claimant may rely. The fact that Law No. 60 reproduces the text of the Iraq-Germany BIT, including its Article 11(4), does not assist the Claimant either: the BIT is merely "*attached*" to the ratification law for purposes of the ratification process. Law No. 60 cannot, therefore, on its own, constitute a unilateral and unconditional undertaking by Iraq to be bound by ICSID arbitration with the Claimant.

77. The Tribunal concludes that the Claimant's argument that Iraqi Law No. 60 of 2012, which ratified the Iraq-Germany BIT (which is yet to enter into force), contains Iraq's consent to ICSID arbitration is manifestly without legal merit.

B. WHETHER THE TRIBUNAL HAS JURISDICTION BASED ON THE PARTNERSHIP AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES AND THE REPUBLIC OF IRAQ, COMBINED WITH THE IRAQ-FRANCE BIT

(1) Brief Summary of the Parties' Positions

78. On 1st August 2018, the Partnership and Cooperation Agreement between the EU and its Member States, on the one hand, and the Republic of Iraq, on the other hand ("**PCA**"), entered into force.[72]

79. The purpose of the PCA is, among other things, to promote trade and investment and harmonious economic relations between the EU, its Member States and Iraq, to foster their sustainable economic development, and to provide a basis for legislative, economic, social, financial and cultural cooperation.[73]

80. Title II of the PCA contains the provisions regarding trade and investments and it is divided into six sections, namely, Section I (Trade in goods), Section II (Trade in services and establishment), Section III (Provisions affecting business and investments), Section IV (Current payments and capital), Section V (Trade-related issues) and Section VI (Dispute Settlement). The Parties' discussions focus on Sections II and III.

81. Article 23 of the PCA sets out the coverage of Section II (Trade in services and establishment):

> "1. This Section hereby lays down the necessary arrangements for the progressive liberalisation of trade in services and establishment between the Parties.
>
> 2. This Section applies to measures affecting trade in services and establishment in all economic activities, with the exception of: (a) […] (h) […]".[74]

82. Section II, Article 25(2) of the PCA provides:

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72 PCA, p. 114 (**Exhibit CL-6**).

73 PCA, Article 1(2)(b) and (c) (**Exhibit CL-6**).

74 PCA, Article 23 (**Exhibit CL-6**).

> "From the entry into force of this Agreement and subject to paragraph 3, Iraq shall grant to services, service suppliers, establishments and investors of the Union in the services and non-services sector, treatment no less favourable than that granted to like services, services suppliers, establishments and investors of Iraq or to like services, service suppliers, establishments and investors of any third country, whichever is the better".[75]

83. Section II, Article 27 of the PCA in turn provides:

> "Nothing in this Section shall limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in any existing or future international agreement relating to investment to which a Member State of the Union and Iraq are Parties".[76]

84. Finally, Annex 4 of the PCA contains notes and supplementary provisions. Ad Article 23, paragraph 2 of the PCA, states:

> "Investment protection, other than the treatment deriving from Article 25, including investor state dispute settlement procedures, is not covered by this Section".[77]

85. Section III (Provisions affecting business and investments) contains two provisions. Article 32 requires the parties to "*encourage an increase in mutually beneficial investment by establishing a more favourable climate for private investment*".[78] Article 33 requires the parties to designate a contact point to facilitate communication on any trade matter related to private investment.[79]

86. The Respondent alleges that the Claimant cannot rely on the PCA and the Most-Favored-Nation ("**MFN**") clause contained in its Article 25(2) as the basic treaty through which it

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75 PCA, Article 25 (**Exhibit CL-6**).

76 PCA, Article 27 (**Exhibit CL-6**).

77 PCA, Annex 4, Ad Article 23(2) (**Exhibit CL-6**).

78 PCA, Article 32 (**Exhibit CL-6**).

79 PCA, Article 33 (**Exhibit CL-6**).

can import Iraq's consent to ICSID arbitration contained in Article 8 of the Iraq-France BIT. The Tribunal sets out the key arguments raised by the Respondent below.[80]

87. *First*, the Respondent argues that the PCA is not an investment treaty.[81] Thus, the Claimant has no direct rights that it can enforce under the PCA. In addition, the PCA does not contain any dispute settlement provision between the treaty parties and foreign investors. In these circumstances, an MFN clause such as Article 25(2) of the PCA cannot be used to import consent to ICSID arbitration from another treaty, in this case the Iraq-France BIT.[82]

88. *Second*, and relatedly, the Respondent claims that because the PCA and the Iraq-France BIT do not have a similar subject matter, the MFN clause cannot be invoked by the Claimant.[83] The Respondent characterizes the PCA as a trade agreement and not an investment treaty.[84]

89. *Third*, the MFN provision included in the PCA does not apply to France, which is a Contracting State to the PCA and, therefore, not a "*third country*" under that provision.[85] Because France is not a third country, the Iraq-France BIT does not fall to be invoked within the scope of Article 25(2) of the PCA.[86]

90. *Fourth*, the PCA does not contain substantive investment protection and the Claimant cannot import the entire Iraq-France BIT through the MFN provision of the PCA.[87]

91. *Finally*, Ad Article 23(2) expressly states that the PCA does not cover investment protection.[88]

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80 Respondent's Rule 41(5) Application, ¶ 31.

81 Respondent's Rule 41(5) Application, ¶¶ 32 and 35.

82 Respondent's Rule 41(5) Application, ¶ 32.

83 Respondent's Rule 41(5) Application, ¶ 33.

84 Respondent's Rule 41(5) Application, ¶ 35.

85 Respondent's Rule 41(5) Application, ¶ 36.

86 Respondent's Rule 41(5) Application, ¶ 36.

87 Respondent's Rule 41(5) Application, ¶ 37.

88 Respondent's Reply, ¶ 23.

92. The Claimant has several arguments in response. The Claimant asserts that it does not rely on the PCA on a standalone basis, but uses its Article 25(2) combined with its Article 27 to import Iraq's consent to ICSID arbitration contained in the Iraq-France BIT. The Claimant argues that Article 25(2) of the PCA is broad and not limited in any material way, which is reinforced by Article 27 of the PCA.[89] In the Claimant's view, Article 27 "states *that the PCA does not limit any rights under other international agreements, and indeed any more favourable treatment contained in any* existing *or* future *international agreements relating to investment to which a Member State of the Union and Iraq are parties*".[90]

93. Further on Article 27 of the PCA, the Claimant argues that "[i]*n addition, it is the beginning of Article 27 of the PCA ('*Nothing in this Section*') that fully rebuts Iraq's contrived argument, that France, as a party to the PCA, is not included in Article 25's broad wording. Precisely because '*Nothing in this Section [which includes Article 25] shall limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in <u>any</u> existing or future international <u>agreement</u> relating to investment <u>to which a Member State of the Union and Iraq are Parties</u>', Article 25's words must be read to allow for German investors to be granted Iraq's better treatment of French investors*".[91]

94. The Claimant further considers that Iraq's allegation that France is not a "*third country*" is immaterial because France is a "*third country*" with respect to Germany, notwithstanding that both are Parties to the PCA.[92]

95. The Claimant also contends that Iraq's allegation that the PCA does not contain investment protection is wrong. The Claimant invokes the recitals of the PCA,[93] Title II of the PCA

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89 Claimant's Response, ¶ 39.

90 Claimant's Response, ¶ 39.

91 Claimant's Response, ¶ 42 (emphasis in the original).

92 Claimant's Response, ¶ 41; Claimant's Sur-Reply, ¶ 26.

93 Claimant's Response, ¶ 44 citing to Article 2(b) of the PCA: "*The objectives of this Partnership are:* […] *(b) to promote trade and investment and harmonious economic relations between the Parties and so to foster their sustainable economic development*".

(which refers to "*Trade and Investments*"),[94] Ad Article 23(2),[95] and the definition of investor under Article 24(n)[96] as examples demonstrating that the PCA and the Iraq-France BIT cover a similar subject-matter.

96. Finally, the Claimant argues that "*Iraq mischaracterizes Claimant's case on jurisdiction as requiring to import the entire French BIT into the PCA*" because "*Claimant simply invokes Article 8 of the French BIT together with the relevant definitions of terms used therein*".[97]

(2) The Tribunal's Analysis

97. *First*, the starting point of the analysis under the PCA is the scope of the sections on which the Claimant relies for purposes of this Tribunal's jurisdiction.

98. The scope of Section II does not contain investor-State protection. It is limited in Article 23(2) of the PCA to "*measures affecting trade in services and establishment in all economic activities*", with a number of exceptions. The notion of "*trade in services*" is in turn defined in Article 24(i) as "*the supply of a service*" through a number of described modes. Finally, Article 24(l) defines "services" as "*any service in any sector except services supplied in the exercise of governmental authority*". On their face, none of these provisions is relevant to investment protection.

99. In fact, the PCA goes even further, given that, in Annex 4, it specifically excludes investor-State protection from the scope of Section II of the PCA (as defined in Article 23(2)). Indeed, Ad Article 23(2) provides, in no ambiguous terms:

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94 Claimant's Response, ¶ 46; Claimant's Sur-Reply, ¶¶ 23-24.

95 Claimant's Response, ¶ 46 citing to Ad Article 23(2) of the PCA: "*Investment protection, other than the treatment deriving from Article 25, including investor state dispute settlement procedures, is not covered by this Section*".

96 Claimant's Response, ¶ 47 citing to Article 24(n) of the PCA: "'investor' *of a Party means any natural or juridical person that seeks to perform or performs an economic activity through setting up an establishment*". *See also* Hearing Transcript, p. 49, lines 8-18.

97 Claimant's Sur-Reply, ¶ 28.

> "Investment protection, other than the treatment deriving from Article 25, including investor state dispute settlement procedures, is not covered by this Section."

100. Given this clear and unequivocal language, the Tribunal considers that the Claimant has not provided any tenable argument or reasoning when stating, without more, that "*this footnote serves an additional purpose: it expressly embraces that the MFN provision of Article 25 includes investor-state dispute settlement procedures*".[98] Ad Article 23(2) of Annex 4 says the exact contrary, namely that investment protection, including investor-State dispute settlement procedures, is excluded from the scope of Section II of the PCA (subject to the limited exception relating to the treatment deriving from Article 25). The Tribunal notes that the Parties debated in passing the wording of Ad Article 23(2) in other languages, notably in Spanish and German. While the German version is very close to the English one,[99] the Spanish version—which indicates "*ni tampoco los procedimientos de solución de diferencias entre inversores y poderes públicos*" ("nor does it cover dispute settlement procedures between investors and public authorities")—supports the interpretation that what is excluded from the scope of Section II is "*investment protection* [...] *including investor state settlement procedures*".[100] The Tribunal further observes that,

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98 Claimant's Response, ¶ 46.

99 The Claimant relied on the German version ("*Nicht unter diesen Abschnitt fällt der Investitionsschutz, ausgenommen die Behandlung nach Artikel 25, einschließlich Verfahren zur Beilegung von Streitigkeiten zwischen Investor und Staat*"; with the Claimant's word-for-word translation into English: "*Not under this Section falls investment protection, other than the treatment under Article 25, including procedures for the settlement of disputes between investor and state*"): *see* Claimant's Sur-Reply, ¶ 27.

100 The Respondent relied on the Spanish version ("*La presente sección no abarca la protección de las inversiones, a excepción del trato derivado del artículo 25, ni tampoco los procedimientos de solución de diferencias entre inversores y poderes públicos*", translated into "*The present section does not cover investment protection, except for the treatment derived from Article 25, nor does it cover dispute settlement procedures between investors and public authorities*"): cited in the Respondent's Reply, n. 43). At the Hearing, the Respondent further explained: "*We think this language is entirely clear. To the extent that there is any ambiguity, the Spanish version of the PCA, which is equally authentic to the English, resolves that ambiguity by having the word "nor" to emphasise the exclusion of the investor-state dispute settlement procedures*" (Hearing Transcript, p. 29, lines 17-22); "*The second point is to the extent that there is any doubt about this, the Spanish text is the clearest because it has the language '*nor does it cover dispute settlement'. *So it is obvious that this was the intention and we cannot disregard the Spanish language just because we don't like it or because there is an English version as well. So to the extent there is any doubt at all, the Spanish*

were the Claimant's reading to be followed, this would mean that the exclusion of investment protection by Ad Article 23(2) could be re-introduced through the limited back door of Article 25 of the PCA. Such an interpretation would be purposeless.

101. It follows from the language of Annex 4 that investment protection, including through investor-State arbitration (be it ICSID or otherwise), cannot derive from Section II of the PCA. In other words, even if Article 25 of the PCA, which is the only exception to the exclusion contained in Annex 4, allows for limited protection through the "*treatment*" it provides, it cannot be a backdoor to jurisdiction that is explicitly excluded by Annex 4 ("*including investor state dispute settlement procedures*").

102. In any event, the Tribunal finds that even if the Claimant were right in its interpretation of Ad Article 23(2), there are other reasons why the Claimant cannot rely on the PCA to establish the Tribunal's jurisdiction, as explained below.

103. *Second*, it is uncontested between the Parties that Article 25(2) is an MFN clause. To recall, it provides:

> "From the entry into force of this Agreement, and subject to paragraph 3, Iraq shall grant to services, service suppliers, establishments and investors of the Union in the services and non-services sector, treatment no less favourable than that granted to like services, service suppliers, establishments and investors of Iraq or to like services, service suppliers, establishments and investors of any third country, whichever is the better".

