INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL COURT OF ARBITRATION

CASE No 20273/AGF/ZF/AYZ/ELU

BETWEEN:

THE REPUBLIC OF IRAQ

(Claimant)

– and –

THE REPUBLIC OF TURKEY

(Respondent)

FINAL AWARD

Date: 13 February 2023

The Tribunal:

Sir David A R Williams KNZM KC (President)

Sir Christopher Greenwood GBE CMG KC

H.E. Judge Peter Tomka

Secretary to the Tribunal:

Anna Kirk

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Abbreviation	Definition
Submissions	
Claimant's Request	Claimant's Request for Arbitration (for Case No. 20273/AGF/ZF) dated 23 May 2014
Respondents' Answer	Respondents' Answer and Statement of Counterclaims dated 3 September 2014
Claimant's Memorial	Claimant's Memorial on the Merits dated 18 November 2016
Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 7 April 2017
Claimant's Reply	Claimant's Reply Memorial on the Merits dated 6 October 2017
Respondent's Rejoinder	Respondent's Rejoinder on the Merits dated 15 December 2017
Claimant's Rejoinder	Claimant's Rejoinder on the Counterclaim dated 26 January 2018
Claimant's Skeleton Submission	Claimant's Pre-Hearing Skeleton (Amended) dated 9 April 2019
Respondent's Skeleton Submission	Respondent's Pre-Hearing Skeleton (Amended) dated 16 April 2019
Claimant's Post-Hearing Brief	Claimant's Post-Hearing Brief dated 28 June 2019
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief dated 28 June 2019

Claimant's Rebuttal Post-Hearing Brief	Claimant's Rebuttal Post-Hearing Brief dated 2 August 2019
Respondent's Rebuttal Post-Hearing Brief	Respondent's Rebuttal Post-Hearing Brief dated 2 August 2019
Claimant's 1 April 2022 Submission	Claimant's Submission on the New Evidence dated 1 April 2022
Respondent's 1 April 2022 Submission	Respondent's Submission on the New Evidence dated 1 April 2022
Claimant's 13 May 2022 Submission	Claimant's Reply to Respondent's Submission on the New Evidence dated 13 May 2022
Respondent's 13 May 2022 Submission	Respondent's Reply to Claimant's Submission on the New Evidence dated 13 May 2022
Claimant's 10 June 2022 Submission	Claimant's Rebuttal Submission on the New Evidence dated 10 June 2022
Respondent's 10 June 2022 Submission	Respondent's Rebuttal Submission on the New Evidence dated 10 June 2022
Expert Reports and Witness Statements	
First Traver Expert Report	First Expert Report of Stuart Traver dated 18 November 2016
Second Traver Expert Report	Second Expert Report of Stuart Traver dated 6 October 2017
Al-Shahristani Witness Statement	Witness Statement of Hussain Al-Shahristani dated 7 November 2016
Ulutaş Witness Statement	Witness Statement of Ahmet Ulutaş dated 6 April 2017

First Judge Schwebel Expert Report	First Expert Report of Judge Stephen Schwebel dated 6 April 2017
Second Judge Schwebel Expert Report	Second Expert Report of Judge Stephen Schwebel dated 15 December 2017
First Earnest Expert Report	First Expert Report of Neil Earnest dated 7 April 2017
Second Earnest Expert Report	Second Expert Report of Mr Neil Earnest dated 15 December 2017
First Hamoudi Expert Report	Expert Report of Professor Haider Ala Hamoudi, undated, filed on 7 April 2017
Second Hamoudi Expert Report	Supplementary Expert Report of Professor Haider Ala Hamoudi, undated, filed on 15 December 2017
Third Hamoudi Expert Report	Expert Report of Professor Haider Ala Hamoudi, undated, filed on 1 December 2021
Fourth Hamoudi Expert Report	Expert Report of Professor Haider Ala Hamoudi, undated, filed on 1 April 2022
Fifth Hamoudi Expert Report	Expert Report of Professor Haider Ala Hamoudi dated 9 June 2022
Binder and Schreuer Legal Opinion	Legal Opinion of Professors Christina Binder and Christoph Schreuer dated 31 March 2022
General	
1946 Treaty	Treaty of Friendship and Neighbourly Relations between Iraq and Turkey
1973 Agreement	Crude Oil Pipeline Agreement Between The Government of the Iraqi Republic and The Government of the Turkish Republic

1976 Protocol	Crude Oil Pipeline Protocol Between the Government of the Turkish Republic and the Government of the Iraqi Republic
1985 Addendum	Addendum to the Crude Oil Pipeline Agreement of 27 August 1973 Between the Government of the Iraqi Republic and the Government of the Turkish Republic
2010 Amendment	Amendment to the Crude Oil Pipeline Agreement Dated 27 August 1973 and Subsequent Relevant Agreements, Protocol, Minutes of Meetings and Addendums Between the Government of the Republic of Iraq and the Government of the Republic of Turkey
40-inch Pipeline	A 40-inch pipeline constructed from Kirkuk to Ceyhan under the 1973 Agreement
46-inch Pipeline	A 46-inch pipeline constructed from Kirkuk to Ceyhan under the 1985 Addendum
BOTAŞ	BOTAŞ Petroleum Pipeline Corporation (Turkey)
Case 59 Decision	Decision of the Federal Supreme Court of the Republic of Iraq in Case 59/Federal/2012 issued on 15 February 2022
Closing Hearing	Hearing for oral closings that took place in Paris on 28 September 2019
Daesh	Islamic State of Iraq and al-Sham
DFI	Development Fund for Iraq
FGI	Federal Government of Iraq

ICC Court	International Court of Arbitration of the International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration 2012
ICC Secretariat	Secretariat of the ICC International Court of Arbitration
ILC Articles on State Responsibility	International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts
Iraq (or the Claimant)	The Federal Government of Iraq
Iraqi Constitution	Constitution of the Republic of Iraq 2005
Iraqi Side	Ministry of Oil of the Republic of Iraq
ISIS	Islamic State of Iraq and al-Sham
ITP	Iraqi-Turkish Pipeline from Kirkuk, Iraq to Ceyhan Terminal, Turkey
ITP Agreements	The Iraq-Turkey Pipeline Agreements, comprised of the 1973 Agreement, 1976 Protocol, 1985 Addendum and 2010 Amendment
Jurisdiction Award	Partial Final Award on Jurisdiction dated 16 June 2016
KOTO	Kurdistan Oil Trust Organisation
KRG	Kurdistan Regional Government of Iraq
KRI	Kurdistan Region of Iraq

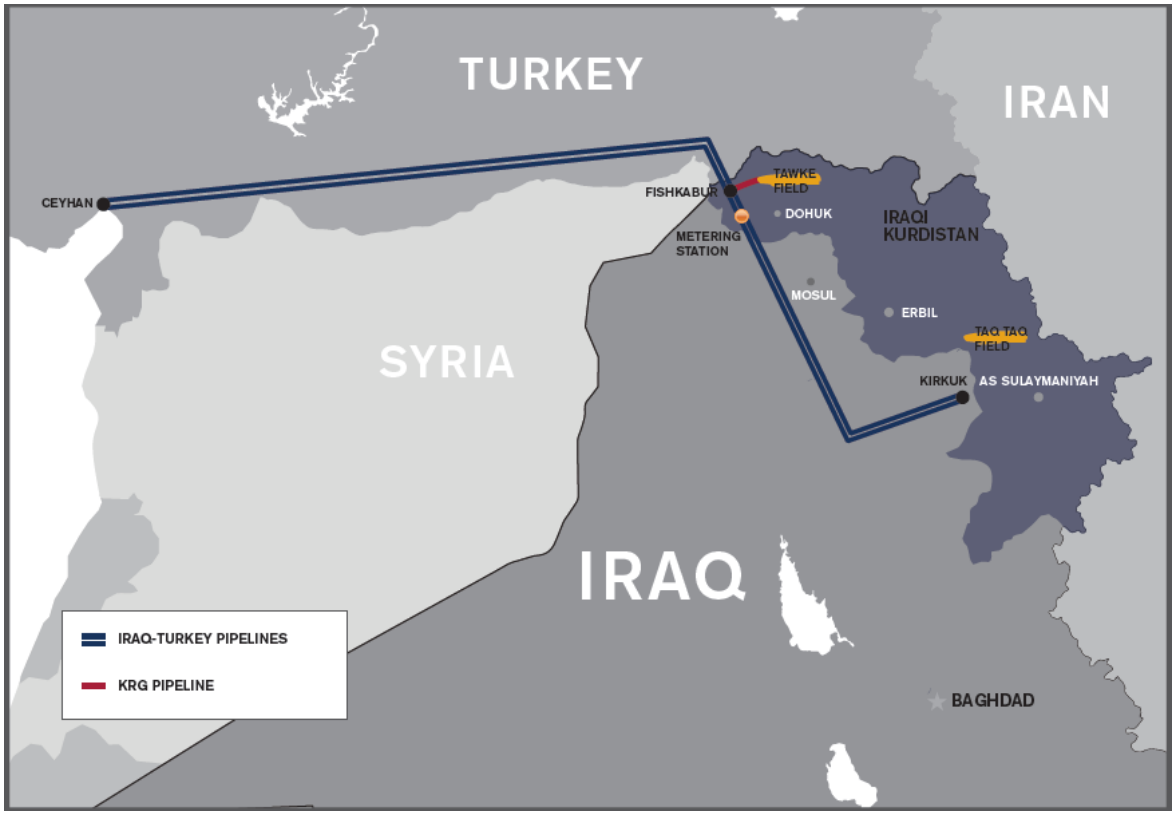
Merits Hearing	Hearing on the merits that took place in Paris from 24-26 April 2019
MGT fees	Minimum Guaranteed Throughput fees
Minimum Guaranteed Throughput	Minimum quantity of crude oil to be delivered to the system in any calendar year pursuant to the ITP Agreements
MTA	Million metric tonnes per annum
New Evidence	Evidence admitted under Procedural Orders No 8 and 9, in particular the 2021 Iraqi Budget Law and the Case 59 Decision
New Evidence Hearing	Hearing on the New Evidence that took place in Paris from 12-13 July 2022
NOC	North Oil Company (Iraq)
OPRA/DFI	Iraqi Oil Proceeds Receipt Account and Development Fund for Iraq established in 2003 pursuant to UN Security Council Resolution No. 1483 (2003)
Peshmerga	Kurdish military forces of the KRI
Pipelines	The 40-inch pipeline constructed under the 1973 Agreement and the 46-inch pipeline constructed under the 1985 Addendum
SOMO	Iraq's Oil Marketing Company
Turkey (or the Respondent)	The Republic of Turkey
Turkish Side	Ministry of Energy and Natural Resources of the Republic of Turkey
UNCC	United Nations Compensation Commission

Vienna Convention	Vienna Convention of the Law of Treaties, 23 May 1969

I. INTRODUCTION

1. In 1973, the Claimant, the Republic of Iraq (***Iraq*** or ***Claimant***), and the Respondent, the Republic of Turkey (***Turkey*** or ***Respondent***) entered into a Crude Oil Pipeline Agreement for the supply and purchase of crude oil (***1973 Agreement***). The 1973 Agreement and its various subsequent amendments, addendums and protocols (which are described in more detail at paragraphs 145 to 169 below) are now known collectively as the Iraq–Turkey Pipeline Agreements (***ITP Agreements***).

2. Pursuant to the ITP Agreements, the Parties agreed to construct two oil pipelines running from the Kirkuk oil fields in Northern Iraq to Ceyhan, a port city in Southern Turkey (***the Pipelines***). Ceyhan has been a transportation hub for oil and natural gas from the Middle East, Central Asia and Russia for many years.[1]



[1] Map is taken from (HM-1 / C-17).

3. The ITP Agreements govern the construction, maintenance, operation and use of the Pipelines and the use of related facilities at Ceyhan for the storage and loading of crude oil transported through the Pipelines. The first pipeline was constructed under the 1973 Agreement (***40-inch Pipeline***) and the second (bigger) pipeline was constructed under the 1985 Addendum (***46-inch Pipeline***). Under the ITP Agreements, each side would construct, operate and maintain the two Pipelines within their respective territories. The Claimant would benefit from a new export channel for its oil and the Respondent would develop Ceyhan further as an energy transportation hub. In exchange for the transportation, storage and loading of its oil, the Claimant would pay the Respondent a transportation fee. Until 2010, a certain portion of the oil was also reserved for purchase by the Respondent.

4. The Claimant has alleged that the Respondent is in breach of the ITP Agreements as it has allowed crude oil from the Kurdistan Region of Iraq (***KRI***) to flow through the Pipelines without the consent of Iraq's Ministry of Oil. The Claimant alleges further that the KRI's oil has then been stored and loaded at Ceyhan using the ITP facilities without its consent.[2]

5. The Claimant commenced this arbitration on 23 May 2014 against (i) the Respondent and (ii) BOTAŞ Petroleum Pipeline Corporation (***BOTAŞ***), pursuant to Article 10 of the 2010 Amendment to the Crude Oil Pipeline Agreement of 1973 (***2010 Amendment***) and the Treaty of Friendship and Neighbourly Relations between Iraq and Turkey of March 29, 1946 (***1946 Treaty***).[3] The arbitration is governed by the 2012 version of the ICC Rules of Arbitration (***ICC Rules***).

6. BOTAŞ was originally the second respondent in this arbitration. It is a State-owned enterprise and is the Respondent's appointed "*Nominee*" under Article 2 of the 1973 Agreement. Its original purpose was to perform the Respondent's obligations under the 1973 Agreement.

7. Following a jurisdictional objection by the Respondent and BOTAŞ, the arbitration proceedings were bifurcated, with a hearing on jurisdiction taking place in Paris, France on 12 and 13 October 2015.

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[2] Claimant's Memorial, paras 1.2-1.3.

[3] Claimant's Request.

8. The Partial Final Award on Jurisdiction dated 16 June 2016 (***Jurisdiction Award***) was notified to the Parties on 22 June 2016. A summary of its findings is set out below:[4]

   a. the Claimant's claims under the ITP Agreements are arbitrable;

   b. the Claimant's claims under the ITP Agreements fall within the scope of the arbitration agreement;

   c. the Tribunal does not have jurisdiction *ratione materiae* over the Claimant's claims under the 1946 Treaty; and

   d. the Tribunal does not have jurisdiction *ratione personae* over the second respondent, BOTAŞ.

9. The Tribunal found that BOTAŞ was not a party to the arbitration agreement as it did not act independently or for its own benefit.[5] Its participation in the ITP Agreements did not extend beyond acting as Turkey's agent. Therefore, the Tribunal concluded it did not have jurisdiction over BOTAŞ in the present arbitration.

A. Summary of Claims

10. In this merits phase of the arbitration, the Claimant has divided its main claims regarding breach of the ITP Agreements into five parts:[6]

   a. the transportation claim;

   b. the storage claim;

   c. the loading claim;

   d. the exclusive use claim; and

   e. the access claim.

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[4] Jurisdiction Award, para 303.

[5] Jurisdiction Award, para 254.

[6] Claimant's Memorial, para 5.6.

11. The transportation, storage and loading claims are premised on the submission that the ITP Agreements confer exclusive use of the Pipelines on the two parties to the ITP Agreements: the Claimant and the Respondent.[7] Additionally, the ITP Agreements provide that the Respondent may transport, store and load crude oil using the ITP facilities under the instruction of the Iraqi Ministry of Oil only or its representatives.[8] As such, according to the Claimant, use of the ITP facilities for exporting crude oil from the KRI, without the authorisation or instruction of the Iraqi Ministry of Oil, is a breach of the ITP Agreements.

12. The exclusive use claim is also premised on the submission that only the Claimant and the Respondent have the right to use the ITP facilities under the ITP Agreements. This means that any use by third parties, which the Claimant alleges includes the KRI, without express authorisation is contrary to the ITP Agreements.[9] Consequently, according to the Claimant, any facilitation by the Respondent of the KRI's use of the ITP facilities was a breach of the ITP Agreements.

13. With regard to the access claim, the Claimant has alleged that the Respondent breached its obligations under the ITP Agreements to allow Iraq's Ministry of Oil representatives certain access to the ITP facilities on the Turkish side of the border.[10]

14. The Claimant has requested that the Tribunal order the Respondent to pay it the value of the crude oil pumped and loaded through the Pipelines without authorisation, being no less than USD 30,457,196,787.[11] Alternatively, the Claimant has requested that the Respondent transfer the value of the proceeds from the unauthorised sale of oil into the Iraqi Oil Proceeds Receipt Account and Development Fund for Iraq (***OPRA/DFI***).[12] The OPRA/DFI accounts are maintained by the Central Bank of Iraq with the Federal Reserve Bank of New York in accordance with Iraqi

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7 Claimant's Memorial, paras 2.10-2.14.

8 Claimant's Memorial, para 2.6.

9 Claimant's Memorial, para 5.22.

10 Claimant's Memorial, paras 5.25-5.26.

11 Thirty billion, four hundred and fifty-seven million, one hundred and ninety-six thousand, seven hundred and eighty-seven US dollars (Claimant's Post-Hearing Brief, para 6.32). The amount in dispute was updated by the Claimant throughout the arbitration proceedings.

12 Claimant's Memorial, para 6.39.

law and Iraq's commitments to the United Nations Security Council.[13] According to the Claimant, all proceeds from the sale of Iraqi oil must be paid into OPRA/DFI.[14]

15. The Respondent has not denied that crude oil was transported, stored and loaded by the KRI using the ITP system, but has said that these activities did not amount to breaches of the ITP Agreements as the Respondent's obligations had been suspended and/or the instructions from the Iraqi Ministry of Oil were invalid.[15] It also contended that the exclusive use and access claims had no merit.[16]

16. The Respondent rejected the allegations of breach on the basis that (i) the Claimant did not have the authority to instruct the Respondent to close the Pipelines; (ii) the Claimant's instructions were in bad faith, an abuse of right and contrary to the purpose of the ITP Agreements; (iii) the Federal Government of Iraq (***FGI***) allowed the oil to enter into the 40-inch Pipeline in Iraq; and (iv) the Respondent had a duty under international law to assist the KRG in preventing genocide.

17. The Respondent also submitted that it was entitled to suspend its obligations under the ITP Agreements by virtue of the Claimant's own breaches of the ITP Agreements, including its failure to repair the damaged Pipelines and failure to meet its minimum throughput obligations under the ITP Agreements (***Minimum Guaranteed Throughput***) and related payment obligations.[17] It also asserted that the lack of any operational ITP system in Iraq constituted a fundamental change of circumstances which allowed the Respondent to suspend its obligations under the ITP Agreements.[18] The Respondent also contended that the Claimant's inability to operate the Pipelines, evidenced by its invocation of *force majeure*, meant that both Parties have been excused from their obligations since 2 March 2014 (the day on which the 46-inch Pipeline was severely damaged by bombing).[19]

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13 Claimant's Memorial, paras 4.26 and 6.40 *et seqq*.; United Nations Security Council Resolution No. 1483, 22 May 2003 (HM-59 / C-20).

14 Claimant's Memorial, para 6.40.

15 Respondent's Counter-Memorial, paras 167, 226 and 228-229.

16 Respondent's Counter-Memorial, paras 231-236 and 237.

17 Respondent's Counter-Memorial, paras 119-122.

18 Respondent's Counter-Memorial, paras 139-141.

19 Respondent's Counter-Memorial, para 158.

18. The Respondent further submitted that it would be in breach of its non-derogable *jus cogens* obligations in respect of the Kurdistan Regional Government's (***KRG***) military efforts against the Islamic State of Iraq and al-Sham (***ISIS***) if the Respondent had followed the Claimant's instructions.[20]

B. Summary of Counterclaims

19. The Respondent filed counterclaims alleging that the Claimant has not paid amounts due as a result of its failure to meet the Minimum Guaranteed Throughput (as prescribed in the 2010 Amendment) and transportation charges, as well as its alleged failure to reimburse the Respondent for equipment and staff expenses.[21]

20. The Respondent has requested that the Tribunal order the Claimant to pay the Respondent USD 1,319,203,957.49[22] in compensation for the Claimant's alleged breaches of the ITP Agreements.[23]

21. The Claimant denied that it had breached the ITP Agreements, including on the basis of *force majeure*.[24]

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[20] Respondent's Counter-Memorial, paras 247-250. Jus cogens are "norm[s] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" (Vienna Convention, Art 53, I-44 / RL-44).

[21] Respondent's Counter-Memorial, para 283.

[22] One billion, three hundred and nineteen million, two hundred and three thousand, nine hundred and fifty-six US dollars and forty-nine cents.

[23] Respondent's Rejoinder, para 275.3; Respondent's Skeleton, 16 April 2019, paras 36-39.

[24] Claimant's Reply, para 4.1.

II. THE PARTIES

A. Claimant: The Republic of Iraq

22. The Claimant is the Republic of Iraq, which acts through the Ministry of Oil of the Republic of Iraq. The preamble of the 2010 Amendment describes "*the Iraqi Side*" of the ITP Agreements as the Ministry of Oil of the Republic of Iraq.

23. The Claimant is represented in this arbitration by Vinson & Elkins RLLP and Cleary Gottlieb Steen & Hamilton LLP.

24. The address of counsel for the Claimant is:

Vinson & Elkins RLLP
Level 24
20 Fenchurch Street
London EC3M 3BY
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Suite 4700
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12, rue de Tilsitt
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B. Respondent: The Republic of Turkey

25. The Respondent is the Republic of Turkey.

26. Turkey is represented in these proceedings by King & Spalding International LLP. Mr Eric A Schwartz of Schwartz Arbitration (and formerly of King & Spalding) also represented the Respondent at the Merits Hearing and the Closing Hearing.

27. The address of counsel for the Respondent is:

King & Spalding International LLP
125 Old Broad Street
London EC2N 1AR
UNITED KINGDOM

48 bis rue de Monceau
75008 Paris
FRANCE

e: tsprange@kslaw.com / sahmed@kslaw.com / allamzon@kslaw.com / jcastello@kslaw.com / jbeessundchrostin@kslaw.com / elannini@kslaw.com / tmckenzie@kslaw.com / lwong@kslaw.com

C. The Arbitral Tribunal

28. The members of the Arbitral Tribunal are as follows:[25]

President

Sir David A R Williams KNZM, KC[26]
Bankside Chambers
Level 22, 88 Shortland Street
Auckland 1010
NEW ZEALAND

e: david.williams@darwilliams.co.nz

Co-arbitrator

Sir Christopher Greenwood GBE, CMG, KC
Magdalene College
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Co-arbitrator

H.E. Judge Peter Tomka
International Court of Justice
Peace Palace
Carnegieplein 2
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THE NETHERLANDS

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[25] This paragraph contains the details of the Arbitral Tribunal as at the date of the Award. As set out in paragraphs 79 and 110 of this Award, previous members of the Arbitral Tribunal were Prof. David Caron and Prof. Emmanuel Gaillard. Their details are contained in paragraph 8 of the Jurisdiction Award.

[26] On the death of Queen Elizabeth II, Sir David Williams and Sir Christopher Greenwood, became King's Counsel ("KC") as opposed to Queen's Counsel ("QC").

29. The Secretary to the Tribunal is:

Anna Kirk
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Level 22, 88 Shortland Street
Auckland 1010
NEW ZEALAND

e: anna@darwilliams.co.nz

D. Other Entities Relevant to the Dispute

1. BOTAŞ

30. As noted in paragraph 5 above, BOTAŞ was originally the second respondent in this arbitration and is Turkey's appointed "*Nominee*" under Article 2 of the 1973 Agreement.[27] It was established on 15 August 1974 by Decree No. 7/7/871. It is a Turkish "State-owned enterprise" pursuant to the Decree Law of the Council of Ministers No 233. BOTAŞ's role in relation to the ITP Agreements is to perform Turkey's obligations under the ITP Agreements.[28] BOTAŞ has been involved in the construction, finance, operation, maintenance and management of the ITP facilities.[29]

2. State Oil Marketing Company

31. Iraq's State Oil Marketing Company (***SOMO***) is located at the Ceyhan, Turkey, facilities that are used under the ITP Agreements. It is wholly owned by the Iraqi Ministry of Oil. SOMO is also involved in the operation of the Pipeline facilities as envisaged under the ITP Agreements.

3. North Oil Company

32. North Oil Company (***NOC***) is a company wholly owned by the Iraqi Ministry of Oil. It has undertaken various activities on behalf of the Claimant in relation to the Pipelines. For

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[27] 1973 Agreement, Art 2 (providing that either party has the right to Nominees); Request for Arbitration, para 2.7.

[28] Claimant's Request, para 2.5.

[29] Respondent's Reply Memorial on Jurisdiction, para 32.

instance, NOC participated with BOTAŞ in the creation and implementation of various protocols in relation to the Pipeline facilities.[30]

4. Kurdistan Regional Government of Iraq

33. The KRG governs the Kurdistan autonomous region in northern Iraq. The Iraqi Constitution confers separate legislative, executive and judicial powers upon the KRG.[31] The KRG is not a party to the ITP Agreements between Iraq and Turkey (or subsequent amendments). The KRG has used the Pipelines and facilities to transport and load crude oil from the Kurdistan autonomous region directly to Turkey since late 2013, precipitating the present dispute between the Parties.

III. ARBITRATION AGREEMENT AND GOVERNING LAW

34. The Parties' relevant arbitration agreement is contained in Article 10 of the 2010 Amendment between the Claimant and the Respondent. Reproduced in full, that provision provides that:[32]

> "The Sides shall take all reasonable steps to solve any dispute that may arise during the implementation and interpretation of this Amendment amicably and through cooperation spirit [sic] and shall immediately start discussing the matter with each other in order to reach a solution.
>
> If any conflict or disparity arises between the Sides about the implementation and interpretation of this Amendment or any other issue that is not specified in the Agreement during its validity period or thereafter and if the conflict can not [sic] be resolved through amicable discussions in 4 months starting from the date the negotiations begin, that conflict shall be resolved according to the arbitration rules of the International Chamber of Commerce.
>
> The arbitration board shall be composed of 3 arbitrators and the appointment of the arbitrators shall be carried out according to the

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30 For example, see 2010 Amendment, Arts 5.2 or 7.

31 Constitution of the Republic of Iraq, Arts 1, 4(3), and 117(1) (HM-69 / R-2).

32 2010 Amendment, Article 10.

> arbitration rules of International Chamber of Commerce. Each side shall appoint an arbitrator and the two arbitrators who are appointed as mentioned above shall appoint a third arbitrator who is not a citizen of the Republic of Turkey or the Republic of Iraq.
>
> If any one of the Sides does not appoint an arbitrator in 30 days time after arbitration request date, then the other Side may request from the International Chamber of Commerce to appoint an arbitrator. If the third arbitrator can not *[sic]* be determined within 30 days time after the two arbitrators are appointed then the third arbitrator (the chairman) shall be appointed by the arbitration board of the International Chamber of Commerce provided that the arbitrator shall not be a citizen of Republic of Turkey or Republic of Iraq.
>
> The arbitration place shall be Paris, France. The applicable law shall be French Law. Arbitration language shall be English. The charges of the arbitration process shall be determined by the arbitration board. However the charges that shall be determined shall not be more than the charges that are specified in the tariff which is issued in compliance with the rules of the International Chamber of Commerce.
>
> The award of the arbitration board shall be final and have a binding effect on the Sides."

35. The Parties disagree as to the applicable law governing the ITP Agreements. This issue is addressed by the Tribunal in Section IX below.

IV. PROCEDURAL HISTORY[33]

A. Jurisdiction Award

36. The Jurisdiction Award, dated 16 June 2016, was notified to the Parties by the Secretariat of the ICC International Court of Arbitration (***ICC Secretariat***) on 22 June 2016. The Tribunal found that:[34]

a. the Claimant's claims under the ITP Agreements were arbitrable;

b. the Claimant's claims under the ITP Agreements fell within the scope of the arbitration agreement;

c. the Tribunal did not have jurisdiction *ratione materiae* over the Claimant's claims under the 1946 Treaty; and

d. the Tribunal did not have jurisdiction *ratione personae* over BOTAŞ.

37. The procedural history set out in the Jurisdiction Award is incorporated into the present Award.

B. Procedural Order No 3

38. Procedural Order No 3 was issued on 6 September 2016. It set out the procedural timetable for the merits phase of the arbitration in Schedule 1. The timetable is reproduced below:[35]

Merits Phase Procedural Steps	**Time**	**Date**
Claimant's Memorial on the Merits		November 18, 2016
Respondent's Counter-Memorial on the Merits	18 weeks	March 24, 2017
Parties exchange *intra partes* document requests (if any)	2 weeks	April 7, 2017

[33] Note: For the purposes of this procedural history, any dates not specified in formal correspondence accord with New Zealand calendar dates as and when received.

[34] Jurisdiction Award, para 303.

[35] Procedural Order No. 3, Schedule 1.

Merits Phase Procedural Steps	Time	Date
Parties exchange *intra partes* responses and objections to produce documents (if any)	2 weeks	April 21, 2017
Parties: (i) produce documents to which there are no objections; (ii) confer to resolve any disputes relating to the production of documents; and (iii) submit to the Tribunal those outstanding disputes related to document production that each Party chooses to pursue in the form of a completed Redfern Schedule	6 weeks	June 2, 2017
Tribunal rules on disputes related to document production (if any) Parties to produce any documents whose production the Parties agreed to after 2 June	2 weeks	June 16, 2017
Parties produce those documents that the Tribunal has ordered to be produced	4 weeks	July 14, 2017
Claimant's Reply on the Merits	10 weeks	September 22, 2017
Joint Expert Report(s) to be submitted, if requested by the Tribunal	5 weeks	October 27, 2017
Respondent's Rejoinder on the Merits	10 weeks (from Reply)	December 1, 2017
Claimant's Rejoinder on the Counterclaim	7 weeks	January 19, 2018
Parties to notify Tribunal and other party of witnesses required for questioning at hearing (if any)	1 week	January 26, 2018
Parties to submit draft index to the Agreed Bundle of Documents for the hearing	5 days	January 31, 2018
Parties to submit agreed list of issues to the Tribunal	2 days	February 2, 2018

Merits Phase Procedural Steps	Time	Date
Parties to submit agreed chronology to the Tribunal	1 week	February 7, 2018
Parties to submit Agreed Bundle of Documents for the hearing	-	February 7, 2018
Parties to submit pre-hearing skeleton submissions to the Tribunal	1 week	February 12, 2018
Pre-Hearing Conference Call	-	Week commencing February 12, 2018
Hearing on the Merits (1 week)	2 weeks	February 26 – March 2, 2018

C. Appointment of New Secretary to the Tribunal

39. The President informed the Parties that Mr David Turner was no longer available to fulfil the role of Secretary to the Tribunal in a letter dated 6 September 2016. The President recommended that Dr Anna Kirk replace Mr David Turner as the Tribunal Secretary.

40. In emails dated 8 and 10 September 2016, the Parties confirmed their agreement to the appointment of Dr Kirk. Dr Kirk was appointed Secretary to the Tribunal on 6 October 2016.

D. Memorials

5. Claimant's Memorial on the Merits

41. The Claimant's Memorial on the Merits was filed on 18 November 2016. It was accompanied by the expert report of Mr Stuart Traver and the witness statement of Dr Hussain Al-Shahristani.

6. Respondent's Counter-Memorial on the Merits

42. By letter of 7 March 2017, the Parties requested a two-week extension for the submission of the Respondent's Counter-Memorial on the Merits, along with two further amendments to the Timetable set out in Procedural Order No 3:[36]

    a. Respondent's Counter-Memorial on the Merits – 7 April 2017.

    b. Parties exchange *intra partes* document requests (if any) – 21 April 2017.

    c. Parties exchange *intra partes* responses and objections to produce documents (if any) – 5 May 2017.