104. As its language makes clear, this provision extends better treatment to "*services, service suppliers, establishments and investors*" of the EU, an "investor" being defined in Article 24(n) as "*any natural or juridical person that seeks to perform or performs an economic activity through setting up an establishment*". Even assuming the Claimant qualifies as an "*investor*" within the meaning of this provision and can benefit from the PCA, the PCA does not create, through the MFN provision of Section II, unlimited and unqualified protection for all types of investors. Focusing on "*investors*" as defined in the PCA, this provision

version is just one hundred percent on point." (Hearing Transcript, Response to the Tribunal, p. 88, lines 12-21).

allows EU investors to benefit from the better treatment given to "*investors of Iraq*" or "*investors of any third country*" within the scope of Section II and Article 25(2) itself. In this respect, the Parties agree that the *ejusdem generis* principle requires that, in the case of an MFN clause, the two international instruments at play cover, following the *Maffezini* case, "*the same subject matter*".[101] However, the PCA and the Iraq-France BIT do not cover the same scope; while Section II of the PCA covers trade in services and establishment, the Iraq-France BIT covers investment. Hence, the *ejusdem generis* principle could not apply to the application of the MFN provision of Article 25 of the PCA, especially given the clear and express exclusion in Annex 4.

105. *Third*, the Tribunal is also not convinced by the Claimant's reliance on Article 27 of the PCA to the effect that it "*re-emphasizes that the MFN provision in Article 25(2) of the PCA is broad and not limited in any material way, and that the PCA parties intended that the PCA would not limit the more favourable treatment of investors contained in the French BIT, or any other existing or future international agreements relating to investment between Iraq and any Member State of the European Union*".[102]

106. In this regard, it bears repeating that Article 27 of the PCA provides as follows:

> "Other agreements
>
> Nothing in this Section shall limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in any existing or future international agreement relating to investment to which a Member State of the Union and Iraq are Parties".

107. As its language makes clear, all that this provision does is reserve the right of investors (as defined in Article 24(n) of the PCA) to benefit from other more favorable international agreements relating to investment. In other words, Article 27, which is titled "Other

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101 Respondent's Rule 41(5) Application, n. 39 citing to Draft Articles on Most-Favoured-Nation Clauses, with Commentaries, text adopted by the International Law Commission at its thirtieth session, Yearbook of the International Law Commission, 1978, vol. II, Part Two, p. 30, ¶ 10 (**Exhibit RL-27**); Respondent's Reply, n. 32; Claimant's Response, ¶ 43; Hearing Transcript, p. 30, lines 4-11 for the Respondent, and p. 49, lines 3-18 for the Claimant.

102 Claimant's Response, ¶ 40.

agreements", does not import or incorporate by reference any investment protection treaty into the PCA; rather, it affirms that the existence of the PCA is without prejudice to the existence, in parallel, of any other international agreement relating to investment to which investors of the PCA State parties may be entitled. Nor can the Claimant rely on the wording of "[n]*othing in this Section*" in Article 27 to expand the scope of Article 25(2) of the PCA. Indeed, the Claimant would like to read Article 27 and Article 25(2) in combination to the effect that "*Article 25's words must be read to allow for German investors to be granted Iraq's better treatment of French investors*".[103] However, nothing in Article 27 indicates that it should inform the interpretation of Article 25(2) or that it somehow expands the scope of Article 25(2). The wording of "[n]*othing in this Section*" is designed, as already noted, to affirm that Section II of the PCA is without prejudice to the operation of other international agreements relating to investment that may apply, separately from the PCA. Article 27 cannot be read, as the Claimant invites the Tribunal to do, to annihilate the express exclusion of investment protection, including investor-State dispute resolution, in Annex 4. In fact, if the Tribunal were to read Article 27 in the manner the Claimant invites it to, it would be using that provision to annihilate any exclusions under Section II of the PCA, including that of Article 23, as completed by Annex 4. The Tribunal, however, is constrained by the clear and express exclusion of investment protection, including investor-State settlement procedures, effectuated by Annex 4 of the PCA (with the limited right under Article 25). In other words, rather than expand the scope of Article 25, Article 27 of the PCA, consistent with the PCA's Article 23(2) and Annex 4, confirms the exclusion of investment protection from the scope of the PCA.[104]

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103 Claimant's Response, ¶ 42.

104 The Claimant has also alleged that the Iraq-Germany BIT provides consent by operation of Articles 25 and 27 of the PCA (Request, ¶ 96; Claimant's Response, ¶ 33 ("*the German BIT is also accessible to Claimant […] operation of Articles 25 and 27 of the PCA*"). This argument presents important flaws, including because (*i*) the Claimant has relied on Article 25 of the PCA as a most-favored-nation provision for purposes of which the Iraq-Germany BIT cannot be resorted to, given that the notion of discrimination vis-à-vis nationals of a third State assumes that German nationals may only invoke treaties entered into by States other than their home State; and (*ii*) in any event, for purposes of both Article 25 and Article 27 of the PCA , even assuming these provisions operate in the way the Claimant argues, the Iraq-Germany BIT has not entered into force (see above ¶¶ 68-77).

108. *Fourth*, even assuming Article 25(2) of the PCA were to achieve the broad result that the Claimant assigns to it—namely, allowing an investor (as defined in a third treaty rather than Article 24(n) of the PCA) to benefit from the investor-State dispute resolution mechanism contained in a third treaty, notwithstanding that Section II expressly excludes such a benefit—the Tribunal is not convinced that the better treatment can be found in a treaty entered into between Iraq and France. The PCA does not define "third country". The Claimant contends that "*France is a 'third country' with respect to Germany*".[105] The Respondent, in turn, argues that "[…] *it is plain and obvious that the reference to any 'third country' in Article 25(2) of the PCA does not include Member States of the European Union such as France. Article 122 of the PCA defines '*the Parties*' to the PCA as the European Union and its Member States, on the one hand, and Iraq, on the other. France is thus a party to the PCA, and any treaties between Iraq and France, including the French BIT, cannot fall within the scope of Article 25(2)*".[106] The Tribunal observes that nothing in Article 25(2) indicates that "*third*" is to be defined *vis-à-vis* one State (here, Germany) over another. As the Claimant itself admits, "*'any third country' is unqualified*".[107] In the absence of a definition in the PCA itself, the Tribunal finds it appropriate, for purposes of its interpretation task, to refer to the common rules of treaty law as codified in the Vienna Convention on the Law of Treaties of 1969 ("**1969 Vienna Convention**").[108] The Tribunal notes that, even though Iraq is not a party to the 1969 Vienna Convention, as noted by the Claimant,[109] to the extent the Convention's provisions on the subject reflect customary international law, they can appropriately be referred to by the Tribunal in interpreting the wording of the PCA. In this respect, Article 2(h) of the 1969 Vienna Convention defines "*third State*" as "*a State not party to the treaty*". Based on this definition, France cannot be considered a "*third*" country, being a State party to the PCA, both in its own name and as a Member State of the EU. This interpretation is consistent with the logic of the PCA,

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105 Claimant's Response, ¶ 41.

106 Respondent's Rule 41(5) Application, ¶ 36. *See also* Respondent's Reply, ¶ 22; Hearing Transcript, p. 32, lines 5-25 and p. 33, lines 1-11.

107 Claimant's Response, ¶ 41.

108 Vienna Convention on the Law of Treaties (**Exhibit RL-29**).

109 Hearing Transcript, p. 84, lines 3-19.

which creates a partnership between Iraq on the one hand and the EU and its Member States on the other hand. It is also consistent with the reference, in Article 25(2) of the PCA, to the better treatment to be given to the "*investors of the Union*",[110] rather than a reference, for example, to "investors of the Union's Member States", which shows an intention to consider EU Member States as a block, with "*third*" countries being those that are outside the EU regional protection zone.

109. *Fifth*, even if the Claimant were to prevail on the broad and contra-textual meaning it assigns to Article 25(2) of the PCA, and even if Iraq's consent to ICSID arbitration could be found in that provision—notwithstanding the clear and explicit language of Annex 4—the Claimant's case would still suffer from a significant flaw: given that, under Annex 4, the PCA's only "investment protection" is the "treatment" deriving from Article 25, the Claimant would need to import both Iraq's consent to arbitration in the investor-State dispute provision of the Iraq-France BIT (namely, its Article 8) and the entirety of the substantive protection offered in the Iraq-France BIT. The Claimant conceded as much when, asked by the Tribunal whether, in addition to Article 8, it also "*rel*[ied] *on the substantive provisions of the BIT*", the Claimant's counsel confirmed: "*Indeed, through Article 25(2) and I think it is non-controversial that an MFN provision can be applied to substantive standards provided for in a different treaty*".[111] In its Request for Arbitration, the Claimant refers specifically to Articles 4, 5, 6, 7 and 10 of the Iraq-France BIT. The necessity for the Claimant to rely on Article 25(2) of the PCA to import all relevant provisions of the Iraq-France BIT in order to both seek Iraq's consent to arbitrate and

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110 On this question, the Tribunal notes that, although the Parties differed fundamentally on the meaning to be ascribed to "*third country*", there was some level of common understanding between the Parties on the way in which the EU and Member States would consider this matter: *see* the Parties' responses to the Tribunal's questions at the Hearing, for both the Respondent ("[…] *just to demonstrate the manifest lack of legal merit of the Claimant's argument and also that it is fundamentally flawed under international law, if Claimant's argument were accepted, it basically would mean that any investor from any of the 27 EU Member States would be able to pursue ICSID arbitration against Iraq under the French BIT. The entirety of the French BIT would be available to any investor of the EU via Article 25(2). This is clearly not what the parties to the PCA or the French BIT intended, and the Tribunal does not need to look any further into this question"*, Hearing Transcript, p. 32, lines 19-25 and p. 33, lines 1-7) and for the Claimant ("[…] *it would be antithetical for the European Union to allow Iraq to give different treatment to investors from different EU Member States"* Hearing Transcript, p. 82, lines 11-14.).

111 Hearing Transcript, p. 111, lines 6-15.

import the substantive protection that is lacking in the PCA confirms, if anything, that Section II the PCA only provides for trade in services and not investment protection, and that any imported consent to ICSID arbitration—even assuming such importation is feasible under the PCA—would result in consent over an empty shell, which is clearly not what the State parties to the PCA can be deemed to have intended.

110. *Finally*, Section III of the PCA (entitled "*Provisions affecting business and investment*") does not assist the Claimant: Article 32 of the PCA makes clear that the only obligation undertaken by the State Parties to the PCA is the encouragement of "*an increase in mutually beneficial investment by establishing a more favorable climate for private investment*". Given the absence of any protection-related provision in Section III (including as regards investor-State dispute resolution procedures), the Tribunal's conclusion remains unaltered.

111. In light of the above considerations, the Tribunal concludes, by majority, that the Claimant's argument that Iraq's consent to ICSID arbitration contained in Article 8 of the Iraq-France BIT can be imported through the MFN clause of Article 25 of the PCA, taken alone or in combination with Article 27 of the PCA, is manifestly without legal merit.

112. In the view of the minority, recalling the language of the *Trans-Global v. Jordan* tribunal, the Respondent has not established its objections to the Claimant's MFN argument based on the PCA "*clearly and obviously, with relative ease and despatch*".[112] The minority considers that the MFN argument, in particular in light of the ambiguity of the language in Ad Article 23 of Annex 4 of the PCA—whether the Claimant could make its case in the end or not—is not manifestly without legal merit.

[112] Claimant's Response, ¶ 4; Respondent's Rule 41(5) Application, ¶ 11. *See also* Hearing Transcript, p. 8, lines 12-15, citing to *Trans-Global v. Jordan,* ¶ 88 (**Exhibit RL-3**).

C. WHETHER THE TRIBUNAL HAS JURISDICTION BASED ON THE REHABILITATION CONTRACT

(1) Brief Summary of the Parties' Positions

113. On 20 April 2008, the Iraqi General Company for Cement on the one hand, and the Middle East Company, Salahaddin Holding Company and AHG on the other hand, entered into the Rehabilitation Contract. The Claimant has not explained the relationship existing between AHG and the two other signatories to the Rehabilitation Contract, namely Middle East Company and Salahaddin Holding Company. The Claimant has also referred to the "*Extended License*" signed on 5 January 2016, which was an Addendum to the original Rehabilitation Contract. The Tribunal notes, however, that the Claimant relies on the same Article 26(2) of the Rehabilitation Contract in connection with the Extended License for the purposes of establishing the Tribunal's jurisdiction.[113]

114. The Claimant argues that "*AHG and Iraq (acting through ICSC, an instrumentality of the MOI and of the Iraqi state) signed the License in the presence of the then Iraqi Minister of Industry and Minerals, Minister Hariri, and Dr Al Araji*".[114] The Claimant adds that "[t]*he Ministry of Industry and Minerals approved and controlled the License, participated in negotiations and solicitations relating to the License, provided the English translation of the Investment Law to AHG with the tender documents, and ultimately determined and controlled the termination/n of the License*".[115]

115. Article 26(2) of the Rehabilitation Contract provides:

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113 The Extended License incorporates Article 26(2) of the Rehabilitation Contract as it states "[t]*his Addendum including any amendments and obligations shall be considered an integral part of the Kirkuk Cement Plant Rehabilitation and Operation Contract*": Addendum to the Rehabilitation Contract, Article 20 (**Exhibit C-8**). The Claimant states for instance, that it "*can rely on Law No. 64 of 2012 and the ICSID Convention via Article 22 of the Investment Law and Article 26(2) of the Extended License*" (Claimant's Response, ¶ 63).

114 Request, ¶ 29.

115 Claimant's Response, ¶ 50. The Claimant further notes that the recitals of the Rehabilitation Contract provide that "*the Ministry of Industry and Minerals has announced the intention to rehabilitate, operate, renovate and develop Kirkuk Cement Factory according to the general conditions advertised for the interested applicants" and "the Middle East Company submitted the offer to rehabilitate, renovate and develop the factory as per the advertised conditions of the Ministry of Industry and Minerals*". *See also* Claimant's Sur-Reply, ¶¶ 29-30.

> "1. Any dispute or dissidence resulting from executing this contract or relevant to it, shall be addressed amicably between the two parties.
>
> 2. If the dispute could not be resolved or settled informally, it shall be settled and determined by arbitration pursuant to the law of civil procedures, or any other substitutable law related to arbitration in Iraq".[116]

116. The Respondent argues that Article 26(2) of the Rehabilitation Contract does not provide consent to ICSID arbitration.[117]

117. The Respondent's primary position is that Iraq is not a party to the Rehabilitation Contract and is therefore not bound by its terms.[118]

118. The Respondent alleges that, in any event, Article 26(2) cannot provide consent to ICSID arbitration for three separate reasons.

119. *First*, according to the Respondent, Article 26(2) "*simply provides that disputes under the Rehabilitation Contract will be settled by arbitration in accordance with the applicable Iraqi domestic rules on arbitration*".[119]

120. *Second*, "*any other substitutable law related to arbitration in Iraq*" cannot be construed as a reference to Law No. 60 of 2012 and Law No. 24 of 2012—which the Claimant invokes as a jurisdictional pathway indirectly referenced under Article 26(2) of the Rehabilitation Contract—because these are not arbitration laws of general application but, rather, merely served to ratify the Iraq-Germany BIT and the Iraq-France BIT.[120]

121. *Third*, ICSID arbitration could not have been contemplated as the dispute settlement mechanism under Article 26(2) of the Rehabilitation Contract, as this would have resulted in a dispute settlement mechanism that does not apply to all parties to the Rehabilitation

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116 The Rehabilitation Contract, Article 26(2) (**Exhibit C-1**).

117 Respondent's Rule 41(5) Application, section III.C.

118 Respondent's Rule 41(5) Application, ¶ 41.

119 Respondent's Rule 41(5) Application, ¶ 41(a).

120 Respondent's Rule 41(5) Application, ¶ 41(b).

Contract. The Respondent thus explains: "*Iraq could not have consented to ICSID arbitration through Article 26(2) of the Rehabilitation Contract, as this would mean that the Rehabilitation Contract would not have a procedure for settling disputes that would apply to all the parties to the Rehabilitation Contract. The Claimant's argument is implausible and absurd*".[121]

122. The Respondent further contends that, even if Article 26(2) of the Rehabilitation Contract were to be understood as containing a reference to the Iraq-Germany BIT, this instrument cannot be relied on as it is not in force[122] and, in any event, the Rehabilitation Contract contains no substantive investment protection.[123]

123. In response, the Claimant argues that Article 26(2) of the Rehabilitation Contract confirms Iraq's intention to arbitrate disputes under the ICSID Convention.[124] In particular, the Claimant argues that the reference to the settlement of disputes pursuant to any other "*substitutable law related to arbitration in Iraq*" should be construed as a reference to Law No. 60 of 2012, which allowed Iraq's accession to the ICSID Convention and which, according to the Claimant, "*literally contain*[s] *Iraq's offer to arbitrate at ICSID*".[125]

124. The Claimant also alleges that "*any other substitutable law*" is a reference to Law No. 24 of 2012 and Law No. 49 of 2013 which refer respectively to Article 8 of the Iraq-France BIT

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121 Respondent's Rule 41(5) Application, ¶ 41(c).

122 Respondent's Rule 41(5) Application, ¶ 42.

123 Respondent's Rule 41(5) Application, ¶ 43.

124 Claimant's Response, ¶ 51.

125 Claimant's Response, ¶ 51 (the full passage reads: "*Iraq's intent to arbitrate disputes under the ICSID Convention is confirmed by Article 26(2) of the Rehabilitation Contract referring disputes to '*arbitration pursuant to [...] substitutable law related to arbitration in Iraq.*' At the time of contracting, Iraq had already announced via Article 22 of the Investment Law that German foreign investors shall enjoy additional privileges in accordance with international agreements signed between Iraq and their country and multilateral international agreements which Iraq has joined. Simply staying with the contractual language, for AHG, a specific substitutable law is Iraqi national Law No. 60 of 2012, literally containing Iraq's offer to arbitrate at ICSID. Indeed, in Law No. 60 of 2012, Iraq '*declare*[d]* its acceptance of the *[ICSID]* procedure' should Germany and Iraq become Contracting States to the ICSID Convention, which occurred in 2015. The same holds true for Law No. 24 of 2012 and for that matter, the PCA*"). *See also* Request, ¶ 104; Hearing Transcript, p. 74, lines 11-16.

and the PCA, thereby granting AHG the "*benefits from Iraq's expressed consent to ICSID Convention arbitration in the French BIT through the License*".[126]

(2) The Tribunal's Analysis

125. The Tribunal notes that the Rehabilitation Contract was entered into, on the one hand, by the Iraqi Cement State Company ("**ICSC**") (as the first party) and, on the other hand, by the Middle East Company, Salahaddin Holding Company as well as the Claimant, AHG (collectively, the second party). The Claimant argues however that the Republic of Iraq is the real contractual party through the actions of the ICSC.[127]

126. The Tribunal has carefully considered whether, based on the evidence provided and relied upon by the Parties, the ICSC can be said to act for or under the supervision of the Iraqi Ministry of Industry. *First*, the Tribunal notes that the Republic of Iraq is not a signatory to the Rehabilitation Contract; nor does the ICSC appear to have signed the Rehabilitation Contract in the name or on behalf of the Republic of Iraq. That being said, and although it is not clear what structural or functional relationships exist between the ICSC and the Iraqi

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[126] Request, ¶ 100; Claimant's Response, ¶¶ 25 and 51 (the Tribunal notes that in paragraph 25 the Claimant relies on Law No. 49. However, in paragraph 51, the Claimant refers to the PCA itself and not the Law No. 49 ratifying the PCA); Hearing Transcript, p. 74, lines 11-16.

[127] Claimant's Sur-Reply, ¶ 29 ("*Iraq continues to attempt to hide behind the fact that ICSC, the Iraqi Cement State Company, contracted with Claimant in the License and Extended License and thereby bound the Republic of Iraq. In fact, as elaborated in the Response, there is ample reference to the Iraqi state in such contracts themselves and ICSC's letterhead states: '*Republic of Iraq, Ministry of Industry, Iraqi Cement State Company*'. As pled in the Request for Arbitration, the Minister of Industry of Iraq terminated the License and Extended License, acting in his capacity for the Republic of Iraq*"). *See also* Hearing Transcript, p. 59, lines 18-25 and p. 60, lines 1-19 ("[…] *there is a factual dispute on the issue because it was Minister Hariri as the Minister of Industry that has stated to have entered into agreements in Dubai in April 2008, including the agreement you are looking at, the licence, and then later on the extended licence, thereby binding the Republic of Iraq. The Iraqi State Cement Company on its letterhead, as our exhibits show, refer to them as ICSC, the Iraqi Cement State Company. It not only references the acronym ICSC here but it then on the line above reads Ministry of Industry and on the line above that reads Republic of Iraq. At all times the Iraqi State Cement Company acted for and against the Republic of Iraq. The Ministry of Industry as is also submitted in the Request for Arbitration not only approved and controlled the licence, it solicited and negotiated the licence, it provided the English version of the tender documents containing the English translation of article 22 of the Investment Law and article 27(4) of the Investment Law at that point in time, and, last but not least, also by means of the exhibits submitted as part of the pleadings on the Rule 41(5) objections, it was the Ministry of Industry that determined and controlled the terminations at both times in 2008 and in 2018* […]").

Government, certain documents provided by the Claimant refer to letterheads bearing the name of the "*Republic of Iraq*"; notably, the ICSC's termination notice was issued on a letterhead bearing the name of "*Ministry of Industry*".[128] *Second*, the rights and obligations under the Rehabilitation Contract refer to the two parties, not the Republic of Iraq. That being said, certain provisions under the Rehabilitation Contract refer to the Minister of Industry, for example Article 30 of the Rehabilitation Contract, which provides that the contract shall not be waived to a third party "*unless the approval of HE the Minister of Industry and Minerals has been obtained*".[129]

127. These elements show that there are a number of uncertainties as to whether the Republic of Iraq, although not a signatory to the Rehabilitation Contract, can be deemed to be the real party to the Contract through the ICSC. Accordingly, and for purposes of the Respondent's ICSID Rule 41(5) Application, the Tribunal has assumed that the Republic of

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[128] Letter from Iraqi Cement State Co. to Kirkuk Cement Company Ltd, dated 5 February 2009 and Letter from Ministry of Industry and Minerals, 5 February 2009 (**Exhibit C-13**). The Iraqi General Company for Cement's letter of 8 April 2018 was sent on a letterhead bearing both an indication of the "Republic of Iraq" and the "Ministry of Industry", *see* Letter from Iraqi General Company for Cement's to ICSC-Kirkuk Cement Plant / Director of Steering Committee, dated 8 April 2018 (**Exhibit C-14**).

On this question, see the Respondent's answer to the Tribunal's question: Hearing Transcript, p. 101, lines 21-25, p. 102 and p. 103, lines 1-9 ("*Our position is that the party to the Contract is the Iraqi State Cement Company, deliberately so, and that as a matter of state policy that is perfectly legitimate. It doesn't change the fact that that is the party to the Contract. The fact that the Minister may have espoused the bidding process, may have even organised the bidding process, does not change the fact that the Iraq State Cement Company is the party to the Contract. With respect, the letterhead doesn't change that either. It is common practice for state-owned companies to reference the ministries which are their owners, their supervisors perhaps, perhaps they control the spending of funds, or maybe even appoint the Minister to the board. That is common practice. It does not change the fact that the Iraq State Cement Company is the party to the Contract. The termination of the Contract is a matter of course of fact. There is one exhibit to that effect. Looking at the exhibit, I don't have it immediately to hand but I do not believe that it terminates the Contract by virtue of its own terms. Of course the state may exercise exorbitant powers to terminate contracts. That does not mean that it becomes a party to the Contract; it means that it exercises its powers to do so. Again, this is without prejudice to the full argument that the Respondent may have on these issues, but our position is that it does not turn it into a party. The exhibit I was referring to, I am kindly reminded, is exhibit C-14, which the Tribunal can of course examine, but we believe it is not one in which the Ministry in any way steps into the shoes of the Iraq State Cement Company. Of course also without prejudice to the fact that we believe there is no consent to ICSID Convention arbitration in any event, but I hope the answers have been helpful, Madam President*").

[129] Rehabilitation Contract, Article 30 (**Exhibit C-1**).

Iraq can be deemed to be a real party to the Rehabilitation Contract. The question, then, is whether that is enough to establish Iraq's consent to ICSID arbitration under the Rehabilitation Contract. The Tribunal finds in the negative, given that the Claimant faces two major and evident hurdles in relation to Article 26(2) of the Rehabilitation Contract.

128. *First*, the Claimant refers to the wording of "*any other substitutable law related to arbitration in Iraq*" under Article 26(2) of the Rehabilitation Contract as implying a reference to Law No. 60 of 2012 (the law ratifying the Iraq-Germany BIT),[130] Law No. 24 of 2012 (the law ratifying the Iraq-France BIT),[131] or Law No. 49 of 2013 (the law ratifying the PCA).[132] Given the Claimant's argument and the clear language of Article 26(2) of the Rehabilitation Contract, which refers to "*any other substitutable law related to arbitration in Iraq*" (emphasis added), the Tribunal's analysis has focused on each of these ratification laws rather than the underlying instruments.

129. The Tribunal notes, in this respect, that the Claimant has not raised, in the sections addressing directly Article 26(2) of the Rehabilitation Contract, Law No. 64 of 2012, which is the law allowing the accession of Iraq to the ICSID Convention.[133] The Claimant did, however, refer to Law No. 64 being a "*substitutable law*" under the Rehabilitation Contract

130 Law No. 60 of 2012 dated 4 December 2010 (**Exhibit CL-4**).

131 Law No. 24 of 2012 dated 31 October 2010 (**Exhibit CL-5**).

132 Law No. 49 of 2013 (**Exhibit CL-6**).

133 Claimant's Response, ¶ 51 stating under Section IV.C "Article 26 of the Extended License" that "*Iraq's intent to arbitrate disputes under the ICSID Convention is confirmed by Article 26(2) of the Rehabilitation Contract referring disputes to '*arbitration pursuant to […] substitutable law related to arbitration in Iraq.*' At the time of contracting, Iraq had already announced via Article 22 of the Investment Law that German foreign investors shall enjoy additional privileges in accordance with international agreements signed between Iraq and their country and multilateral international agreements which Iraq has joined. Simply staying with the contractual language, for AHG, a specific substitutable law is Iraqi national Law No. 60 of 2012, literally containing Iraq's offer to arbitrate at ICSID. Indeed, in Law No. 60 of 2012, Iraq '*declare[d] its acceptance of the [ICSID] procedure' *should Germany and Iraq become Contracting States to the ICSID Convention, which occurred in 2015. The same holds true for Law No. 24 of 2012 and for that matter, the PCA*".

in the section directly addressing Law No. 64,[134] which is where the Tribunal will address that argument.