43. The Tribunal accepted these extensions by email of 13 March 2017.

44. The Respondent filed its Counter-Memorial on the Merits on 7 April 2017. It was accompanied by the expert opinions of Judge Schwebel, Professor Haider Ala Hamoudi and Mr Neil Earnest, as well as the witness statement of Mr Ahmet Ulutaş.

45. The Respondent submitted a corrected version of its Counter-Memorial on 12 April 2017.

E. Document Production Order

46. The Parties submitted their respective document production requests to the Tribunal on 2 June 2017.

47. The Tribunal's Ruling on Request for Production of Documents was issued on 16 June 2017, granting 13 of the Claimant's requests and one of the Respondent's requests.

48. On 14 July 2017, the Respondent produced one document in response to the Tribunal's order granting 13 of the Claimant's requests. Also on 14 July 2017, the Claimant produced one document in response to the Tribunal's order granting one of the Respondent's requests.

49. In an email dated 21 July 2017, the Respondent informed the Tribunal of its inability to produce the remaining documents in response to the Claimant's requests due to confidentiality

[36] Letter from King & Spalding, 7 March 2017.

restrictions.[37] The Respondent attached a letter from the KRG dated 17 July 2017 in which the KRG refused to grant consent to the production of those documents on the grounds of confidentiality.

50. The Claimant wrote to the Tribunal on 23 August 2017, requesting that the Tribunal enforce the previous production order and seek justification from the Respondent as to the assertion of confidentiality.

51. The Tribunal wrote to the Parties on 28 August 2017 directing a response from the Respondent by 1 September 2017.

52. The Respondent requested an extension of the above deadline to 11 September 2017 due to the celebrations and holidays of Eid al-Adha. This extension was granted by the Tribunal in an email dated 29 August 2017.

53. The Claimant wrote to the Tribunal by email of 30 August 2017 requesting a commensurate 10-day extension to the submission of its Reply on the Merits in order to allow any new documents or information to be incorporated into its pleading.

54. By email of 14 September 2017, the Respondent confirmed its approval of that extension, which amended the date for submission of the Claimant's Reply Memorial to 6 October 2017.

55. In light of the above extension, the Claimant and Respondent attempted to revise the remainder of the Procedural Timetable. The remaining dates were unable to be agreed upon.

56. In a letter to the Tribunal dated 11 September 2017, the Respondent restated that it was unable to disclose the documents requested.

F. Procedural Order No 4

57. Procedural Order No 4 was issued on 27 September 2017. It addressed the Claimant's concerns over the lack of documents produced by the Respondent to the 13 document requests granted by the Tribunal.

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[37] Documents numbered 1, 2, 3, 8, 9, 13, 17 and 18.

58. In relation to those requests for which the Respondent asserted confidentiality, the Tribunal directed the Parties to conduct a "Special Master" process whereby the validity of those claims could be independently assessed.

59. Procedural Order No 4 also set out an amended timetable for the remainder of the proceedings, as follows:[38]

a. Claimant's Reply on the Merits – 6 October 2017.

b. Joint Expert Report(s) to be submitted, if requested by the Tribunal – 10 November 2017.

c. Respondent's Rejoinder on the Merits – 15 December 2017.

d. Claimant's Rejoinder on the Counterclaim – 26 January 2018.

e. Parties to notify Tribunal and other Party of witnesses required for questioning at hearing (if any) – 31 January 2018.

f. Remaining dates in Schedule 1 to Procedural Order No. 3 are unchanged.

60. In a letter dated 9 October 2017, Counsel for the Respondent confirmed that they were unable to participate in a "Special Master" process to assess the alleged confidential documents, as required by Procedural Order No 4. The Respondent enclosed legal advice from two separate Swiss counsel, advising that the disclosure of such documents to a Special Master would be a breach of its confidentiality obligations. As directed by Procedural Order No 4, the Respondent also provided a description of the search undertaken for documents responsive to those requests for which confidentiality had not been asserted.

61. The Tribunal invited the Claimant to respond to the Respondent's letter of 9 October by 16 October 2017.

62. The Claimant wrote to the Tribunal on 16 October 2017, criticising the search undertaken by the Respondent for responsive documents, alleging that it was too narrow. The Claimant also criticised the use of advice from the Swiss lawyers as "self-serving", given that the Swiss lawyers had not been provided with copies of the underlying contracts. The Claimant stated

[38] Procedural Order No. 4, para 6.3.

that if the Respondent continued to refuse to comply with the Tribunal's orders, adverse inferences should be drawn.

63. The Tribunal invited the Respondent to respond to the Claimant's letter of 16 October by 30 October 2017.

64. The Respondent responded by letter dated 30 October 2017, disputing all of the Claimant's contentions.

65. In an email dated 13 November 2017, the President of the Tribunal informed the Parties that the Special Master procedure described in Procedural Order No 4 was unable to advance any further and that the Claimant's request to draw adverse inferences would be considered at a later time in the proceedings.

G. Reply Memorials

Claimant's Reply on the Merits

66. In accordance with the amended procedural timetable contained in Procedural Order No 4, the Claimant's Reply on the Merits was submitted on 6 October 2017. It was accompanied by the second expert report of Mr Stuart Traver.

Respondent's Rejoinder on the Merits

67. The Respondent submitted its Rejoinder on the Merits on 15 December 2017. It was accompanied by the second expert reports of Judge Schwebel, Mr Neil Earnest and Professor Haider Ala Hamoudi.

Claimant's Rejoinder on the Counterclaim

68. The Claimant's Rejoinder on the Counterclaim was submitted on 26 January 2018.

H. Hearing Documents

69. Each Party notified the Tribunal and the other Party of the witnesses required to attend the hearing on the merits by letters dated 31 January 2018. The Claimant specified Mr Neil K Earnest. The Respondent specified Mr Stuart Traver and Dr Hussain Al-Shahristani.

70. By email of 3 February 2018, the Parties requested an extension for the submittal of an Agreed List of Issues, amending the date specified in Procedural Order No 3 from 2 February 2018 to 7 February 2018. The Tribunal granted this extension by email of 4 February 2018.

71. The Parties were unable to agree on a List of Issues and the Chronology. The Tribunal Secretary circulated to the Tribunal and opposing counsel both Parties' versions of each document in an email of 8 February 2018.

72. By email of 13 February 2018, the Parties requested an extension of time to submit their pre-hearing skeleton submissions, amending the deadline to 19 February 2018. The Tribunal approved this extension by email of the same date.

73. The Claimant submitted an Application for Adverse Inferences on 12 February 2018 accompanied by nine new fact exhibits. The Respondent replied to the Claimant's Application by letter dated 14 February 2018.

74. A Pre-Hearing Conference was held via tele-conference on 14 February 2018 at 8pm CET.

I. Procedural Order No 5

75. Following the Pre-Hearing Conference, the Tribunal issued Procedural Order No 5 dated 15 February 2018. The Procedural Order set out various matters pertaining to the merits hearing, including logistics, witnesses and updating authorities. A draft hearing schedule was attached and the Tribunal ruled that it would address the Claimant's Application of Adverse Inferences as part of the Award.

J. Skeleton Submissions and Postponement of the Hearing

76. Both Parties sent the Tribunal Secretary their Skeleton Submissions dated 19 February 2018. The intention was that the Tribunal Secretary would facilitate the simultaneous exchange of these Submissions.

77. However, before an exchange of the Skeleton Submissions could be completed, the Tribunal was informed that Professor David Caron had fallen seriously ill and would not be in a position to attend the merits hearing. The President informed the Parties of this development by email dated 20 February 2018 and asked the Parties to consult with each other as to how they wished to proceed.

78. On 21 February 2018, Claimant's counsel informed the Tribunal that – having consulted with the Respondent – the Parties had agreed to adjourn the merits hearing and alternative dates for the hearing would be arranged as soon as practicable. The Respondent confirmed its agreement by separate email. Both Parties expressed their sincere hope for Professor Caron's speedy recovery.

79. Later that same day, the President of the Tribunal sent the Parties the following message:

> "Dear Colleagues,
>
> It is with profound regret and deep sadness that we have to inform you that Professor Caron passed away last night. He was a truly wonderful lawyer, scholar, colleague and friend and, as we learned in working with him, a very charming and unduly modest gentleman.
>
> With reference to the constructive emails from the parties yesterday, which have been duly noted, it will, of course, now be necessary to take a different course, namely the appointment of a replacement arbitrator. In that regard the parties will need to address Article 15 of the 2012 ICC Rules and in particular the first sentence of Rule 15(4).
>
> In the meantime, we shall discuss our availability in coming months and so advise the parties. That will enable the parties to ascertain when it may be possible to hold the adjourned hearing with a full Tribunal following the appointment of a replacement arbitrator.
>
> Yours sincerely
>
> Sir David Williams KNZM, QC"

K. Replacement of Professor David Caron

80. By way of letter dated 26 February 2018, Claimant's counsel informed the ICC Secretariat that the Claimant would appoint a replacement arbitrator pursuant to Article 10 of the 2010 Amendment within 30 days of that letter.

81. On 8 March 2018, the ICC Secretariat informed the Tribunal and the Parties that the International Court of Arbitration of the International Chamber of Commerce (***ICC Court***) had

decided to invite the Claimant to nominate a co-arbitrator to replace Professor Caron and to fix Professor Caron's fees at USD 250,000. The Claimant was invited to nominate a co-arbitrator by 2 April 2018.

82. By letter to the ICC Secretariat dated 16 March 2018, the Claimant nominated Sir Christopher Greenwood QC (as he then was) as arbitrator.

83. In his Statement of Acceptance, Sir Christopher Greenwood disclosed that he had recently been appointed by the United States as a member of the Iran-United States Claims Tribunal. In a letter dated 28 March 2018, the ICC Secretariat invited the Parties to provide any comments on this disclosure by 4 April 2018. If no comment was received by that date, it would be assumed that the Parties had no objection.

84. On 6 April 2018, the Respondent objected to Sir Christopher Greenwood's nomination on the basis that Sir Christopher had recently become an arbitrator at 24 Lincoln's Inn Fields (which, the Respondent maintained, was linked with Essex Court Chambers) and that Sir David Williams was an Overseas Associate at Essex Court Chambers and an arbitrator at 24 Lincoln's Inn Fields.

85. Following an invitation from the ICC Secretariat, the Claimant commented on the objection on 12 April 2018 and Sir Christopher Greenwood responded to the Respondent's concerns on 16 April 2018, noting that:

> "Sir David's connection with 24 Lincoln's Inn Fields is different from my own. He is an overseas associate of Essex Court Chambers as well as one of the arbitrators at 24 Lincoln's Inn Fields and, as such, is able to conduct work both as counsel and as an arbitrator. I understand- though this is a matter on which he is better placed to speak than I - that most of his work is conducted through his chambers in New Zealand, rather than London.
>
> Sir David and I have no common financial interest arising out of our different relationships with 24 Lincoln's Inn Fields. We do not share research assistance there or have any other connection which would bear upon our work as arbitrators. Moreover, I cannot recall our having met more than two or three times at 24 Lincoln's Inn Fields even before I left to become a Judge and on those occasions our conversation was purely social."

86. Further correspondence was exchanged directly between the Parties on the issue.

87. Against that background, on 3 May 2018, the ICC Court confirmed Sir Christopher Greenwood as co-arbitrator nominated by the Claimant in replacement of Professor Caron.

L. Re-scheduling the Merits Hearing

88. Upon the re-constitution of the Tribunal, the President wrote to the Parties on 15 May 2018 noting that Article 15(4) of the ICC Rules allows parties an opportunity to comment on "if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal". The Tribunal suggested that, with the possible exception of the pre-hearing conference call, any repetition was unnecessary, but invited the Parties to comment by 1 June 2018. The Parties agreed with the Tribunal's position.

89. Following considerable correspondence between the Tribunal and Parties and attempts to accommodate important religious festivals (including Ramadan), it was finally agreed that the merits hearing would take place from Wednesday, 24 April 2019 to Saturday, 27 April 2019 (***Merits Hearing***).

M. Preparation for the Hearing

90. On 10 March 2019, the Claimant wrote to the Tribunal setting out a number of matters that had been agreed by the Parties in relation to the upcoming Merits Hearing. In particular it was agreed that:

a. the Lists of issues and Chronologies required no updates;

b. Procedural Order No. 5 would continue to apply, save for the new hearing dates;

c. Pre-Hearing Skeleton's would be exchanged on an agreed date; and

d. there were no new legal authorities to be submitted by either Party.

91. Separately, on the same date, the Claimant also filed Supplement No. 1 to Claimant's Application for Adverse Inferences.

92. The Tribunal also granted the Parties' request to provide a three-page factual update submission. The Tribunal directed that the submissions be exchanged simultaneously on 1 April 2019. Following exchange, the Respondent objected on 5 April 2019 to the Claimant's

Factual Update on the basis that it contained new or amended argument. The Claimant responded to this objection on 6 April 2019. The President directed that the matter be addressed at the Pre-Hearing Conference.

93. It was agreed that the President alone would conduct the Pre-Hearing Conference on 8 April 2019 at 10pm (Paris time). The Tribunal Secretary would provide a note of the call to the co-arbitrators and the Claimant would record the call for reference if necessary.

94. During the Pre-Hearing Conference Call, Mr James Loftis spoke on behalf of the Claimant and Mr Eric Schwartz spoke on behalf of the Respondent.

95. The Parties confirmed logistical arrangements for the Merits Hearing. It was agreed that the Parties' Skeletons would be exchanged the following day and that no further written submissions would be exchanged on the Respondent's objection to the Claimant's factual update, but that this issue could be addressed in the oral openings. It was also agreed that the Parties would consult regarding the allocation of time during the oral opening submissions as between the claim and the counterclaim.

N. Merits Hearing

96. The Merits Hearing took place between 24 and 26 April 2019 at the ICC Hearing Centre in Paris, France.

97. The attendees at that hearing were as follows:

a. The Tribunal and the Tribunal Secretary;

b. <u>For the Claimant</u>

(i) Vinson & Elkin LLP

James Loftis
Ahmed el-Gaili
Alexander Slade
Robert Landicho
Andrea Cohen
Francesca Gray

(ii) Cleary Gottlieb Steen & Hamilton LLP

Andrew Bernstein
Claudia Annacker
Enikő Horváth
Cecile Biadatti
Severin Klinkmüller
Pablo Rodriguez
Zeineb Bouraoui
Anastasia Poorhassan
Paloma Vollhardt

(iii) Representatives from the Republic of Iraq

Laith Al-Shahir
Salem Chalabi

c. For the Respondent

(i) Schwartz Arbitration

Eric A Schwartz

(ii) King & Spalding

Thomas K Sprange QC (as he then was)
Sajid Ahmed
Aloysius Llamzon
Jessica Beess und Chrostin
Héloïse Hervé
Kabir Bhalla
Lisa Wong
Karam Farah

(iii) Representatives from the Republic of Turkey

Alparslan Bayraktar
Safa Uslu
Reha Aykul Muratoglu
Ercan Kilinçkiran
Cemile Hilal Gözel
Serkan Yikarbaba

Muhammet Talha Pamukçu
Serkan Genel
Hakan Oygur
Serhan Köklü
Halim Çakmak

98. The following factual and expert witnesses provided oral evidence at the hearing: Dr Hussain Al-Shahristani, Mr Stuart Traver of Gaffney, Cline & Associates and Mr Neil Earnest of Muse, Stancil & Co.

O. Procedural Order No 6

99. During the Merits Hearing, the Parties differed as to whether oral closings should be given on the final day of the hearing or whether the Parties and the Tribunal should reconvene for a one-day hearing at a later date. Having heard the Parties' positions, the Tribunal determined that a one-day hearing where the Parties would answer any questions that the Tribunal may have and provide oral closing submissions (***Closing Hearing***) was preferable. Following consultation, it was agreed the Closing Hearing would take place of Saturday, 28 September 2019 at the ICC Hearing Centre in Paris.

100. Consequently, the Merits Hearing timetable was amended and on 26 April 2019, the Tribunal issued Procedural Order No 6 setting out the timetable for the post-hearing phase. This included Post-Hearing Briefs and Replies, as well as the Closing Hearing on 28 September 2019.

P. Post-Hearing Submissions

101. In accordance with Procedural Order No 6, on 10 May 2019, the Tribunal provided the Parties with questions for their consideration when preparing Post-Hearing Submissions. The Parties exchanged their respective Post-Hearing Submissions on 28 June 2019, together with an agreed chronology. Rebuttal Post-Hearing Submissions were simultaneously exchanged on 2 August 2019.

Q. Closing Hearing

102. On 7 September 2019, the Tribunal provided further questions for the Parties to address during the Closing Hearing on 28 September 2019 at the ICC Hearing Centre in Paris, France.

103. The attendees at that hearing were as follows:

a. The Tribunal and the Tribunal Secretary.

b. For the Claimant

(i) Vinson & Elkins RLLP

James Loftis
Ahmed el-Gaili
Alexander Slade
Robert Landicho

(ii) Cleary Gottlieb Steen & Hamilton LLP

Claudia Annacker
Andrew Bernstein
Cecile Biadatti
Severin Klinkmüller
Pablo Rodriguez
Zeineb Bouraoui
Anastasia Poorhassan
Paloma Vollhardt
François Le Bolc'h

(iii) Representatives from the Republic of Iraq

Laith Al-Shahir
Fereed Al Jader

c. For the Respondent

(i) Schwartz Arbitration

Eric A Schwartz

(ii) King & Spalding

Thomas K Sprange QC (as he then was)
Sajid Ahmed
Héloïse Hervé
Aloysius Llamzon
Jessica Beess und Chrostin
Kabir Bhalla
Lisa Wong

(iii) Representatives from the Republic of Turkey

Alparslan Bayraktar
Safa Uslu
Ercan Kilinçkiran
Serkan Yikarbaba
Reha Aykul Muratoglu
Cemile Hilal Gözel
Serkan Genel
Demet Basal
Halim Çakmak
Serhan Köklü

R. Further Submissions on Arbitration commenced by the Respondent

104. On 2 March 2020, the Claimant wrote to the Tribunal seeking leave to make a submission regarding a new arbitration that had been commenced by the Respondent against the Claimant. The Claimant said that the Respondent was taking certain positions in that arbitration that were relevant to matters being determined by this Tribunal. The Tribunal asked the Respondent to comment on the Claimant's application by 17 March 2020.

105. On 16 March 2020, the Respondent requested an extension to 24 March 2020 to provide its comments. The Tribunal granted the extension. On 24 March 2020, the Respondent requested, and was granted, a further extension to file its comments until 3 April 2020. On 3 April 2020, the Respondent filed its comments on the Claimant's application to make an additional submission.

106. The Claimant filed a response to the Respondent's comments on 6 April 2020, withdrawing its request to file an additional submission and instead seeking leave to produce in this arbitration new evidence consisting of the request for arbitration and the amended request for arbitration filed by the Respondent in the new arbitration. The Respondent responded on 14 April 2020.

107. Having considered the above correspondence, on 17 April 2020, the Tribunal directed that it would receive the new evidence from the Claimant, but that it would not take this evidence into account without giving both Parties the right to make further submissions on it. The Claimant filed the new evidence on 29 April 2020.

S. Confidentiality

108. On 15 May 2020, the Secretariat wrote to the Parties noting the confidentiality agreement in the Terms of Reference and inviting the Parties to confirm by 22 May 2020 whether information regarding the names of the arbitrators, their nationality, their role within the tribunal and the method of their appointment, and whether the arbitration is pending or closed could be published on the ICC's website.

109. As the Parties did not respond to the letter within the specified timeframe, the Secretariat confirmed on 25 May 2020 that the information would not be published.

T. Replacement of Professor Gaillard

110. On 1 April 2021, Professor Emmanuel Gaillard sadly and suddenly passed away. Sir David Williams wrote to the Parties on 7 April 2021 saying:

> "It is with great regret that I write to you regarding Professor Galliard's sudden passing on 1 April 2021. I am sure that you all share our shock and sadness at this tragic news. He was a very valued colleague and will be greatly missed.
>
> Given the advanced stage of the arbitration, the Tribunal is currently consulting in a preliminary and provisional way with the ICC about the steps to be taken in these unfortunate and unusual circumstances. We will write again to the parties shortly with an update."

111. On 6 May 2021, the ICC Court decided to replace Professor Gaillard by inviting the Respondent to nominate a new arbitrator. After seeking an extension of time to make its nomination, the Respondent informed the ICC Secretariat on 4 June 2021 that it nominated Professor Zachary Douglas QC (as he then was). As Professor Douglas made disclosures to which the Claimant objected, on 22 July 2021, the ICC Court decided not to confirm his nomination and invited the Respondent to nominate another arbitration by 6 August 2021.

112. On 2 August 2021, the Respondent wrote to the ICC Secretariat requesting that the ICC Court reconsider its decision and confirm Professor Douglas' nomination and to provide a reasoned opinion detailing the Court's decision on this request. At its session on 23 August 2021, the

ICC Court decided not to reconsider its decision not to confirm Professor Douglas. The ICC Court declined to provide reasons.

113. Having requested and been granted further extensions of time to nominate an arbitrator, the Respondent nominated H.E. Judge Peter Tomka as co-arbitrator on 9 September 2021.

114. On 28 September 2021, the ICC Secretariat wrote to the Parties attaching Judge Tomka's Statement of Acceptance, Availability, Impartiality and Independence and his *Curriculum Vitae*. As Judge Tomka made a disclosure, the ICC Secretariat invited the Parties to comment by 5 October 2021.

115. By email of 5 October 2021, the Claimant confirmed that it did not object to the confirmation of Judge Tomka as arbitrator.

116. By letter dated 12 October 2021, the ICC Secretariat informed the Parties and the Tribunal that "*on 8 October 2021 the Secretary General confirmed H.E. Judge Peter Tomka as co-arbitrator in replacement of Professor Emmanuel Gaillard upon Respondent's nomination*." The ICC Secretariat provided Judge Tomka with a copy of the Secretariat's correspondence from the beginning of the case until that time and invited the Parties to provide Judge Tomka with a set of their respective submissions as well as the Arbitral Tribunal's orders and decisions. The case bundle was provided by the Parties to Judge Tomka on 21 October 2021.

U. Applications for Admission of New Evidence

117. On 29 October 2021, the Respondent filed an application to introduce the 2021 Iraqi Budget Law and two reports from the Iraq Oil Report into the arbitral record and to order that certain related documents be produced by the Claimant. The Respondent also requested that (i) the Parties make written submissions on the new evidence; and (ii) a date be set for an oral hearing on the new documents.

118. On 12 November 2021, the Claimant opposed the application. The Respondent filed a reply on 1 December 2021, attaching a third expert opinion of Professor Haider Ala Hamoudi. The Claimant objected to the Respondent's reply on 6 December 2021.

119. Pursuant to Procedural Order No 8 dated 15 December 2021, the Tribunal granted the application and admitted the new documents into the arbitral record and set a timetable for the parties' written submissions on the same. The Tribunal also granted one of the

Respondent's document production requests, but denied the remainder. The Tribunal initially proposed that a hearing be held on an agreed date between 23-25 May 2022, but later changed the hearing dates to 12-13 July 2022 with the agreement of the Parties. The purpose of the hearing was to address the new evidence, as well as to answer any questions from Judge Tomka on the arbitral record.

120. On 17 February 2022, the Claimant filed an application seeking leave to admit into the evidentiary record the decision of the Federal Supreme Court of the Republic of Iraq in Case 59/Federal/2012 issued on 15 February 2022 (***Case 59 Decision***), as well as six articles from Iraq Oil Report relating to the 2021 Iraqi Budget Law and two reports published by the KRG relating to its oil export revenues audited by Deloitte. The Claimant also proposed a revised timetable for submissions on both the 2021 Iraqi Budget Law and the Case 59 Decision.

121. The Respondent opposed the application on 23 February 2022 and the proposed timetable for submissions. The Claimant replied on 25 February 2022. On 27 February 2022, the Respondent objected to the Claimant's unsolicited reply.

122. The Tribunal issued Procedural Order No 9 on 3 March 2022, admitting the Claimant's new evidence and setting a revised timetable for submissions on all new evidence admitted under Procedural Orders Nos 8 and 9 (together the ***New Evidence***).

123. In accordance with the timetable set in Procedural Order No 9:

a. the Parties simultaneously filed submissions on the New Evidence on 1 April 2022. The Respondent filed a legal opinion from Professors Christoph Schreuer and Christina Binder and a fourth expert report of Professor Haider Ala Hamoudi with its submissions;

b. the Parties simultaneously filed their response submissions on 13 May 2022; and

c. the Parties simultaneously filed rebuttal submissions (limited to 10 pages) on 10 June 2022. The Respondent also filed a fifth expert report of Professor Haider Ala Hamoudi.

124. Both Parties sought to admit further new evidence and legal authorities with their submissions of 13 May 2022. On 24 May 2022, the Parties confirmed by email that they had agreed that both Parties' new legal authorities and fact exhibits submitted in the Parties' 13 May 2022 submissions shall be admitted into the arbitration record, provided that both Parties: (i)

reserve the right to comment on the admitted documents; and (ii) are not precluded from submitting further exhibits and legal authorities.

125. On 10 June 2022, the Respondent filed an application seeking an order from the Tribunal for further document production by the Claimant. By way of separate cover letter on the same date, the Respondent also requested that the Tribunal draw adverse inferences from the Claimant's alleged failure to produce documents pursuant to Procedural Order No 8. The Claimant objected to both the adverse inferences application and the further document production requests on 20 June 2022. In relation to document production, the Claimant noted that it had already provided some further documents to the Respondent and that any other documents were privileged.

126. In the Respondent's reply of 24 June 2022, the Respondent requested that the Tribunal require the Claimant to provide a privilege log. The Respondent also requested permission to admit 22 new documents into the arbitral record.

127. The Tribunal issued Procedural Order No 10 dated 30 June 2022 requiring the Claimant to produce "*all documents in its possession or control directly concerning the audit mechanism as implemented under Article 11(1) of the 2021 Budget Law for the settlement of claims for the years 2004 to 2020, to the extent that such documents are not publicly available*" by 8 July 2022. The Tribunal also allowed the 22 new documents into the record. The Tribunal declined the Respondent's request that the Claimant provide a privilege log.

128. On 29 June 2022, H.E. Judge Tomka provided to the Parties a list of questions to be addressed by the Parties at the upcoming hearing, in accordance with Procedural Order No 9.

V. Hearing on the New Evidence

129. The hearing on the New Evidence was held in Paris on 12-13 July 2022 at the Delos Hearing Centre (***New Evidence Hearing***).

130. The attendees at that hearing were as follows:

a. Members of the Tribunal and the Tribunal Secretary;

b. <u>For the Claimant</u>

(i) Vinson & Elkins RLLP

James Loftis
Robert Landicho
Mina Monrova
Kylie Terry

(ii) Cleary Gottlieb Steen & Hamilton LLP

Andrew Bernstein
Laurie Achtouk-Spivak
Zeineb Bouraoui
Marianne Diab
Jack Przybylski
Camille Van Kote

(iii) Representatives from the Republic of Iraq

Ihsan Abdul Jabbar Ismail
Laith al-Shahir
Ali Al Ambari (Ministry of Oil)
H.E. Nazar Marjan (Ambassador to the French Republic)

c. For the Respondent

(i) King & Spalding

Thomas K Sprange QC (as he then was)
James Costello
Sajid Ahmed
Aloysius Llamzon
Jessica Beess und Chrostin
Emma Iannini
Timothy McKenzie
Lisa Wong
Medhavi Singh

(ii) Representatives from the Republic of Turkey

Alparslan Bayraktar (Ministry of Energy and Natural Resources)
Ercan Kilinçkiran
Serkan Yikarbaba
Cemile Hilal Gözel
Serkan Genel

Demet Basal
Halim Çakmak
Serhan Köklü
Hakan Oygur
Burcu Yardim
Muhammet Talha Pamukçu
Öztürk Selvitop (BOTAŞ)

W. Costs Submissions

131. In accordance with Procedural Order No 11 dated 25 July 2022, the Parties filed costs submissions on 10 August 2022.[39] The Respondent filed an updated version of its costs submissions on 15 August 2022.

132. Procedural Order No 11 directed that, after filing costs submissions, the Parties would consider whether reply submissions were necessary. If reply submissions were to be filed, the Parties would agree upon the date of filing. No reply submissions were filed.

X. Challenge Procedure

133. On 9 August 2022, the Respondent sent a letter to Sir David Williams KNMZ, KC requesting that he resign from the Tribunal on the basis of lack of mental capacity. The letter was copied to the Claimant.

134. On 10 August 2022, the Claimant responded to the Respondent's letter objecting to its contents and stating that it did not wish Sir David to resign. The Claimant copied the Co-Arbitrators and the ICC Secretariat on its communications.

135. On 12 August 2022, Sir David wrote to the Parties rejecting the allegations and declining to resign.

136. On 19 August 2022, the Respondent filed a challenge to Sir David with the ICC Court on the basis of lack of mental capacity. The ICC Secretariat invited the arbitrators and the Claimant to comment by 1 September 2022.

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[39] The Respondent's Costs Submissions were dated 10 August 2022, but were received by the Tribunal Secretary on 11 August 2022 at 2:19 pm (NZ time).

137. On 30 and 31 August 2022, the Members of the Tribunal each (separately) commented on the challenge. Sir David again rejected the allegations and declined to resign. The co-arbitrators supported that decision. On 1 September 2022, the Claimant commented on the challenge.

138. On 2 September 2022, the Respondent requested that it be allowed to provide a further submission in response. It did so on 9 September 2022. The Claimant also requested permission to file a further rebuttal submission, it did so on 16 September 2022.

139. On 6 October 2022, the ICC Court decided that the challenge against Sir David was admissible but that the challenge was dismissed on the merits. The Parties and the Tribunal were informed of the ICC Court's decision on 7 October 2022, with reasons provided on 28 October 2022.

Y. Extensions of time for rendering Final Award

140. The Jurisdiction Award sets out at paragraphs 39-43 the extensions of time that had been granted by the ICC Court prior to issuing that Award.

141. As at the date of the Jurisdiction Award, the ICC Court had extended the time limit for rendering the Final Award until 29 July 2016.