130. The Tribunal notes that the phrase "*any other substitutable law related to arbitration in Iraq*" follows the wording of "*arbitration pursuant to the law of civil procedures*". The Claimant has argued that "*Iraq mistakenly attempts to connect the second alternative ("substitutable law related to arbitration in Iraq") with the first alternative ("arbitration pursuant to the law of civil procedures"). There is no connection between the substitutable law and the domestic Iraqi arbitration under Iraq's law of civil procedures. Each refers to a different kind of arbitration – one to (ad hoc) domestic arbitration, the other (alternatively) to any other arbitration arising out of another Iraqi law related to arbitration – such as the ones relied upon by Claimant as set forth in the Request for Arbitration and the Response*".[135] The Tribunal does not agree. The language of Article 26(2) is not "*arbitration pursuant to the law of civil procedure, or any other law related to arbitration in Iraq*", but "*arbitration pursuant to the law of civil procedure, or any other substitutable law related to arbitration in Iraq*" (emphasis added). The parties to the Rehabilitation Contract clearly had an intention when using the word "*substitutable*". The notion of substitution is designed to refer to a law that is susceptible of replacing the arbitration regime prescribed in the Iraqi law of civil procedure (even assuming such regime is that of international arbitration). In this context, the Claimant has not explained how any of the laws ratifying the Iraq-Germany BIT, the Iraq-France BIT or the PCA[136] can be considered

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134 Claimant's Response, ¶ 63 stating under Section IV.F "Law No. 64 of 2012" that "*Claimant can rely on Law No. 64 of 2012 and the ICSID Convention via Article 22 of the Investment Law and Article 26(2) of the Extended License*." In the Request for Arbitration, the Claimant invoked Law No. 64 of 2012 as being referenced in Article 26(2) of the Rehabilitation Contract under section IV.B.7 "*Iraq's Consent to ICSID Arbitration in Law No. 64 of 2012 – Available Through Article 22 of the Investment Law and/or Article 26(2) of the License*"; Claimant's Sur-Reply, ¶ 35 stating under Section III.E "Law No. 64 of 2012" that "*aside from Iraq's consent to ICSID Convention arbitration contained in Article 22 of the Iraqi Investment Law No. 13 of 2006, the German BIT, the French BIT, the ICSID Convention, as affirmed by Law No. 64 of 2012, also became substitutable law related to arbitration in Iraq*".

135 Claimant's Sur-Reply, ¶ 30.

136 The same holds true for the other laws to which the Claimant made in passing reference at the Hearing: "*All of the domestic laws in Iraq, whether it is Investment Law, whether it is Law No 60, whether it is Law No 64, whether it is even the PCA ratification in Law No 49, or the French BIT ratification, Law No 24. They all are substitutable laws related to arbitration in Iraq*" (Hearing Transcript, p. 74, lines 11-16).

to be "*substitutable law*[s]" for the Iraqi law of civil procedure or even an "*Iraqi law related to arbitration*", as none of them establishes an arbitration regime or contains consent to arbitration. Given that a substitutable law must contain an arbitration regime that would govern the arbitration under the Rehabilitation Contract, no law ratifying an international instrument such as the Iraq-France BIT, the Iraq-Germany BIT or the PCA can be considered to be such a law. Contrary to the position taken by the Claimant at the Hearing that these laws make "*reference to the different Iraqi national laws that refer to ICSID arbitration and ICSID Convention arbitration*",[137] none of these laws has the object or purpose of "*referring to ICSID arbitration*" or "*referring to ICSID Convention arbitration*"; they refer only to the required domestic procedure allowing Iraq to ratify an international treaty, which is the actual instrument containing Iraq's consent to ICSID arbitration, subject to its applicability. In other words, when no consent to ICSID arbitration can be found or operate in the underlying international treaty—which, for the reasons set out above, is the case for each of the Iraq-Germany BIT, the PCA and the Iraq-France BIT—the law authorizing the ratification of these instruments cannot be a substitute for consent that otherwise does not exist.

131. *Second*, even assuming the Claimant were able to validly identify Iraq's consent to ICSID arbitration in any of the ratification laws of the Iraq-Germany BIT, the PCA or the Iraq-France BIT as being "*any other substitutable law related to arbitration in Iraq*" under Article 26(2) of the Rehabilitation Contract, it has failed to establish whether and in which of those instruments it can find the substantive protection it seeks under international law, given that the Rehabilitation Contract does not contain any such protection. In other terms, consent to ICSID arbitration, even if established—which it is not—would be over an empty shell or, at best, over any breaches of the Rehabilitation Contract itself, which the Claimant has not argued as such.[138]

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137 Hearing Transcript, p. 92, lines 8-10.

138 *See, e.g.*, Request, ¶ 78: "*Iraq's conduct amounts to breaches of the License, the Investment Law, Law 60 of 2012 (the German BIT), the PCA, the French BIT, the Iraqi Constitution and customary international law. Iraq's breaches will be developed further in this arbitration. By way of example only, at this stage of the proceeding, Iraq: (i) expropriated AHG's investment without compensation*

132. The Tribunal notes in passing that the Claimant has not sought to rely on the reference to "*arbitration pursuant to the law of civil procedures*" contained in Article 26(2) of the Rehabilitation Contract. This reference is to Articles 251-276 of the Iraqi Code of Civil Procedures, Law No. 83 of 1969.[139] Should there be any dispute between the Claimant and the ICSC "*resulting from executing this contract or relevant to it*" as defined in Article 26(1), the Claimant thus has the option of seeking its determination by arbitration pursuant to the Iraqi Code of Civil Procedures, which the Claimant has not argued is an impossibility.

133. The Tribunal concludes, on the above bases, that the Claimant's argument that Article 26(2) of the Rehabilitation Contract contains Iraq's consent to ICSID arbitration is manifestly without legal merit.

D. WHETHER THE TRIBUNAL HAS JURISDICTION BASED ON IRAQ'S INVESTMENT LAW NO. 13 OF 2006

(1) Brief Summary of the Parties' Positions

134. Law No. 13, which is Iraq's Investment Law, was issued in 2006 and amended in 2010 and 2015.

135. Article 22 of Law No. 13 provides as follows:

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by expelling AHG from the Kirkuk Cement Plant in April 2018; (ii) expropriated AHG's investment without compensation by taking AHG's majority shareholding in KCC by means of a court process and changes to the company registry; (iii) treated AHG's investment unfairly and inequitably by means of the conduct described in (i) and (ii) above; (iv) treated AHG's investment unfairly and inequitably by carrying out an unlawful or unjustified termination of the License in February 2009 and by effectively keeping AHG out of the project due to the various court proceedings lasting until the end of 2015 following the unlawful termination; (v) failed to accord AHG's investment full protection in allowing the various armed incursions into and seizures of the Kirkuk Cement Plant and the Pipe Plant; (vi) failed to allow AHG to take out its capital, and its proceeds, from Iraq; and (vii) failed to observe its obligations relating to AHG's investments" (emphasis added). *See also* Respondent's Rule 41(5) Application, ¶ 43 ("*The Claimant does not even allege any breaches of the Rehabilitation Contract in the Request for Arbitration*").

[139] Iraqi Code of Civil Procedures, Law No. 83 of 1969, (**Exhibit R-5**). *See also* Respondent's Rule 41(5) Application, ¶ 41.

> "The foreign investor shall enjoy additional privileges in accordance with international agreements signed between Iraq and his country or multilateral international agreements which Iraq has joined".[140]

136. Article 27 (First) of the Law provides that:

> "Disputes arising from applying this law shall be subjected to Iraqi Law, the mandate of Iraqi Judiciary, and may agree with the investor to resort to Commercial Arbitration (National, or International) in accordance to an agreement concluded between the two parties determines Arbitration procedures, its authority, and law applicable".[141]

137. The non-amended version of Law No. 13, which was included as part of the Iraqi Ministry of Industry and Minerals investment file for rehabilitation of the Kirkuk Cement Plant,[142] contains the same wording as Article 22, but a different provision with regards to Article 27:

> "Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed, save to the cases that are subject to the provisions of the Iraq law exclusively or the jurisdiction of Iraqi courts.
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> […]
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> (4) If the parties to a dispute are subject to the provisions of this law, they may, at the time of signing the agreement, agree on a mechanism to resolve disputes including arbitration pursuant to the Iraqi law or any other internationally recognized entity".[143]

138. The Respondent alleges that Article 22 of the Investment Law is not a dispute resolution provision or an MFN clause and, as a result, it does not contain Iraq's consent to ICSID

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140 Iraq's Investment Law of 2006, Article 22 (**Exhibit CL-3A**). The Respondent noted in the course of the hearing that the Arabic authentic text does not contain the word "*signed*" as part of Article 22 (Hearing Transcript, p. 34, lines 1-5).

141 Iraq's Investment Law of 2006, Article 27 (**Exhibit CL-3A**).

142 Investment File for Rehabilitation of Kirkuk Cement Plant dated March 2007, Annex 2 (**Exhibit C-11**). During the hearing the Claimant submitted that the non-amended version submitted as Exhibit CL-3 governs this issue: "*it is Claimant's submission that it is what is submitted as CLA-3, as opposed to what the Respondent relies on, which is CLA-3A, governs*". Hearing Transcript, p. 56, lines 19-22.

143 Iraq's Investment Law of 2006, Article 27 (**Exhibit CL-3A**).

arbitration.[144] According to the Respondent, "*Article 22 simply recognizes that in addition to the privileges under the Investment Law, a foreign investor has the benefit of any available privileges under international agreements between its home State and Iraq. Article 22 does not provide investors with additional rights and is not a declaration of consent to any specific mechanism for dispute resolution*".[145] The Respondent has characterized Article 22 as a "*non-derogation clause*".[146]

139. The Respondent further notes that dispute settlement is addressed in a separate provision of the Investment Law (Article 27) that does not provide consent to any form of arbitration except if the Parties so agree after a dispute has arisen.[147]

140. The Respondent also argues that even if Article 22 could be construed as expressing consent to arbitrate, none of the agreements that the Claimant relies on amounts to an additional privilege, because they are not available to the Claimant.[148]

141. In response, the Claimant argues that it is a well-established principle that States can express their written consent to ICSID arbitration in national laws.[149] In this regard, the Claimant notes that the Iraqi Investment Law is couched in mandatory language, stating that "[t]*he foreign investor shall enjoy additional privileges*"[150] and that Iraq's request for tender for the underlying cement plant project contained an English translation of the Investment Law, which AHG relied upon in making its decision to invest in Iraq.[151]

142. The Claimant states that "*Article 22 by itself is an additional offer to arbitrate*" and considers that it should be read to entitle AHG to enjoy additional privileges in accordance

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144 Respondent's Rule 41(5) Application, ¶ 46.

145 Respondent's Rule 41(5) Application, ¶ 47.

146 Respondent's Reply, ¶ 29; *see also* Hearing Transcript, p. 34, lines 14-21.

147 Respondent's Rule 41(5) Application, ¶ 48.

148 Hearing Transcript, p. 35, lines 1-25.

149 Claimant's Response, ¶ 54; *See also* Hearing Transcript, p. 100, lines 6-11.

150 Claimant's Response, ¶ 57 (emphasis in original); *See also* Hearing Transcript, p. 100, lines 12-18.

151 Claimant's Response, ¶ 57; See *also* Hearing Transcript, p. 53, lines 1-10 and p. 55, lines 5-22.

with the Iraq-Germany BIT,[152] the ICSID Convention,[153] the PCA[154] and, via the PCA, the Iraq-France BIT.[155]

143. As regards Article 27, the Claimant considers it to be an independent ground for jurisdiction.[156] During the Hearing, the Claimant underscored the reference to an "*internationally recognized entity*" in the non-amended version of the Investment Law as an "*interesting choice of words*", and stated that "*ICSID is such a recognized entity. Article 13 of the Iraqi National Investment Law provides that any and all amendments shall have no retroactive effect*".[157]

(2) Summary of the Parties' Positions following the submission of new evidence by the Claimant

a. Admissibility

144. On 20 December 2021, the Claimant submitted what it considered to be "*newly available evidence that conclusively establishes that Iraq consented to ICSID Convention arbitration also through the references in Article 22 of Investment Law No. 13 of 2006*",[158] (the "**December 2021 Submission**"). Along with its letter, the Claimant submitted Exhibits

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152 Request, ¶ 102; Claimant's Response, ¶¶ 25, 33-34 and 58-59; Hearing Transcript, p. 58, lines 6-15.

153 Request, ¶ 108; Claimant's Response, ¶¶ 25, 58 and 63; Hearing Transcript, p. 56, lines 23-25 and p. 57, lines 1-6.

154 Request, ¶ 97; Claimant's Response, ¶ 58; Hearing Transcript, p. 56, lines 23-25 and p. 57, lines 1- 6.

155 Claimant's Response, ¶ 58. Hearing Transcript, p. 56, lines 23-25 and p. 57, lines 1-6.

156 Claimant's Response, n. 80 referring to Claimant's letter to ICSID dated 23 June 2020. In this letter, the Claimant stated: "*There is no conflict between Article 22 and 27 both amongst each other and especially with respect to the relevant international law provisions and provisions of Iraqi law providing for the Republic of Iraq's consent to ICSID arbitration* […]. *All of these provisions by themselves and certainly when read in conjunction with each other permit Iraq to arbitrate with AHG at ICSID with respect to the investment dispute set forth in the Request*." Claimant's letter to ICSID, dated 23 June 2020, pp. 4-5. *See also*, Hearing Transcript, p. 91, lines 17-21: "*the way I address article 27(4) of the 2006 version, it authorises agreement on arbitration with any other internationally recognised entity, and we submit that that includes ICSID*".

157 Hearing Transcript, p. 56, lines 14-19. *See also* p. 91, lines 10-21.

158 Claimant's letter to the Tribunal, dated 10 December 2021, p. 1.

C- 15 through C-18 and legal authorities CL-20 and CL-21.[159] Exhibits C-15 through C-17 are different Investor Guides issued by the Iraqi National Investment Commission at different times ("**Investor Guides to Iraq**"), and all describe Iraq's investment environment.[160] Exhibit C-18 is an OECD report on investing in Iraq.[161]

145. The Respondent alleged that the December 2021 Submission was inadmissible as a violation of paragraph 16.3 of Procedural Order No. 1,[162] given that the Claimant failed to seek the Tribunal's authorization prior to submitting new evidence.[163] The Respondent further contended that the evidence submitted by the Claimant along with the December 2021 Submission could not be considered "*newly available evidence*" since the documents had been publicly available at least by the time of the Claimant's last written submission.[164]

146. The Claimant denied any breach of Procedural Order No. 1, because it "*does not address the submission of newly available evidence, much less at the stage of the Preliminary Objections per Rule 41(5) of the ICSID Arbitration Rules and prior to the Memorial, which is actually addressed in paragraph 16.3 of Procedural Order No. 1*".[165]

147. The Claimant requested the Tribunal to consider the newly available evidence and the arguments raised in its letter, because, "[i]*n the interest of procedural economy and clearly*

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159 Mobil *Corporation, Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (**Exhibit CL-20**); *Cemex Caracas Investments B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 (**Exhibit CL-21**).