142. The ICC Court further extended the time limit for rendering the Final Award pursuant to Article 30(2) of the ICC Rules as follows:

a. at its session of 21 July 2016, the ICC Court extended the time limit for rendering the Final Award until 31 August 2016;

b. at its session of 25 August 2016, the ICC Court extended the time limit for rendering the Final Award until 30 November 2016;

c. at its session of 24 November 2016, the ICC Court extended the time limit for rendering the Final Award until 28 February 2017;

d. at its session of 23 February 2017, the ICC Court extended the time limit for rendering the Final Award until 31 May 2017;

e. at its session of 24 May 2017, the ICC Court extended the time limit for rendering the Final Award until 1 June 2018;

f. at its session of 31 May 2018, the ICC Court extended the time limit for rendering the Final Award until 28 September 2018;

g. at its session of 26 September 2018, the ICC Court extended the time limit for rendering the Final Award until 31 July 2019;

h. at its session of 25 July 2019, the ICC Court extended the time limit for rendering the Final Award until 31 December 2019;

i. at its session of 19 December 2019, the ICC Court extended the time limit for rendering the Final Award until 31 January 2020;

j. at its session of 30 January 2020, the ICC Court extended the time limit for rendering the Final Award until 28 February 2020;

k. at its session of 27 February 2020, the ICC Court extended the time limit for rendering the Final Award until 30 April 2020;

l. at its session of 30 April 2020, the ICC Court extended the time limit for rendering the Final Award until 30 June 2020;

m. at its session of 25 June 2020, the ICC Court extended the time limit for rendering the Final Award until 31 July 2020;

n. at its session of 30 July 2020, the ICC Court extended the time limit for rendering the Final Award until 31 August 2020;

o. at its session of 27 August 2020, the ICC Court extended the time limit for rendering the Final Award until 30 September 2020;

p. at its session of 24 September 2020, the ICC Court extended the time limit for rendering the Final Award until 30 October 2020;

q. at its session of 29 October 2020, the ICC Court extended the time limit for rendering the Final Award until 30 November 2020;

r. at its session of 26 November 2020, the ICC Court extended the time limit for rendering the Final Award until 31 December 2020;

s. at its session of 17 December 2020, the ICC Court extended the time limit for rendering the Final Award until 31 January 2021;

t. at its session of 28 January 2021, the ICC Court extended the time limit for rendering the Final Award until 26 February 2021;

u. at its session of 25 February 2021, the ICC Court extended the time limit for rendering the Final Award until 31 March 2021; and

v. at its session of 25 March 2021, the ICC Court extended the time limit for rendering the Final Award until 30 April 2021;

w. at its session of 29 April 2021, the ICC Court extended the time limit for rendering the Final Award until 30 June 2021;

x. at its session of 24 June 2021, the ICC Court extended the time limit for rendering the Final Award until 31 July 2021;

y. at its session of 29 July 2021, the ICC Court extended the time limit for rendering the Final Award until 30 September 2021;

z. at its session of 30 September 2021, the ICC Court extended the time limit for rendering the Final Award until 31 October 2021;

aa. at its session of 28 October 2021, the ICC Court extended the time limit for rendering the Final Award until 31 January 2022;

bb. at its session of 27 January 2022, the ICC Court extended the time limit for rendering the Final Award until 30 November 2022;

cc. at its session of 23 November 2022, the ICC Court extended the time limit for rendering the Final Award until 31 January 2023; and

dd. at its session of 26 January 2023, the ICC Court extended the time limit for rendering the Final Award until 28 February 2023.

Z. Closure of proceedings

143. On 30 November 2022, the Tribunal notified the Parties that it was closing the proceedings pursuant to Article 27 of the ICC Rules.

V. SUMMARY OF MATERIAL FACTS

144. The pertinent facts as established by the Parties' submissions are as summarised by the Tribunal below. Where there is a disagreement between the Parties as to the course of events, or the reasons behind them, this disagreement is noted. If one Party has asserted a fact and the other has not disputed it, the fact has been recorded as uncontested.

A. The Relevant Agreements

145. The ITP Agreements were entered into between Iraq and Turkey in order to establish a pipeline system for the transport of crude oil from Kirkuk, Iraq, to storage and loading facilities at Turkey's Mediterranean port in Ceyhan. The ITP Agreements govern the construction, maintenance and operation of the Pipelines and associated facilities. The ITP Agreements comprise:

i. The 1973 Agreement - being the Crude Oil Pipeline Agreement, dated 27 August 1973, between Iraq and Turkey;[40]

ii. The Protocol to the Crude Oil Pipeline Agreement of 27 August 1973, dated 16 May 1976, between the Iraq National Oil Company and BOTAŞ (***1976 Protocol***);[41]

iii. The Addendum to the Crude Oil Pipeline Agreement of 27 August 1973, dated 30 July 1985, between Iraq and Turkey (***1985 Addendum***);[42]

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[40] Crude Oil Pipeline Agreement Between the Government of the Iraqi Republic and The Government of the Turkish Republic (HM-43 / C-2).

[41] Crude Oil Pipeline Protocol between the Government of the Turkish Republic and the Government of the Iraqi Republic (HM-45 / C-3).

[42] Addendum to the Crude Oil Pipeline Agreement of 27 August 1973 between the Government of the Iraqi Republic and the Government of the Turkish Republic (HM-46 / C-4).

iv. The 2010 Amendment – being the Amendment to the Crude Oil Pipeline Agreement, dated 27 August 1973, and Subsequent Relevant Agreements, Protocols, Minutes of Meetings and Addendums, dated 19 September 2010, between Iraq and Turkey.[43]

146. The ITP Agreements are described in detail in the Jurisdiction Award.[44] The provisions of the Agreements relevant to the issues in dispute in the merits phase of the proceedings are summarised below.

1. 1973 Agreement

147. The 1973 Agreement provided for the construction and operation of the original 40-inch Pipeline from Kirkuk to the port at Ceyhan. The Parties anticipated that Turkey would then store the crude oil for Iraq at Ceyhan awaiting Iraq's instructions on sale and delivery. In exchange, Iraq undertook to pay a specified throughput fee on a per-barrel basis. A certain portion of the oil was also reserved for purchase by Turkey.

148. The expressed purposes of the 1973 Agreement were fourfold:[45]

a. To "*consolidate good neighbourly and friendly relations*" between Iraq and Turkey;

b. To "*strengthen economic ties*" between Iraq and Turkey;

c. To "*grant and establish the right of transit for all kinds of crude oil […] [and] the right of shipping and loading such crude oils*"; and

d. To "*transit crude oils through pipelines […] for both Turkish consumption and for export*".

149. Article 3 of the 1973 Agreement contemplated that "*[t]he Project shall be exclusively assigned to transport and load the crude oils coming from Iraq*".[46] Pursuant to Article 3, Iraq had the right to use the full capacity of the ITP system for transporting oil from Iraqi to Turkish territory.

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[43] Amendment to the Crude Oil Pipeline Agreement Dated 27 August 1973 and Subsequent relevant Agreements, Protocols, Minutes of Meetings and Addendums between the Government of the Republic of Iraq and the Government of the Republic of Turkey (HM-115 / C-6).

[44] Jurisdiction Award, paras 51-83.

[45] 1973 Agreement, p.1.

[46] 1973 Agreement, Article 3.

However, if there was a period of "*substantial idle capacity*", the Parties could agree to use the Pipelines to transport crude oil produced in Turkey, provided that such transportation would not affect the proper operation of the project nor prejudice Iraq's right to use of the full capacity of the Pipelines.[47] This Article was replaced by Article 2.4 of the 2010 Amendment (see paragraph 165 below).

150. The 1973 Agreement also recorded various undertakings and guarantees on behalf of both Parties. Iraq undertook to take all measures required for the continuous flow of crude oils "*across the Iraq–Turkey border*". Additionally, Article 11 stated that the Iraqi Side would use "*their best endeavour[s] to utilise the full capacity of the pipeline system*" and in any case "*undertake to deliver to the system in any calendar year not less than fifteen million metric tons*" of oil (the Minimum Guaranteed Throughput). Except in cases of *force majeure*, the sum payable by the Iraqi Side to the Turkish Side for any calendar year would not be less than the total remuneration payable for the Minimum Guaranteed Throughput.[48]

151. In return, Turkey undertook to take all measures required for the continuous flow of crude oils coming from Iraq across the Turkish territory and the loading of the crude oils at Ceyhan, and to ensure and facilitate the export of crude oils from Ceyhan in accordance with the requirements of the Iraqi Side.[49]

152. Articles 16 and 17 established various additional understandings and undertakings on behalf of Turkey. Turkey agreed that Iraq would establish an office at the terminal in Ceyhan. In addition, Turkey undertook to provide all necessary facilities for the operation of the office, including permits for entry, residency and work for office personnel.[50] Turkey further guaranteed to Iraqi personnel the rights for necessary passage and visits to the ITP facilities within Turkish territory.

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47 1973 Agreement, Article 3. Prior to construction of the 46-inch Pipeline, the 1973 Agreement applied only to the 40-inch Pipeline. After completion of the 46-inch Pipeline, the 1973 Agreement (as amended) applied to both Pipelines. For ease, the Tribunal refers to "Pipelines" in the plural.

48 1973 Agreement, Article 11.2.

49 1973 Agreement, Article 12.

50 1973 Agreement, Article 16.

153. Article 19 defined *force majeure* and set out the effect of a *force majeure* event on the Parties' obligations.[51] Article 19 states:

> "1. The meaning of the term force majeure shall be limited to events for whose occurrence the side concerned was not responsible and whose occurrence and consequences cannot be foreseen and prevented or avoided by the said side.
>
> 2. Force majeure shall not exempt the side concerned from fulfilling its obligations as provided for in this Agreement, but shall suspend them temporarily. Exemption shall be restricted to those obligations affected by force majeure and to the period between its occurrence and the cessation of its effect."

2. 1976 Protocol

154. The 1976 Protocol set out the Parties' anticipated undertakings relating to the construction and the operation of the Pipelines and associated facilities.[52]

155. Article 3 is relied on by the Claimant for its argument that the transport, loading and storage of crude oil using the ITP facilities may only occur under the instruction of Iraq's Ministry of Oil.[53] Article 3 confers on the Respondent an obligation to "*ensure and facilitate the transit, loading and export of crude oils coming from Iraq across Turkish territory and to ensure and facilitate its continuous flow and arrival at the terminal in the quantities pumped in accordance with the instructions and requirements of the Iraqi side*".[54] Article 3 also creates an obligation for the Respondent to "*ensure pumping and tanker loading operations for crude oils coming from Iraq in accordance with the instructions and requirements of Iraqi Side"*.[55]

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51 1973 Agreement, Article 19.

52 Claimant's Request, para 2.5.

53 Claimant's Memorial, para 2.5.

54 1976 Protocol, Article 3(a).

55 1976 Protocol, Article 3(b).

156. Articles 4 and 5 of the 1976 Protocol provide for the establishment of an office for Iraqi staff at the terminal at Ceyhan and allow Iraqi personnel to access the ITP facilities to monitor the relevant operations.[56]

157. Article 7 of the 1976 Protocol provides that "[s]*ince the Turkish side undertakes the transport, pumping and loading operations within Turkish territory, it shall adhere to the instructions of the Iraqi side in relation to the movement of crude oil coming from Iraq in all centres of storage, disposal and at the terminal*".[57]

158. Finally, Article 9 requires that the loading of oil from the ITP facilities may only be onto tankers as nominated and scheduled by the Iraqi Side.[58]

3. 1985 Addendum

159. The 1985 Addendum, in part, provided for increased physical throughput capacity of the ITP system, from 46.5 million metric tonnes per annum (***MTA***) to 70.9 MTA, through the construction of the 46-inch Pipeline and related facilities.[59]

160. Article 2.1 obliges Iraq to "*do its best effort*" to use the full throughput capacity of this expanded system. Iraq's Minimum Guaranteed Throughput obligations were further increased from 15 MTA to 35 MTA.

161. Article 2.7 provides that, except in the case of *force majeure*, the Claimant is obliged to pay no less than the full amount due for the Minimum Guaranteed Throughput.

4. 2010 Amendment

162. Iraq and Turkey entered into the 2010 Amendment on 19 September 2010. The expressed purpose of the 2010 Amendment, as stated in the preamble, was to:

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[56] Claimant's Memorial, paras 2.20 and 5.23.

[57] 1976 Protocol, Article 7.

[58] Claimant's Memorial, para 5.14.

[59] 1985 Addendum, Article 1.

a. Further consolidate "*the good neighbourly and friendly relations*" and "*strengthen economic ties*" between Iraq and Turkey;

b. Recognise the "*important contribution of the Iraq–Turkish crude oil pipeline system to the economies of both countries*";

c. Expand and modify some of the articles in the existing agreements, as well as organise some paragraphs under those agreements; and

d. Confirm compliance with the 1973 Agreement and subsequent agreements.

163. Article 2.1 restates the obligation of each Party to "*provide all requirements*" for the part of the system located in that Party's territory:

> "Each of the two Sides guarantees to operate, maintain, manage and finance, and to provide all requirements for the part of the system located within its own territory to transport Crude Oil through the pipelines across Iraqi and Turkish territories and to deliver into Ceyhan terminal on the Mediterranean shore."

164. Article 2.2 reaffirms that the "*Turkish Side shall guarantee the continuous flow and security of the Crude Oil coming from Iraq across the Turkish territory through the ITP*". Article 2.3 amends Article 17.2 of the 1973 Agreement in the following manner: "*the Turkish Side guarantees to load all the Crude Oil coming from Iraq to the tankers that will be instructed by the Iraqi Side without delay and to do the necessary port and customs formalities for the departure of the tankers from the port"*.

165. Article 2.4 reaffirms that the Pipeline system and associated facilities would be used exclusively for the transport and loading of crude oil coming from Iraq. However, in modification of Article 3 of the 1973 Agreement, the Parties agreed that in the event of "*substantial idle capacity in the system*" for a "*certain period of time*", they would meet "*to investigate the possibility of and agree upon the rendering of storage and pier loadings services by BOTAŞ to 3rd parties who are not a party to this Amendment*". That amended provision was, however, subject to the proviso that "*such transactions shall not affect the proper operation of the system and in no way limit the right of the Iraqi Side for the utilization of the full capacity of the system for the transportation of Crude Oil coming from Iraq*".

166. Article 3.2 of the 2010 Amendment amended Article 2 of the 1985 Addendum in order to temporarily decrease Iraq's guaranteed minimum throughput obligation to 22 million metric tonnes for the year 2010, 27 million metric tonnes for 2011, 32 million metric tonnes for 2012. The minimum throughput would then return to 35 million metric tonnes for the year 2013 and thereafter.[60] This Article further provides that: "[n]*othing, except force majeure conditions that are mentioned in the Agreement and this Amendment, shall prevent the Iraqi Side from complying with its commitments as provided in this Article. The Minimum Guaranteed Throughput shall remain valid throughout the validity period of this Amendment*."

167. Article 4.4 provides access for the Iraqi Ministry of Oil and its representatives to the ITP facilities on the Turkish side of the border.

168. Article 4.5 amended Article 11.2 of the 1973 Agreement with respect of the quantity of the Minimum Guaranteed Throughput obligation.

169. Article 10 of the 2010 Amendment established an amended procedure for the resolution of disputes by replacing the dispute resolution clause of the 1973 Agreement. The full text of Article 10 is reproduced at paragraph 34 above.

B. The Dispute

170. As described above, the 1973 Agreement provided for the construction of the 40-inch Pipeline and associated facilities. This Pipeline came into operation in 1977. The 1985 Addendum provided for the construction of the 46-inch Pipeline to run alongside the original 40-inch Pipeline. The 46-inch Pipeline came into operation in 1987.

171. In addition to the Pipelines, storage and loading facilities for the crude oil received through the Pipelines were also constructed at Ceyhan.

172. These facilities include a tank farm and marine loading facilities at the terminal in Ceyhan. The tank farm at Ceyhan has seven storage tanks numbered 601–607 and five storage tanks numbered T1–T5.[61]

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[60] 1985 Addendum, Article 3.2.

[61] Claimant's Request, para 4.2.

173. The Claimant commenced this arbitration against the Respondent on the following basis.[62]

a. Under the ITP Agreements, the Respondent is obligated to act in accordance with instructions given by the Claimant in operating the Turkish portion of the Pipelines, as well as the related storage and loading facilities at Ceyhan. The Agreements provide that the Claimant has the exclusive right to the utilisation of the full capacity of these facilities. The Agreement provides that the facilities may not be used for the benefit of third parties except with the Claimant's agreement.

b. In breach of these obligations, the Respondent has, since at least December 2013, without the authorisation of the Iraqi Ministry of Oil and in direct contravention of the Ministry of Oil's written instructions, used the pipeline infrastructure and associated storage facilities covered by the Agreement to transport and store crude oil pumped by the KRG. On 21 May 2014, the Respondent began loading that crude oil using the facilities covered by the ITP Agreements onto a tanker at Ceyhan, again without the authorisation of the Ministry of Oil and in violation of the Ministry of Oil's explicit instructions. The KRG is not a party to the ITP Agreements and has no right to use the Pipelines and related facilities covered by the ITP Agreements.

c. The Respondent has signed a series of energy sector cooperation agreements with the KRG and has supported the KRG in connecting its oil transport infrastructure to the 40-inch Pipeline, without the Ministry of Oil's authorisation. The Respondent is also aware that the crude oil pumped by the KRG and accepted by the Respondent is owned by the Claimant, and thus is being wrongfully transported, stored and loaded by the Respondent.

d. These actions constitute a breach of the ITP Agreements.

e. As a result of the Respondent's breaches, the Claimant has suffered harm and now seeks relief in this arbitration, including damages in the amount of USD 30,457,196,787.[63]

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[62] Claimant's Request, paras 1.3-1.7.

[63] Claimant's Post-Hearing Brief, para 6.32.

174. In its Request for Arbitration, the Claimant also asserted that the above actions constituted a breach of the 1946 Treaty insofar as the Respondent's actions constituted interference in the domestic affairs of Iraq:[64]

> "By providing active assistance to the KRG, contrary to the explicit appeals and instructions of Iraq, for the transport, storage and loading of oil extracted in the Kurdistan Region, to which the KRG holds no title, Turkey is interfering in Iraqi domestic affairs. The extraction, export and sale of oil owned by Iraq and the sharing of proceeds are domestic affairs of Iraq."

175. The Tribunal, however, found in its Jurisdiction Award that it does not have jurisdiction *ratione materiae* over the Claimant's claims under the 1946 Treaty.[65]

C. Factual Background

1. The Relationship between the FGI and the KRG

176. Before addressing the factual background in detail, the Tribunal considers it useful to briefly address the relationship between the FGI (being the federal government based in Bagdad) and the KRG (being the government of the Kurdish region based in Erbil). The relationship was discussed in depth in the Jurisdiction Award at paragraphs 86 to 95, which is taken as incorporated into this Award. Some key points are reproduced below.

177. The Kurdistan Region of Iraq (defined above as the KRI) was formally established as an autonomous region of Iraq under the Constitution of the Republic of Iraq 2005 (***Iraqi Constitution***). The FGI and the KRG have disagreed over the interpretation of the Iraqi Constitution in relation to the management and ownership of oil and natural resources in the KRI. In the absence of federal legislation, the KRG enacted its own hydrocarbons law in 2007 in relation to the management of crude oil and gas fields within the KRI.[66] In February 2022, the

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64 Claimant's Request, para 4.20.

65 Jurisdiction Award, para. 303(c).

66 Respondents' Memorial on Jurisdiction, paras 51–52.

Iraqi Supreme Court held in the Case 59 Decision that this hydrocarbons law violated certain provisions of the Iraqi Constitution.[67]

178. Prior to this Supreme Court decision, pursuant to the KRG's hydrocarbons law, the KRG began to develop oil and gas fields within the KRI. From 2011, crude oil was delivered to SOMO under various arrangements agreed between the KRG and SOMO (which, as noted earlier, is Iraq's State Oil Marketing Company), in return for a share of the FGI's overall federal budget.[68] Disputes arose between the KRG and the FGI regarding payment (or alleged non-payment) of the KRG's share of the federal budget. In 2012, the KRG and the Turkish Minister of Energy and Natural Resources announced that a new pipeline would be built to tie-in to the ITP Pipeline system close to the Turkish border.[69]

179. In September 2013, the KRG completed the tie-in to the 40-inch Pipeline at the Fishkabur pumping station, just inside the federal borders of Iraq.[70] At the time, the 40-inch Pipeline was not operational, for reasons explained below. Following testing, the KRG began using this tie-in early in 2014 to send oil through the 40-inch Pipeline directly to the storage facilities at Ceyhan.[71]

180. ISIS invaded Northern Iraq in June 2014. Large parts of the territory of Iraq were thereafter occupied by ISIS. As a result, the FGI effectively lost control of Kirkuk, located near the border of the KRI. Subsequently, Kurdish military forces (the ***Peshmerga***) secured Kirkuk under the control of the KRG. ISIS forces were eventually defeated in Iraq around December 2017.

181. Since the tie-in became operational in late 2013, the FGI and the KRG have entered into several agreements as part of an effort to improve relations between them, as described below.[72]

    a. In November 2014, the FGI and the KRG entered into an interim agreement to create an oil revenue-sharing arrangement between the FGI and the KRG. Under the terms of the

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67 Case 59 Decision, 15 February 2022 (HM-443 / C-266).

68 Respondent's Counter-Memorial, para 44.

69 Claimant's Memorial, para 4.20; Respondent's Counter-Memorial, para 51; "Baghdad attacks Turkey oil pipeline plan" Financial Times, 25 May 2012 (HM-151 / C-75).

70 Respondent's Counter-Memorial, para 56.

71 Respondent's Counter-Memorial, paras 61 and 65.

72 See Jurisdiction Award, para 93; Respondent's Counter-Memorial, para 81.

agreement, the FGI agreed to make a single one-time payment of US $500 million to the KRG in exchange for daily delivery by the KRG to SOMO of 150,000 barrels of crude oil per day produced in Kurdistan.

b. In December 2014, the FGI and the KRG entered into an agreement for the duration of one year. Under the terms of this agreement, the KRG agreed to transfer 250,000 barrels per day of crude oil exports to the FGI. In addition, the KRG agreed to facilitate the transit of 300,000 barrels per day from the oil fields in Kirkuk to Ceyhan via the Pipelines. The FGI agreed to: *"(i) make monthly payments corresponding to the Kurdistan Region of Iraq's agreed share of the national budget (17%) in line with the Iraqi Constitution; and (ii) allocate US $1 billion from the Iraqi Defense Ministry's budget to the KRG's Peshmergas*". The effect of the agreement was to allow the KRG, for one year at least, to use the Pipelines and facilities at Ceyhan for delivery, storage and loading of crude oil from Kirkuk.

c. In August 2016, the FGI and the KRG entered into a new agreement under which crude oil from the KRI would be "*split, with half going to SOMO and the other half to be sold by the KRG*". This agreement operated until the enactment of the 2017 Federal Budget Law, which allocated 17% of the federal budget to the KRG in return for the KRG's facilitation of the export of at least 300,000 barrels of crude oil per day through the ITP facilities.[73]

2. The Dispute between Iraq and Turkey

182. At the time the 2010 Amendment was signed by the Parties, the 46-inch Pipeline was operational in Iraq. As mentioned above, the 40-inch Pipeline was not operational. Iraq had been unable to meet its Minimum Guaranteed Throughput commitments for several years prior to the 2010 Amendment, so this Amendment introduced lower Minimum Guaranteed Throughput commitments for a number of years, albeit on the basis that Iraq would work towards increasing throughput such that previously agreed Minimum Guaranteed Throughput would resume after 2013.

[73] Respondent's Counter-Memorial, para 85; B. Lando, Baghdad-Erbil oil deal leads to renewed SOMO Kirkuk Sales, Iraq Oil Report, 28 September 2016 (HM-351 / C-116).

183. In 2011, 163.2 million barrels of Iraqi crude oil flowed through the 46-inch Pipeline (including 65.5 million barrels after the 2010 Amendment came into force on July 27, 2011). In 2012, 134.2 million barrels of oil flowed through the 46-inch Pipeline. In 2013, this increased to 253.2 million barrels, but this still fell short of Iraq's Minimum Guaranteed Throughput commitments under the 2010 Amendment.[74] The Claimant paid Minimum Guaranteed Throughput fees throughout this period, although the Parties agree that a reconciliation amount of US$67,607,024.62 remains to be paid by the Claimant to the Respondent (the Claimant submits the amount is not yet due).[75]

184. In January 2011, the FGI and the KRG entered into an agreement whereby the KRG would resume deliveries of crude oil to SOMO,[76] although deliveries were variously suspended and resumed throughout 2011 to 2013.[77] Also from 2012, the Respondent exported some oil for the KRG by truck, but these volumes were limited.[78] In May 2012, the KRG announced that it would build an oil pipeline so as to allow oil exports through Turkey.[79] Construction took place through the second half of 2012 and into 2013. The FGI was aware of the construction.

185. On 17 September 2013, the KRG completed its pipeline construction when it created a tie-in between its own pipeline and the 40-inch Pipeline at the Fishkabur pumping station in Iraq (this station was unaffected by the damage to the 40-inch Pipeline and was located just within Iraqi territory).[80] The Claimant asserted that the Respondent facilitated the tie-in, but the Respondent disputed this on the basis that "*Turkey played no part in the construction of the tie-in, which was constructed by the KRG entirely inside Iraq*".[81]

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74 Claimant's Memorial, para 4.10.

75 See Respondent's Counterclaim Opening Slides, slide 12; Claimant's Memorial, para 4.10.

76 Meeting Report of January 17, 2011 Meeting, 19 January 2011 (HM- 124 / C-156).

77 See, for example, "KRG Ministry of Natural Resources, Oil Production, Export, and Consumption Report 2003-2013" (HM-28 / C-69) and "Kurds, Baghdad could agree this month on energy deals: Turkey", Reuters, 3 December 2013 (HM-199 / C-90).

78 Agreed Chronology (the KRG reported that 749,567 barrels of oil were exported by truck in 2012).

79 "Baghdad attacks Turkey oil pipeline plan" Financial Times, 25 May 2012 (HM-151 / C-75); KRG, Press Release, "Prime Minister Barzani: Kurdistan's energy relations with Turkey to enter a new phase", 21 May 2012 (HM-152 / C-177); and "Iraq warns Turkey over Kurdistan pipeline deal", BBC, 22 May 2012 (HM-153 / C-76).

80 Claimant's Request, para 4.8.

81 Respondent's Counter-Memorial, para 56.

186. In November and December 2013, the KRG commenced testing by pumping test quantities of crude oil through its pipeline and into the 40-inch Pipeline via the tie-in. Certain agreements were signed by the KRG and the Respondent in late November 2013 regarding the export of oil from the Kurdish region.[82] Testing was completed by the end of December 2013 and from 4 January 2014, the KRG began using the Pipeline infrastructure to transport crude oil to Ceyhan.[83] The Respondent permitted tanks 601 to 605 to be used to store oil for the benefit of the KRG.

187. During the testing period, the Claimant protested the KRG's use of the ITP facilities without permission from the Ministry of Oil.[84] On 1 December 2013, the Claimant and the Respondent held negotiations in Ankara (Turkey) in an attempt to resolve the dispute pursuant to the requirements of Article 10 of the 2010 Amendment. No resolution was found and the Claimant maintained its objections in a series of correspondence in December 2013 and January 2014.[85] A further meeting between representatives of both Parties was held on 27 January 2014, whereby the Respondent reassured the Claimant that the Pipeline was being used for hydrostatic testing purposes only.[86]

188. On 18 February 2014, the Director-General of SOMO wrote to the Director-General of BOTAŞ instructing BOTAŞ to cease all transportation of crude oil through the Pipelines without the express written instructions of the Iraqi Side, and requiring the closure of the Turkish portion of the 40-inch Pipeline. This letter also stated that the crude oil stored in the tanks at Ceyhan was the property of Iraq and could not be sold or otherwise disposed of except on the instructions of SOMO.[87] Further correspondence in February raised similar concerns.

189. BOTAŞ said in response that it did not consider that there had been a breach of the ITP Agreements and that BOTAŞ had no control over the oil entering the Pipelines on the Iraqi

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82 B. Van Heuvelen, "Turkey, Kurdistan cement massive energy deal" Iraq Oil Report, 29 November 2017 (HM-189 / C-77) (see also HM-190 and 191 / C-86 and 87).

83 Letter from SOMO to BOTAŞ, 5 January 2017 (HM-214 / C-7).

84 B. Van Heuvelen "Yildiz meets Shahristani in effort to mend ties" Iraq Oil Report, 1 December 2013 (HM-195 / C-78); Letter NOC to BOTAŞ, 31 December 2013 (HM-208 / C-52).

85 See paragraph 359 below, describing those letters in detail.

86 Letter from SOMO to Turkish Ministry of Energy and Natural Resources and BOTAŞ enclosing minutes of meeting on 27 January 2014, 3 March 2014 (HM-231 / C-13).

87 Letter from SOMO to BOTAŞ, 18 February 2014, (HM-228 / C-11).

side.[88] BOTAŞ also stated that SOMO had not fulfilled its own obligations under the ITP Agreements with regards to BOTAŞ's receivables from Iraq arising under the Minimum Guaranteed Throughput obligations.

190. At the time the tie-in became operational in late 2013, only the 46-inch Pipeline remained usable on the Iraqi side. The Respondent asserted that the 40-inch Pipeline has been damaged since 1997 and has been unusable since this time. However, on 2 March 2014, the 46-inch Pipeline was severely damaged by bombing.[89] The 46-inch Pipeline has not been operational since that date. The FGI has sought tenders to construct a new 48-inch pipeline that would run parallel to the 40 and 46-inch Pipelines in Iraq. As at September 2019, the Government was still considering these proposals and both the 40 and 46-inch Pipelines remained non-operational.[90] The Claimant also confirmed that the FGI is seeking to repair the 40 and 46-inch Pipelines, but the Tribunal has not been provided with any specific information as to the status of these repairs.[91]

191. On 7 April 2014, the Director-General of SOMO wrote again to BOTAŞ, reiterating that it considered that the Respondent was in breach of the ITP Agreements, and requesting an immediate cessation of these violations. The Director-General expressed a preference for amicable resolution of the dispute but said that the Iraqi Ministry of Oil had recommended the commencement of arbitration proceedings.[92]

192. On 21 May 2014, the Respondent began loading crude oil pumped by the KRG onto a tanker located at Ceyhan.[93] The Director-General of SOMO wrote to the Ministry of Energy and Natural Resources of the Republic of Turkey, copying BOTAŞ, expressing surprise and disappointment to learn that the Respondent had permitted the export of the KRG's crude oil through vessels at Ceyhan, requesting that the Respondent stop such exports, and confirming

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88 Letter from BOTAŞ to SOMO, 25 March 2014 (HM-238 / C-14).

89 Respondent's Counter-Memorial on Jurisdiction, para 29.

90 Ministry of Oil Projects Company State Company, Notice of a Tender to Execute a New Iraq-Turkish Crude oil Export Pipeline Project, 20 December 2017 (HM-376 / C-232); See Transcript (Closing Hearing), 26:3-28:25.

91 Transcript (Closing Hearing), Day 1, 28:14-18;

92 Letter from SOMO to BOTAŞ, 7 April 2014, (HM-239 / C-15).

93 Claimant's Request, para 1.2.

that transport and loading should take place in accordance with SOMO's instructions and that the Ministry of Oil is "*sole sovereign authority*" for exportation of Iraqi oil, through SOMO.[94]

193. On 23 May 2014, the Claimant lodged its Request for Arbitration.

VI. SUMMARY OF THE PARTIES' POSITIONS

A. Claimant's Position

1. The Claimant's Claims

194. The Claimant has divided its primary claims for breach of the ITP Agreements into five areas:[95]

a. the transportation claim;

b. the storage claim;

c. the loading claim;

d. the exclusive use claim; and

e. the access claim.

195. The Claimant submitted that the Respondent was in breach of the ITP Agreements when it transported crude oil from the KRG, and used the ITP facilities to store and load that oil, contrary to the instructions of the Iraqi Side.[96] The Claimant has also alleged that by facilitating the KRG's use of the Pipelines in this way, the Respondent breached the exclusivity provisions of the ITP Agreements to which only the Claimant and the Respondent were parties. Further, the Claimant submitted that the Respondent breached those provisions of the ITP Agreements that require access to be given to Iraqi Ministry of Oil staff to the facilities in Ceyhan.

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94 Letter from SOMO to BOTAŞ, 21 May 2014 (HM-249 / C-16).

95 Claimant's Memorial, para 5.6.

96 Claimant's Post-Hearing Brief, para 1.1.

196. The Respondent did not deny that it transported, stored and loaded crude oil from the KRG, but submitted that these activities did not breach the ITP Agreements. The Claimant contended that these undisputed facts prove violations of the ITP Agreements in and of themselves.[97]

2. The Claimant's Request for Relief

197. The Claimant requested relief on the basis that "*but for*" the deprivation of the Claimant's control over the ITP facilities by the Respondent, any oil exported through the ITP facilities would have been sold at fair market value and the proceeds would have been deposited into Iraq's OPRA/DFI account.[98]

198. The Claimant submitted that the Respondent caused the injury to the Claimant by depriving it of control over the ITP facilities, and consequently the oil transported through the Pipelines.[99] According to the Claimant, the Respondent accepted the delivery of crude oil pumped by the KRG into the ITP facilities in breach of the ITP Agreements, ignored instructions from the Claimant to hold the oil at Ceyhan, and used the facilities for the benefit of KRG, who is not a party to the ITP Agreements.[100]

199. The Claimant has denied that compensation for the Respondent's breaches would amount to double recovery,[101] and said that any damage suffered by the Claimant cannot be remedied by payment to the KRG, which is a sub-State entity.[102] According to the Claimant, the Respondent's failure to adduce evidence of the use of the proceeds from oil exported through the Pipelines or evidence of any sums paid to the KRG for the oil purchased was telling. The Claimant requested that the Respondent be required to provide full accounting records of proceeds from the sale of crude oil from the KRG and any related payments.[103]

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97 Claimant's Reply, para 2.4; Claimant's Post-Hearing Brief, para 1.4.

98 Claimant's Reply, para 3.3.

99 Claimant's Reply, para 3.7.

100 Claimant's Reply, para 3.6.

101 Claimant's Reply, paras 3.8-3.18.

102 Claimant's Reply, paras 3.14-3.16.

103 Claimant's Reply, para 3.12.

200. The Claimant further contended that the Respondent was not entitled to invoke Iraqi domestic law concerning export rights to justify its breaches of the ITP Agreements.[104] Similarly, Iraq's internal budget allocation could not have any impact on the Respondent's alleged breaches.[105]

201. The Claimant submitted that it was entitled to interest at a rate "*calculated for each month, equal to the yield on the U.S. dollar-denominated Turkish government bonds with a maturity as close as possible to the award date*".[106] In making this submission, the Claimant emphasised that arbitral tribunals have a broad discretion in the award of interest rates.[107]

3. Claimant's Reply to Respondent's Defences and Counterclaims

The Claimant did not act in bad faith, nor were its instructions an abuse of rights

202. In its Counter-Memorial, the Respondent submitted that the Claimant's instruction to close the Turkish section of the 40-inch Pipeline was issued in bad faith or was an abuse of right (see paragraphs 242 to 244 below). The Claimant rejected this position.

203. The Claimant submitted that there is a presumption that a State is acting in good faith. To rebut that presumption, the Respondent is required to adduce "*clear and convincing evidence*".[108] The Claimant said that the Respondent had not met this high threshold. It responded to each of the Respondent's respective submissions as set out below.

a. The instructions given were not inconsistent with the object and purpose of the ITP Agreements.[109] The Respondent's assertion as to the object and purpose of the ITP Agreements was wrong, and therefore the Respondent's reliance on that object and purpose rendered the claim of bad faith impossible. There is nothing in the Agreements which indicates that its purpose is to provide for the "*continuous flow*" of crude oil across the Iraqi-Turkish border, using as much of the system's capacity as possible.[110]

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104 Claimant's Reply, paras 3.24-3.33.

105 Claimant's Reply, paras 3.19-3.20.

106 Claimant's Memorial, para 6.58.

107 Claimant's Reply, para 3.55.

108 Claimant's Reply, para 2.69.

109 Claimant's Reply, paras 2.83-2.91.

110 Claimant's Reply, para 2.83.

b. The Respondent's arguments regarding risk of injury to the Respondent were erroneous and did not excuse its breaches of the ITP Agreements.[111] The Respondent's submission that the lack of crude oil flow created a risk of corrosion or explosion contradicted the Respondent's argument that the 40-inch Pipeline has been idle since 1997.[112] Further, the allegedly required "*continuous flow*" of crude oil could have been achieved through a negotiated tripartite agreement with the FGI and the KRG.[113] The Claimant criticised the Respondent's argument pertaining to environmental damage as an "*after-the-fact attempt to justify its violations of the ITP Agreements*".[114] The Claimant also considered that the Respondent would not have been exposed to loss of revenue if it had followed the Iraqi Ministry of Oil's instructions or, when the *force majeure* was later declared, entered discussions to make the ITP facilities available to third parties.[115]

c. The instruction to close the Turkish side of the 40-inch Pipeline was not made for an *"illegitimate benefit*".[116] There was nothing illegitimate about ensuring that the Respondent complied with its legal obligations. With regard to the contention that the Claimant in fact benefited from the export of crude oil from Kurdistan (as a constituent region of Iraq), the Claimant disputed this on the grounds that the proceeds from the sale of the oil had been deposited into a Turkish bank account, and not to the OPRA/DFI account as required by Iraqi law.[117] The Claimant further pointed out that there was no role for the Respondent in attempting to resolve a domestic political dispute between the FGI and the KRG, much less any right to attempt to do so by violation of the ITP Agreements.[118]

d. The instruction to close the Turkish side of the 40-inch Pipeline had no relation to Iraq's national security.[119] The Respondent did not have the right to determine and manipulate

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111 Claimant's Reply, paras 2.92-2.105.

112 Claimant's Reply, para 2.94.

113 Claimant's Reply, para 2.98.

114 Claimant's Reply, para 2.103.

115 Claimant's Reply, paras 2.104-2.105.

116 Claimant's Reply, paras 2.106-2.118.

117 Claimant's Reply, para 2.110.

118 Claimant's Reply, para 2.118.

119 Claimant's Reply, paras 2.119-2.120.

how Iraq's budget should be allocated for defence and security.[120] Additionally, the Respondent had not provided any evidence that the proceeds from the export of crude oil were in fact being allocated to the Peshmerga.

e. The FGI did not "*tacitly approve*" the KRG's use of the facilities in contravention of the ITP Agreements.[121] The Claimant disputed that the KRG's prior use of the ITP facilities allowed it to use the Pipelines for direct export. The Claimant stated that it remained supportive of the KRG's use of the Pipelines, provided that the use was in accordance with the Ministry of Oil instructions and Iraqi law.[122] The agreements reached between the FGI and the KRG allowed it to use the Pipelines and facilities for authorised exports and therefore it does not follow that it would justify the KRG's present unauthorised use of the Pipelines.

The Respondent was not entitled to suspend its performance of the ITP Agreements

204. The Claimant disputed that the Respondent was entitled to suspend its performance of the ITP Agreements.

205. The Claimant's primary position was that it had not breached the ITP Agreements. Therefore, there was no basis on which the Respondent could invoke the *exceptio non adimpleti contractus* principle – literally the "exception of a non-performed contract" – or Article 60 of the Vienna Convention on the Law of Treaties (***Vienna Convention***).[123] The Claimant set out its arguments against its alleged breaches of the ITP Agreements as follows.[124]

a. The Claimant had paid all Minimum Guaranteed Throughput fees owing to the Respondent at the time the Respondent began using the ITP facilities on the instruction of the KRG.

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120 Claimant's Reply, para 2.120.

121 Claimant's Reply, paras 2.121-2.123.

122 Claimant's Reply, para 2.123.

123 Claimant's Reply, para 2.125.

124 Claimant's Reply, paras 2.156-2.162.

b. The Claimant was unable to deliver the Minimum Guaranteed Throughput. However, the requirement under the ITP Agreements was that it nonetheless must pay the Minimum Guaranteed Throughput fees for the capacity it did not use, which it had paid.

c. The Claimant did not violate its obligation to operate and maintain the Iraqi section of the ITP system. At the time that the Respondent's breaches began, the Claimant had been pumping crude oil through the 46-inch Pipeline. With respect to the damaged 40-inch Pipeline, the Claimant had awarded a contract for its repair, which could not go ahead because of the KRG's unauthorised use of the 40-inch Pipeline.

206. Even if suspension of the Respondent's obligations was found to have occurred, the Claimant argued that it would still not entitle the Respondent to transport, store and load crude oil contrary to the instructions of the FGI.[125] This is because the Respondent is continuing to make use of the ITP facilities, which are governed by the ITP Agreements. Therefore, according to the Claimant, this does not amount to a suspension *per se*, but instead a "de facto *amendment of [the ITP Agreements'] fundamental terms*".[126] Though a suspension would release contracting parties from their obligations to perform a treaty, the treaty would remain in force with unaltered provisions.[127]

207. In any event, the Claimant submitted that any successful suspension of the ITP Agreements could not be invoked retroactively, so the Respondent could not be excused from its past and continuing breaches of the ITP Agreements.[128]

The Claimant was not in conflict with its *jus cogens* obligations

208. Further, the Claimant argued that it was not in conflict with its *jus cogens* obligations by seeking compliance with the ITP Agreements.[129] According to the Claimant, the Respondent did not provide a proper legal or factual foundation for such an argument, failing to demonstrate any *jus cogens* obligation to prevent genocide, let alone an obligation to assist third parties in the

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125 Claimant's Reply, para 2.127.

126 Claimant's Reply, para 2.127.

127 Claimant's Reply, para 2.128.

128 Claimant's Reply, para 2.154.

129 Claimant's Reply, paras 2.228-2.241.

prevention of genocide.[130] The Claimant disputed the Respondent's position *"that it must continue to violate the ITP Agreements to facilitate the indirect funding of the KRG's security forces, in turn indirectly (and allegedly) facilitating the prevention of genocide".*[131]

209. The Claimant submitted that the Respondent could not rely on a *jus cogens* duty, if one could be made out, to violate its obligations under the ITP Agreements.[132] First, because there is no conflict between the Respondent's obligations under the ITP Agreements and its obligation to prevent genocide. Secondly, because the Respondent could not demonstrate that there was no alternative means of preventing genocide other than by breaching the ITP Agreements.

210. The Claimant further submitted that the Respondent's *jus cogens* argument lacked a factual basis. First, the Respondent relied on a press release connected to a United Nations Human Rights Council report on the plight of the Yazidis in Syria (not Iraq). This press release referred to the Peshmerga's failure to support the Yazidi minority in north-western Iraq, noting that it was Syrian Kurds who provided assistance.[133] The Respondent therefore failed to demonstrate that the Peshmerga were currently fighting against genocide of the Yazidis. Secondly, the Yazidis came under threat after the Respondent began to breach the ITP Agreements, meaning the Respondent relied on an event which occurred several months after the period it alleged it was entitled to ignore the instructions of the FGI.[134]

211. Additionally, the Claimant pointed out that the Respondent had not provided evidence that any of the proceeds from the sale of oil transported from the KRG have actually been used to aid in the funding of the Peshmerga.[135] The Claimant submitted that the Respondent would have been better able to aid in the funding of the fight against ISIS by complying with the ITP Agreements, as the resulting revenues would be paid into the OPRA/DFI account and used in accordance with Iraqi budget law, which allows for allocations to the Peshmerga.[136]

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130 Claimant's Reply, paras 2.231-2.232.

131 Claimant's Reply, para 2.232.

132 Claimant's Reply, para 2.234.

133 Claimant's Reply, paras 2.235-2.236.

134 Claimant's Reply, para 2.237.

135 Claimant's Reply, para 2.238.

136 Claimant's Reply, para 2.239.

Impact of the Iraqi Supreme Court's Case 59 Decision and the 2021 Iraqi Budget Law

212. In relation to the New Evidence submitted by the Parties, the Claimant submitted that the Iraqi Supreme Court's Case 59 Decision of February 2022 is fatal to the Respondent's defences. According to the Claimant, these defences depended in large part on the Respondent's contention that the FGI did not "own" the oil and that ownership rights vested in the KRG, as contended in the legal opinions of Professors Haider Ala Hamoudi and James Crawford.[137] The Claimant said that the Supreme Court has now definitively determined this issue and in doing so destroyed the assertions of the Professors.[138]

213. The Claimant submitted that the Case 59 Decision supports its position that there was no fundamental change of circumstances and that the ITP Agreements were not suspended.[139] The Decision also undermined the Respondent's position that the Claimant suffered no compensable injury, which relies on the KRG's purported legal control over the oil.[140] In the Claimant's submission, any oil sale proceeds received by the KRG could not be viewed as a benefit to Iraq in circumstances where the KRG's exports violated the Iraqi Constitution.[141] Similarly, the Claimant contended that the Case 59 Decision confirmed that the KRG's conduct was not attributable to Iraq as a whole because the FGI has exclusive competence to deal with Iraqi oil.[142]

214. According to the Claimant, the Supreme Court's Decision does not affect its own claims, which are based solely on the ITP Agreements.[143] The 2021 Iraqi Budget Law is similarly irrelevant to its claims.[144] The Claimant noted that the audit contemplated in the Budget Law had not been undertaken.[145]

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137 Claimant's 10 June 2022 Submission, para 1.2; Claimant's 1 April 2022 Submission, paras 4.1. See James Crawford "The Authority of the Kurdistan Regional Government over Oil and Gas under the Constitution of Iraq" reprinted in 3 Oil Gas & Energy Law (2008), (HM-84 / R-26).

138 Claimant's 1 April 2022 Submission, paras 2.30 and 4.5; Claimant's 10 June 2022 Submission, para 4.3.

139 Claimant's 1 April 2022 Submission, para 4.23.

140 Claimant's 1 April 2022 Submission, paras 5.3 - 5.13.

141 Claimant's 1 April 2022 Submission, para 5.14.

142 Claimant's 1 April 2022 Submission, para 5.25.

143 See Jurisdiction Award, paras 161-162.

144 Claimant's 1 April 2022 Submission, para 6.2 and 6.5; Claimant's 13 May 2022 Submission, para 2.1.

145 Claimant's 13 May 2022 Submission, para 1.4; Claimant's 10 June 2022 Submission, para 5.2.

215. The Claimant rejected the Respondent's contention that the Budget Law retrospectively authorised the KRG to export oil through the ITP system.[146] The Claimant submitted that crude oil export rights in Iraq could not be governed by the Budget Law.[147]

The Respondent's counterclaims have no merit

216. The Claimant denied that it owed any amounts to the Respondent under the 2010 Amendment. It considered that the figures relied upon by the Respondent, as calculated by its expert witness, Mr Earnest, were inaccurate and the Claimant had, in fact, paid more than the amount due.[148]

217. The Claimant further asserted that it was not liable for any Minimum Guaranteed Throughput fees from 2003 to July 2011 due to the invocation of *force majeure* conditions arising from constant armed conflict during that period, which made it difficult to attempt any repairs to the ITP facilities.[149]

218. The Claimant rejected the Respondent's argument that the Claimant's reliance on *force majeure* was flawed (set out at paragraph 266 below) for the reasons set out below.[150]

    a. The Claimant identified the relevant periods of *force majeure* in its Reply to Counterclaims as being 2003 to 27 July 2011. It noted that it was unable to deliver the Minimum Guaranteed Throughput volumes "*beginning in 2003*" and that despite improvements from 2007, continued attacks and intermittent siphoning made it impossible for the Claimant to deliver the Minimum Guaranteed Throughput volumes until 2011.

146 Claimant's 13 May 2022 Submission, para 2.12.

147 Claimant's 13 May 2022 Submission, para 2.16.

148 Claimant's Reply, paras 4.4-4.13.

149 Claimant's Reply, para 4.18.

150 Claimant's Reply, paras 4.26-4.29.

b. The Claimant submitted that it met the definition of *force majeure* in Article 19 of the 1973 Agreement as a result of "*military intervention and insurgent attacks on the pipeline and repair crews*".[151] In particular, the Claimant noted by way of example:[152]

> "On June 12, 2003, September 18, 2003, and December 22, 2003 attacks were conducted in or around the ITP pipeline.
>
> On March 25, 2004, a main oil well in northern Iraq that feeds exports to the ITP pipeline was attacked, causing fire and damage.
>
> On May 24 and 26, 2004, two explosions damaged the ITP pipeline near Kirkuk.
>
> On June 6 and 9, 2004, and throughout the month of June 2004, additional attacks on the ITP pipeline or on neighbouring facilities occurred.
>
> On July 15, 2004, an explosion occurred at the ITP pipeline near Fatah, west of Kirkuk. An additional attack on the ITP pipeline on July 16 was thwarted, with minor damage.
>
> Other explosions occurred at or near the ITP pipeline, inter alia, on August 3, August 5, September 1, September 6, September 14, October 21, November 1, November 2, November 15, November 25 and December 1, 2004.
>
> Attacks on the ITP pipeline or related facilities or inputs, occurred on June 24, August 26, September 3, September 26, October 20, and October 24, 2005.
>
> Attacks on the ITP pipeline or related facilities occurred on January 25, February 2, and July 9, 2006. Attacks on security or staff took place on July 11 and 13, 2006.

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[151] Claimant's Reply, para 4.28.

[152] Claimant's Reply, para 4.22.

> Attacks on the ITP pipeline or feeder pipelines occurred on January 11 and September 18, 2007.
>
> Attacks on pipelines in Kirkuk oilfields feeding into the ITP pipeline in December 2009.
>
> In April 2010, a bomb-damaged part of the ITP pipeline in Nineveh, south of Mosul. Officials reported that "Iraq's infrastructure has come under attack frequently since 2003, hampering Iraqi efforts to boost lacklustre oil production and exports above pre-invasion levels"
>
> In March 2011, a bomb planted under the ITP pipeline in Nineveh exploded, causing further damage."

c. The *force majeure* prevented the Claimant from delivering the Minimum Guaranteed Throughput, not from delivering any crude oil at all. Therefore, the Respondent was wrong to consider that the Claimant's reduced but continued throughput created a lack of credibility around its *force majeure* invocation.

219. The Claimant submitted that the Respondent's claim for transportation fees owing for services provided in 1990 was without merit. First, the Respondent provided no evidence to support its claim other than by its expert witness, Mr Earnest, who relied on figures from the Respondent at face value.[153] Second, the figure claimed by the Respondent had already been *"decided and rejected by a panel of commissioners appointed by the Governing Council of the UNCC"* in 2001.[154]

220. In respect of the period from 2003 to 27 July 2011, the Claimant disputed that it owed any actual transportation fees. It submitted that the Respondent and Mr Earnest had incorrectly attributed the Claimant's actual transportation charges to Minimum Guaranteed Throughput fees, of which none were due as a result of the invocation of *force majeure*.[155]

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153 Claimant's Reply, para 4.31.

154 Claimant's Reply, para 4.32. See also United Nations Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment of "E1" Claims, S/AC.26/2001/18, 28 September 2001 (H-235 / CL-234).

155 Claimant's Rejoinder, paras 4.1-4.2.

221. The Claimant also considered that the Respondent's claim for reimbursement of expenses incurred by it on the Claimant's behalf was not supported by any evidence.[156] It submitted that the Respondent had not provided any detail as to the costs incurred, nor any reasoning demonstrating the Claimant's alleged obligation to pay.

4. Adverse Inferences

222. As set out in paragraph 47 above, on 16 June 2017 the Tribunal issued its Ruling on Request for Production of Documents, granting 13 of the Claimant's document requests and one of the Respondent's document requests. In response to those orders, the Respondent produced one document and claimed that a number of responsive documents were subject to confidentiality provisions and could not be disclosed without the KRG's consent. The Tribunal ordered a Special Master procedure but, according to the Claimant, the Respondent disregarded that procedure on the basis of unsolicited Swiss law opinions.[157] The Claimant highlighted that the Respondent later produced responsive documents, heavily redacted, with its own submissions and Mr Earnest's Second Expert Report.[158]

223. As a result of this failure to disclose documents or participate in the Special Master procedure, the Claimant applied to the Tribunal for adverse inferences to be drawn against the Respondent, as follows:[159]

a. Inference 1: The Heads of Agreement, the Energy Framework Agreement, and ancillary agreements contain provisions setting forth the scope of the services that the Respondent has provided to the KRG in respect of the use of the ITP facilities and the management of revenue derived from the sale of oil transported, stored and loaded through the ITP facilities.

b. Inference 2: Respondent and its State-owned companies have received direct financial benefits from the proceeds of the KRG's unauthorized sale of crude oil, for transporting,

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156 Claimant's Reply, paras 4.34-4.37.

157 Claimant's Adverse Inferences Application, para 3.8.

158 Claimant's Adverse Inferences Application, para 3.11.

159 Supplement No 1 to Claimant's Application for Adverse Inferences.

storing and loading crude oil through the ITP facilities in violation of the ITP Agreements, representing an effective (and improper) discount on the KRG's crude oil sales.[160]

c. Inference 3: The gross value that the KRG realizes from its crude oil sales from Ceyhan (even before taking into account the effective discount resulting from the improper payments made to Respondent and its State-owned companies) is less than the fair market value of that crude oil.

224. In relation to the Respondent's request that the Tribunal draw adverse inferences from the Claimant's failure to produce documents in response to Procedural Order No 8, the Claimant submitted that this claim cannot be sustained, as it is manifestly overbroad and inconsistent with the evidence.[161] The Claimant confirmed that it complied with the Tribunal's orders and conducted a diligent search. As a result of the search, it did not locate any documents that evidenced "*terms and formulae*" used by the audit board and therefore found no responsive documents to produce.[162]

225. During the New Evidence Hearing, Counsel for the Claimant also confirmed that, pursuant to the document production order contained in Procedural Order No 10, the Claimant had "*made every reasonable effort to obtain those documents. But we have shown that the ministerial enquiries obtained by Iraq in response to Procedural Order 8 confirmed that the KRG hadn't complied. And they still hadn't complied. The process hadn't moved forward*."[163]

B. Respondent's Position

226. The Respondent submitted that the Claimant itself has been in breach of the ITP Agreements for no less than 20 years. The Respondent contended that the Claimant breached the following obligations:[164]

a. to operate, manage and maintain the section of the ITP system located within Iraq;

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[160] This inference was amended based on information in the Deloitte Reports of the KRG's oil production (see Supplement No. 1 to Claimant's Application for Adverse Inferences).

[161] Claimant's 13 May 2022 Submission, para 7.1.

[162] Claimant's 13 May 2022 Submission, para 7.1.

[163] Transcript (New Evidence Hearing), Day 2, 106: 14-18.

[164] Respondent's Counter-Memorial, para 28.

b. to supply the Minimum Guaranteed Throughput of crude oil coming from Iraq;

c. to ensure the continuous flow of crude oil from Iraq through the Pipelines; and

d. to pay all of the amounts due to the Respondent under the ITP Agreements.

227. The Respondent said that the Iraqi section of the 40-inch Pipeline was damaged in 1997 and became unusable. In early March 2014, the 46-inch Pipeline was also damaged and could not be used to transport oil from Kirkuk. Neither Pipeline has been repaired, therefore the ITP system can only operate through the KRG tie-in at Fishkabur.[165] Therefore, according to the Respondent, the Claimant has failed to meet its obligations to manage and maintain the Iraqi sections of the Pipelines.

228. The Respondent submitted that for the period of 2003 to 2013, the Claimant fulfilled only 40% of its Minimum Guaranteed Throughput obligations.[166]

229. The Respondent contended that "*Iraq has failed to satisfy every major commitment that it made to Turkey when entering into the 2010 Amendment*."[167] By contrast, the Respondent has "*ensured the maintenance in good operation condition of all ITP facilities in Turkey so that they are capable of accepting throughput at all times*" in addition to purchasing equipment to repair the Iraqi section of the border and supporting staff at the Ceyhan terminal.[168]

230. The Respondent stated that, due to the Claimant's own defaults, Iraq has been unable to use either Pipeline since 2 March 2014 and, as a result, the Claimant has not been in a position to perform its obligations under the ITP Agreements since that time.[169]

231. The Respondent has denied that it is responsible for the decline and ultimate cessation of the KRG's crude oil deliveries to SOMO. Instead, it contended that the KRG was forced to pump crude oil direct to Ceyhan as a result of acts and omissions by the FGI, in particular the FGI's

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165 Respondent's Counter-Memorial, para 29.

166 Respondent's Counter-Memorial, para 30.

167 Respondent's Counter-Memorial, para 32.

168 Respondent's Counter-Memorial, para 33.

169 Respondent's Counter-Memorial, paras 34-35.

failure to pay the KRG the required amount under the various budget laws.[170] As such, it was the Claimant, not the Respondent that was responsible for the lack of crude oil supplied by the KRG to SOMO.

232. The Respondent further contended that the Claimant's assertion that the tie-in was made without the FGI's authorisation was wrong because the tie-in was constructed 600 metres from NOC's metering station. Therefore, the Claimant was aware of the construction and took no measures to block it.[171] In fact, the Respondent averred that NOC may be assumed to have collaborated with the KRG in its construction of the tie-in because the valve at the NOC's metering station would need to have been closed, and the Pipeline would need to have been drained, for the safe construction and operation of the tie-in.[172]

233. The Respondent submitted that once the KRG commenced pumping crude oil into the 40-inch Pipeline, the Respondent was obliged to keep the valve on the Turkish side open in order to ensure the continuous flow of crude oil and to prevent damage to the Pipeline and the surrounding environment.[173] The Respondent relied on the witness evidence of Mr Ulutaş, the District Manager of Petroleum Operations of BOTAŞ, to demonstrate the potential repercussions if there was insufficient crude oil flowing through the Pipelines, or if there was pressure build-up as a result of a valve being closed while crude oil is pumped from another location.[174]

234. The Respondent denied that the Ministry of Oil personnel at Ceyhan were refused access to the ITP facilities at any time.[175] Evidence from Mr Ulutaş (of BOTAŞ) was also relied upon to illustrate that the Iraqi personnel were provided with the necessary office equipment at Ceyhan.[176] The Respondent pointed out that this access was expressly appreciated by SOMO and NOC.[177]

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170 Respondent's Counter-Memorial, paras 42-50 and 54.

171 Respondent's Counter-Memorial, para 57.

172 Respondent's Counter-Memorial, para 58.

173 Respondent's Counter-Memorial, paras 63-65.

174 Ulutaş Witness Statement, paras 19-24.

175 Respondent's Counter-Memorial, para 67.

176 Ulutaş Witness Statement, para 17.

177 Respondent's Counter-Memorial, paras 68-69.

235. The Respondent alleged that the Claimant penalised the KRG for the use of the Pipelines by *"withholding from the KRG its entire share of Iraqi federal funding for 2014".*[178] The Respondent relied on the expert evidence of Professor Hamoudi to illustrate that despite the lack of a federal budget law for 2014, the KRG remained entitled to a share of federal funding under the Iraqi Constitution:[179]

> "The KRG is free to manage and sell its own oil reserves under […] the Constitution. Neither party, however, is permitted to deny the other the equitable portion of the national revenues arising from oil and gas under Article 111."

236. The Respondent submitted that the temporary agreement reached in 2014 between the KRG and the FGI effectively endorsed the use of the tie-in and the ITP facilities by the KRG.[180] The Respondent further contended that, because of SOMO's inability to export crude oil through the ITP system, an arrangement for the transport of crude oil from the KRI to Ceyhan was memorialised in the 2015 Federal Budget Law.[181] However, the relationship later broke down and, according to the Respondent, the amount of federal budget withheld from the KRG by the FGI exceeded the value of the crude oil transported by the KRG.[182] A new agreement was reached in August 2016 whereby the crude oil produced in the KRI was to be split such that half was transported to SOMO and the remaining half was to be sold by the KRG. Following this agreement, the 2017 Federal Budget Law allocated the KRG 17% of the federal budget, in exchange for facilitating the export of certain quantities of oil.[183]

237. According to the Respondent, as a result of the FGI's failure to pay for exports to SOMO prior to December 2013, along with the FGI's failure to distribute federal funding to the KRG or provide funding for the Peshmerga, the KRG was forced to export oil directly to Ceyhan in order to support regional security against ISIS.[184] The Respondent argued that this *"is no doubt an*

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178 Respondent's Counter-Memorial, para 75.

179 First Hamoudi Expert Report, para 152.

180 Respondent's Counter-Memorial, para 81.

181 Respondent's Counter-Memorial, para 82.

182 Respondent's Counter-Memorial, paras 83-84.

183 Respondent's Counter-Memorial, para 85.

184 Respondent's Counter-Memorial, paras 88-93.

important reason why the FGI has itself taken no concrete steps to prevent the KRG from using [the ITP] facilities since December 2013 and […] is currently cooperating with the KRG in relation to the transportation, storage and delivery of oil at Ceyhan".[185]

1. Respondent's Response to the Claimant's Claims

238. By way of general defences to the Claimant's claims, the Respondent contended as follows.

a. Under the ITP Agreements, the FGI controlled access to the ITP facilities in Iraq, therefore the Respondent could not be liable for the entry of Iraqi oil into the ITP system within Iraq.[186]

b. The Claimant had no legitimate claim under the ITP Agreements concerning the FGI's alleged loss of control over the Iraqi oil transported through the ITP system, as it could not demonstrate that it had exclusive export rights over the crude oil.[187]

c. The Respondent was entitled to suspend its performance of the ITP Agreements on the following grounds:[188]

i. the principle of *exception d'inexécution* under French law and a general principle of international law, that, in accordance with the concept of *exceptio non adimpleti contractus*, a party may withhold the execution of obligations in response to non-performance by the other treaty party*;*

ii. the rule codified in Article 60 of the Vienna Convention according to which a material breach of a bilateral treaty by one of the parties, entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part;

iii. the *rebus sic stantibus* principle of Article 62 of the Vienna Convention based on a fundamental change of circumstances which existed when the treaty was concluded. These changes were (a) the inability of the FGI to secure cooperation

185 Respondent's Counter-Memorial, para 93.

186 Respondent's Counter-Memorial, paras 97-104.

187 Respondent's Counter-Memorial, paras 105-114.

188 Respondent's Counter-Memorial, paras 119-160.

with the KRG which deprived the FGI of a considerable supply of oil and (b) the inability to use the Pipelines following the damage incurred in March 2014; and

iv. the Claimant has not been in a position to perform its obligations, other than through the KRG, since March 2014 due to the damage to the Pipelines. Though the Respondent maintained that the *force majeure* sought to be invoked by the Claimant was not in operation, if the Tribunal found that it was, the effect of it would be to excuse *both sides* from their obligations from 2 March 2014.

d. If the Respondent had followed the FGI's instructions, this would have placed the Respondent in breach of its *jus cogens* obligations as concerns the fight against ISIS. It contended that the ITP system was and is the main source of funding for the Kurdish Peshmerga - which the Respondent argued was the *"only military stronghold in the region"* and played a substantial role in the fight against ISIS – and therefore to instruct against using the ITP system would go against the Parties' commitment to prevent genocide.[189]

239. The Respondent's response to each of the Claimant's specific claims and the relief sought is set out in paragraphs 240-260 below.

The Transportation Claim

240. The Respondent did not deny that the KRG started pumping oil through the 40-inch Pipeline in January 2014, following completion of testing in late 2013. However, it denied that the Respondent's failure to close the Turkish section placed it in breach of the ITP Agreements.[190] According to the Respondent, the only instruction that the FGI gave the Respondent in relation to the transportation of the KRG's crude oil was to close the Turkish section of the 40-inch Pipeline.[191] The Respondent maintained that this was not a legitimate instruction under the ITP Agreements.

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189 Respondent's Counter-Memorial, para 247.

190 Respondent's Counter-Memorial, paras 166-167.

191 Respondent's Counter-Memorial, para 168.

241. First, the Respondent submitted that the Claimant did not have authority to unilaterally instruct it to close the Turkish section of the 40-inch Pipeline.[192] Article 3 of the 1976 Protocol obliges the Respondent to follow the instructions of the FGI in order to *"ensure and facilitate the transit … of crude oils coming from Iraq […] and facilitate its continuous flow and arrival at the terminal in the quantities pumped',* and does not authorise the Claimant to issue instructions to close any part of the Pipelines.[193] Further, Article 7 is related to crude oil in *"all centers of storage, disposal and at the terminal*", not the movement of oil through the Pipelines.[194] The Respondent added that it is the Claimant's responsibility to stop the oil being pumped on the Iraqi side of the border, on the basis that the Respondent's obligation is merely to ensure any oil coming across the border through the Pipelines flows continuously and arrives safely.[195] It was therefore not in breach of the ITP Agreements when it did not adhere to the instruction to close the valve.

242. Second, the Respondent submitted that even if the Claimant had authority to issue such an instruction, it acted in bad faith when it instructed the Respondent to close down the Turkish section of the Pipeline.