160 Republic of Iraq, "Investor Guide to Iraq 2020-2021", undated (**Exhibit C-15**); Republic of Iraq, "Investor Guide to Iraq 2013", undated (**Exhibit C-16**); Republic of Iraq, "Investor Guide to Iraq", undated (**Exhibit C-17**).

161 OECD, "Promoting Investment in a Fragile Context: the OECD Iraq Project, dated June 2016 (**Exhibit C-18**).

162 Procedural Order No. 1, ¶ 16.3 provides that "[n]*either party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party*".

163 Respondent's letter to the Tribunal, dated 23 December 2021, ¶¶ 5-6.

164 Respondent's letter to the Tribunal, dated 23 December 2021, ¶¶ 7-10.

165 Claimant's letter to the Tribunal, dated 27 December 2021, pp. 1-2.

of relevance for the current phase of this proceeding, Claimant's December 10, 2021 submission was made as early as possible prior to the submission of the Memorial".[166]

148. On 17 January 2022, the Tribunal informed the Parties that "[t]*he Claimant's latest submission dated December 10, 2021 as well as the three subsequent letters from the Parties (Claimant's letter of December 27, 2021 and the Respondent's letters of December 23 and 31, 2021) are admitted into the record. The Tribunal will deal with those submissions in its forthcoming ruling on the Respondent's ICSID Arbitration Rule 41(5) Objections*". The Tribunal notes that the Claimant has not indicated when it became aware of the exhibited Investor Guides to Iraq[167] or whether these documents were publicly available prior to its last written submission.

b. Merits

149. The Claimant argues that the Investor Guides issued by the Government of Iraq confirm Iraq's unambiguous intent in its unilateral declaration in Article 22 of the Investment Law, which "*was to bestow the additional privilege of ICSID Convention arbitration on German investors as soon as Iraq had signed an international agreement with Germany to that effect*".[168]

150. The Claimant further alleges that "[s]*ubsequent ratification and entry into force of those international agreements on the international plane neither condition nor change the privileges that the foreign investor from Germany shall have enjoyed from the moment Iraq signed the international agreement*".[169]

151. In this regard, the Claimant notes *inter alia* that the Investor Guide to Iraq 2020-2021 lists the Iraq-Germany BIT as an agreement signed by Iraq along with other treaties that were

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166 Claimant's letter to the Tribunal, dated 27 December 2021, p. 2.

167 In its letter, the Claimant simply states that "*AHG has become aware of Iraq's Investor Guide to Iraq (2020-2021)*": Claimant's letter to the Tribunal, dated 10 December 2021, p. 4.

168 Claimant's letter to the Tribunal, dated 10 December 2021, p. 3.

169 Claimant's letter to the Tribunal, dated 10 December 2021, p. 3.

in force, which, in the Claimant's view, confirms "*the intention of Iraq to be held to its signed bilateral agreements without regard to their status on the international plane*".[170]

152. The Claimant further alleges that the fact that Iraq decided to use the same wording as Article 22 of the Investment Law in its Investor Guides after it received training from the OECD "*further establishes that Article 22 of Investment Law No. 13 of 2006 was a purposeful unilateral declaration offering ICSID Convention arbitration to certain foreign investors, such as Claimant, whose home countries have international agreements with Iraq and that Iraq has signed*".[171]

153. The Respondent argues that, even if admitted, the December 2021 Submission does not assist the Claimant's jurisdiction case. In particular, the fact that the Investor Guides to Iraq state that Iraq signed the Iraq-Germany BIT is not evidence of consent, because the Iraq-Germany BIT is not in force.

154. The Respondent alleges that (*i*) Iraq's Investment Guides are not statements intended to bind Iraq;[172] (*ii*) the word "*signed*" does not appear in the authentic Arabic version of the Investment Law,[173] and (*iii*) even if the word "*signed*" was part of the Investment Law, additional privileges can only be enjoyed "*in accordance with*" the applicable treaty under Article 22 of the Investment Law, and the Iraq-Germany BIT does not provide additional privileges because it is not in force.[174]

(3) The Tribunal's Analysis

155. Having declared the December 2021 Submission to be admissible, the Tribunal will, in the following sections, address the Parties' submissions on the various iterations under which,

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170 Claimant's letter to the Tribunal, dated 10 December 2021, p. 6.

171 Claimant's letter to the Tribunal, dated 10 December 2021, p. 8.

172 Respondent's letter to the Tribunal, dated 23 December 2021, ¶ 14(a).

173 Respondent's letter to the Tribunal, dated 23 December 2021, ¶ 14(b).

174 Respondent's letter to the Tribunal, dated 23 December 2021, ¶ 14(c). In its response to the Claimant's reply, the Respondent added that even if "*the German BIT could be treated as a unilateral declaration, there is manifestly no basis to exclude Article 14 of the German BIT from the rest of its provisions*" (Respondent's letter to the Tribunal, dated 31 December 2021, p. 1).

according to the Claimant, the Iraqi Investment Law provides jurisdiction to this Tribunal, namely under the Investment Law itself (**a**), or under a combination of the Investment Law and another international instrument, be it the Iraq-Germany BIT, the PCA or the Iraq-France BIT through the PCA (**b**).

a. Jurisdiction under the Investment Law Itself

156. As a preliminary matter, the Tribunal notes that the Claimant has invoked the Investment Law on a standalone basis, mainly in relation to Article 27 (which will be considered below), but also, to a lesser degree, in relation to Article 22 which it has argued "*by itself is an additional offer to arbitrate*".[175] However, the Claimant has not explained how, on its face, Article 22 of the Investment Law contains any offer to arbitrate under the ICSID Convention when it merely refers to a foreign investor's right to "*enjoy additional privileges in accordance with international agreements signed between Iraq and his country or multilateral agreements which Iraq has joined*". Given this language, and the fact that the Claimant's above argument is immediately followed by the contention that "*Article 22 of the Investment Law provides that AHG shall (also) '*enjoy additional privileges in accordance with*' the German BIT, the ICSID Convention, the PCA, and via the PCA, the French BIT*",[176] the Tribunal has focused its attention on Article 22 of the Investment Law as combined with other international instruments (Section (b) below).

157. The next question is whether Article 27 of the Investment Law provides, on a standalone basis, Iraq's consent to ICSID arbitration.

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[175] Claimant's Letter to ICSID dated 23 June 2020, pp. 4-5 ("*There is no conflict between Article 22 and 27 both amongst each other and especially with respect to the relevant international law provisions and provisions of Iraqi law providing for the Republic of Iraq's consent to ICSID arbitration, including by virtue of Article 26(2) of the License and Extended License. All of these provisions by themselves and certainly when read in conjunction with each other permit Iraq to arbitrate with AHG at ICSID with respect to the investment dispute set forth in the Request*" (emphasis in original)). *See also* Claimant's Response, ¶ 58 ("[…] *In addition to Iraq's agreement to arbitrate with AHG via the Extended License, in accordance with Article 27 of the Investment Law, Article 22 by itself is an additional offer to arbitrate. Article 22 of the Investment Law provides that AHG shall (also) '*enjoy additional privileges in accordance with*' the German BIT, the ICSID Convention, the PCA, and via the PCA, the French BIT*").

[176] Claimant's Response, ¶ 58.

158. The Tribunal first notes that the types of disputes that are covered by this provision are "*disputes arising from applying this law*", which means that, even if the Tribunal were to have jurisdiction based on Article 27, the scope of protection would be limited to any substantive protections granted by Law No. 13.

159. More on point as regards the Tribunal's jurisdiction, there are at least four reasons why, on its face, Article 27 cannot grant such jurisdiction: *first*, the provision nowhere contains consent to ICSID arbitration; *second*, the provision uses optional language and arbitration is not the exclusive remedy ("*may agree with the investor*"); *third*, Article 27 refers to "*commercial arbitration*", not investor-State arbitration; *fourth*, such arbitration is to be conducted "*in accordance to an agreement concluded between the two parties*", and there is no such agreement between Iraq and AHG. On the latter point, to the extent the Rehabilitation Contract for the Kirkuk Cement Factory—which the Claimant argues followed a bid based on tender documents that included a certain translation of the Investment Law[177]—can be deemed to be binding on Iraq, that agreement does not contain consent to ICSID arbitration, as already found by the Tribunal (above, paragraphs 125-133).

160. The non-amended version of Article 27(4)[178] does not assist the Claimant, as it refers to an agreement between the parties "*at the time of signing the agreement*". Further, that the dispute resolution mechanism that could be envisaged between the Parties may be an "*internationally recognized entity*" such as ICSID does not mean that one can overlook the requirement of a specific agreement concluded between the parties to the dispute, here

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177 Claimant's Request, ¶ 5. *See also* Investment File for Rehabilitation of Kirkuk Cement Plant, dated March 2007 (**Exhibit C-11**) and Offer for the Rehabilitation and Operation of the Cement Plant Kirkuk presented to the Ministry of Industry and Minerals Investment Department, dated 24 July 2007 (**Exhibit C-12**).

178 The non-amended version of Article 27(4) (**Exhibit CL-3**) provides: "*If the parties to a dispute are subject to the provisions of this law, they may, at the time of signing the agreement, agree on a mechanism to resolve disputes including arbitration pursuant to the Iraqi law or any other internationally recognized entity*".

Iraq and AHG, and referring to the "*arbitration procedures, its authority, and law applicable*" as mandated by Article 27(First) of the Law. Such an agreement does not exist.

161. The Tribunal concludes that Article 27 of the Investment Law does not grant it jurisdiction to decide the present investor-State dispute under the ICSID Convention.

b. Jurisdiction under a combination of the Investment Law and other international instruments

162. In addition to Article 27 of the Investment Law—which the Tribunal has concluded does not contain consent to arbitration, let alone ICSID arbitration—the Claimant contends that it can import Iraq's consent to ICSID arbitration, through Article 22 of the Law, from a number of international instruments to which Iraq is a party.

163. The Claimant refers, this time, to the "*mandatory language*" under Article 22, which provides that *"*[t]he *foreign investor shall enjoy additional privileges in accordance with international agreements signed between Iraq and his country or multilateral international agreements which Iraq has joined*". The Claimant seeks, through Article 22, to rely on any of the Iraq-Germany BIT,[179] the PCA[180] or the Iraq-France BIT through the MFN provision of the PCA.[181]

164. The Tribunal is not convinced that the wording of "*additional privileges*" can validly be understood as the required consent to ICSID arbitration that the Claimant needs in order to establish this Tribunal's jurisdiction. Contrary to the Claimant's assertion, nothing in Article 22 indicates, on its face, that it is "*by itself an additional offer to arbitrate*", as it does not contain *any reference* to arbitration.

165. To the contrary, as the language of Article 22 makes clear, it merely states that foreign investors enjoy privileges deriving from the international agreements to which they can

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179 Request, ¶ 102; Claimant's Response, ¶¶ 25, 33-34 and 58-59; Hearing Transcript, p. 58, lines 6-15.

180 Request, ¶ 98; Claimant's Response, ¶ 58; Hearing Transcript, p. 56, lines 23-25 and p. 57, lines 1-6. *See also* Claimant's Response, ¶ 25 (in this context, the Claimant refers to Law No. 49 ratifying the PCA instead of the PCA itself).

181 Claimant's Response, ¶ 58; Hearing Transcript, p. 56, lines 23-25 and p. 57, lines 1-6.

claim benefit. In other words, the existence of the Investment Law is without prejudice to any international protection to which foreign investors may be entitled under existing international agreements. This is confirmed by the use of the word "*additional*", which clearly conveys the notion that these privileges are those that come in addition *to* any privileges and protections contained in the Investment Law.

166. Nor can Article 22 be understood as incorporating by reference the substance of any international agreement, regardless of the status of such agreement, such that Article 22 could, on a standalone basis, contain both the substantive protections and irrevocable consent to arbitration. Nothing in the language of Article 22 indicates that it is anything other than a general reference to other existing protections that apply independently of the Investment Law.[182]

167. The Claimant states that, under international law, "*a host State may provide advance consent to ICSID Convention arbitration through a unilateral declaration in the form of its national legislation*".[183] However, for such advance consent to exist, as in any investment protection treaty, it must be expressed specifically and unequivocally. It is not enough, for purposes of consent, that the law in question generally refers to international agreements which, in turn, may include such consent.

168. The Claimant has also relied on the Investor Guides issued by Iraq in 2009, 2013 and 2020-2021, arguing that the specific reference in the latest Investor Guide of 2020-2021 to the Iraq-Germany BIT as an agreement signed by Iraq (along with other agreements that are in force) confirms Iraq's intention "*to be held to its signed bilateral agreements without regard to their status on the international plane*".[184] The Claimant also relies on the

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182 The same logic applies, *a fortiori*, to the Claimant's allegations that Iraqi legislation operates to the same effect, namely Law No. 60 and Law No. 49, which the Claimant argues are incorporated by reference into Article 22 of the Investment Law (respectively, Request, ¶ 102 and Claimant's Response, ¶ 25), or Law no. 24, which the Claimant argues is an "*additional privilege*" under Article 22 of the Investment Law (Claimant's Response, ¶ 25).