243. The Respondent cited French law as prohibiting the exercise of a right when its use is (a) malicious and intends to harm, (b) disproportionate, or (c) contrary to its purpose.[196] Further, under international law, treaties must be performed in accordance with the principle of good faith.[197] The Respondent noted that intention to harm a State is not required for establishing an abuse of right.[198]

244. On that basis, the Respondent considered that the instruction to close the Turkish section of the 40-inch Pipeline was an abuse of right or issued in bad faith because it was (a) contrary to the object and purpose of the treaty, (b) unnecessarily injurious to the Respondent, (c) otherwise intended to procure illegitimate benefits for the Claimant, (d) contrary to security

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192 Respondent's Counter-Memorial, para 169.

193 Respondent's Counter-Memorial, para 170.

194 Respondent's Counter-Memorial, para 171.

195 Respondent's Counter-Memorial, para 174.

196 Respondent's Counter-Memorial, para 179.

197 Respondent's Counter-Memorial, para 182.

198 Respondent's Counter-Memorial, para 189.

interests of both Iraq and Turkey and (e) contrary to the FGI's own tacit approval, by its conduct, of the KRG's use of the ITP facilities.[199] These arguments are summarised further below.

a. The object and purpose of the ITP Agreements was described as providing for the "*continuous flow*" of Iraqi oil across the Iraqi-Turkish border, with the use of as much of the capacity of the ITP system as possible.[200] As such, the direction to block the flow of crude oil conflicted with this purpose.

b. The Respondent was exposed to injury as closure of the 40-inch Pipeline would have created risk of damage to the Pipeline and subsequent environmental harm in Turkey.[201] The Respondent relied on the witness statement of Ahmet Ulutaş (District Manager of Petroleum Operations at BOTAŞ) to demonstrate this point. Mr Ulutaş stated that the continuous flow of crude oil through the Pipelines minimised the risk of internal corrosion.[202] He also considered that the closure of the Pipelines on one side while the other side continued to pump oil would expose the Pipelines to risk of explosion from pressure build up.[203] In addition, the Respondent would have lost considerable revenue from the ITP facilities, because the FGI has been unable to operate the ITP system other than through the KRG since March 2014.[204]

c. The FGI only instructed the Respondent to close down the Turkish section to encourage the KRG to deliver its oil to SOMO and not directly to the Respondent.[205] The Respondent considered that this was an illegitimate benefit and that the "*simple way*" for this to be achieved was for the FGI to pay to the KRG the sums it owed.[206]

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199 Respondent's Counter-Memorial, para 177.

200 Respondent's Counter-Memorial, para 194.

201 Respondent's Counter-Memorial, para 200.

202 Ulutaş Witness Statement, para 21.

203 Ulutaş Witness Statement, para 27.

204 Respondent's Counter-Memorial, para 201.

205 Respondent's Counter-Memorial, para 204.

206 Respondent's Counter-Memorial, para 205.

d. The FGI tacitly approved the KRG's use of the Pipelines by its own conduct when it did nothing to prevent the construction of the tie-in, which happened within the sovereign territory of Iraq.[207] In any event, the Respondent should not be blamed for the construction of the tie-in by the KRG. The FGI took no action to prevent oil being pumped from the Iraqi side of the border.[208] Further, the agreements that the FGI has entered with the KRG, which allow the KRG to use the Pipelines, contradicts its position that the KRG is an unauthorised third party.[209]

245. The Respondent further considered that it was not required to obtain the consent of the FGI to transport Iraqi oil.[210] Only the Claimant is responsible for controlling the oil on the Iraqi side of the border, not the Respondent, and the Respondent must only ensure the continuous flow of oil on the Turkish side of the border.[211]

The Storage Claim

246. The Respondent has not disputed that it did not comply with the Claimant's request to hold crude oil until further instruction was received from SOMO. However, the Respondent denied that it breached Article 7 of the 1976 Protocol when it stored the KRG's crude oil at Ceyhan.[212]

247. The Respondent contended that it was *"obvious that [the oil] needed to be stored"* once the oil in question reached Ceyhan and the Claimant did not deny this point.[213] Further, the Respondent said that SOMO did not purport to provide storage instructions under Article 7 of the 1976 Protocol, but on the basis that the oil was the property by the Republic of Iraq and therefore the FGI (through SOMO) had the sole right to issue instructions regarding its sale.[214] Thus, the storage claim was founded on the FGI's ownership right, rather than the ITP Agreements. The Respondent averred that ownership and export rights of the crude oil in

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207 Respondent's Counter-Memorial, paras 212-213.

208 Respondent's Counter-Memorial, para 215.

209 Respondent's Counter-Memorial, para 216.

210 Respondent's Counter-Memorial, para 173.

211 Respondent's Counter-Memorial, paras 173-174.

212 Respondent's Counter-Memorial, paras 219-220.

213 Respondent's Counter-Memorial, para 222.

214 Respondent's Counter-Memorial, para 223.

question are not conferred by the ITP Agreements, and determining such rights is outside of the Tribunal's jurisdiction.[215]

248. Following the issuance in February 2022 of the Case 59 Decision by the Iraqi Supreme Court, the Respondent further contended that the Tribunal should prefer the evidence of Professor Hamoudi (together with the opinion of Professor Crawford) to the reasoning of the Iraqi Supreme Court in the Case 59 Decision.[216] The Respondent criticised the Supreme Court Decision as poorly reasoned and politically motivated.[217]

The Loading Claim

249. The Respondent submitted that, as with the storage claim above, the Claimant's argument pertaining to the loading claim was based on the idea that SOMO was exclusively entitled to export crude oil from the KRI.[218] The Respondent disputed that the ITP Agreements conferred such a right.

250. The Respondent submitted that this claim should be rejected as the determination of Iraqi export rights does not fall within the jurisdiction of the Tribunal in this arbitration.[219]

The Exclusive Use Claim

251. The Respondent also denied any breach of the ITP Agreements with respect of the claim for exclusive use. It considered that only the Claimant was responsible for ensuring that the "exclusive use" it sought was enforced, not the Respondent.[220]

252. The Respondent was also of the view that the ITP Agreements did not provide for the "exclusive use" that the Claimant claimed, citing the 1973 Agreement preamble: *"[…] all kinds of crude*

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215 Respondent's Counter-Memorial, para 224.

216 Respondent's 13 May 2022 Submission, para 32. The Respondent also referred to the judgment of Butcher J in the English High Court case of *Dynasty Company for Oil and Gas Trading Ltd v. The Kurdistan Government of Iraq et al.,* [2021] EWHC 952 (Comm) (M-70).

217 Respondent's 1 April 2022 Submission, paras 108-110; Respondent's 13 May 2022 Submission, para 27.

218 Respondent's Counter-Memorial, para 228.

219 Respondent's Counter-Memorial, paras 229-230.

220 Respondent's Counter-Memorial, para 233.

oils coming from Iraq" and similar terminology as in Article 3 of the 1976 Protocol, Article 7 of the same, and Article 2.3 of the 2010 Amendment.[221]

253. The Respondent denied that it had any duty to prevent crude oil flowing from the Iraqi side of the border.[222]

The Access Claim

254. The Respondent contended that the access claim by the Claimant was *"simply wrong on its facts"*.[223] It noted that the Claimant did not produce any evidence on which it purported to base its claim, and further considered that the allegation conflicted with SOMO's acknowledgement to the contrary.[224] The Respondent said the claim should be dismissed.

2. Respondent's Response to Claimant's Request for Relief

255. The Respondent submitted that the Claimant could not claim relief because the Respondent had not breached the ITP Agreements.[225]

256. The Respondent further submitted that, in any case, the Claimant did not suffer any injury from the export of oil from the KRG through the ITP facilities. According to the Respondent, the Claimant did not lose any sale proceeds because the KRG – a constituent entity of Iraq – benefited from the sale proceeds and/or the value of that oil. As a result, if the Claimant were to be awarded compensation for the loss of such proceeds, it would effectively amount to double recovery.[226]

257. The Respondent further stated that, in the event that the Claimant could demonstrate injury, it could not show that the Respondent caused the injury. It argued that the "*but for*" scenario presented by the Claimant was not supportable because the oil being produced in the KRI

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221 Respondent's Counter-Memorial, paras 234-235.

222 Respondent's Counter-Memorial, para 236.

223 Respondent's Counter-Memorial, para 237.

224 Respondent's Counter-Memorial, paras 239-240.

225 Respondent's Counter-Memorial, para 251.

226 Respondent's Counter-Memorial, para 258.

would not necessarily have been "*handed over*" to SOMO by the KRG without due consideration.

258. The Respondent also noted Mr Earnest's third scenario which proposed that the oil could have been exported from the KRI by truck as opposed to through the Pipelines.[227] As such, the Claimant could not prove that it would have been in a better position if the Respondent had not committed the alleged breaches of the ITP Agreements.[228]

259. The Respondent relied on Mr Earnest's opinion that the Claimant's expert, Mr Traver, did not properly assess damages.[229] Therefore, the evidence presented by the Claimant regarding the fair market valuation of the crude oil in question did not add anything to the Claimant's claim for relief.

260. The Respondent added that the Claimant could not claim interest on the basis that it could not make out any losses, nor attribute those losses to the Respondent.[230] It pointed out that one of the *"but for"* scenarios presented by the Claimant itself was that the oil produced in the KRI may have remained in Iraq.[231] As such, the Claimant could not claim interest on the value of crude oil which may not have been sold. In any event, interest should be 0.90% in accordance with French law, which the Respondent contended governs this arbitration.[232]

New Evidence

261. The Respondent submitted that the New Evidence – namely the 2021 Budget Law and the Case 59 Decision – provide for a retrospective audit that will account for both the KRG's historical oil sales revenue and its entitlements to a share of the national budget. On this basis, the Respondent contended that the Tribunal should not engage in a quantum analysis which may disrupt negotiations or result in double recovery.[233] The Respondent also submitted that the

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227 Respondent's Counter-Memorial, para 274.

228 Respondent's Counter-Memorial, para 273.

229 Respondent's Counter-Memorial, paras 276-279.

230 Respondent's Counter-Memorial, para 280.

231 Respondent's Counter-Memorial, para 281.

232 Respondent's Counter-Memorial, para 282.

233 Respondent's 1 April 2022 Submission, para 4.

Tribunal should reconsider the admissibility of the Claimant's claims as a result of the New Evidence.

262. The Respondent maintained that the 2021 Budget Law demonstrates that the Claimant's alternative damages claim for the alleged discount between the KRG sales price and the SOMO price (USD 6.67 billion[234]) is based upon an implausible theory of causation. According to the Respondent, the Budget Law confirms that the FGI could not have exported the oil itself and was reliant on the KRG to export the oil.[235]

263. The Respondent was also critical of the Supreme Court's Case 59 Decision, saying it was a "*surprise ruling*" having lain dormant for years, was short and lacked coherence, and was potentially politically motivated.[236] The Respondent criticised the Claimant for not engaging properly with the Case 59 Decision, the 2021 Budget Law or with the Iraqi Constitution itself, instead using the Decision as a "*blunt tool*" without any attempt to reconcile these documents.[237] The Respondent noted that the Case 59 Decision did not invalidate the Budget Law and, indeed, requires the KRG to comply with it.[238]

264. The Respondent submitted that Article 11 of the 2021 Budget Law contains the FGI's explicit consent to the KRG's export of its own oil through the ITP system.[239] Article 11(2)(a) of the Budget Law authorises the KRG to export all the oil it produces in the KRI independently of the FGI and SOMO. In return, the KRG is obliged to transmit, in an internal accounting process, the value of 250,000 bpd at the relevant SOMO price, to the federal treasury.[240] Consequently, contended the Respondent, the Claimant can no longer credibly suggest that it maintains the right to deny the KRG the use of the ITP system or to order the Respondent to stop accepting

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234 See footnote 600.

235 Respondent's 1 April 2022 Submission, para 8.

236 Respondent's 1 April 2022 Submission, paras 108-110; Respondent's 13 May 2022 Submission, para 27.

237 Respondent's 13 May 2022 Submission, para 3.

238 Respondent's 1 April 2022 Submission, para 113; Respondent's 13 May 2022 Submission, para 29.

239 Respondent's 1 April 2022 Submission, para 86.

240 Respondent's 1 April 2022 Submission, para 176.

shipments of oil coming from the KRG.[241] The Claimant also cannot show that the Respondent caused it any damage.[242]

3. Respondent's Counterclaims

Iraq's failure to pay Minimum Guaranteed Throughput fees

265. The Respondent counterclaimed that Iraq failed to comply with its Minimum Guaranteed Throughput obligations from 2003 to 2013. The Respondent alleged that the Claimant failed to deliver the actual guaranteed throughput, and further failed to pay the fees which would have been payable in the event that the Minimum Guaranteed Throughput was not met.[243] The Respondent calculated that although the Claimant paid part of the fees owed, it remained in shortfall in the amount of USD 1,183,633,570.35.[244]

266. The Claimant acknowledged that it failed to satisfy the Minimum Guaranteed Throughput obligation, but said that it was not required to do so on the basis of its *force majeure* invocation. The Respondent submitted that the *force majeure* was not applicable for three reasons:[245]

a. the Claimant failed to identify the relevant periods of *force majeure*;

b. the Claimant failed to identify the events which it relied upon to satisfy the definition of *force majeure* in the ITP Agreements; and

c. the Claimant continued to produce and export crude oil during the periods in question, thereby its claim of *force majeure* lacks credibility.

267. The Respondent also rejected the Claimant's argument that the French law statute of limitation applied in this case, as French law did not apply to the ITP Agreements prior to entry into force of the 2010 Amendment.[246]

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241 Respondent's 1 April 2022 Submission, para 125.

242 Respondent's 1 April 2022 Submission, para 186.

243 Respondent's Counter-Memorial, paras 285-287.

244 Respondent's Rejoinder, paras 244-245.

245 Respondent's Counter-Memorial, para 293.

246 Respondent's Counter-Memorial, paras 294-295.

Iraq's failure to pay actual transportation charges

268. The Respondent's second counterclaim was that the Claimant failed to satisfy its obligations to pay charges due for actual transportation of crude oil in 1990, and from 2003 to 2013 (to the extent not addressed by fees for the Minimum Guaranteed Throughput). It relied on evidence from its expert, Mr Earnest, in claiming that the Claimant was in shortfall in the amount of USD 132,138,255.91 for these transportation charges.[247]

Failure to reimburse Turkey for fees incurred on behalf of Iraq

269. The Respondent's final counterclaim concerned the Claimant's failure to reimburse the Respondent for money spent on staff expenses for Iraqi personnel, and on obtaining equipment on behalf of Iraq for the repair of the Pipelines, in the sum of USD 3,432,131.23.

Interest

270. The Respondent claimed interest on the above amounts at the French legal interest rate, to accrue from the date the damages were incurred until such compensation is repaid by the Claimant in full.[248]

4. Adverse Inferences

271. The Respondent requested that the Tribunal draw adverse inferences against the Claimant for its failure to produce any documents in response to the document production orders contained in Procedural Order No 8, relating to the audit mechanism in the 2021 Iraqi Budget Law. [249] The Respondent submitted that the Claimant's suggestion that there are no responsive documents is untenable and was based on an unduly narrow reading of the order.[250]

272. The Respondent rejected the Claimant's contention that there were no responsive documents because the audit process had not been progressed, pointing to documents in the record that contradicted this.[251] On this basis, the Respondent contended that it was inconceivable that

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247 Respondent's Rejoinder, para 264.

248 Respondent's Rejoinder, para 274.

249 See Respondent's 1 April 2022 Submission, para 27 for the specific inferences requested.

250 Respondent's 1 April 2022 Submission, para 22.

251 See Letter from the Federal Board of Supreme Audit to the Ministry of Oil, 10 April 2022 (HM-461 / C-272); Transcript (New Evidence Hearing), Day 2, 97: 6-16.

there were no documents in existence relating to the mechanism and the formula or to the actual audit process.[252]

273. The adverse inferences requested by the Respondent were:[253]

a. The 2021 Budget Law is being implemented by the FGI and the KRG and the compromise enshrined within that law on oil revenue sharing continues to receive support from Iraq's Parliamentary majority;

b. Article 11(1) of the 2021 Budget Law's retroactive auditing mechanism seeks to resolve all prior disputes over oil revenue sharing between the FGI and the KRG for the years 2004-2020, including the relevant period of this arbitration, such that the FGI will recoup through this internal accounting all of the alleged "damages" for lost oil revenues it claims from Turkey in this case; and

c. Article 11(1)'s audit will proceed according to the Article 11(2)(a) formula, under which the KRG will assume the costs of the alleged discount to FMV, alleged excess transportation fees, and all other alleged improper payments Iraq also claims against Turkey as damages in this case.

274. In response to the Claimant's request for adverse inferences (see paragraph 223 above), the Respondent stated that the inferences sought bore no direct relevance to the Claimant's claims and were improperly being used to amend the Claimant's claims. The Respondent also reiterated that the documents that the Claimant requested were subject to strict confidentiality obligations. The Respondent submitted it would be improper to draw the adverse inferences requested, given these circumstances.[254]

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252 Transcript (New Evidence Hearing), Day 2, 98: 3-11.

253 Respondent's 1 April 2022 Submission, para 27; Letter from Respondent to the Tribunal, 10 June 2022, p.4 (D-82).

254 Respondent's Response to Iraq's Adverse Inferences Application and Supplement, 3 April 2019.

VII. PARTIES' REQUESTS FOR RELIEF

A. Claimant's relief

275. The Claimant has requested that the Tribunal grant the following relief:[255]

a. Declare that Respondent, by operating the ITP pipelines and related storage and loading facilities at Ceyhan for the benefit of the KRG and at the KRG's instruction, without regard to the instructions of Iraq, and without its authorization, is in breach of the ITP Agreements;

b. Order Respondent to cease and/or to refrain from (i) accepting into the ITP pipelines, (ii) storing, and (iii) loading, crude oil from Iraq except pursuant to the instructions of the Ministry of Oil of Iraq or its wholly-owned companies NOC and SOMO;

c. Order Respondent to make appropriate assurances and guarantees of non-repetition, i.e., that it will henceforth accept into the ITP pipelines, store and load Iraqi crude oil solely pursuant to the instructions of the Ministry of Oil or its wholly-owned companies NOC and SOMO;

d. Order Respondent to restitute to Iraq the crude oil in the Ceyhan storage tanks, or elsewhere in the ITP facilities, as of the date of the award;

e. Order Respondent to compensate Iraq for the value of the crude oil that has been pumped through the ITP pipelines from the Kurdistan Region of Iraq and loaded onto tankers in Ceyhan pursuant to the KRG's instructions, which as of 30 September 2018 would be no less than USD 30,457,196,787;[256]

f. In the alternative, order Respondent to transfer to Iraq's Oil Proceeds Receipts Account all the proceeds from the sale of crude oil exported from the Kurdistan Region of Iraq through the ITP facilities, as well as any difference between the price charged by the KRG and the price that would have been charged by SOMO, which as of July 31, 2017 (the

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255 Claimant's Reply, para 5.1.

256 This figure is claimed in Claimant's Post-Hearing Brief (para 6.32) and updates the figure in the Claimant's Reply.

latest date as of which a calculation may practicably be made) would be no less than USD 30,457,196,787 and which will be updated as the arbitration progresses;

g. Order Respondent to provide a full accounting of its diversions of the proceeds and related payments from the Iraqi crude oil transported, stored and loaded through the ITP facilities, including without limitation amounts received by Respondent or its State-owned companies as commissions, transport or other fees, financing payments, or other non-financial benefits;

h. Order Respondent to pay interest on the sums awarded at a rate equal to the yield on U.S. dollar-denominated Turkish Government bonds with a maturity date as close as possible to the award date, or such other rate as the Tribunal may deem appropriate;

i. Dismiss all of Respondent's counterclaims in their entirety;

j. Order Respondent to pay the costs of this arbitration, including all expenses that Iraq has incurred or shall incur in respect of the fees and expenses of the arbitrators, the ICC, legal counsel, experts and consultants as well as its own internal costs; and

k. Order such other or further relief to Claimant as the Tribunal may deem appropriate.

l. In its Pre-Hearing Skeleton, the Claimant also requested, in the alternative, that it is entitled to the difference between the sums that the KRG allegedly received from the oil transported, stored and loaded through the ITP facilities (after deducting improper transport fees, commissions, and other similar amounts received by Respondent and its State-owned companies), and the fair market value of such crude oil.[257]

B. Respondent's relief

276. The Respondent has requested that the Tribunal grant the following relief:[258]

a. Dismiss Iraq's case in its entirety for lack of merit;

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[257] Claimant's Pre-Hearing Skeleton, VI(6).

[258] Respondent's Rejoinder, para 275.

b. Declare that Iraq has breached its obligations to pay Turkey the amounts owed to it for transportation charges for the annual Minimum Guaranteed Throughput, actual transportation charges and expenses incurred by Turkey on behalf of Iraq;

c. Order Iraq to pay Turkey USD 1,319,203,957.49 in respect of Iraq's breaches;

d. Order that any sum to be paid by Iraq shall bear interest compound annually, at the French legal interest rate, such interest to accrue from the date that damage was incurred until the date of the payment in full;

e. Grant such additional or other relief as might be just and proper under the law; and

f. Order Iraq to pay Turkey the costs of the arbitration on a full indemnity basis, including legal costs and all fees and other expenses incurred in connection with the arbitration.

VIII. ISSUES TO BE ADDRESSED

277. The Parties each provided lists of issues to be determined by the Tribunal. These lists are attached as Appendix 2 to this Award.

278. The issues identified by the Parties fall under the following broad headings which the Tribunal has used to structure its Award:

a. Has the Respondent breached the ITP Agreements?

i. Transportation claim

ii. Storage Claim

iii. Loading Claim

iv. Exclusive Use Claim

v. Access Claim

b. In considering whether the Respondent was in breach of the ITP Agreements, was the Respondent entitled to suspend its performance of the ITP Agreements?

c. In considering whether the Respondent was in breach of the ITP Agreements, would the Respondent have violated a *jus cogens* obligation by shutting down the ITP Pipelines on the instruction of the Claimant?

d. What relief (if any) is the Claimant entitled to for any breach?

e. Has the Claimant breached the ITP Agreements by failing to pay Minimum Guaranteed Throughput fees? If so, what relief (if any) is the Respondent entitled to?

f. Has the Claimant breached the ITP Agreements by failing to pay transportation fees? If so, what relief (if any) is the Respondent entitled to?

g. Is the Respondent entitled to reimbursement of costs and expenses allegedly owed by the Claimant?

h. Interest.

279. In addition to these issues, the Tribunal must also determine: (i) the law that is applicable to the substance of the dispute; and (ii) the Respondent's submission that the Claimant's claims are inadmissible. The Tribunal addresses these two issues first.

280. The Tribunal has provided summaries of the Parties' positions for each issue. The Tribunal has had the benefit of several rounds of written and oral submissions addressing all of the issues set out above, as well as updates from the Parties and written and oral submissions on the New Evidence. For the avoidance of doubt, even if not specifically mentioned in the summary of the Parties' positions in this Award, all of the Parties' submissions and arguments have been carefully considered by the Tribunal in reaching its decisions.

IX. APPLICABLE LAW: FRENCH LAW, INTERNATIONAL LAW OR BOTH?

281. In the Jurisdiction Award, the Tribunal stated that "*all Parties agree that the law applicable to the merits of these proceedings is French law as well as international law*".[259] The Tribunal observed, however, that each side had criticised the other's lack of specificity as to which law was applicable in which circumstances.

[259] Jurisdiction Award, para 164.

282. This lack of specificity continued in the Parties' submissions during the merits phase. The Tribunal sought clarification of this point during the Merits Hearing and it became apparent that the Parties no longer agreed that both French and international law applied.[260] Consequently, before addressing the substantive claims and counterclaims in this matter, the Tribunal must determine the appliable law governing the merits of the dispute.

283. The 1973 Agreement was silent on the applicable law. The 2010 Amendment states in Article 10 (the arbitration agreement) that:

> "The arbitration place shall be Paris, France. The applicable law shall be French Law. Arbitration language shall be English."

284. The Parties disagree whether the law applicable to the merits of this dispute is international law or French law (or both).

A. Claimant's Position on Applicable Law

285. The Claimant's position, as set out during the Hearing and in its Post-Hearing Brief, is that the ITP Agreements constitute a treaty and therefore the customary international law of treaties applies to questions of interpretation, application, validity, termination and suspension. The law of State responsibility applies to breach and remedies.[261]

286. The Claimant acknowledged that parties may subject specific aspects of a treaty to domestic law, but said that treaties are nonetheless principally governed by international law.[262] It cited the Vienna Convention in support of this proposition, which defines a treaty as "*an international agreement concluded between States in written form and governed by international law*."[263]

287. According to the Claimant, treaties are not contracts and French contractual law cannot apply.[264] In particular, the French law on suspension of contracts is inapplicable. The Claimant

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260 See Transcript (Merits Hearing), Day 1, 193-195; Transcript (Closing Hearing), 40-41 and 105-106.

261 Claimant's Post-Hearing Brief, para 2.2. See also Transcript (Merits Hearing), Day 2, 30: 1-5; Transcript (Closing Hearing), 40-4; Transcript (New Evidence Hearing), Day 2, 118: 4-9.

262 Claimant's Post-Hearing Brief, para 2.3.

263 Article 2(1)(a) confirms that a treaty is governed principally by international law.

264 Transcript (Merits Hearing), Day 2, 30:6-7; Claimant's Post-Hearing Brief, para 2.3.

submitted that suspension must be governed by customary international law only.[265] Even if French law on treaties were held to apply, it simply requires the application of customary international law. Therefore, according to the Claimant, there is no practical difference between French law and international law for the purposes of this dispute.

B. Respondent's Position on Applicable Law

288. The Respondent submitted that the Claimant had performed a *volte face*, as its original position was that French law applied to the commercial aspects of the ITP Agreements, whereas international law applied to the sovereign elements of the Agreements. This reflects the Respondent's continued position.[266] The Respondent argued that the Parties' express agreement in the 2010 Amendment that French law apply must be given some effect and cannot be ignored as contended by the Claimant.

289. In contrast to the Claimant's position, the Respondent considered that there are no limitations on the freedom of contracting parties to subject a treaty to domestic law. The Respondent claimed that both French law and international law could apply harmoniously, but that French law should prevail in the event of conflict.

290. Both Parties agreed that, prior to the 2010 Amendment, international law applied to the ITP Agreements.

C. Tribunal's Analysis of Applicable Law

291. In the Jurisdiction Award, the Tribunal concluded at paragraph 165 that "[t]*he Parties have submitted, and the Tribunal agrees, that the 1973 Agreement is a treaty*."[267] In the liability phase of the arbitration, both Parties have consistently maintained that the 1973 Agreement (with its amendments and protocols) is a treaty.[268] This includes the 2010 Amendment. Both

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265 Claimant's Reply, para 2.188.

266 Respondent's Rebuttal Post-Hearing Brief, para 10.

267 Jurisdiction Award, para 165.

268 See Transcript (Merits Hearing), Day 2, 28:23-29:25; Respondent's Post-Hearing Brief, para 4.

Parties also agree that, because the ITP Agreements (together) constitute a treaty, international law is applicable to some extent.[269]

292. The difference between the Parties is that the Claimant submitted that French domestic contract law is not applicable to the interpretation, application, validity, termination or suspension of the ITP Agreements or to remedies available for breach. While French law on treaties may be applicable, the Claimant maintained that this does not vary from international law.[270] The Respondent, on the other hand, considered that French law (and international law) applies, including French contract law, and that French law should take precedence over international law in the case of conflicting provisions.[271]

293. In the following analysis, the Tribunal first considers the characterization of the ITP Agreements and, in particular, the 2010 Amendment (*i.e.,* as a contract or as a treaty) to identify the starting point for the interpretation and application of the choice of law provision. The Tribunal then considers the proper interpretation of Article 10 of the 2010 Amendment.

294. The Vienna Convention defines a treaty as "*an international agreement concluded between States in written form and governed by international law*."[272] This definition is accepted by both Parties.[273]

295. As it did in the Jurisdiction Award, the Tribunal agrees with the Parties that the 1973 ITP Agreement, with its subsequent amendments and protocols, is a treaty. Specifically, the 2010 Amendment to the 1973 Agreement constitutes a treaty between the two States.

296. In considering the 1973 Agreement, a number of factors support the conclusion that it is a treaty. These include:

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269 Claimant's Post-Hearing Brief, para 2.2; Respondent's Post-Hearing Brief, para 28.

270 Claimant's Post-Hearing Brief, paras 2.2-2.3.

271 Respondent's Post-Hearing Brief, para 32.

272 Vienna Convention, Article 2(1)(a).

273 Respondent's Post-Hearing Brief, para 35; Claimant's Post-Hearing Brief, para 2.2.

a. the preamble states that the purpose of the Agreement is to "*consolidate the good neighbourly and friendly relations existing between them and to strengthen the economic ties between the two countries*";

b. no applicable law is specified, which is consistent with treaty practice as treaties are automatically governed by international law;

c. Article 24 states that the Agreement comes into force "*on the date of the exchange of the instruments of ratification*" which is subsequent to the date of signature. Ratification, *i.e.,* the approval by a competent State authority (in many countries, a Head of State), is typical for interstate treaties, not contracts; and

d. the Agreement is signed by the Minister of Foreign Affairs for each State.

297. In the Tribunal's view, these factors are all consistent with the conclusion that the 1973 Agreement is a treaty whereby the Parties intended to create obligations under international law. Although the Parties did not register the 1973 Agreement with the United Nations (which would have put the matter beyond doubt), this is not a requirement for the existence of a treaty and does not override the clear indicators that the Parties intended to enter into a treaty.

298. The 2010 Amendment to the 1973 Agreement bears many of the same hallmarks as the original 1973 Agreement:

a. the preamble to the 2010 Amendment states that it is intended to "further consolidate the good neighbourly and friendly relations existing and to strengthen the economic ties between the two countries".

b. in the preamble, the Parties also recognise "*the important contribution of the Iraqi-Turkish crude oil pipeline system to the economies of both countries*."

c. the Amendment is said to come into force after notification from each side "*through diplomatic channels that the internal legal procedures required for entry into force … have been completed*" (Article 11).

d. it is an amendment to the 1973 Agreement, therefore all clauses in the 1973 Agreement which are not amended continue to apply unchanged.

e. the Amendment was signed by the Minister of Oil/Energy for each Party.

f. the Parties signed a "Joint Declaration" on the same day as the 2010 Amendment (19 September 2010), whereby they *inter alia*:

i. "*reemphasize the mutual interest of the two countries in the further cooperation on the transportation of the Iraqi hydrocarbon resources to Turkey and to the global markets via Turkey*"; and

ii. "*confirm their commitment that the sole sovereign authority for the exportation of Iraqi hydrocarbon resources is strictly channelled through the Iraqi Ministry of Oil …*"

299. There are some differences between the 2010 Amendment and the 1973 Agreement, particularly in relation to dispute resolution. In the 2010 Amendment, the Parties agreed that any disputes would be resolved by ICC Arbitration seated in Paris and that French law would be applicable (although the 2010 Amendment does not state to what French law applies).

300. Once again, the object and purpose of the 2010 Amendment, as expressed in the preamble, reflects wording often found in economic treaties between States. The Amendment is signed by Governmental Ministers and came into force following notifications through diplomatic channels that required internal legal procedures for entry into force to be completed. Although it is less usual for States to select an arbitral institution more commonly used to resolve commercial disputes, it is certainly not unprecedented. Neither Party has suggested that the choice of ICC arbitration undermines the Parties' intention that the ITP Agreements constitute a treaty.

301. For the reasons given above, and as agreed by the Parties, the Tribunal finds that the ITP Agreements, including the 2010 Amendment, are treaties. Accordingly, international law provides the starting point for the Tribunal's analysis regarding the applicable law.

302. Before turning to the proper interpretation of Article 10 of the 2010 Amendment, the Tribunal first considers a threshold issue, namely the extent to which international law restricts the freedom of States to select a particular law, other than international law, to govern a treaty. The Claimant submitted that a treaty must be governed principally by international law and that "*all questions relating to the interpretation, application, validity, termination and suspension of a treaty, and the consequences of its breaches,* [must] *be governed by*

international law."[274] The Respondent submitted that international law imposes no relevant limitations in the present case and that "[p]*arty autonomy is a cornerstone of international dispute settlement for States no less than for private parties.*"[275]

303. As provided in the Vienna Convention and recognised under customary international law, treaties create obligations under international law that are governed by international law. While international law applies to treaties by default, the Tribunal accepts that State parties to a treaty may agree that domestic law governs specific issues under a treaty. This occurs regularly in investment treaty law, for example, where domestic law is routinely applied when determining nationality.[276]

304. The legal authorities provided by the Parties confirm a potential role for domestic law under the Vienna Convention. For example, at the Second Session of the United Nations Conference on the Law of Treaties:[277]

> "The Committee had considered that the expression "agreement. . . governed by international law", in paragraph (a) covered the element of the intention to create obligations and rights in international law. It had also noted that States had the right to choose whether a treaty concluded by them should be governed by international law or by internal law only in so far as such choice was permitted by international law."

305. The basic premise of international law is that, subject to peremptory norms of general international law (*i.e., jus cogens*), States enjoy the freedom to enter into treaties on such terms as they see fit. States may choose to express those terms in writing in the treaty itself. At the same time, States are also entitled to incorporate an existing set of rules by reference, such as by selecting an established national legal framework to govern a particular treaty or parts of that treaty. Naturally, such a treaty remains "*governed by international law*" in the

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274 Claimant's Rebuttal Post-Hearing Brief, para 2.21; Transcript (New Evidence Hearing), Day 2, 118: 4-9.

275 Respondent's Post-Hearing Brief, para 34.

276 See C Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 McGill Journal of Dispute Resolution 1 (I-329 / RL-322).

277 Committee of the Whole, UN Conference on the Law of Treaties (Second Session, 1969), 346, para 22 (H-256 / CL-255).

sense that it continues to form part of the international order and interacts with other international law obligations according to the rules of international law.

306. The Tribunal must therefore consider what the Parties meant by their reference to French law in Article 10. In doing so, the Tribunal applies the interpretation principles contained in Articles 31-32 of the Vienna Convention. These Articles state:

> "Article 31 General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32 - Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its

conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

307. Article 10 is entitled "Dispute Resolution" and replaces Article 21 of the 1973 Agreement. It provides:

"The Sides shall take all reasonable steps to solve any dispute that may arise during the implementation and interpretation of this Amendment amicably and through cooperation spirit [sic] and shall immediately start discussing the matter with each other in order to reach a solution.

If any conflict or disparity arises between the Sides about the implementation and interpretation of this Amendment or any other issue that is not specified in the Agreement during its validity period or thereafter and if the conflict can not [sic] be resolved through amicable discussions in 4 months starting from the date the negotiations begin, that conflict shall be resolved according to the arbitration rules of the International Chamber of Commerce.

The arbitration board shall be composed of 3 arbitrators and the appointment of the arbitrators shall be carried out according to the arbitration rules of International Chamber of Commerce. Each side shall appoint an arbitrator and the two arbitrators who are appointed as mentioned above shall appoint a third arbitrator who is not a citizen of the Republic of Turkey or the Republic of Iraq.

If any one of the Sides does not appoint an arbitrator in 30 days time after arbitration request date, then the other Side may request from the International Chamber of Commerce to appoint an arbitrator. If the third arbitrator can not [sic] be determined within 30 days time after the two arbitrators are appointed then the third arbitrator (the chairman) shall be appointed by the arbitration board of the International Chamber of

> Commerce provided that the arbitrator shall not be a citizen of Republic of Turkey or Republic of Iraq.
>
> The arbitration place shall be Paris, France. The applicable law shall be French Law. Arbitration language shall be English. The charges of the arbitration process shall be determined by the arbitration board. However the charges that shall be determined shall not be more than the charges that are specified in the tariff which is issued in compliance with the rules of the International Chamber of Commerce.
>
> The award of the arbitration board shall be final and have a binding effect on the Sides." (emphasis added)

308. Article 10 is far more detailed than Article 21 of the 1973 Agreement. While Article 21 specified arbitration as the dispute resolution mechanism, it did not specify any applicable law, any administrative institution or any arbitral rules to govern proceedings. There is no dispute that international law alone governed the ITP Agreements prior to the 2010 Amendment, even though the treaty did not expressly refer to a governing law.

309. The Parties have provided no information regarding the negotiating history of Article 10 of the 2010 Amendment that might illuminate the Parties' intentions. Therefore, the Tribunal must consider the reference to the applicable law contextually and in the light of the apparent objects and purposes of the treaty as a whole. Assuming that the Parties intended to create obligations under international law, there are a number of possible interpretations of the "applicable law" reference in Article 10:

a. as originally argued by the Claimant, the Parties may have intended that French law was to govern certain commercial aspects of the ITP Agreements, with international law governing aspects that relate to the exercise of sovereign powers;[278]

b. when read in the light of the surrounding text (all of which concerns the mechanics of the dispute resolution process), the reference to French law may have been intended to

[278] Claimant's Counter-Memorial on Jurisdiction, para 2.2.

relate to the place of the arbitration – Paris. In other words, French law was intended to govern the arbitration proceedings as the law of the seat;

c. as arbitration agreements are separable from the rest of the agreement, it is also possible that the reference to the applicable law was a reference to the applicable law to the arbitration agreement itself, rather than to the substantive provisions of the ITP Agreements; or

d. as suggested by the Respondent, it is possible that the Parties intended both French and international law to apply simultaneously to the substantive obligations under the ITP Agreements, with French law taking precedence in case of conflict.

310. Interpretation of treaty provisions under the Vienna Convention requires the Tribunal take into account: (i) the ordinary meaning to be given to the terms of the treaty; (ii) the context in which the terms appear; and, (iii) the object and purpose of the treaty.[279] For the reasons explained below, the Tribunal is of the view that these factors support the conclusion that the reference to French law in the 2010 Amendment was intended to refer to the *lex arbitri*.

311. It is not surprising that the Parties chose to update the dispute resolution provisions in the 1973 Agreement. Article 10 of the 2010 Amendment reflects modern arbitral practice and provides detail around the applicable rules of the arbitration, as well as the appointment process for arbitrators, the seat of the arbitration, the language and costs. Set amongst this detail are the words the "*applicable law shall be French Law*". When read in the context of the surrounding text, all of which relates to the dispute resolution mechanism, the Tribunal finds that the most obvious and natural meaning of this phrase is that the Parties intended the applicable law of the arbitral proceedings to be French law. The entire section relates to the arbitral proceedings, which the Parties chose to seat in Paris under the auspices of the ICC. The consequence is that the *lex arbitri* – the law applicable to the arbitral proceedings – is French law and the reference to French law should be read as confirming this position.

312. In the Tribunal's view, suddenly amending the law governing all obligations contained in the ITP Agreements which had been operating since 1973 from international law to French law

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[279] Given the nature of the ITP Agreements and the question at issue (i.e., which law the Parties intended to govern the ITP Agreements), the concept of good faith interpretation is of less relevance and is therefore not considered separately.

would have been a significant change to the relationship between the Parties. The ITP Agreements had been governed by international law since 1973. A change to French law (and especially to French domestic contract law) might have significantly altered the Parties' rights and obligations under the Agreements. To suggest that such a major change was made by the inclusion of a passing reference to French law in the middle of the arbitration clause is surprising, to say the least. If this had been the Parties' intention, the Tribunal would expect a change of this nature to be set out in a new (separate) governing law clause which included detail as to the interaction between international law and French law and transitional provisions between the two governing laws.

313. The Tribunal's preferred view – that French law refers to the *lex arbitri* – is also consistent with the object and purpose of the ITP Agreements which was to "*consolidate the good neighbourly and friendly relations existing and to strengthen the economic ties between the two countries.*" This language is consistent with a treaty between sovereign States and it would be unusual to subject a relationship like that to foreign domestic law. The sovereign nature of the relationship is emphasised by the fact that it is the Iraqi Ministry of Oil that provides instructions in relation to Iraqi oil. This view is consistent with the Iraqi Supreme Court's Case 59 Decision which stated that "*the oil and gas throughout Iraq are owned by the Iraqi people*."[280] In this context, it would seem strange to choose a foreign domestic law to govern the treaty and, by extension, the actions of government Ministries and Ministers in relation to natural resources.

314. On this basis, the Tribunal finds that: (i) the 2010 Amendment did not amend the governing law of the ITP Agreements; and (ii) international law continues to govern the ITP Agreements.

315. While the Tribunal has concluded that the ITP Agreements are governed by international law, as the Parties have carefully analysed French law and expressed views as to its applicability, the Tribunal has also considered those views in its analysis below, particularly in relation to the Respondent's affirmative defences.

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[280] Case 59 Decision, 15 February 2022, p.12 (HM-443 / C-266).

X. ADMISSIBILITY OF CLAIMS

A. Parties' submissions on admissibility of claims

316. The Respondent submitted that the Tribunal should reconsider its admissibility findings in the Jurisdiction Award in light of the New Evidence (specifically, the 2021 Budget Law and the Case 59 Decision) filed by the Parties in 2022. The Respondent relied on a legal opinion from Professors Schreuer and Binder in support of this submission.[281] The Respondent averred that the 2021 Budget Law and the Supreme Court Decision raised new and serious questions about whether the Tribunal can or should exercise its jurisdiction over this case and admit the Claimant's claims at all.[282] This submission was based on a change in the factual situation, with the result that: (i) the Tribunal cannot contribute meaningfully to resolving the issues; (ii) the KRG is an indispensable party; and (iii) recent developments show the claim is an abuse of process (this is essentially a domestic dispute between the FGI and the KRG).[283]

317. The Respondent maintained that the *res judicata* doctrine does not apply, as its submissions are based on new factual evidence not available at the time of the Jurisdiction Award.[284]

318. The Claimant rejected the Respondent's assertion that admissibility (decided in the Jurisdiction Award) should be re-opened, asserting that the issues are *res judicata*.[285] The Claimant submitted that the Legal Opinion of Professors Schreuer and Binder is based on errors of fact and that the Professors' analysis of the application of the "*indispensable third party*" doctrine is flawed. The Claimant also criticised Professors Schreuer and Binder for failing to disclose associations with the Respondent and its Counsel (including prior work on this matter) in their Opinion.[286]

319. The Claimant further rejected the Respondent's assertions that, at a minimum, the Tribunal should not engage in any form of quantum analysis in this Award so as to allow the audit

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281 Respondent's 1 April 2022 Submission, para 9.

282 Respondent's 1 April 2022 Submission, para 30.

283 Respondent's 1 April 2022 Submission, para 33.

284 Respondent's 10 June 2022 Submission, para 6.

285 Claimant's 13 May 2022 Submission, para 4.3.

286 Claimant's 13 May 2022 Submission, para 4.36.

process in the 2021 Budget Law to proceed. The Claimant contended that this would be wasteful of costs and was fundamentally contrary to the rule of law principle in circumstances where both Parties have agreed to arbitrate the dispute.[287]

B. Tribunal's analysis of admissibility of claims

320. The Tribunal has already determined the admissibility of the Claimant's claims in the Jurisdiction Award. The Tribunal finds that nothing in the New Evidence justifies reopening its previous decisions on admissibility and jurisdiction contained in the Jurisdiction Award. Even if the Tribunal were to re-open those decisions based on the New Evidence, the Tribunal considers that it would come to the same conclusions as contained in the Jurisdiction Award. In other words, the Respondent's arguments on the admissibility of the Claimant's claims (addressed in this Award) would once again be rejected, as they were in 2016.

321. The Tribunal has considered the recent legal opinion of Professors Schreuer and Binder dated 31 March 2022. However, as stated, the Tribunal is not convinced that the New Evidence (specifically, the 2021 Iraqi Budget Law and the Case 59 Decision) provides a sufficient basis on which to reopen issues already decided after comprehensive analysis in the Jurisdiction Award. In particular, the 2021 Budget Law provides for an audit mechanism to resolve differences between the FGI and the KRG as to allocation of funds within Iraq, as a matter of Iraqi law. This does not affect the question of whether the Respondent has breached its obligations to the Claimant under the ITP Agreements – an international treaty. The Tribunal does not agree with the Respondent that a ruling on breach of the ITP Agreements would prejudice the application of the audit mechanism in the 2021 Budget Law, nor does the existence of that mechanism render a ruling on breach otiose.

322. Similarly, the Tribunal also does not agree with the Respondent that quantum issues should be left undecided. The Respondent relied on the *Northern Cameroons* and *Nuclear Tests* cases in support of its position.[288] The Tribunal considers those cases to be distinguishable, as in both cases the International Court of Justice found that the object of the litigation concerned a

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[287] Claimant's 13 May 2022 Submission, para 1.7 and 6.33.

[288] Respondent's 1 April 2022 Submission, paras 38-40.

future factual scenario, whereas this arbitration is primarily a claim for damages for past conduct (albeit with ongoing implications for future conduct).

323. The Tribunal recalls that the Respondent applied for a number of adverse inferences to be drawn from the Claimant's failure to disclose documents relating to the internal audit required by the 2021 Budget Law. The Claimant maintained that it did not have any responsive documents to provide because the audit was not progressing, but the Respondent has asked that an inference be drawn that the 2021 Budget Law is being implemented (see paragraph 273 above). Although it would not change the Tribunal's reasoning here, the Tribunal clarifies (for the avoidance of doubt) that it declines to draw the adverse inferences sought by the Respondent. Given that there is no evidence that the audit process has substantially progressed, the Tribunal accepts the Claimant's explanation that it does not have any documents to disclose and finds that it is unable to draw any adverse inferences from this position, let alone those contended by the Respondent.

324. Whether or not the KRG is required to be a party to this dispute is, again, a question that the Tribunal has already addressed in the Jurisdiction Award, where it rejected the Respondent's submission. The Tribunal cannot see how the 2021 Budget Law or the Case 59 Decision changes that position. This arbitration is between two States – Turkey and Iraq – under an international agreement to which the KRG is not a party. While the FGI represents Iraq, it is not a party in the case - the Republic of Iraq is the Claimant. The KRI is part of the Republic of Iraq and is not required to be represented separately. This was acknowledged by the Parties during the New Evidence Hearing.[289] The Tribunal does not find the Respondent's argument that the KRG is not represented because its officials were not in the hearing room to be compelling.[290]

325. Finally, the Tribunal considers that any internal dispute within the Republic of Iraq cannot mean that it is an abuse of process for that State to seek to enforce its rights under an international treaty against a foreign State.

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[289] See Transcript (New Evidence Hearing) Day 2, 43: 6-19 and 64: 4-11.

[290] Transcript (New Evidence Hearing) Day 2, 78:6 – 80:1.

326. The Tribunal dismisses the Respondent's request to reconsider the admissibility findings made by the Jurisdiction Award.

XI. IRAQ'S CLAIMS FOR BREACH OF THE ITP AGREEMENTS

327. The Claimant has claimed that the Respondent is in breach of provisions of the ITP Agreements relating to the transportation, storage and loading of crude oil through the ITP facilities. Although the Claimant pleaded these claims as three separate issues, they are so closely connected that the Tribunal has found it more efficient to address all three claims together.

A. Relevant Provisions of the ITP Agreements

328. The Tribunal begins by setting out the provisions of the ITP Agreements relevant to the transportation, storage and loading claims.

329. Article 1 of the 1973 Agreement (as amended by Article 2 of the 2010 Amendment) contained a reciprocal undertaking that each Party would assume responsibility for ensuring the functioning of that part of the ITP system that was located within its own territory:

> "Each of the two Sides guarantees to operate, maintain, manage and finance, and to provide all requirements for the part of the system located within its own territory to transport Crude Oil through the pipelines across Iraqi and Turkish territories and to deliver into Ceyhan terminal on the Mediterranean shore."

330. Article 13 of the 1973 Agreement obliged the Claimant to act to ensure the continuous flow of crude oil through the ITP System:

> "Subject to the provisions of this Agreement, the Iraqi side starting from the date of operation of the project and for the whole duration of this Agreement guarantees to take all measures required for the continuous flow of Iraqi crude oils across the Iraq - Turkey border, and to give priority to the lifting of the crude oils purchased by Turkey in accordance with this Agreement."

331. In a similar vein, both the 1973 Agreement and the 1985 Addendum required the Claimant to use best endeavours to utilise the full capacity of the pipeline system.[291]

332. Article 3 of the 2010 Amendment, which amended the 1985 Addendum, provides that:

> "The Iraqi Side undertakes to deliver the following Minimum Guaranteed Throughput to the Turkish side via the ITP:
>
> - 22 MTA for the year 2010;
> - 27 MTA for the year 2011;
> - 32 MTA for the year 2012;
> - 35 MTA for the year 2013 and beyond.
>
> If the existing 70.9 MTA throughput capacity of the pipeline is reduced to a quantity for any reason that is not attributable to the Turkish Side, the Minimum Guaranteed Throughput that the Iraqi Side shall deliver to the system nevertheless remains as above. Nothing, except force majeure conditions that are mentioned in the Agreement and this Amendment, shall prevent the Iraqi Side from complying with its commitments as provided in this Article. The Minimum Guaranteed Throughput shall remain valid throughout the validity period of this Amendment."

333. Reinforcing Article 3, Article 4.5 of the 2010 Amendment (amending the entire text of Article 9 of the 1973 Agreement) provides that "*Except force majeure conditions hereby defined, the amount to be paid to the Turkish side by Iraqi side in a calendar year shall not be less than the transportation charge for Minimum Guaranteed Throughput*."

334. Article 3 of the 1976 Protocol sets out the requirement for the Respondent to operate the ITP facilities in accordance with the instructions and requirements of the Claimant. Pursuant to this Article, the "*Turkish Side*" undertakes:

> "a. To ensure and facilitate the transit, loading and export of crude oils coming from Iraq across Turkish territory and to ensure and facilitate its continuous

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[291] See 1973 Agreement, Art. 11(1); 1985 Addendum, Art. 2(1).

> flow and arrival at the terminal in the quantities pumped in accordance with the instructions and requirements of the Iraqi side.
>
> b. To ensure pumping and tanker loading operations for crude oils coming from Iraq in accordance with the instructions and requirements of the Iraqi side."

335. Article 7 of the 1976 Protocol provides that:

> "Since the Turkish side undertakes the transport, pumping and loading operations within Turkish territory, it shall adhere to the instructions of the Iraqi side in relation to the movement of crude oil coming from Iraq in all centers of storage, disposal and at the terminal."

336. In accordance with Article 9 of the 1976 Protocol, all tankers were to be nominated and scheduled by the Iraqi Side.[292]

337. Article 2.3 of the 2010 Amendment amended Article 17, paragraph 2 of the 1973 Agreement as follows:

> "The Turkish Side guarantees to load all the Crude Oil coming from Iraq to the tankers that will be instructed by the Iraqi Side without delay and to do the necessary port and customs formalities for the departure of the tankers from the port."

338. "Iraqi Side" is defined in Article 1 of the 2010 Amendment as "the Ministry of Oil of the Republic of Iraq".

339. Article 2.4 of the 2010 Amendment amended Article 3 of the 1973 Agreement as follows:

> "The Pipeline system, tanks and other terminal facilities subjected to ITP shall exclusively be assigned to transport and load the Crude Oil coming from Iraq. However if for a certain period of time, there is a substantial idle capacity in the system, the two Sides shall meet to investigate the possibility of and agree upon the rendering of the storage and pier loading services by BOTAŞ to 3rd parties who are not a party to this Amendment provided that such transactions shall not affect the proper operation of the system and in no

[292] Claimant's Memorial, para 5.14.

way limit the right of the Iraqi Side for the utilization of the full capacity of the system for the transportation of Crude Oil coming from Iraq."

B. Transportation, Storage and Loading Claims

1. Claimant's submissions on Transportation, Storage and Loading Claims

340. The Claimant submitted that the Respondent has been in breach of the ITP Agreements since late 2013 by transporting, storing and loading Kurdish crude oil contrary to the express instructions of the Iraqi Ministry of Oil.[293] The Claimant contended that the ITP Agreements require the Respondent to operate the Pipelines in accordance with the instructions of the Iraqi Side – defined as the Iraqi Ministry of Oil – and the Respondent's failure to do so is a clear breach of the Agreements.

341. The Claimant stated that the principal functions to be performed under the ITP Agreements after the construction of the ITP facilities was completed are to: (i) transport crude oil from Iraq to Ceyhan; (ii) store such crude oil in tanks at the Ceyhan facility; and (iii) load such crude oil onto tankers docking at Ceyhan for that purpose. All of this is to take place exclusively upon the instructions of the Iraqi Ministry of Oil.[294]

342. According to the Claimant, there is no dispute about the relevant facts. In November 2013, the Respondent and the KRG entered into an Energy Framework Agreement which included provisions relating to the transport of oil through the 40-inch Pipeline. The tie-in to the 40-inch Pipeline at Fishkabur pumping station (around 3 kilometres from the Turkish border) was completed by the KRG on 17 September 2013, with testing of oil transportation beginning around November 2013. Following tests, oil began to be regularly pumped into the Pipeline by the KRG from the beginning of January 2014.[295] This oil was transported to Ceyhan where it was stored in tanks 601-607, which the Respondent reserved for the KRG.

343. The Claimant maintained that the Respondent not only transported, stored and loaded Kurdish crude oil in accordance with the KRG's instructions (not those of the Ministry of Oil), but also

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293 Claimant's Memorial, paras 5.9-5.10.

294 Claimant's Memorial, para 5.1.

295 Letter from SOMO to BOTAŞ, 5 January 2014 (HM-214 / C-7).

ignored explicit instructions from the Ministry of Oil, including that the Respondent was to hold the crude oil at Ceyhan "*to its order*".[296] According to the Claimant, Respondent chose to ignore that clear instruction in May 2014, and since that time has loaded numerous shipments of oil, as and when instructed by the KRG while disregarding of Claimant's repeated objections.[297]

344. The Claimant submitted that these uncontested facts prove the Respondent's breach of the ITP Agreements.

345. The Claimant rejected the Respondent's contention that this claim depends on an issue of control over the crude oil under Iraqi domestic law. On the contrary, the Claimant submitted that the ITP Agreements confer the right of "control" on the Claimant by explicitly granting the Ministry of Oil the right to give instructions relating to: (i) transporting crude oil; (ii) determining all movements of crude oil in the storage and loading facilities; (iii) designating the tankers onto which the crude oil must be loaded. According to the Claimant, the issue of control is based upon the ITP Agreements and not Iraqi law or ownership. Any question as to export rights under Iraqi domestic law is therefore irrelevant.[298] However, to the extent that Iraqi domestic law is relevant, the Claimant maintained that the Iraqi Supreme Court has now definitively addressed the issue in the Case 59 Decision, ruling that the KRG's hydrocarbon law breaches the Iraqi Constitution.[299]

346. The Claimant submitted that the Respondent had "*read in*" obligations that were not present in the ITP Agreements when it contended that the Claimant had a duty to ensure non-Iraqi oil did not enter the Pipelines on the Iraqi side of the border.[300] The Claimant rejected the Respondent's interpretation, as the Claimant's only obligations were to keep the Pipelines in good working order – subject to *force majeure* – and operate them so that oil could be transported through them.[301]

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296 Claimant's Memorial, paras 5.12-5.13.

297 Claimant's Memorial, para 5.16.

298 Claimant's Reply, para 1.7.

299 Claimant's 1 April 2022 Submission, paras 2.16, 3.6 and 4.6.

300 Claimant's Reply, para 2.53.

301 Claimant's Reply, para 2.56.

347. Finally, the Claimant noted that the New Evidence did not impact or change its claims in the arbitration, as it is not necessary for the Tribunal to rule on the question of oil ownership or export rights as between the KRG and the FGI in order to determine these claims under the ITP Agreements.[302]

2. Respondent's Submissions on Transportation, Storage and Loading Claims

348. The Respondent contended that there is no merit to these claims and denies liability based on (i) general defences to all claims and (ii) specific defences to each of the claims. The Respondent's general defences are addressed in Section XII below. In this section, the Tribunal considers the Respondent's specific objections raised in relation to the transportation, storage and loading claims.

349. The Respondent did not dispute that from January 2014 the KRG pumped oil into the 40-inch Pipeline via the tie-in near the Fishkabur metering station on the Iraqi side of the border. The Respondent also acknowledged that between January and May 2014, the FGI objected to the use of the 40-inch Pipeline for the transportation of the KRG's oil and instructed the Respondent to close the Pipeline. The Respondent acknowledged that it did not do so. However, the Respondent disputed that any breach of Articles 3 or 7 of the 1976 Protocol had occurred.[303]

350. According to the Respondent, the FGI's only proper "instruction" to Turkey was to close the 40-inch Pipeline within Turkish territory in February 2014. This would have stopped the flow of KRG oil through that Pipeline. Had this instruction been followed, the entire ITP system would have been inoperable from March 2014, when the 46-inch Pipeline became disabled.[304] The Respondent also noted that, from November 2014, the FGI and the KRG entered into a series of agreements that expressly provided for, and required, the KRG's use of the ITP system.[305]

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302 Claimant's 1 April 2022 Submission, paras 1.3 and 1.16. See Jurisdiction Award, paras 161-162.

303 Respondent's Counter-Memorial, para 166.

304 Respondent's Counter-Memorial, para 168.

305 Respondent's Skeleton Submission, paras 5 and 13; Respondent's Counter-Memorial, para 177.

351. The Respondent disputed that the Claimant had the right to unilaterally request closure of the Turkish section of the Pipeline.[306] According to the Respondent, the Claimant's claim is premised on the FGI having the right under Articles 3 and 7 to instruct the Respondent to close the Turkish section of the 40-inch Pipeline so as to prevent its use by the KRG. The Respondent contended that the Claimant has no such power or right to shut down the entire ITP infrastructure.[307] The Articles provide the FGI with the ability to issue instructions consistent with the purpose of ensuring the continuous flow of oil.

352. The Respondent also highlighted that Articles 3 and 7 of the 1976 Protocol do not require Turkey to seek the FGI's consent to transit Iraqi oil through the Pipelines, as the flow of Iraqi oil into the Pipelines is the Claimant's responsibility under the Agreements.[308] It was therefore the FGI's responsibility to stop the KRG from pumping oil into the Pipelines within Iraqi territory if it objected to this practice. The Respondent's responsibility was to ensure the flow of oil and any instructions "*were only intended to permit the satisfactory implementation of that objective.*"[309]

353. Even if the Claimant had the right under the ITP Agreements to instruct the Respondent to close the 40-inch Pipeline, the Respondent submitted that the Claimant's instructions were in bad faith and were contrary to the object and purpose of the ITP Agreements.[310] This is because the instructions were a) contrary to the object and purpose of the treaty, b) unnecessarily injurious to Turkey, c) otherwise intended to procure illegitimate benefits for Iraq, d) contrary to security interests of both Iraq and Turkey and e) contrary to the FGI's own tacit approval, by its conduct, of the KRG's use of the ITP facilities.[311]

354. In relation to the storage and loading claims, the Respondent denied any wrongdoing saying that the Claimant's position appears to be based on an assumption that SOMO was entitled to instruct the Respondent on the storage and loading of KRI crude oil under the ITP

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306 Respondent's Counter-Memorial, paras 169 and 190.

307 Respondent's Skeleton Submission, para 36.

308 Respondent's Counter-Memorial, para 173.

309 Respondent's Counter-Memorial, para 174.

310 Respondent's Skeleton Submission, para 41.

311 Respondent's Counter-Memorial, para 177.

Agreements.[312] The Respondent averred that SOMO's instruction to hold the crude oil at Ceyhan until receipt of further instructions from SOMO was not based on Articles 3 and 7 of the 1976 Protocol, but was premised "*on a claim of ownership by Iraq over the crude oil being stored by Turkey and SOMO's purported exclusive right to sell or dispose of that oil*."[313] The Respondent argued that it could not be required to hold the oil to the order of the FGI, without the FGI establishing that it was legally entitled to control or export that oil.[314] According to the Respondent, this amounted to the Claimant appropriating oil produced for the KRG by international oil companies.[315] In the Respondent's submission, the storage and loading claims were effectively claims relating to the ownership of the oil pumped into the Pipeline by the KRG.

355. The Respondent submitted that, through Article 11 of the 2021 Budget Law, the FGI recognised the KRG's right to independently export oil it produces and established a mechanism to comprehensively and retrospectively settle financial claims with the KRG dating back to 2004. The Case 59 Decision by the Iraqi Supreme Court does not disturb this settlement, and in fact also calls for a settlement of claims between the FGI and KRG. According to the Respondent, these developments have a direct impact on Iraq's claims in these proceedings.[316]

3. Tribunal's analysis of Transportation, Storage and Loading Claims

356. The Tribunal begins by noting that many key factual matters are agreed by the Parties. These include:

a. the 40-inch Pipeline was not operational in Iraq when the 2010 Amendment was signed and had not been repaired at the time the alleged breaches began;

b. the KRG's tie-in was connected to the 40-inch Pipeline on 17 September 2013, and the KRG commenced testing by pumping test quantities of crude oil through the tie-in and into the 40-inch Pipeline around November 2013;

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312 Respondent's Counter-Memorial, paras 224 and 228.

313 Respondent's Counter-Memorial, para 224.

314 Respondent's Counter-Memorial, para 225.

315 Respondent's Skeleton Submission, para 54.

316 Respondent's 1 April 2022 Submission, para 55.

c. the KRG began pumping oil through the Pipeline (other than for testing purposes) from January 2014. The Respondent transported, stored and loaded this oil in accordance with the KRG's instructions;

d. the Claimant did not meet its MGT obligations between July 2011 (when the 2010 Amendment came into force) and the end of 2013; and

e. since the attack on the 46-inch Pipeline on 2 March 2014, the portion of the 46-inch Pipeline located in Iraq has been unusable.

357. On this basis, there is no need for the Tribunal to determine whether or not the Respondent transported, stored and loaded crude oil on instruction from the KRG, using the ITP facilities from January 2014. Both Parties have accepted that this happened. As stated by the Claimant in its Rebuttal Post-Hearing Brief, "*[i]t is uncontested that Turkey transported, stored and loaded oil through the ITP facilities on the KRG's instructions, and contrary to the Ministry of Oil's instructions, since December 2013.*"[317] The issue before the Tribunal is whether, in doing so, the Respondent breached the ITP Agreements.

358. As noted above, the KRG connected its pipeline to the 40-inch Pipeline via the "tie-in" on 17 September 2013. According to the Claimant, the Respondent opened the valve on the Turkish side so that oil could flow through the 40-inch Pipeline on 30 December 2013,[318] although the Respondent contended that the valve had always been open.[319] There is also ample evidence to show that the Ministry of Oil objected to the KRG oil being transported, loaded and stored using ITP facilities and requested that the Respondent cease to do so except as instructed by the Iraqi Ministry of Oil. Between December 2013 and May 2014, NOC/SOMO wrote several letters to BOTAŞ regarding the oil being pumped into the 40-inch Pipeline by the KRG.

359. The Tribunal sets out below the communications between the Iraqi Ministry of Oil (including NOC and SOMO) and BOTAŞ.

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317 Claimant's Post-Hearing Rebuttal Brief, para 1.