183 Claimant's letter to the Tribunal, dated 10 December 2021, p. 8.

184 Claimant's letter to the Tribunal, dated 10 December 2021, p. 6.

Investor Guides to Iraq as unilateral declarations offering ICSID arbitration, given the use of the same wording as Article 22 of the Investment Law.[185]

169. The Tribunal is not convinced by these arguments, for several reasons.

170. *First*, in its letter of 10 December 2021, the Claimant indicates:

> *"*AHG has become aware of Iraq's Investor Guide to Iraq (2020-2021). Iraq maintains a government website for foreign investors at https:///investpromo.gov.iq/. In the 'About Us' section, Iraq touts Investment Law No. 13 of 2006 as the 'foundation for attracting foreign investment into Iraq' and the National Investment Commission ("**NIC**") as the 'face of private investment in Iraq' and '[the] promoter, facilitator, monitor and policy advisor for investment into Iraq'".[186]

171. The Claimant has not explained how, if it became aware of the 2020-2021 Investor Guide to Iraq only when it made its submission in December 2021—which presumably justified its belated filing of such new evidence—it could have relied on this Guide at the time of its investment and, consequently, how it had any understanding or expectation that such Guide constituted a unilateral declaration by Iraq that it consented to ICSID arbitration in the event of a dispute relating to the Claimant's investment.

172. *Second*, the Claimant refers to the "*Iraqi government-issued 'I*nvestor Guides to Iraq*', which promise foreign investors exactly what Article 22 of Investment Law No. 13 of 2006 says – the 'additional privileges in accordance with international agreements signed between Iraq and his country or multilateral international agreements which Iraq has joined'*".[187] The Claimant also argues that "[w]*ith the 'Investor Guides to Iraq' in hand, it is clear that Iraq's unambiguous intent with its unilateral declarations in Article 22 of Investment Law No. 13 of 2006 was to bestow the additional privilege of ICSID Convention*

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185 Claimant's letter to the Tribunal, dated 10 December 2021, p. 3.

186 Claimant's letter to the Tribunal, dated 10 December 2021, p. 4 (emphasis added).

187 Claimant's letter to the Tribunal, dated 10 December 2021, p. 3 (emphasis in original).

arbitration on German investors as soon as Iraq had signed an international agreement with Germany to that effect".[188]

173. However, the Investor Guides to Iraq, as their name indicates, are nothing more than general descriptions and guidelines of the legal framework for investors interested in investing in Iraq. In its letter of 10 December 2021, the Claimant did not describe the 2020-2021 Guide any differently.[189]

174. More on point, the Claimant relies on the 2020-2021 Guide in relation to the following excerpt:[190]

> "Iraq's bilateral and multilateral agreements
>
> First: Bilateral Agreements:
>
> Iraq has already signed investment agreements with: (Japan, France, Germany, Belarus, Armenia, Kuwait, Jordan, Iran, and KSA) in addition to the agreement with USA regarding investment incentives".[191]

175. On its face, this is no more than a list of the bilateral investment treaties entered into by Iraq. How such a list, appearing in a general guide on Iraq's investment framework, constitutes Iraq's irrevocable consent to ICSID arbitration in relation to disputes with AHG has not been explained by the Claimant.

176. *Third*, the Tribunal has carefully considered the Claimant's reference to the words "*signed*" and "*joined*" in the English translation of Article 22, and in the Respondent's reference to the absence of the word "*signed*" in the original Arabic language. The Tribunal is mindful, as emphasized by the Claimant,[192] that what the Claimant received with the Tender documents was the English translation of the Investment Law referring to both words,

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188 Claimant's letter to the Tribunal, dated 10 December 2021, p. 3.

189 Claimant's letter to the Tribunal, dated 10 December 2021, pp. 4-6.

190 Claimant's letter to the Tribunal, dated 10 December 2021, p. 6.

191 Republic of Iraq, "Investor Guide to Iraq 2020-2021", undated p. 32 (**Exhibit C-15**) (emphasis added).

192 Hearing Transcript, p. 55, lines 19-22 and p. 113, lines 11-16.

namely "*signed*" and "*joined*". Indeed, in the English version submitted as Exhibit CL-3A, both words are used, as the provision makes reference to agreements "*signed*" by Iraq or which Iraq has "*joined*". The distinction in the English version, on which the Claimant says it has relied, may be explained by the fact that one expression ("*signed*") seems to refer to bilateral agreements between Iraq and the investor's home State, while the other ("*joined*") seems to refer to multilateral agreements. Whatever terminology is used, however, it is without prejudice to the applicability of the international agreements in question in the first place. The Iraq-Germany BIT may have been "*signed*" by both Iraq and Germany, but not having been ratified by Germany pursuant to its own terms, it has not come into existence internationally. Not being in force, the Iraq-Germany BIT cannot be brought to life through the mere reference, in Article 22 of the Investment Law, to "*international agreements signed*" between Iraq and an investor's home State. Such reference assumes that any "*international agreements signed between Iraq and* [the foreign investor's] *country or multilateral agreements which Iraq has joined*" be in force or be applicable in the first place. The same holds true for the PCA and the Iraq-France BIT, none of which can find application here through Article 22 when they do not apply in the first place, for the reasons explained above (paragraphs 97-112).

177. The Tribunal concludes, for the reasons set out above, that the Claimant's argument that Iraq's Investment Law No. 13 of 2006 contains, in its Article 22 and its Article 27 (First), Iraq's consent to ICSID arbitration is manifestly without legal merit.

E. WHETHER THE TRIBUNAL HAS JURISDICTION BASED ON THE KURDISTAN INVESTMENT LAW OF 2006

(1) Brief Summary of the Parties' Positions

178. The Claimant alleges that the Tribunal also has jurisdiction over its claims in connection with an investment of approximately US$ 17 million in the Erbil Pipe Plant located in Kurdistan.[193]

[193] Request, ¶¶ 52 and 110-111.

179. For purposes of its claims related to the Erbil Pipe Plant, the Claimant relies on Law No. 4 of 2006 adopted by the President of the Kurdistan Region in Iraq entitled "Law of Investment in Kurdistan Region-Iraq" ("**Kurdistan Law No. 4**").

180. Article 17 of Law No. 4 provides that:

> "Investment disputes shall be settled in accordance with the contract concluded between both parties, and if there is no clause in the contract on this regard, the disputes shall be settled amicably between both parties. If they fail to reach an amicable settlement, they may refer the matter to arbitration whose regulations are stated in the laws applicable in the Region, or in accordance with the rules of dispute settlement mentioned in any of the mutual or international conventions of which Iraq is a member".[194]

181. The Claimant initially alleged that Article 17 of Law No. 4 should be construed as establishing consent to ICSID arbitration by indirect reference to Articles 25 and 27 of the PCA and Article 8 of the Iraq-France BIT, as well as Articles 11(2) and (4) of the Iraq-Germany BIT and the ICSID Convention.[195] However, on 12 January 2022, the Claimant submitted a "Notice and Request for Voluntary Partial Withdrawal of Claim Without Prejudice", relating solely to the claims related to the Erbil Pipe Plant and the Claimant's reliance on Kurdistan Law No. 4.[196] In so doing, the Claimant stated that "*all claims and arguments pertaining to the Erbil Pipe Plant have been* de minimis".[197]

182. The Respondent objected to the Claimant's request to withdraw this claim without prejudice. The Respondent stated that it has already incurred significant time and costs

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194 Kurdistan Investment Law No. 4 (**Exhibit CL-8**) or (**Exhibit R-3**).

195 Claimant's Response, ¶ 61.

196 Claimant's letter to the Tribunal dated 21 January 2022 pp. 1-2.

197 Claimant's letter to the Tribunal dated 21 January 2022, p. 2. Referring to the Article 41(5) proceedings, the Claimant noted it "*has referenced (and Respondent has addressed as part of its* ratione voluntatis *objection in a total of six paragraphs) Law No. 4 of 2006 only in conjunction with Iraq's consent to ICSID Convention arbitration contained in other instruments (Respondent's Objection, ¶¶50-53, Claimant's Response, ¶60-61, Respondent's Reply, ¶33-34, and Claimant's Sur-Reply, ¶31-32)*".

defending against the Claimant's unmeritorious claims and requested the Tribunal to issue a decision disposing of this claim with prejudice.[198]

183. On 11 February 2022, the Tribunal noted that the Claimant had not provided any justification or specific reasons as to the timing of its withdrawal request and reserved any decision until its ruling on the Respondent's Rule 41(5) Application.

184. On substance, the Respondent argues that the Claimant cannot rely on Law No. 4 to find consent to ICSID arbitration with respect to claims related to the Erbil Pipe Plant for at least two reasons. *First*, the Kurdistan Regional Government is a federal region within the Republic of Iraq with autonomous status. Thus, even if Kurdistan Law No. 4 were to provide consent to ICSID arbitration, it does not amount to consent by Iraq.[199] *Second*, the Respondent argues that Article 17 of Kurdistan Law No. 4 is not a declaration of consent to ICSID arbitration and does not provide consent by reference to another agreement.[200]

(2) The Tribunal's Analysis

185. The Tribunal has taken note of the Claimant's withdrawal of this claim and related arguments. However, given that the Tribunal is addressing the Claimant's comprehensive grounds for jurisdiction, and the jurisdictional basis for this claim has been fully briefed by the Parties, the Tribunal finds that good administration of justice mandates that this ground for jurisdiction be addressed in this Award.

186. *First*, the main question before this Tribunal is the scope of application of Kurdistan and that Law No. 4 applies only to Kurdistan.[201] The Claimant does not challenge this and

198 Respondent's letter to the Tribunal dated 8 February 2022, p. 1.

199 Respondent's Rule 41(5) Application, ¶¶ 50-51. In this regard, the Respondent also notes that Article 25(3) of the ICSID Convention provides that "*Consent by a constituent subdivision or agency of a Contracting State [to ICSID arbitration] shall require the approval of that State unless that State notifies the Centre that no such approval is required*" and that the Republic of Iraq has not granted its consent in the present case. Respondent's Rule 41(5) Application, n. 55.

200 Respondent's Rule 41(5) Application, ¶ 52.

201 Respondent's Rule 41(5) Application, ¶ 51. Hearing Transcript, p. 37, lines 19-25.

accepts that "*Iraq rightly points out that Kurdistan is a federal region within the Republic of Iraq*".[202]

187. This is confirmed by the text of Kurdistan Law No. 4. As the title of the law provides, it is the "*Law of Investment in Kurdistan Region*". It is signed by the President of the Kurdistan Region, and has been adopted pursuant to "*legislation by the Kurdistan National Assembly – Iraq, and by virtue of Article 10 of Law no. (1) of 2005*".[203] Further, the law defines, in its Article 1, the term "*Government*" as the "*Government of the Region*". Nothing in the Kurdistan Law No. 4 gives any indication that it does—or can—extend to the Government of Iraq.

188. As the above considerations establish, any piece of legislation (in this case, investment legislation) that is adopted by the Kurdistan Region can only apply to that region and address the conduct of the authorities of the region. Even assuming Article 17 of Kurdistan Law No. 4 were to contain irrevocable consent to ICSID arbitration—which it does not, as will be discussed below—there is simply no legal basis for the Claimant to argue, even on a *prima facie* basis, that Kurdistan's consent to arbitrate disputes involving investments made in Kurdistan and relating to the protection of investors in Kurdistan *vis-à-vis* the authorities of Kurdistan can internationally bind Iraq.

189. Further, the Tribunal notes that the Kurdistan Regional Government is not a notified constituent subdivision of Iraq under Articles 25(1) and 25(3) of the ICSID Convention—which, respectively, provide that "[t]*he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State* […]", and that "[c]*onsent by a constituent subdivision or agency of a Contracting State shall require the approval of that*

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202 Claimant's Response, ¶ 60.

203 *See* Preamble of the law, under Kurdistan Regional Investment Law No. 4 of 2006 (**Exhibit CL-8**), also produced as **Exhibit R-3** containing the Arabic version.

State unless that State notifies the Centre that no such approval is required"—the requirements of which are thus not met.

190. For these reasons, Kurdistan Law No. 4 cannot bind Iraq. This could be the end of the matter. Nonetheless, the Tribunal will address the Parties' other arguments.

191. *Second*, even assuming that Kurdistan has the capacity to bind the State of Iraq, which the Tribunal has found it does not, Article 17 of Kurdistan Law No. 4 does not contain the specific and irrevocable consent to ICSID arbitration invoked by the Claimant.

192. The Tribunal first notes that Article 17 itself does not contain any reference to ICSID arbitration. It first refers to the dispute resolution mechanism contained in "*the contract concluded between both parties*". It then refers to arbitration "*whose regulations are stated in the laws applicable in the Region*" and, lastly, to the "*rules of dispute settlement mentioned in any of the mutual or international conventions of which Iraq is a member*". Article 17, therefore cannot be an independent source of consent to ICSID arbitration.

193. The Claimant's argument seems to be based on an incorporation by reference of the PCA and Iraq-France BIT and of the Iraq-Germany BIT through the reference, under Article 17 of Kurdistan Law No. 4, to the "*rules of dispute settlement mentioned in any of the mutual or international conventions of which Iraq is a member*". Such an incorporation by reference, however, requires that the international agreements in question contain consent to ICSID arbitration which the Claimant can claim the benefit of. As the Tribunal has found, the Claimant cannot claim such benefit.

194. As regards the Iraq-France BIT (which the Claimant invokes through the PCA), the Tribunal has found that the Claimant cannot resort to the PCA (and, on that basis, the Iraq-France BIT) because (*i*) investor-State dispute resolution is excluded from the scope of the PCA in Annex 4, (*ii*) under the limited "*treatment*" of Article 25 of the PCA, France is not a third country, and (*iii*) Article 27 does not import or incorporate by reference any investment protection treaty into the PCA but, rather, affirms that the existence of the PCA is without prejudice to the existence, in parallel, of any other international agreements relating to

investment to which investors of the PCA State parties may be entitled (see paragraphs 97-112).

195. As regards the Iraq-Germany BIT, the Tribunal has found that it has not come into force internationally, given Germany's failure to ratify the Treaty, and that, on this basis, it cannot be referred to as an international agreement validly containing Iraq's consent to ICSID arbitration (see paragraphs 68-77).

196. On these bases, the Tribunal concludes that the Claimant's argument that Article 17 of the Kurdistan Law No. 4 of 2006 establishes Iraq's consent to ICSID arbitration is manifestly without legal merit.

F. WHETHER THE TRIBUNAL HAS JURISDICTION BASED ON LAW NO. 64 OF 2012 RATIFYING THE ICSID CONVENTION

(1) Brief Summary of the Parties' Positions

197. On 1 October 2012, the President of the Republic of Iraq issued Law No. 64 of 2012 authorizing the Republic of Iraq to join the ICSID Convention. The Law No. 64 provides in full:

> "Article 1 - The Republic of Iraq shall hereby join the Convention on The Settlement Of Investment Disputes Between States And Nationals Of Other States which came into effect as of 14/10/1966.
>
> Article 2 - This Law shall come into force as of the date of publication in the Official Gazette".[204]

198. Approximately three years later, on 17 November 2015, Iraq signed the ICSID Convention and deposited its instrument of ratification, and became an ICSID Contracting State on 17 December 2015.

[204] Law No. 64 of 2012 (**Exhibit R-6**). In addition, Law No. 64 sets out the reasons for issuing this law and reproduced the ICSID Convention.

199. The Claimant argues that the "*explanatory note*" to Law No. 64, setting out the reasons for its adoption, reflects Iraq's consent to ICSID arbitration.[205] This refers to the provision on the purpose of Law No. 64 ("*causes*"), which sets out: "*For the purpose of encouragement of investment, protection of the investor and settlement of disputes arising between the states and nationals of other states*".[206]

200. The Claimant further alleges that Law No. 64 constitutes an independent consent outside of the mere joining of ICSID, especially because under Article 73(2) of the Iraqi Constitution, the President of Iraq "*has the power to ratify international treaties and agreements after they have been approved by the Council of Representatives, the issuance of Law No. 64 of 2012, by itself, constitutes the required additional step to consent to ICSID arbitration beyond the mere joining of ICSID*".[207]

201. The Claimant also argues that, for the Tribunal's jurisdiction, it "*can rely on Law No. 64 of 2012 and the ICSID Convention via Article 22 of the Investment Law and Article 26(2) of the Extended License*".[208]

202. The Respondent argues that Law No. 64 merely authorizes Iraq to join the ICSID Convention and that it is plain and obvious that it does not contain the Respondent's consent to ICSID arbitration with any party or class of parties.[209]

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205 Claimant's Response, ¶ 62 citing to Law No. 64 of 2012 (**Exhibit CL-1**), also produced as **Exhibit R-6**.

206 Law No. 64 of 2012 (**Exhibit R-6**).

207 Claimant's Response, ¶ 63. The Claimant further states that it "*can rely on Law No. 64 of 2012 and the ICSID Convention via Article 22 of the Investment Law and Article 26(2) of the Extended License*". The Claimant's jurisdictional arguments via the Investment Law and the Rehabilitation Contract are addressed in sections V.D and V.C, respectively.

208 Claimant's Response, ¶ 63. *See also* Request, ¶¶ 107-109.

209 Respondent's Rule 41(5) Application, ¶ 55.

(2) The Tribunal's Analysis

203. The Tribunal finds that Law No. 64 does not assist the Claimant, as its sole object and purpose is to allow Iraq's accession to the ICSID Convention.

204. This is clear from Article 1 of the Law, which provides that "[t]*he Republic of Iraq shall hereby join the Convention On The Settlement Of Investment Disputes Between States and Nationals of Other States which came into effect as of 14/10/1966*". Put simply, this Law constitutes the domestic formality necessary to Iraq's accession to the Convention—nothing less, nothing more.

205. This is also clear from what the Parties agree to characterize as the "*Explanatory Note*", namely the section in the Law that sets out its purpose.[210] All this language does is provide an explanation for Iraq's accession to the ICSID Convention, namely the "*encouragement of investment, protection of the investor and settlement of disputes arising between the states and nationals of other states".* Nowhere on its face does it provide Iraq's consent to ICSID arbitration, be it general or specific.

206. Given the nature of Law No. 64, which does not itself contain specific consent to ICSID arbitration in relation to the Claimant and its investment, the Claimant cannot rely on this law to establish this Tribunal's jurisdiction to hear the present dispute.

207. This should be the end of the matter.

208. The Claimant, however, makes two further arguments, neither of which assists it in its efforts to establish ICSID jurisdiction.

209. *First*, the Claimant goes as far as arguing that "*Law No. 64 of 2012 constitutes an independent consent outside of the mere joining of ICSID*", relying on the Iraqi President's power to ratify international treaties under Article 73(2) of the Iraqi Constitution following an approval by the Council of Representatives. On this basis, says the Claimant, "*the issuance of Law No. 64 of 2012, by itself, constitutes the required additional step to consent*

[210] Claimant's Response, ¶¶ 62-63.

to ICSID arbitration beyond the mere joining of ICSID".[211] The Claimant has, however, not explained how the Iraqi President's general power to ratify international treaties, or even the exercise of that power in relation to Iraq's accession to the ICSID Convention, somehow gives this Tribunal jurisdiction to rule on the dispute before it when Iraq's specific consent to ICSID arbitration is lacking.

210. Indeed, as the Claimant concedes, "[i]*t is a matter of law that participation in international treaties such as the ICSID Convention, in and of itself, is not sufficient to establish jurisdiction. The ICSID Convention Preamble expressly states '*[...] that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration'".[212] In other words, being a Party to the ICSID Convention is not, in and of itself, sufficient to establish a tribunal's jurisdiction if consent to ICSID arbitration has not specifically and additionally been given by both parties to a dispute. Thus, it is not enough for the Claimant to rely on general consent to ICSID arbitration, which exists by Iraq being a Contracting Party to the ICSID Convention and for which the Claimant does not need Law No. 64. What the Claimant needs to show is that, <u>in addition</u> to jurisdiction under the ICSID Convention, the Tribunal has jurisdiction under the specific instrument on the basis of which it has been constituted and the Claimant seeks to establish Iraq's liability on the merits. Thus, for this Tribunal to have jurisdiction to hear the dispute, the Claimant needs to establish both Iraq's consent to ICSID jurisdiction under the Convention (which is established, given that Iraq is a Contracting Party) *and* Iraq's consent to ICSID arbitration under a specific instrument—be it a contract, or a treaty. That additional ground, however, cannot be found in any of the domestic law formalities required for the accession to the ICSID Convention, be it the issuance of Law No. 64 or the exercise by the Iraqi President of his power to ratify international treaties. Such additional

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211 Claimant's Response, ¶¶ 62-63.

212 Claimant's Sur-Reply, ¶ 33. *See also* Hearing Transcript, p. 57, lines 24-25 and p. 58, lines 1-5: "*The ICSID Convention as we admit and concede does require an additional step beyond the mere joining of the ICSID Convention for consent to ICSID arbitration to be valid. It is our submission that in addition to other pieces relied upon, and I am sorry, I should be more precise, other instruments relied upon, the causes stated in Law No 64 of 2012 qualify for that purpose as well*".

ground should be found independently, in addition to and separately from the ICSID Convention.

211. In this respect, given that, for the reasons explained above (paragraphs 68-77 (Iraq-Germany BIT); paragraphs 97-112 (PCA); and paragraphs 155-177 (Investment Law)), none of the instruments on which the Claimant seeks to rely—namely the Iraq-Germany BIT, the PCA, the Iraq-France BIT through the PCA or even Investment Law No. 13—benefits the Claimant for purposes of this dispute, the Tribunal cannot conclude that it has jurisdiction to hear the present dispute.

212. *Second*, the Claimant relies on a combination of Law No. 64, on the one hand, and Article 22 of the Investment Law (which refers to foreign investors enjoying "*additional privileges in accordance with international agreements signed between Iraq and [their] country or multilateral agreements which Iraq has joined*"), as well as Article 26(2) of the Rehabilitation Contract, on the other hand.[213]

213. The Claimant maintains, in this respect, that "*it is clear that Law No. 64 of 2012 projects Iraq's will to subject itself to the ICSID jurisdiction and Claimant emphasizes that the issuance of the law is an additional step Iraq undertook on top of what its Constitution requires, thereby perfecting the reference to the '*substitutable law related to arbitration in Iraq*' contained in Article 26(2) of the License and Extended License*. […] *It is abundantly clear that Iraq has indeed consented to ICSID jurisdiction by virtue of an express agreement between the parties. For the avoidance of doubt and aside from Iraq's consent to ICSID Convention arbitration contained in Article 22 of the Iraqi Investment Law No. 13 of 2006, the German BIT, the French BIT, the ICSID Convention, as affirmed by Law No. 64 of 2012, also became substitutable law related to arbitration in Iraq*".[214]

214. It has not always been easy for the Tribunal to follow the Claimant's logic which, as the above excerpt shows, mixes a number of different instruments, assigning various priorities

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213 Claimant's Response, ¶ 63: "*As set forth in the Request for Arbitration, Claimant can rely on Law No. 64 of 2012 and the ICSID Convention via Article 22 of the Investment Law and Article 26(2) of the Extended License*".

214 Claimant's Sur-Reply, ¶¶ 34-35.

to various laws and international instruments, depending on the chosen angle (for example, Article 22 of the Investment Law being the starting point to identify the applicable "*additional privileges*", or Article 26(2) of the Rehabilitation Contract being the starting point to seek the "*other substitutable law related to arbitration in Iraq*"). As summarized, the Claimant's argument seems to be that Law No. 64 is a "*substitutable law*" for purposes of Article 26(2) of the Rehabilitation Contract, and that it would constitute an "*additional privilege*" under Article 22 of the Investment Law. Here too, the Tribunal finds that the Claimant's argument manifestly lacks any merit.

215. As regards Article 26(2) of the Rehabilitation Contract, Law No. 64 cannot be considered a "*substitutable law related to arbitration in Iraq*". As decided above (paragraphs 125-133), a "*substitutable law related to arbitration in Iraq*" must contain both a specific consent to ICSID arbitration and the arbitration regime that will govern the dispute that is subjected to it. Law No. 64 does none of that. Its only substance is to allow Iraq's accession to ICSID and constitutes a mere domestic formality allowing Iraq's accession to the ICSID Convention. As the Claimant has itself conceded, "[t]*he ICSID Convention as we admit and concede does require an additional step beyond the mere joining of the ICSID Convention for consent to ICSID arbitration to be valid*".[215] How the law that merely allows such accession constitutes the "*additional step beyond the mere joining of the ICSID Convention*" for a valid consent to ICSID arbitration to exist has not been explained by the Claimant.

216. As to Article 22 of the Investment Law, it does not contain Iraq's consent to ICSID arbitration either, but merely affirms that a foreign investor's rights and privileges under international agreements to which it is entitled are not affected by the legal regime under the Investment Law (*see* above, paragraphs 162-177). This, however, assumes that the investor's entitlement to such rights and privileges under international agreements can be established, following which the investor would be at liberty to trigger the applicable arbitration regime under any of those agreements, separately from the Investment Law itself. Law No. 64, which constitutes the domestic formality allowing Iraq's accession to

[215] Hearing Transcript, p. 57, lines 23-25 and p. 58, line 1.

the ICSID Convention, cannot be an "*additional privilege* […] *in accordance with international agreements*" under Article 22 of the Investment Law, as it is not even an international agreement. Nor does it contain any privilege: it simply is part of the domestic formalities that needed to be accomplished for Iraq to be bound by the ICSID Convention, without this constituting the specific consent to ICSID arbitration that is needed for this Tribunal to have jurisdiction over the dispute. Again, as the Claimant itself recognizes, "[t]*he ICSID Convention as we admit and concede does require an additional step beyond the mere joining of the ICSID Convention for consent to ICSID arbitration to be valid*".[216]

217. For all these reasons, the Tribunal concludes that Law No. 64 is neither a "*substitutable law*" for purposes of Article 26(2) of the Rehabilitation Contract, nor does it constitute an *"additional privilege*" under Article 22 of the Investment Law. Simply put, the Claimant cannot rely on Law No. 64, which is merely a law enabling Iraq's accession to the ICSID Convention, to establish Iraq's specific consent to ICSID arbitration, either for this particular dispute or for a category of disputes within which the present dispute would fall.

218. The Tribunal concludes, for the reasons set out above, that the Claimant's argument that Iraq's Law No. 64 of 2012 contains Iraq's consent to ICSID arbitration is manifestly without legal merit.

G. WHETHER THE TRIBUNAL HAS JURISDICTION BASED ON THE INTERPLAY BETWEEN VARIOUS INSTRUMENTS

(1) Brief Summary of the Parties' Positions

219. The Claimant takes the view that the Respondent has failed to address the Claimant's case on jurisdiction, which is not limited to the operation of any one standalone jurisdictional instrument, "*but rather relies on Iraq's offer to arbitrate through the interplay of various instruments referenced and expressed in Iraq's contracts (the License and Extended License), national laws (the 2006 Investment Law) as well as Law Nos. 24 (French BIT), 60 (German BIT), 64 of 2012 (ICSID Convention), Law No. 49 of 2013 (PCA) and the Kurdish*

[216] Hearing Transcript, p. 57, lines 23-25 and p. 58, line 1.