318 Claimant's Memorial, para 4.34.

319 Respondent's Counter-Memorial, para 63.

a. 31 December 2013: On behalf of the Iraqi Ministry of Oil, NOC expressed concern that BOTAŞ had opened the 40-inch Pipeline valve at the border "*without reason*". NOC requested that, if there was an emergency or an abnormal situation, BOTAŞ inform NOC immediately. NOC's communication (and all subsequent communications from NOC) was sent on letterhead stating "Ministry of Oil – North Oil Company" and bearing the Iraqi State crest.[320]

b. 5 January 2014: SOMO wrote to BOTAŞ expressing its surprise and disappointment that the Respondent was pumping Kurdish oil without Iraq's consent and ignoring previous letters in this regard. The Ministry of Oil reminded the Respondent of its commitments under Art 2.4 of the 2010 Amendment and the Joint Declaration and requested that Turkey immediately stop pumping KRI oil without consent.[321]

c. 6 January 2014: NOC wrote to BOTAŞ describing quantities of KRI oil that had been pumped through the 40-inch Pipeline and stored at Ceyhan. NOC said in the letter that it had been informed by BOTAŞ officials that storage tanks 601 – 607 at Ceyhan had been allocated to store KRI oil. NOC protested that the oil belonged to Iraq and that the Turkish Side had no right to involve itself with that oil. NOC informed BOTAŞ that these acts violated the ITP Agreements and asked the Respondent to comply with its legal obligations under the Agreements.[322] This letter and NOC's letter of 5 January 2014 were also sent by the Ministry of Oil to the Turkish Ministry of Energy.[323]

d. 9 January 2014: NOC wrote to BOTAŞ noting it had received no response to its letter of 6 January 2014 and that BOTAŞ may deal with Iraqi oil "*only under the approval and authorization of the Federal Government of Iraq … other acts are to be considered completely illegal and totally unacceptable*." NOC said that continuation of using the 40-inch Pipeline and tanks 601-607 in violation of instructions from the Iraqi Side would

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320 Letter from NOC to BOTAŞ, 31 December 2013 (HM-208 / C-52).

321 Letter from SOMO to BOTAŞ, 5 January 2014 (HM-214 / C-7).

322 Letter from NOC to BOTAŞ, 6 January 2014 (HM-215 / C-8).

323 Letter from Iraqi Ministry of Oil to Turkish Ministry of Energy and Natural Resources, 15 January 2014 (HM- 221 / C-100).

leave Iraq with no choice but to take action to ensure compliance with the ITP Agreements.[324]

e. January 2014: The Ministry of Oil issued a statement expressing its disapproval of the unauthorized exports, and stating that it: "*direct*[ed] *our strong protest to the Turkish Ministry of Energy and Mineral Resources and Botaş for making* [the] *Iraqi-Turkish pipeline network accessible to others, by allowing pumping and storing the crude produced from Kurdistan to use the network without the consent of the Iraqi Federal Government*."[325] The Ministry of Oil stated that these actions are a violation of the ITP Agreements and that it will take legal action against those who "*collaborate in such wrongdoing*."

f. 16 January 2014: At a meeting between representatives of NOC, SOMO and BOTAŞ, BOTAŞ represented that the Kurdish oil was being pumped through the 40-inch Pipeline so as to transfer water that had built up in Pipeline to Ceyhan. BOTAŞ explained that the operation would end once the water reached Ceyhan.[326]

g. 27 January 2014: Representatives of the Iraqi Ministry of Oil met with representative of the Turkish Ministry of Energy. The minutes of the meeting record that the Iraqi representatives reiterated Iraq's grievances as set out in the letters described at paragraph 359(a)-(f) above. Turkish representatives noted that quantities of oil from the KRI aimed to raise the export capacities to maximum, and the actions taken were only for hydrostatic testing purposes. The Turkish representatives also confirmed that any sale process in the future would not happen without the permission of the Iraqi government.[327]

h. 18 February 2014: SOMO sent a letter to BOTAŞ advising that transporting oil through the 40-inch Pipeline without instruction from the Iraqi Side was a violation of the ITP Agreements. SOMO instructed BOTAŞ to "*cease all transportation of crude oil through*

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[324] Letter from NOC to BOTAŞ, 9 January 2014 (HM-218 / C-9).

[325] Iraq Ministry of Oil, Press release: Announcement Regarding Kurdistan Ministry of Natural Resources Sale of the First Crude Oil Shipment, January 2014 (HM-211 / C-98).

[326] Minutes of Meeting between NOC, SOMO and BOTAŞ, 16 January 2014 (HM-222 / C-99).

[327] Minutes of Meeting on 27 January 2014 (HM-231 / C-13).

the ITP, except upon the express written instruction of SOMO" and to "*close immediately the portion of the 40-inch pipeline that lies in the territory of the Republic of Turkey and take all measures necessary to prevent the transportation of crude oil through that pipeline unless and until you have written authorization from the Iraqi Side*." SOMO advised that all crude oil currently stored at Ceyhan was the property of Iraq and instructed BOTAŞ "*to hold such crude oil in storage at Ceyhan until receipt of further instruction from SOMO*."[328]

i. 20 February 2014: The Director General of the Legal Directorate of the Ministry of Oil in Iraq then wrote to the Turkish Minister of Energy and Natural Resources further to all previous correspondence and to meetings that had taken place in Ankara and Ceyhan on 27-28 January 2014. He said that:[329]

> "… it has been reported that the Turkish Side has permitted parties other than the Iraqi Side to use the Pipeline to transit crude oil; failed to account to the Iraqi Side for these uses of the Pipeline; and prevented the Iraqi Side from exercising its rights to control storage and loading.
>
> By accepting and transporting crude oil, and allocating storage capacity for such crude oil, at the instructions of a party other than the Government of Iraq … each of these acts would be a breach of the ITP Agreements.
>
> We understand … that loading of crude oil stored at Ceyhan … has not yet commenced, but that it may commence in the future. Such loading, without the consent of the Ministry of Oil of Iraq, would constitute a further breach of the ITP Agreements."

j. 25 February 2014: SOMO wrote to BOTAŞ recalling the storage breach and stating that BOTAŞ is "*instructed to make available all storage capacity for the Iraqi Side, and to ensure that all Iraqi crude oil currently stored in tanks 601, 602, 603, 604, 605 ,606 and 607 is held strictly to SOMO's order*." The letter also reminded BOTAŞ that it had been

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328 Letter from SOMO to BOTAŞ, 18 February 2014, (HM-228 / C-10).

329 Letter from the Legal Directorate of the Iraqi Ministry of Oil to the Turkish Minister of Energy and Natural Resources, 20 February 2014 (HM-229 / C-11).

instructed to (i) cease all transportation of crude oil through Pipelines other than on instruction from SOMO; (ii) close the 40-inch Pipeline; and (iii) take all measures necessary to prevent the transportation of crude oil through the 40-inch Pipeline except as instructed by SOMO.[330]

k. 25 March 2014: BOTAŞ wrote to SOMO denying any breach of ITP Agreements and noting that the operation of the Pipelines within Iraq is not within the means of BOTAŞ. BOTAŞ also informed SOMO that Iraq had not fulfilled its obligations with regard to the payment of the Minimum Guaranteed Throughput obligations under the ITP Agreements.[331]

l. 7 April 2014: SOMO responded to BOTAŞ stating that BOTAŞ's failure to follow the instructions of the Iraqi Side did not relate to the operation of the Pipelines in Iraq and that it must cease all violations of the ITP Agreements immediately.[332] The letter went on to note that SOMO understood that transportation of crude oil from the KRG had stopped over the last several days and requested BOTAŞ's confirmation that this cessation was permanent. Once confirmed, SOMO would then address the issue of storing and loading oil already at Ceyhan. SOMO stated that all of these issues must be resolved in order to avoid arbitration.

m. 11 April 2014: The Turkish Ministry of Energy wrote to the Iraqi Ministry of Oil stating that all oil coming through the ITP system from Iraq is considered "Iraqi oil" under the ITP Agreements. In particular, all oil from KRG fields transported in 2009, 2011 and 2012 was treated this way. Turkey reiterated that any problems on the Pipelines that have occurred within Iraq are Iraq's responsibility and "not within the responsibility and the authority of the Turkish side."[333]

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330 Letter from SOMO to BOTAŞ, 25 February 2014 (HM-230 / C-12).

331 Letter from BOTAŞ to SOMO, 25 March 2014 (HM-238 / C-14).

332 Letter from SOMO to BOTAŞ, 7 April 2014 (HM-239- / C-15).

333 Letter from the Turkish Ministry of Energy and Natural Resources to the Iraqi Ministry of Oil, 11 April 2014 (HM-241 / C-38).

n. 21 May 2014: Both NOC and SOMO sent letters to BOTAŞ expressing concern that Turkey was now exporting the KRG's oil without instruction from the Iraqi Side. SOMO asked BOTAŞ to cease this practice immediately.[334]

o. 23 May 2014: The Claimant commenced the present arbitration proceedings.

p. June 2014: The KRG received funds from crude oil transported through the ITP Pipeline, then stored and loaded at Ceyhan by BOTAŞ. These funds were deposited into an account at Turkey's state-owned bank, Halkbank.[335] The Respondent had previously represented that it would keep proceeds from the sale of any KRG crude oil in escrow for later distribution to the FGI and the KRG once a revenue sharing arrangement was agreed.[336]

4. Findings of the Tribunal – Turkey in breach of ITP Agreements

360. As set out at paragraph 155 above, Article 3 of the 1976 Protocol requires the Respondent to facilitate the "*transit, loading and export of crude oils coming from Iraq*" in accordance with the instructions and requirements of the Iraqi side. The Kurdish oil that was entering the 40-inch Pipeline from early 2014 (following completion of testing) was clearly oil coming from Iraq. Thus, the Respondent had an obligation under the ITP Agreements to deal with that oil in accordance with the instructions of the Iraqi Ministry of Oil.

361. The Tribunal examines the Ministry of Oil's instructions for the transportation, storage and loading of the oil flowing through the 40-inch Pipeline. For the reasons explained below, the Tribunal finds that the Respondent breached the ITP Agreements by failing to load the oil in accordance with the instructions of the Iraqi Side.

362. The Tribunal finds that the evidence does not demonstrate a breach of the ITP Agreements in relation to the transportation and storage of Kurdish oil through the 40-inch Pipeline.

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334 Letter from SOMO to BOTAŞ, 21 May 2014 (HM-249 / C-16); Letter from NOC to BOTAŞ, 21 May 2014 (HM-236 / C-103).

335 "Iraqi Kurdistan Gets Around $100 Million for First Major Oil Export" The Wall Street Journal, 23 June 2014 (HM-258 / C-108).

336 "Kurdish crude arrives at Ceyhan, but no sale without Iraq consent: Yildiz" Platts, 20 January 2014 (HM-223 / C-106); B. Van Heuvelen "Turkey Kurdistan cement massive energy deal" Iraq Oil Report, 29 November 2013 (HM-189 / C-77).

Instructions from the Ministry of Oil in relation to the transportation, were primarily negative. These were effectively instructions to cease transportation. It is not clear to the Tribunal how such transportation was to be ceased once the oil had entered into the Pipeline in Iraq. The Tribunal is also concerned that such instructions were not consistent with the ITP Agreements' object and purpose which was, essentially, to transport Iraqi oil (which includes Kurdish oil) from Iraq to Ceyhan.

363. The Tribunal accepts the evidence of Mr Ulutaş, which was not challenged during the Merits Hearing.[337] Mr Ulutaş explained the damage that is caused to the Pipelines by corrosion when insufficient quantities of oil flow through them.[338] Mr Ulutaş also explained the Respondent's strategies to minimise this damage. The Tribunal also accepts Mr Ulutaş's evidence on the dangers of closing a valve in one of the Pipelines when oil is being pumped into that Pipeline.[339] The Tribunal does not consider that the Ministry of Oil's instruction to close the 40-inch Pipeline to prevent Iraqi oil flowing through it was realistic or legitimate – both in a practical sense and in terms of the purpose of the ITP Agreements.

364. This conclusion is consistent with the changing nature of some instructions, as emphasised by Mr Schwartz at the Merits Hearing. Mr Schwartz gave examples of instructions issued by SOMO in late 2014 and 2015 that demonstrate that the initial instruction to close the Pipeline appeared to have been superseded.[340] The Tribunal agrees with the Respondent that the specific instruction to shut the valve on the 40-inch Pipeline appears not to have remained an active and ongoing instruction. This supports the view that closing the Pipeline was not a feasible or practical position for the Claimant to take, especially when SOMO needed access to the Pipeline (via the tie-in) itself.

365. Taking these matters into account, in the Tribunal's view, the instructions to cease transportation of Iraqi oil (including by closing the valve) were not valid instructions with which the Respondent was obliged to comply under Article 3 of the 1976 Protocol. The transportation of oil was the primary purpose of the ITP system and an instruction to stop transportation

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337 Mr Ulutaş was not cross-examined by the Claimant at the Merits Hearing.

338 Ulutaş Witness Statement, paras 22-25.

339 Ulutaş Witness Statement, paras 26-28.

340 Transcript (Merits Hearing), Day 1, 173:7-23 (see also Respondent's Opening Submissions Slides 53-54).

(effectively a "negative" instruction) was entirely inconsistent with that purpose. The Respondent was transporting to Ceyhan Iraqi oil that entered the Pipeline in Iraq – this is precisely the Respondent's obligation under the ITP Agreements. Moreover, throughout this time, the Iraqi Side (being the Ministry of Oil) remained in control of the Iraqi oil. The simple transportation of the Iraqi oil through the Pipeline system did not deprive the Iraqi Side of the ability to instruct the Respondent on how to deal with that oil at Ceyhan.

366. Consequently, the Tribunal finds that the Respondent did not breach the ITP Agreements in relation to the transport of Iraqi oil. At the very least, any technical failure to follow the Iraqi Side's instructions was entirely reversible, provided the Respondent followed such instructions once the oil was at Ceyhan.

367. Similarly, there is no clear evidence that the Respondent breached the ITP Agreements in relation to storage. Storage instructions from the Iraqi Side included to make available all storage capacity for the Iraqi Side. The Respondent stored only Iraqi oil in the tanks designated for ITP storage. In the Tribunal's view, the storage in those tanks of Iraqi oil pumped into the Pipelines by the KRG did not breach the ITP Agreements. The Iraqi Side remained in control of the oil and the Respondent could still load that oil in accordance with the Iraqi Side's instructions. It was the loading and export of that oil that caused the issues, as discussed below. The Tribunal finds no breach of the ITP Agreements in relation to the storage of Iraqi oil.

368. The ITP Agreements require that the loading and export of Iraqi oil take place pursuant to the instructions of the Iraqi Ministry of Oil (through SOMO). The Tribunal finds that the loading of Iraqi oil on the instructions of anyone other than the Iraqi Side was a breach of the ITP Agreements and inconsistent with the Claimant's instructions to:

a. hold all Iraqi crude oil stored in tanks 601 to 607 strictly to SOMO's order; and

b. cease the practice of exporting KRG oil without instruction from the FGI.

369. There is no dispute that the Respondent loaded the oil in accordance with the KRG's instructions. Prior to this loading, the Iraqi oil in the ITP facilities remained at the disposal of the Iraqi Side. The transportation of oil and its storing in Ceyhan "*did not predetermine the final*

decision to be taken."[341] Until loading of oil in Ceyhan, it was still possible to proceed in accordance with instructions of the Iraqi Side, i.e., the Ministry of Oil. Had the Respondent loaded the oil in accordance with the Iraqi Side's instructions, in the Tribunal's view, it would have remained in compliance with its obligations. However, the loading of the Iraqi oil in accordance with the KRG's instructions (which had not been authorised by the Iraqi Side) caused a loss of control of the oil by the Iraqi Side and (subject to consideration of the Respondent's defences) a breach of the ITP Agreements. At this time the breach became irreversible.

370. The Respondent's assertion that consent from the Iraqi Ministry of Oil was not required to load crude oil at Ceyhan is irrelevant, in the Tribunal's view.[342] There is no debate that the Respondent knew that the oil in the 40-inch Pipeline was being pumped into the Pipeline by the KRG via the tie-in. Nor is it contested that the Respondent followed the KRG's instructions with regard to exporting that oil, and not those of the Iraqi Ministry of Oil. In doing so, the Respondent breached the ITP Agreements.

371. The fact that the Ministry of Oil ceased issuing instructions after this arbitration commenced in May 2014, does not impact upon the Tribunal's finding that the Respondent breached the ITP Agreements by loading oil in accordance with the KRG's (and not the Iraqi Side's) instructions. The Claimant has clearly maintained its objection to the Respondent's behaviour throughout the duration of this arbitration and at no time since sending the letters described in paragraph 359 above has the Claimant withdrawn its instructions. Consequently, the Claimant's clear position since December 2013 has been, and continues to be, that the Respondent was and remains required to act in accordance with the instructions of the Iraqi side, defined in the 2010 Amendment as the Iraqi Ministry of Oil, in relation to any Iraqi oil pumped into the Pipelines by the KRG.

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[341] *Gabčíkovo-Nagymaros Project (HungarylSlovakia), Judgment, I.C.J. Reports 1997*, p. 54, para. 79. As the Court observed "[s]uch a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act . . . and the conduct prior to that act which is of a preparatory character and which does not qualify as a wrongful act" (*ibid.*).

[342] Respondent's Counter-Memorial, para 173.

372. The Respondent has raised a number of affirmative defences to the breach allegations, which the Tribunal considers below. In addition to its affirmative defences, the Respondent has raised two principal objections to the validity of the instructions relied on by the Claimant: (i) the ITP Agreements did not permit the Iraqi Ministry of Oil to issue the instructions that it did; and, (ii) even if the Claimant was technically entitled to issue those instructions, the Claimant's instructions were not made in good faith and were abusive in the circumstances of this case. The Tribunal is unconvinced by the Respondent's arguments for reasons that will now be explained.

Ownership of the Oil

373. The Respondent submitted that the Claimant could not instruct it to store and load the oil from the KRG as the FGI was not the custodian of that oil. As contended by Mr Schwartz (for the Respondent) at the Merits Hearing:[343]

> "…. the oil was being produced and pumped into the ITP system by the KRG, rather than the Federal Government. Second, SOMO's right to sell or dispose of the oil was then and still is disputed by the KRG. And, thirdly, a substantial part of the oil - - and we mustn't lose sight of that - corresponded to cost oil and profit oil of the international oil companies who had sold that oil to the KRG as a means of being compensated under their production sharing contracts."

374. The Tribunal does not intend to enter into a discussion about the ownership of the oil under Iraqi law, as it is not necessary to determine this issue. Even prior to the Case 59 Decision, the Tribunal did not consider it proper or necessary for it to resolve internal Iraqi law issues as to ownership of oil. The Tribunal agrees with the Claimant that the Case 59 Decision does not alter this position.[344] The ITP Agreements are clear – the Respondent is to load all crude oil coming from Iraq in accordance with the instructions of the Iraqi Side, which was expressly defined in the 2010 Amendment as the Ministry of Oil of the FGI. All crude oil coming from Iraq is subject to this requirement. It was not for the Respondent to make a decision, or to

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[343] Transcript (Merits Hearing), Day 1, 179: 2-11.

[344] See Claimant's 1 April 2022 Submission, para 1.3.

form a view, as to whether the Iraqi Ministry of Oil had ownership rights over the crude oil and then to elect whether to follow instructions. That is not the agreement that the Respondent made. It is perfectly possible that oil not "owned" by the FGI could have flowed through the Pipelines. However, regardless of ownership, the instructions had to be funnelled through the Iraqi Ministry of Oil – that was the agreement, and the commitment made by the Respondent was to act in accordance with those instructions.

375. It is clear that the Respondent understood that following the KRG's instructions without approval by the Iraqi Ministry of Oil would breach the ITP Agreements. The Respondent specifically told the Claimant that it would follow the Iraqi Ministry of Oil's instructions at the meeting on 27 January 2014, it later promised to hold funds from the exports in escrow pending agreement between the FGI and the KRG (see paragraph 359(g) and (p) above). Moreover, the Respondent's consistent position throughout that time (January-June 2014) was that the KRG oil was "Iraqi oil" under the ITP Agreements and should be treated as such.

376. If the oil is not crude oil coming from Iraq, but is in fact third party crude oil (as the Claimant claimed in January-June 2014), then it would fall under Article 2.4 of the 2010 Amendment and the Parties would need to agree as to any use of the ITP facilities by the third party. The Tribunal notes that Article 2.4 refers only to the use of loading and storage facilities by third parties. It does not allow for the transportation of oil through the Pipelines on behalf of third parties.

Good Faith

377. The Respondent submitted that the Claimant's instructions to close the 40-inch Pipeline and to hold the oil at Ceyhan were given in bad faith and constituted an abuse of rights. The Respondent submitted that the instructions were contrary to the object and purpose of the ITP Agreements, particularly after March 2014 when both the 40-inch and the 46-inch Pipeline were damaged on the Iraqi side of the border. The Respondent submitted that it was, therefore, at risk of being deprived completely of the economic benefit it should have received under the ITP Agreements.[345]

[345] Respondent's Rejoinder, para 155.

378. The Tribunal considers here the instructions related to loading only, as these are the instructions which the Tribunal has found were breached

379. International law places good faith performance obligations on State parties to a treaty (which is similar to the French contractual doctrine of good faith).[346] The International Court of Justice has affirmed that a basic principle governing the creation and performance of international legal obligations is the principle of good faith.[347] Customary international law, as codified in Article 26 of the Vienna Convention provides that every treaty must be performed by the parties in good faith. This obligation requires "*the Parties to apply* … [the treaty] *in a reasonable way and in such a manner that its purpose can be realized*."[348] Good faith also requires the parties to a treaty to act honestly, fairly, refrain from taking unfair advantage and to honour legitimate expectations.[349]

380. The Claimant's instructions directed the Respondent to load crude oil only in accordance with its instructions and to cease doing so on the instruction of any other entity. This is precisely what the Respondent was obliged to do under Articles 3 and 7 of the 1976 Protocol. There is no basis on which to suggest that an instruction from the Claimant to cease loading oil except in accordance with its instructions was an abuse of rights by the Claimant.

381. Indeed, during the discussions at the time, it was the Respondent that took a position that was contrary to what it was actually doing. The Respondent explicitly confirmed in the 2010 Joint Declaration that all exports of Iraqi oil were to be strictly channelled through the Ministry of Oil and SOMO. In meetings that took place in January 2014, the Respondent represented that the KRG oil was being pumped through the 40-inch Pipeline in order to flush out water in the

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346 Respondent's Counter-Memorial, paras 177-182.

347 *Nuclear Tests (New Zealand v. France)*, 1974 ICJ 457, 473, para. 49 (Judgment of 20 December) (I- 215 / RL-208).

348 *Gabčikovo-Nagymaros Project (Hungary v. Slovakia*), 1997 ICJ 7, 79, para. 142 (Judgment of 25 September 1997) (I-178 / RL-171).

349 M.E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (2009), pp. 425-426 (I-209 / RL-209). See also the *Interpretation of the Algerian Declarations of 19 January 1981 (Claims Against US Nationals)*, Iran US Claims Tribunal, 21 December 1981, 62 ILR 595, 605-606: 'The plain meaning of good faith in interpretation of agreements is application of the spirit of honesty and respect for law' (I-217 / RL-210).

Pipeline and for hydrostatic testing purposes.[350] The Respondent said that it would stop pumping oil once the water had been flushed out. The Respondent also confirmed that it would not export the oil for the KRG without consent from SOMO.[351] However, the Respondent continued to load oil for the KRG and export it on the KRG's instruction. In June 2014, the Respondent represented that it would hold all proceeds from the sale of oil in escrow for the Claimant.[352] It failed to do this.

Retrospective Authorisation

382. The Tribunal has considered whether the 2021 Budget Law authorized retrospectively the export of oil by the KRG.[353] The Tribunal does not consider this to be relevant to whether the Respondent breached the ITP Agreements for the same reasons as the Tribunal has declined to determine ownership of the oil – it is not a matter that needs to be (or should be) decided by this Tribunal. The Respondent had clear obligations under the ITP Agreements to follow the instructions of the Ministry of Oil in relation to any Iraqi oil flowing through the ITP Pipelines. Those obligations existed regardless of whether SOMO or the KRG had the right to export that oil.

Conclusion

383. In the Tribunal's view, the evidence clearly shows that the Claimant's protests were persistent and genuine and there can be no doubt that the Respondent understood the Claimant's position and instructions. The Respondent chose not to follow the Claimant's instructions when it loaded the crude oil coming through the 40-inch Pipeline from Iraq on the instructions of the KRG and not the Ministry of Oil. Therefore, subject to the analysis of the Respondent's general defences below, the Tribunal finds that the Respondent acted in breach of Articles 3

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350 Letter from SOMO to Turkish Ministry of Energy and Natural Resources and BOTAŞ enclosing draft minutes of meeting held on 27 January 2014, 3 March 2014 (HM-231 / C-13).

351 "Kurdish crude arrives at Ceyhan, but no sale without Iraq consent: Yildiz" Platts, 2 January 2014 (HM-223 / C-106).

352 "Kurdish crude arrives at Ceyhan, but no sale without Iraq consent: Yildiz" Platts, 2 January 2014 (HM-223 / C-106). B. Van Heuvelen, "Turkey, Kurdistan cement massive energy deal" Iraq Oil Report, 29 November 2013 (HM-189 / C-77).

353 Respondent's 1 April 2022 Submission, para 2.

and 7 of the 1976 Protocol by failing to follow the Iraqi Ministry of Oil's instructions by loading and exporting oil in accordance with the KRG's instructions.

C. Exclusive Use Claim

1. Claimant's submissions on Exclusive Use Claim

384. The Claimant has also claimed that the Respondent is in breach of its obligation to ensure that the ITP facilities be used exclusively for the transportation, loading and storage of crude oil shipped by or pursuant to the instructions of the Iraqi Side.

385. The Claimant relied on Article 2.4 of the 2010 Amendment, which states that "[t]*he Pipeline System, tanks and other terminal facilities subjected to ITP shall exclusively be assigned to transport and load the Crude Oil coming from Iraq*." It further provides that, if there is excess capacity, the Iraqi Side and Turkish Side are to meet and agree before the Turkish Side may use the storage and loading facilities for "*3rd Parties who are not a Party to* [the 2010 Amendment]." Article 2.4 is set out in full at paragraph 339 above.

386. The Claimant further cited Articles 3 and 7 of the 1976 Protocol and Article 2.3 of the 2010 Amendment in support of its claim.[354]

387. The Claimant rejected the Respondent's contention that the KRG was permitted to use the ITP facilities as an entity of Iraq,[355] stating that such an interpretation of Article 2.4 "*requires it to be taken out of context of (and wholly disregard) the remainder of Article 2.4*" and the 2010 Amendment more generally.[356]

388. Although the Claimant acknowledged that it was open to the Parties to agree third party use of storage and pier loading services under the ITP Agreements, it contended that such an agreement was never made for oil from the KRG.[357]

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[354] Claimant's Memorial, para 5.18. Article 2.3 is set out in paragraph 164 above.

[355] Claimant's Memorial, para 5.21.

[356] Claimant's Memorial, para 5.21.

[357] Claimant's Memorial, paras 5.19-5.20.

389. Therefore, according to the Claimant, the transportation, storage, and loading of crude oil from the KRG contrary to the instructions of the FGI also constituted a breach of the ITP Agreements' exclusive use provisions.

2. Respondent's submissions on Exclusive Use Claim

390. The Respondent rejected this claim, stating that it had not breached Article 2.4 of the 2010 Amendment as the oil flowing through the Pipeline was crude oil coming from Iraq in accordance with that provision.

391. The Respondent claimed that the FGI was responsible for controlling access to the Pipelines in Iraq and that it was therefore responsible for ensuring the system's "exclusive use".[358] According to the Respondent, the oil from the KRG is oil that comes from Iraq and interpreting the clause in this way is consistent with the purpose of the 1973 Agreement – to provide for the "*transit of all kinds of crude oils coming from Iraq*."[359]

392. The Respondent submitted that, when read in its entirety, Article 2.4's reference to "*3rd parties*" was intended to refer to entities whose use of the storage and loading facilities might interfere with "*the utilization of the full capacity of the system for the transportation of Crude Oil coming from Iraq*." Therefore, the third parties in question would be using the storage facilities, not pumping oil from Iraq through the Pipelines. The Respondent contended that the KRG was not a "*3rd party*" within Article 2.4, given that KRI oil was indisputably oil "*coming from Iraq*" and pumped into the ITP system in Iraq by an Iraqi governmental entity. There was, therefore, no breach by the Respondent of the exclusive use provisions of the 2010 Amendment.[360]

3. Tribunal's analysis of Exclusive Use Claim

393. For the reasons articulated at paragraph 374 above, the Tribunal does not intend to enter into an analysis of the ownership of the oil pumped into the ITP Pipelines by the KRG as a matter of

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358 Respondent's Counter-Memorial, para 233.

359 1973 Agreement, second preambular statement. See also, Article 3 of the 1976 Protocol; Respondent's Counter-Memorial, paras 234-235.

360 Respondent's Skeleton Submissions, para 64.

Iraqi constitutional law. The Tribunal considers that this is beyond the jurisdiction of the Tribunal and, in any event, not necessary for determination of the claims before it.

394. Article 2.4 of the 2010 Amendment states:

> "The Pipeline system, tanks and other terminal facilities subjected to ITP shall exclusively be assigned to transport and load the Crude Oil coming from Iraq. However if for a certain period of time, there is a substantial idle capacity in the system, the two Sides shall meet to investigate the possibility of and agree upon the rendering of the storage and pier loading services by BOTAŞ to 3rd parties who are not a party to this Amendment provided that such transactions shall not affect the proper operation of the system and in no way limit the right of the Iraqi Side for the utilization of the full capacity of the system for the transportation of Crude Oil coming from Iraq."

395. In the Tribunal's view, the obligation in Article 2.4 to prevent third parties from using the Pipelines is an obligation placed on the Party who controls the Pipeline at the point where the "offending" oil enters the Pipeline. In this case, it is the Claimant's obligation to ensure that no non-Iraqi oil enters the Pipeline within the territory of Iraq.

396. The Tribunal is satisfied that, regardless of whether ownership and control of the oil in the KRI vests in the FGI, KRG, or a wider concept of the "*Iraqi people*", it is clearly "*Crude Oil coming from Iraq*" within the meaning of Articles 3 and 7 of the 1976 Protocol. It is oil that originated from within the Republic of Iraq and that was placed into the Pipeline system on the Iraqi side of the border. It strains credulity to expect the Respondent to consider that oil as anything other than crude oil coming from Iraq and indeed the Respondent's consistent position between January and June 2014 (and in this arbitration) was that the KRG's oil was indeed Iraqi crude oil.

397. This is consistent with the Tribunal's position on the transportation, storage and loading claims above. Any issue regarding whether the oil should have been placed in the Pipeline in the first place is for the Claimant to address – it is an act that occurred in the Claimant's sovereign territory. The Respondent has no rights or obligations under the ITP Agreements in that regard.

398. Consequently, the Tribunal dismisses the Claimant's exclusive use claim.

D. Access Claim

1. Claimant's submissions on Access Claim

399. The Claimant has also claimed that the Respondent is in breach of its obligations under Article 4.4 of the 2010 Amendment to allow Iraqi personnel to access the Iraqi office at the Ceyhan storage facility. According to the Claimant, the Respondent has refused to permit SOMO or Iraqi officials to monitor the arrival, measurement, loading and quality of oil being shipped to the KRG's instructions.[361]

400. Article 4.4 of the 2010 Amendment grants Iraqi personnel access to "[m]*easurements regarding transportation and loading tonnages of the Crude Oil that are transmitted through the ITP*." In addition, Articles 4 and 5 of the 1976 Protocol provide for the establishment of an Iraqi Office at Ceyhan and that measurements would be taken jointly by representatives of both sides.[362] This office was established in the early days of the ITP Agreements.

401. The Claimant has alleged that its representatives at Ceyhan were denied access by Turkish officials to the relevant ITP facilities in Ceyhan from January 2014, and have thus been prevented from carrying out their duties under the ITP Agreements.[363] In support of its allegations, the Claimant cited a letter from NOC in January 2014 which stated "*The Iraqi Shipping Office […] were told by BOTAS officials that they no longer have any right and anymore to be involve [sic] with what was and still going on*."[364] A further letter from NOC a few days later concluded "*We are astonished at the continuation of this behaviour from your side which is avoiding our shipping office crew from carrying out their usual duties*."[365]

402. The Claimant contended that the key measurements remain obscured from Iraqi personnel, in breach of Article 4.4 of the 2010 Amendment.[366] The Respondent is, therefore, in continuing breach of the access provisions of the ITP Agreements.

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361 Transcript (Merits Hearing), Day 1, 35:10-13.

362 Claimant's Memorial, para 5.23; Claimant's Post-Hearing Memorial, para 4.19.

363 Claimant's Memorial, para 5.25.

364 Letter from NOC to BOTAŞ, 6 January 2014 (HM-215 / C-8).

365 Letter from NOC to BOTAŞ, 9 January 2014 (HM-218 / C-9).

366 Claimant's Post-Hearing Brief, para 4.20.

4. Respondent's submissions on Access Claim

403. The Respondent has denied this claim, stating that Iraqi personnel were provided with access to all facilities at Ceyhan, along with any information requested.[367]

404. According to the Respondent, there was little evidence to support this claim, especially when compared to the volume of evidence demonstrating that access was granted.[368] For example, meeting minutes in January and February 2014 confirm information sharing, including that "*information sharing is done on a regular basis about every issue*."[369] Evidence provided by Mr Ulutaş confirmed that the Claimant's staff continue to be free to go wherever they like in the Ceyhan Terminal area and throughout the ITP Pipeline system.[370]

5. Tribunal's analysis of Access Claim

405. This claim is distinct from the transport, storage and loading claims as it concerns the ability of Iraqi personnel stationed at Ceyhan to access information and monitor the use of the ITP facilities.

406. The Tribunal has carefully examined the letters sent by the Parties in period January – May 2014. It is clear to the Tribunal from these letters that some limitation of access occurred at this time.

407. In a letter from NOC to BOTAŞ on 6 January 2014, the Claimant stated:[371]

> "[subsequently] the Iraqi shipping office despite being the only official representative of the Iraqi Government and as represented by (NOC & SOMO),

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367 Respondent's Counter-Memorial, paras 237-241.

368 See Respondent's Rejoinder, para 186; Tank Farm Security Records for the period 06.09.2013 to 21.10.2013 (HM-185 / R-119); Tank Farm Security Records for the period 21.10.2013 to 12.12.2013 (HM-193 / R-120); Tank Farm Security Records for the period 12.12.2013 to 21.01.2014 (HM-209 / R-121); Jetty Security Gate Records 2013 (HM-29 / R-122); Guesthouse Records, January 2014 (HM-210 / R-123).

369 Minutes of Meeting, 5 February 2014 (HM-225 / R-94). See also Minutes of Meeting signed by BOTAŞ, NOC and SOMO, 16 January 2014 (HM-222 / C-99).

370 Ulutaş Witness Statement, para 17.

371 Letter from NOC to BOTAŞ, 6 January 2014 (HM-215 / C-8).

were told by BOTAS officials that they no longer have any right and anymore to be involve [sic] with what was and is still going on."

408. A second letter of the same date, this time to the Prime Minister of Turkey, stated:[372]

> "We have recently noticed mistreatment by the personnel in charge in the Turkish Botas company of the representatives of the Iraqi oil loading office and lack of cooperation with them on work processes".

409. In a further letter from NOC to BOTAŞ on 9 January 2014, the Claimant said:

> "Unfortunately, we regreat [sic] to inform you of the persistence of the unacceptable bad treatment and restrictions being imposed by BOTAS officials at Ceyhan terminal against our Iraqi shipping office personnel. We are astonished at the continuation of this behaviour from your side which is avoiding our shipping office crew from carrying out their usual duties bearing in mind that our office at Ceyhan is the only legaly [sic] authorized and official Iraqi side at this terminal to supervise and run all matters related to the operation and shipping of the Iraqi crude oil and as per all the relevant agreements signed between the Iraqi and Turkish governments."[373]

410. The behaviour did not stop. During a meeting that took place between the Parties on 27 January 2014, the Claimant:[374]

> "asked the Turkish Ministry of Energy to restore the status of a month ago and allow the Iraqi office personnel in Ceyhan to obtain all data regarding the system and permit the Iraqi side to fully utilize the system and its tanks."

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372 Letter from NOC to Prime Minister, 6 January 2014 (HM-216 / C-151).

373 Letter from NOC to BOTAŞ, 9 January 2014 (HM-218 / C-9).

374 Minutes of Meeting, 27 January 2014 (HM-231 / C-13).

411. However, it does appear that some information was being provided to the Iraqi personnel. SOMO expressly recognised this at a meeting between the Parties on 5 February 2014:[375]

> "Information was given about the operations performed. It was declared that between two sides information sharing is done on a regular basis about every issue. And also, it was expressed by two sides dispatching center [sic] and the tank farm staff have been providing information to Iraq officials at every stage of operation and highlighted there is no problem about cooperation and sharing information."

412. On the basis of this evidence, the Tribunal is satisfied that the Claimant's personnel at Ceyhan experienced access difficulties in early 2014. However, the evidence provided by the Respondent confirms that any restriction on information sharing did not continue. From around March 2014, information sharing appears to have resumed and there is no evidence of continued protest by Iraqi personnel. The Claimant appeared to acknowledge this in its Reply Memorial, stating that "*[i]f the situation has improved recently, as Respondent claims, then that is certainly a positive development*."[376]

413. Having considered the evidence, the Tribunal finds that the Respondent failed to provide the required access to Iraqi personnel between January and March 2014 and was consequently in breach of Article 4.4 during this short period of time. There is no evidence that the breach continued beyond the early months of 2014.

XII. ANALYSIS OF TURKEY'S AFFIRMATIVE DEFENCES

414. Having found that the Respondent's actions in loading crude oil in accordance with instructions from the KRG (and against the instructions of the Iraqi Ministry of Oil) was not in conformity with the Respondent's obligations under the ITP Agreements and having found a minor breach of the access obligations in early 2014, the Tribunal now considers the affirmative defences

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375 Minutes of Meeting, 5 February 2014 (HM-225 / R-94). See also Minutes of Meeting signed by BOTAŞ, NOC and SOMO, 16 January 2014 (HM-222 / C-99); Tank Farm Security Records for the period 06.09.2013 to 21.10.2013 (HM-185 / R-119).

376 Claimant's Reply Memorial, para 2.51.

raised by the Respondent to support its assertion that any non-compliance does not constitute a breach of the ITP Agreements.

415. The primary defence raised by the Respondent is that its obligations under the ITP Agreements were suspended. In addition, the Respondent asserted that:

a. the Claimant was responsible for controlling access to the Iraqi section of the Pipelines and, therefore, for allowing the KRG to pump oil into the Pipeline;

b. the Claimant did not have a legitimate claim to the crude oil entering the Pipeline; and

c. the Respondent had a *jus cogens* obligation to prevent genocide which it would have breached if it had followed the FGI's instruction to close the Pipelines.

416. Each of these defences is considered below.

A. Was the Respondent entitled to suspend its performance of the ITP Agreements?

1. Respondent's submissions

417. The Respondent submitted that it was entitled to suspend its performance of the ITP Agreements based on the following principles:

a. if French law applies, the French law principle of *exception d'inexécution*; or

b. if international law applies:

i. the international law principle of *exceptio non adimpleti contractus*;

ii. customary international law as reflected in Article 60 of the Vienna Convention, which is similar (but separate) to the *exceptio* principle; and/or

iii. the international law principle of *rebus sic stantibus* based on a fundamental change of circumstances (codified by Article 62 of the Vienna Convention).

418. The Respondent also asserted that any suspension of obligations based on the successful invocation of *force majeure*, as claimed by the Claimant (see Section XIV(A) below), would result in the obligations of both Parties being suspended.

419. The Respondent submitted that the Claimant has been in breach of the ITP Agreements since at least 1997, when the 40-inch Pipeline on the Iraqi side of the border became inoperable as a result of damage that was not repaired.[377] According to the Respondent, the Claimant has breached its obligation to operate and maintain the Iraqi section of the Pipelines pursuant to Article 1 of the 1973 Agreement as amended by Article 2.1 of the 2010 Amendment. The Respondent further contended that the Claimant was in breach of its Minimum Guaranteed Throughput obligations and related payment obligations (see further Section XIV below). These alleged breaches form the basis on which the Respondent asserted its right to suspend its obligations under the ITP Agreements.

Exceptio non adimpleti contractus

420. As a result of the Claimant's alleged failure to perform its obligations under the 2010 Amendment, the Respondent submitted that the international law doctrine of *exceptio non adimpleti contractus* ("***exceptio***") entitled it to "*withhold the execution of [its] obligations in response to non-performance by the other treaty party*".[378] According to the Respondent, the *exceptio* principle is the international law equivalent of the French doctrine of *exception d'inexécution*. According to Judge Schwebel, who provided an expert opinion in support of the Respondent:[379]

> "The *exceptio non adimpleti contractus* arises from the need for flexibility in respect of reciprocal obligations, and the core question underlying its application is whether the parties' respective obligations are synallagmatic. There are no procedural requirements, such as notice, for the invocation of *exceptio non adimpleti contractus.* And there is no requirement that the breach giving rise to the invocation of the principle be *material*."

421. Judge Schwebel opined that the *exceptio* principle is a general principle of law under Article 38(1)(c) of the International Court of Justice, and therefore applies beyond the confines of the Vienna Convention.[380] The principle finds support in the *Klöckner v Cameroon* Award, where

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377 Respondent's Counter-Memorial, para 119.

378 Respondent's Counter-Memorial, para 126.

379 First Judge Schwebel Expert Report, para 8.

380 First Judge Schwebel Expert Report, paras 6-10.

the Tribunal stated, *"[t]he* exceptio non adimpleti contractus *may be invoked at any time, even during judicial or arbitral proceedings, without giving prior notice of default to the non-performing party".*[381] Judge Schwebel was of the view that the *exceptio* principle applied in this case, as the Claimant had failed to perform its core obligation to maintain the Pipelines over the course of many years (i.e., since 1997).[382]

French law doctrine of *l'exception d'inexécution*

422. The Respondent submitted that the French law doctrine of *exception d'inexécution* also entitled it to refuse to execute its contractual obligations. According to the Respondent, *exception d'inexécution* requires two conditions: [383]

> "(i) the Parties' obligations must be interdependent and reciprocal; and (ii) the breach of the non-performing party must have occurred prior to – or at least concomitantly with – the suspension of performance in response to that breach."

423. Although the Claimant's alleged breaches of the ITP Agreements as outlined in paragraph 419 above, pre-date the 2010 Amendment, the Respondent said that it entered into the 2010 Amendment on the understanding that the breaches by the Claimant would be cured going forward. However, no cure was forthcoming.[384]

424. The Respondent observed that prior notice is not a requirement under French law to invoke this doctrine. As to the degree of non-performance, the Respondent submitted that French courts require that non-performance need not be total, but must be "*sufficiently serious*" that it justifies suspension as a proportionate response.[385]

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381 *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983, 2 ICSID Reports 3, 62 (I-182 / RL-175); Respondent's Counter-Memorial, para 134.

382 Respondent's Counter-Memorial, para 127.

383 Respondent's Counter-Memorial, para 124.

384 Respondent's Counter-Memorial, paras 120-121.

385 See Respondent's Counter-Memorial, para 125. O. Deshayes, *L'exception d'inexécution doit-elle être proportionnée?* Revue des Contrats, 1 December 2016, No. 4, p. 654 (I-157 / RL-153); P. Malaurie, L. Aynès, and P. Stoffel-Munck, Les Obligations (Lextenso ed., 5th ed., 2011), para 861 (I-153 / RL-151).

Suspension under the rule of international law codified in Article 60 of the Vienne Convention

425. In addition to the *exceptio* principle, the Respondent submitted that Article 60(1) of the Vienna Convention codifies the concept that one party may suspend or terminate its obligations under a treaty in response to a breach by another party, and is a closely related, but separate, rule to the *exceptio* principle. The Respondent submitted that this right forms part of customary international law, such that it applies to States which are not parties to the Vienna Convention, including the Parties to this arbitration.

426. Article 60 requires an assessment of the object and purpose of the ITP Agreements, as its invocation must be based on a "*material breach*". According to Judge Schwebel, a material breach occurs where one party violates a provision of the treaty which is essential to achieving the object or purpose of that treaty.[386]

427. In Judge Schwebel's opinion, the object and purpose of the ITP Agreements was to ensure the continuous transit of crude oil from Iraq through Turkey, for the economic benefit of both countries.[387] The Respondent submitted that when the Claimant breached Articles 2.1 and 2.2 (to operate and maintain the ITP system), Article 3.2 (minimum throughput), and Article 8.1 (minimum flow rate) of the 2010 Amendment, it amounted to a "*material breach*" for the purposes of Article 60 of the Vienna Convention, thus allowing the Respondent to suspend the Agreements.[388]

428. The Respondent further contended that while the *exceptio* principle and Article 60 of the Vienna Convention are co-existing and can apply independently, the *exceptio* principle is governed by less strict conditions than Article 60, including that it does not require there to have been a material breach, nor is it subject to procedural requirements.[389]

429. The Respondent further submitted that the procedural requirements of Article 65(1) of the Vienna Convention do not reflect customary international law and therefore were not binding on the Respondent.[390] Even if the procedural requirements did apply, the Respondent asserted

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386 Respondent's Counter-Memorial, para 130.

387 Respondent's Counter-Memorial, para 131; First Judge Schwebel Expert Report, paras 17-20.

388 Respondent's Counter-Memorial, para 131.

389 Respondent's Counter-Memorial, paras 132-133.

390 Respondent's Counter-Memorial, para 135.

that it met the requirements when it notified the Claimant that it was invoking it suspension right through its Answer and Statement of Counterclaims dated 3 September 2014.[391] Judge Schwebel agreed.[392]

430. The Respondent noted that under Article 72 of the Vienna Convention, the customary international law result is that the ITP Agreements remain in force while the Parties have suspended their obligations, but they are inoperative during the suspension.[393]

Did the fundamental change of circumstances entitle the Respondent to suspend its performance?

431. The Respondent submitted that a change of circumstances occurred which fundamentally altered the Parties' expectations that prevailed at the time the 2010 Amendment was agreed.[394] The Respondent invoked the March 2014 bombing of the 46-inch pipeline and the KRG's suspension of oil supplies to SOMO in April 2012 as fundamental changes of circumstances that entitled it to suspend its performance of the ITP Agreements under the principle of *rebus sic stantibus,* which is codified by Article 62 of the Vienna Convention.[395]

432. The Respondent noted that the requirements to invoke the customary principle of *rebus sic stantibus* include that the changes must have occurred after the agreement was concluded and they must not have been foreseen by the Parties.[396] In order to invoke the principle, the Respondent contended that a formal indication that the treaty be suspended was sufficient. There is no specific form that notification must take.[397]

433. The Respondent once again relied on the opinion of Judge Schwebel, who was of the view that:[398]

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391 Respondent's Counter-Memorial, para 136.

392 First Judge Schwebel Expert Report, para 32.

393 Respondent's Counter-Memorial, para 138.

394 Respondent's Counter-Memorial, paras 139-140.

395 Respondent's Counter-Memorial, para 141; Respondent's Post-Hearing Brief, para 79.

396 Respondent's Counter-Memorial, para 151.

397 Respondent's Counter-Memorial, para 155.

398 First Judge Schwebel Expert Report, para 42.

> "When the FGI's deteriorating political relationship with the KRG rendered Iraq unable to meet its throughput obligations, and when the FGI subsequently became unable to transport any crude oil at all through the Iraq-Turkey Pipelines (except for crude oil transported through the tie in) in March 2014, the circumstances that existed at the time of the conclusion of the treaty changed fundamentally."

434. The Respondent submitted that the events referred to by Judge Schwebel occurred after the conclusion of the 2010 Amendment and that the events were not foreseen, as evidenced by the Claimant's guarantee in Article 2.1 of the 2010 Amendment that it would be in a position to operate and maintain the ITP system in Iraq. [399]

435. In addition, according to the Respondent, it entered into the 2010 Amendment on the understanding that the Claimant would take steps to repair the 40-inch Pipeline as stated in the Joint Declaration. The cost to the Respondent of the Claimant's breach in this regard has been significant.[400] Mr Ulutaş gave evidence that the Respondent had to repair damage to the Pipeline in Turkey that resulted from low oil flows.[401]

Force Majeure

436. The Respondent submitted that the Claimant had been unable to comply with its obligations under the ITP Agreements since March 2014 other than through the KRG's tie-in, as a result of the damage to both Pipelines.[402] This inability to comply with its obligations is the basis on which the Claimant has invoked *force majeure* as a defence to the Respondent's claim that it is owed Minimum Guaranteed Throughput fees.

437. Although the Respondent disputed the Claimant's entitlement to invoke *force majeure*, it contended that if *force majeure* was validly invoked by the Claimant, this would have the effect of relieving both Parties from their obligations under the ITP Agreements, not just the

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399 Respondent's Counter-Memorial, para 152.

400 Respondent Post-Hearing Reply Brief, para 64

401 Ulutaş Witness Statement, paras 23-24.

402 Respondent's Counter-Memorial, para 156; Respondent's Post-Hearing Brief, para 59.

Claimant. The Respondent said that this principle stands under both French law and international law.[403]

438. The Respondent cited Article 9 of the 2010 Amendment in support of this position. Article 9 provides that:[404]

> "… the obligations of the Sides to the Amendment will be suspended partially or totally to the extent that the performance of these obligations will be directly prevented or delayed by a case of force majeure."

2. Claimant's submissions

439. The Claimant submitted that the Respondent was not entitled to suspend its obligations under the ITP Agreements as Article 45 of the Vienna Convention requires that suspension of a treaty cannot be invoked if, *"after becoming aware of the relevant facts, the State (i) has expressly agreed that the treaty continues in operation; or (ii) must, by reason of its conduct, be considered as having acquiesced in its continued operation."*[405] The Claimant contended that, in respect of point (i), the Respondent expressly agreed that the ITP Agreements continued to operate when it concluded the 2010 Amendment despite the alleged breaches of which the Respondent complains having been ongoing for some time. In respect of point (ii), the Claimant asserted that the Respondent impliedly agreed to the continued operation of the ITP Agreements until at least September 2014, when it claims to have first invoked its right to suspend the Agreements. The Claimant further added that the Respondent had not invoked its right to suspend its performance within a "*reasonable time*", with seventeen years having passed since the first alleged treaty breaches in 1997.[406]

440. The Claimant considered that Articles 60 and 62 of the Vienna Convention do not provide a party with a right to simply declare a treaty terminated or suspended. If the alleged breach is contested (as it is here), "*there will be a 'difference' between the parties with regard to which the normal obligations incumbent upon the parties … to seek a solution of the question through*

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403 Respondent's Counter-Memorial, para 159.

404 Respondent's Counter-Memorial, para 158.

405 Claimant's Reply, para 2.133.

406 Claimant's Reply, para 2.137.

pacific means will apply."[407] In other words, for the suspension or termination to come into effect, the other party must either agree or there must be some form of judicial consent or other settlement.[408] Aside from such a requirement, the Claimant noted that there exists a *"general duty to notify other parties of one's intent to withdraw from or suspend a treaty"*.[409] The Claimant also contended that there are further procedural requirements enshrined in both Article 65 of the Vienna Convention and customary international law, which can be broadly encompassed by an obligation to act in good faith.

441. The Claimant therefore submitted that the Respondent would have had to give formal notice to the Claimant of its intention to suspend the ITP Agreements, followed by "*negotiations in good faith*" to determine whether the Agreements should be terminated or modified, in order to comply with the procedural requirements of such a suspension.[410]

442. In respect of the fundamental change of circumstances alleged, the Claimant again submitted that the Respondent had not complied with requirements under customary international law to provide notice to the Claimant of its intention to suspend its performance.[411]

443. The Claimant added that the arbitration clause at Article 10 of the 2010 Amendment requires that any dispute arising out of the ITP Agreements must be submitted to arbitration. It considered the suspension of the ITP Agreements to be such a dispute.[412] In any event, any successful suspension of the ITP Agreements cannot be invoked retroactively, so the Respondent cannot be excused from its past and continuing breaches of the ITP Agreements.[413]

444. The Claimant submitted that even if the Claimant was in breach of the ITP Agreements as alleged by the Respondent, this still would not excuse the Respondent's breaches.

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[407] See also, Report of the International Law Commission on the Work of its Eighteenth Session, Yearbook of the International Law Commission (1966), Vol. II, 169 at pp. 254-255 (H-153 / CL-155).

[408] Claimant's Reply, para 2.126.

[409] Claimant's Reply, para 2.141.

[410] Claimant's Reply, paras 2.144-2.145.

[411] Claimant's Reply, para 2.149.

[412] Claimant's Reply, para 2.152.

[413] Claimant's Reply, para 2.154.

a. According to the Claimant, the Respondent's argument concerning Article 60 of the Vienna Convention could not stand because the alleged breaches by the Claimant did not "*materially breach*" its obligations to operate and maintain the Iraqi section of the Pipelines and to ensure the Minimum Guaranteed Throughput was delivered through the Pipelines.[414] There was no breach of such obligations if the Minimum Guaranteed Throughput fee was paid in lieu of the minimum requirements of crude oil. The Claimant submitted that it paid these fees where necessary and therefore did not breach these obligations. Alleged violations claimed by the Respondent after December 2013 could not stand as the Claimant was relieved of its obligations to pay the Minimum Guaranteed Throughput fee and operate and maintain the Pipelines due to its invocation of *force majeure*.[415] Further, the ITP Agreements specifically anticipated the potential for idle capacity of the Pipelines, which further detracted from the notion that the Minimum Guaranteed Throughput obligations were of material importance.[416] As there was no breach of the ITP Agreements, there could be no "*material breach*" for the purposes of Article 60 of the Vienna Convention.

b. The Claimant contended that the Respondent could not invoke the principle of *exceptio non adimpleti contractus* as it is not an independent principle of international law, and rather has been replaced by Article 60 of the Vienna Convention.[417] The Claimant referred to Judge Simma's Separate Opinion in the *Application of the Interim Accord* case, where he stated that *"no version of the* exceptio *has survived the codification of the law of treaties*".[418]

c. In any event, the Claimant submitted that the conditions for *exceptio non adimpleti contractus* could not be made out due to the Respondent's failure to establish that the obligations concerned were synallagmatically linked.[419] It submitted that for a party to

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414 Claimant's Reply, para 2.159-2.160.

415 Claimant's Reply, para 2.161.

416 Claimant's Reply, para 2.186.

417 Claimant's Reply, paras 2.163-2.170.

418 *Application of the Interim Accord of 13 December 1995 (the Former Yugoslav Republic of Macedonia v. Greece)*, Separate Opinion of Judge Simma (Dec. 5, 2011), 2011 I.C.J. Reports 695, para 26 (H-179 / CL-179); Claimant's Reply, para 2.167.

419 Claimant's Reply, paras 2.171-2.177.

invoke the *exceptio* principle, it is insufficient to *"simply point to an exchange of obligations under a bilateral treaty"*.[420] Instead, it must prove that to implement one obligation is inconceivable without the other.[421] The Claimant pointed out that the Respondent's obligation to operate the ITP facilities only on the instruction of the Iraqi Ministry of Oil does not depend on Iraq's Minimum Guaranteed Throughput and related payment obligations, nor does it depend on the Claimant's obligation to operate and maintain the ITP facilities in Iraq. Therefore, the Respondent cannot rely on an *exceptio* argument.

d. The Claimant also submitted that the Respondent was not entitled to invoke French law of contracts through the principle of *exception d'inexécution* as it does not apply to the suspension of treaties such as the ITP Agreements.[422] Even if the Respondent could invoke French law of contracts, this would fail on the basis that it did not conduct itself in good faith as required by the *exception d'inexécution*, for example by its failure to give notice to the Claimant (although it is not a formal requirement for the principle to be invoked).[423]

e. The Claimant further argued that the Respondent could not invoke a fundamental change in circumstances to suspend its performance of the ITP Agreements because the circumstances relied upon did not fundamentally change from those which existed at the time the 2010 Amendment was entered into.[424] Both alleged "fundamental changes" upon which the Respondent relied (the bombing of the 46-inch Pipeline in March 2014 and the KRG's suspension of oil supplies to SOMO in April 2012) were foreseeable said the Claimant.[425] The Claimant noted that bombing of the Pipelines was part of terrorist activities that occurred in the lead up to the 2010 Amendment and, according to Dr Al-

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420 Claimant's Reply, para 2.175.

421 Claimant's Reply, para 2.173.

422 Claimant's Reply, paras 2.188-2.191.

423 Claimant's Reply, paras 2.189-2.190.

424 Claimant's Reply, para 2.192.

425 Claimant's Post-Hearing Brief, para 5.36.

Shahristani, the Respondent was aware of the unstable security situation in Iraq during the negotiations of the 2010 Amendment.[426]

f. The Claimant also considered that the domestic political dispute between the KRG and the FGI, or the chance of diminished throughput, could have reasonably been foreseen by the Parties, as it was widely known at the time the 2010 Amendment was agreed.[427] The Claimant also pointed out that, as the provisions in the ITP Agreements allow for events of idle capacity, the FGI's unavailability of oil could not amount to a circumstance sufficiently linked to the object and purpose of the ITP Agreements.[428]

g. The Claimant contended that the change of circumstances, which the Respondent sought to rely on to invoke its right to suspend its obligations, arose as a result of the Respondent's own breaches of the ITP Agreements.[429] Such conduct is an exception to the right to invoke suspension of a treaty under Article 62(2)(b) of the Vienna Convention.[430] The Claimant suggested that the KRG's unwillingness to transport oil on the instruction of the FGI was a result of the Respondent's active collaboration with the KRG to transport crude oil from the KRG since 2011.[431] The Claimant considered that the Respondent's conduct was not only in breach of the ITP Agreements, but also a breach of its *"obligation to refrain from any intervention in the domestic affairs of Iraq"*.[432] Whilst the KRG is a constituent entity of Iraq, this did not allow the Respondent to substitute the KRG for the Contracting Party to the ITP Agreements.[433] At the hearing, Claimant's counsel stated that:[434]

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426 Transcript (Merits Hearing) Day 2, 66:12-15; Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 25-26 February 2009 at p.1 (HM-93 / C-35).

427 Claimant's Reply, paras 2.200-2.202.

428 Claimant's Reply, paras 2.203-2.206.

429 Claimant's Reply, paras 2.211-2.222.

430 Claimant's Reply, para 2.211.

431 Claimant's Reply, para 2.212.

432 Claimant's Reply, paras 2.214-2.218.

433 Claimant's Reply, para 2.219.

434 Transcript (Merits Hearing), Day 1, 54:21 – 55:1.

> "Turkey's claim [for suspension] must be seen for what it is: an attempt to renege on the economic terms agreed in the ITP Agreements, to pocket excess transportation fees and other substantial financial benefits from the KRG; and then, after the fact, attempt to justify its own breaches of the ITP agreements."

h. The Claimant finally submitted that its invocation of *force majeure* could not allow the Respondent to suspend its obligations to follow the instructions of the Claimant.[435] It argued that the Respondent had not shown that its obligation to adhere to the instructions of the Claimant was *"directly prevented or delayed"* by the invocation of *force majeure*, pursuant to Article 9(1) of the 2010 Amendment.[436] In any event, the Claimant submitted that the Respondent was not entitled to unilaterally amend the ITP Agreements if such a suspension was found to be justified.[437]

3. Tribunal's analysis

445. The Tribunal begins by considering the Respondent's suspension argument under the international law principle of *exceptio non adimpleti contractus*. As discussed below, the position would ultimately be the same under the French contractual law principle of *l'exception d'inexécution* also pleaded by the Respondent.

International law – *exceptio non adimpleti contractus*

446. The Respondent maintains that the *exceptio* principle is a separate principle of international law to that codified in Article 60 of the Vienna Convention. The Claimant, on the other hand, disputes that the *exceptio* principle has any existence outside Article 60 of the Vienna Convention.[438] Indeed, the Claimant submitted that the *exceptio* doctrine is not an independent principle of international law at all, but rather a creature of domestic contract law (including French contract law) or, at most, the law of obligations.[439]

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435 Claimant's Reply, paras 2.223-2.227.

436 Claimant's Reply, para 2.225.

437 Claimant's Reply, para 2.227.

438 Claimant's Post-Hearing Brief, para 5.67.

439 Claimant's Reply, para 2.164.

447. The Tribunal has examined the authorities provided by the Parties and observes that there are persuasive authorities both supporting and negating the existence of a separate *exceptio* doctrine in customary international law. The Tribunal summarises these authorities below.

448. In 1937, Judge Anzilotti of the Permanent Court of International Justice stated in his Dissenting Opinion in the *Diversion of Water from the Meuse* case:[440]

> "I am convinced that the principle underlying [Belgium's] submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it should also be applied to international relations. In any event, this is one of those 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute."

449. The Individual Opinion of Judge Hudson in the *Diversion of Water from the Meuse* case also makes a reference to the "*important principle of equity*" whereby a party who continuously breaches a reciprocal obligation cannot hold the other party to performance of that obligation.[441] However, the main judgment does not address the *exceptio* principle at all.

450. International case law after the signing of the Vienna Convention is equivocal as to whether the *exceptio* principle survived as a separate principle of international law, in addition to Article 60 of the Vienna Convention (recognised as forming part of customary international law).

451. The Respondent relies on the Award in the ICSID case of *Klöckner v. Cameroon* in support of its position that the *exceptio* doctrine is recognised as a principle of modern international law. In that case the Tribunal noted that "[t]he *exceptio non adimpleti contractus* may be invoked at any time, even during judicial or arbitral proceedings, without giving prior notice of default to the non-performing party."[442] However, as highlighted by the Claimant, the tribunal in that case examined the *exceptio* doctrine primarily on the basis of French civil law principles, rather

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[440] *Diversion of Water from the Meuse*, 1937 PCIJ, Series A/B (No. 70) (Judgment of 28 June) (Diss. Op of Judge Anzilotti) p. 50 (I-173 / RL-166).

[441] *Diversion of Water from the Meuse*, 1937 PCIJ, Series A/B (No. 70) (Judgment of 28 June) (Diss. Op. of Judge Anzilotti), p. 50 (I-173 / RL-166); Dissenting Opinion of Judge Hudson, p. 70 (K-1 / SS-1).

[442] *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983, 2 ICSID Reports 3, 62 (I-182 / RL-175). See also *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/02/12 (I-183 / RL-176).

than public international law.[443] The Government of Cameroon had invoked the *exceptio* doctrine in respect of particular contracts governed by domestic law.

452. In the *Case Concerning the Gabčikovo-Nagymaros Project,* the International Court of Justice held that, for those States not party to the Vienna Convention, only those grounds in the Vienna Convention that constitute customary international law could be used as a basis for termination.[444] This was a case that involved an initial attempt to suspend and then terminate a treaty. The Court specifically cited Articles 60-62 of the Vienna Convention, but did not directly address the *exceptio* doctrine. It therefore offers little assistance without clear evidence of whether the *exceptio* doctrine is accepted in customary international law

453. The *Application of the Interim Accord* case (2011) presented an opportunity for the International Court of Justice to clarify whether the *exceptio* doctrine formed part of