Investment Law, and signed and ratified treaties (the ICSID Convention, PCA, French BIT and German BIT)".[217]

220. The Claimant further states that Iraq motivated the Claimant to become one of the very first investors in post-Saddam Hussein Iraq and to invest in Iraq, which was followed by the signature of international agreements that granted additional privileges to foreign investors.[218] At the same time, the Claimant argues that Iraq's consent is expressed in each of the instruments invoked by the Claimant.[219]

221. The Respondent states that the Claimant's interplay argument is meritless because a multitude of non-viable pathways to jurisdiction "*cannot combine to create any viable pathway to jurisdiction*".[220]

(2) The Tribunal's Analysis

222. The Claimant has sought to rely on a number of instruments, either on a standalone basis (Law No. 60 of 2012 that ratifies the Iraq-Germany BIT; Articles 22 and 27 of the Investment Law and Law No. 64) or in combination with other instruments (namely, Iraq-Germany BIT combined with Law No. 60 of 2012; the PCA combined with the Iraq-France BIT and the Iraq-Germany BIT; the Investment Law No. 13 of 2006 combined with the PCA and the Iraq-France BIT, Law No. 24 of 2012, the Iraq-Germany BIT, Law No. 60 of 2012, the ICSID Convention through Law No. 64 of 2012 and Law No. 49 of 2013; the Rehabilitation Contract combined with the PCA and the Iraq-France BIT, the Iraq-Germany

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217 Claimant's Response, ¶ 13.

218 Claimant's Response, ¶ 22.

219 Claimant's Response, ¶ 25: "*Iraq's consent is accessible to AHG via: 1) the provisions of the PCA containing Iraq's most-favored nation promises made in Articles 25 and 27; 2) the national laws of Iraq applicable to AHG, namely Article 22 of its Investment Law by reference to what is contained in Iraqi Laws No. 60 and 64 of 2012, as well as the PCA (Iraqi Law No. 49 of 2013) and the French BIT (Law No. 24 of 2012) in the alternative; and 3) the arbitration clause in the underlying investment contract also by reference to what is contained in Iraqi Laws No. 60 and 64 of 2012, on the one hand, and Law No. 49 of 2013 and Law No. 24 of 2012, in the alternative. The Kurdistan Investment Law reinforces and confirms the same paths of access to Iraq's consent to ICSID Convention arbitration*".

220 Respondent's Reply, ¶ 2. *See also* Hearing Transcript, p. 10, line 25, p. 11, lines 1-6 and p. 70, lines 14-24.

BIT, Law No. 64 of 2012, Law No. 60 of 2012, Law No. 49 of 2013, Law No. 24 of 2012, and the Investment Law No. 13 of 2006; Kurdistan Law No. 4 combined with the ICSID Convention, the PCA, the Iraq-France BIT and the Iraq-Germany BIT) and more generally that the Kurdistan Investment Law reinforces and confirms the same paths of access to Iraq's consent to ICSID Convention arbitration.[221] For the reasons explained in the previous sections, the Tribunal has found each of the above-mentioned grounds for jurisdiction to be manifestly without legal merit.

223. The Tribunal agrees in this respect with the Respondent that "*a multitude of non-viable pathways to jurisdiction (or as the Claimant puts it, 'Iraq's offer to arbitrate through the interplay of various instruments') cannot combine to create any viable pathway to jurisdiction*".[222] In this sense, the multitude of grounds relied upon by the Claimant and the necessity for it to seek the interplay between so many instruments emphasizes that not a single one of those instruments contains the required consent to ICSID jurisdiction.[223] Given that, as regards each of those grounds, Iraq's consent to ICSID arbitration with the Claimant is lacking (or non-effective as regards the Iraq-Germany BIT) in a clear and obvious manner, the Tribunal finds that the Claimant's purported cumulative and integrated approach (including through mechanisms such as "*incorporation by reference*") cannot help the Claimant, as such an approach cannot create consent when consent is manifestly lacking.

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221 Claimant's Response, ¶ 25.

222 Respondent's Reply, ¶ 2.

223 Claimant's Response, ¶ 13: "[…] *Claimant's case on jurisdiction is not limited to the operation of any one, stand-alone jurisdictional instrument, much less the German BIT by itself, but rather relies on Iraq's offer to arbitrate through the interplay of various instruments referenced and expressed in Iraq's contracts (the License and Extended License), national laws (the 2006 Investment Law) as well as Law Nos. 24 (French BIT), 60 (German BIT), 64 of 2012 (ICSID Convention), Law No. 49 of 2013 (PCA) and the Kurdish Investment Law, and signed and ratified treaties (the ICSID Convention, PCA, French BIT and German BIT). Incorporation by reference has been found to be a valid mechanism to confirm a State's consent to ICSID arbitration*".

H. GENERAL FINAL CONSIDERATIONS

224. In assessing and determining the case put forward by each Party, the Tribunal has been mindful of certain important considerations, namely the high threshold that applies under ICSID Rule 41(5) (*see* above, paragraphs 49-58) as well as considerations of fairness and good administration of justice.

225. As the Tribunal has established in the previous sections, each of the Claimant's claims to jurisdiction fails as manifestly lacking in legal merit. This assessment, which is a technical one—as mandated by the nature of the ICSID Rule 41(5) procedure—requires that, because the test is one of "*legal*" merit, the Tribunal assume the truth of the facts as alleged by the Claimant. In this sense, the Tribunal has noted the Claimant's argument, made repeatedly, that the "*Claimant was one of the very first investors in post-Saddam Hussein Iraq and invested in Iraq in response to Iraq's invitation and solicitation of foreign investment*".[224] The Tribunal has also had in mind the Claimant's contention that "[a]*n egregious injustice has occurred*".[225] It may well be that, on the facts of the case, the treatment that the Claimant has received in relation to its investment in Iraq—which has not been addressed by the Respondent at this early stage of the arbitration—has been of such nature and scale that the Respondent's conduct would fall squarely within the type of protection that is guaranteed by the Iraq-Germany BIT. However, the question to be decided in relation to the Respondent's Rule 41(5) Application is, as rightly posed by the Respondent, "*whether the Claimant's case on jurisdiction (not the merits) is manifestly without legal merit*".[226] Thus, this Tribunal cannot simply ignore that the Iraq-Germany BIT has not entered into force—not by the Respondent's doing, but as a consequence of Germany's failure to ratify it and, thus, to ensure the protection of its own nationals in Iraq—and, thus, cannot protect the Claimant so long as Germany has not ratified the Iraq-Germany BIT. Likewise, and for the reasons set out in the previous sections, none of the other instruments relied upon by the Claimant, be they international or domestic, can

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224 Request, ¶ 2. *See also* Claimant's Response, ¶ 22.

225 Claimant's Response, ¶ 12.

226 Respondent's Reply, ¶ 9.

establish a ground for this Tribunal to have jurisdiction over the dispute. The Tribunal's decision, therefore, is not made lightly, but within the strict confines of ICSID Rule 41(5) as to whether or not it has jurisdiction to rule on the present dispute, due consideration being given to fairness for both Parties.

226. A further important consideration has guided the Tribunal in reaching its decision, namely the propriety of a summary dismissal of the Claimant's claims based on ICSID Rule 41(5). This is a matter that is distinct from the standard that applies under this provision (on this question, see above, paragraphs 49-58), but has to do, rather, with good administration of justice. In this respect, the Tribunal sides with the *Globex* tribunal which, in finding that it lacked jurisdiction and dismissing the claimant's claims under Rule 41(5), held:

> "That brings one […] to a different question, one that lies half-way between procedure and substance, namely, under what circumstances ought a tribunal to consider it proper to dispose of an objection summarily, at the pre-preliminary stage, under Rule 41(5)? It should be made clear that this is not the same question as the standard to be applied by a tribunal in deciding whether or not the legal demerits of a claim are 'manifest' (see below, paragraph 35). It is, rather, the question: when can a tribunal properly be satisfied that it is in possession of sufficient materials to decide the matter summarily? Here, a balance evidently has to be struck between the right (however qualified) given to the objecting party under Rule 41(5) to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it, and the duty of the tribunal to meet the requirements of due process. Once again, the matter seems to this Tribunal to present itself differently according to whether the outcome is to be to reject the objection, or to uphold it. In the former eventuality, a tribunal that is in doubt as to whether the claim is 'manifestly' without legal merit can decide not to determine the issue summarily, but to leave it over for decision later on, at a more developed stage of the proceedings (see the preceding paragraph). In the latter eventuality, it would seem that the tribunal is under an obligation, not only to be sure that the claim objected to is 'manifestly without legal merit,' but also to be certain that it has considered all of the relevant materials before reaching a decision to that effect, with all the consequences that follow from it. The present Tribunal accordingly posed itself the question, what other materials might either Party (specifically the Claimants) bring to bear if the question at issue were to be postponed until a later stage in the proceedings? Having posed itself that question, the Tribunal was unable to see what

> further materials relevant to the question at issue, be it in the shape of legal argument or authority or in the shape of witness or documentary evidence, either Party might wish to, or be able to, bring forward at a later stage. The Tribunal is accordingly satisfied that the conditions are met for it to dispose of the Respondent's objection pursuant to Article 41(5) of the ICSID Rules".[227]

227. Likewise, the *Lotus Holding* tribunal has held that:

> "The consequence of a summary dismissal under Rule 41(5) is that the claim set out in the request for arbitration proceeds no further. The tribunal rules, in effect, that there is no point in proceeding with the claim because it cannot succeed: no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal. The inevitability of dismissal must be manifest. It must be obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counter-argument is identified. If the claimant, in its submissions under Rule 41(5), can point to an arguable case, the claim should proceed: but if the tribunal is satisfied than no such arguable case has been identified, it is in accordance with the sound administration of justice that the claim should be halted and dismissed at that point".[228]

228. This Tribunal, too, has asked itself whether it has "*considered all of the relevant materials before reaching a decision to that effect, with all the consequences that follow from it*", and "*what other materials might either Party (specifically the Claimants) bring to bear if the question at issue were to be postponed until a later stage in the proceedings*". In other words, notwithstanding its findings under the standard applicable under ICSID Rule 41(5), the Tribunal has asked itself whether any of those grounds could survive a further and more in-depth analysis under ICSID Rule 41(1) should the arbitration continue and should Iraq raise its objections to jurisdiction anew, under this other provision. The answer for the Tribunal was unhesitatingly in the negative, consistent with the view that the Claimant's claims to jurisdiction have fundamental flaws and are thus manifestly lacking in

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227 *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, ¶ 34 (emphasis in original) (**Exhibit RL-8**).

228 *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020, ¶ 158 (**Exhibit RL-14**).

legal merit.[229] Accordingly, given that there is no doubt in its mind that each of the invoked grounds for jurisdiction fails on the "*manifest*" test,[230] the Tribunal finds that its decision to uphold the Respondent's Rule 41(5) Application is also consistent with considerations of good administration of justice.

VI. THE COSTS OF THE ARBITRATION

229. The Tribunal is required, under Article 47 of the ICSID Arbitration Rules, to rule on the costs of the proceedings.

230. The question of costs allocation has been addressed by the Parties in their written pleadings. Each Party has sought a dismissal of the other Party's case and, consequently, an order from the Tribunal that its legal costs and its share of the arbitration costs be incurred by the other Party. The Parties thus agree on the costs allocation principle, namely that the losing Party incur the entirety of the arbitration costs as well as the representation costs of the prevailing Party.

231. As regards the specific costs incurred by each Party, Article 22.1 of Procedural Order No. 1 provides that "[t]*he Tribunal shall also decide when and in what form the parties shall file statements of costs, including any argument in relation thereto*".

232. The Tribunal has deemed it unnecessary to invite the Parties to submit their respective costs associated with the present arbitration, given its decision to not follow the "costs follow the event" principle in this case. Indeed, and notwithstanding that the Tribunal has found in favor of the Respondent in deciding that the Claimant's claims are unmeritorious within the meaning of ICSID Rule 41(5), the Tribunal has been sensitive to the comprehensive and thorough manner in which the Parties sought to assist the Tribunal in its task. The Tribunal has also been sensitive to the Parties' and their counsel's

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229 The different view taken by the minority of the Tribunal on the Claimant's MFN argument based on the PCA is reflected at ¶ 112 above.

230 With the exception of the Claimant's PCA-based MFN argument for the minority of the Tribunal, whose view is reflected at ¶ 112 above.

professionalism throughout the proceedings. Finally, the Tribunal has kept in mind considerations of fairness, as discussed in Section V(H) above.

233. In this light, the Tribunal finds that the appropriate outcome in this case is for the costs of the arbitration to lie where they fall. On this basis, the Tribunal decides that each Party shall be responsible for its own representation costs and that the costs of the arbitration, namely the Tribunal's and its assistant's fees and the fees of ICSID, shall be equally shared among the Parties.

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VII. THE TRIBUNAL'S DECISION

234. For the reasons set forth above, the Tribunal:

(1) FINDS that it manifestly lacks jurisdiction under any and all of the grounds for jurisdiction invoked by AHG Industry GmbH & Co. KG, taken both individually and in combination;

(2) DECLARES that all of the Republic of Iraq's objections to the Tribunal's jurisdiction are well-founded under ICSID Rule 41(5);

(3) Consequently, DISMISSES the claims brought by AHG Industry GmbH & Co. KG against the Republic of Iraq as being manifestly without legal merit, within the meaning of ICSID Rule 41 (5); and

(4) DECIDES that each Party shall bear its own costs of representation, and that the costs of the arbitration, namely the fees of the Arbitral Tribunal and its assistant and those of ICSID, shall be borne in equal shares between the Parties.

Date: 30 September 2022

Prof. Lucy Reed
Arbitrator
Date:

Judge Awn Al-Khasawneh
Arbitrator
Date:

Dr. Yas Banifatemi
President of the Tribunal
Date: 29 September 2022

Prof. Lucy Reed
Arbitrator
Date:

Judge Awn Al-Khasawneh
Arbitrator
Date:
29 September 2022

Dr. Yas Banifatemi
President of the Tribunal
Date:

Lucy Reed

Prof. Lucy Reed
Arbitrator
Date: 29.09.2022

Judge Awn Al-Khasawneh
Arbitrator
Date:

Dr. Yas Banifatemi
President of the Tribunal
Date: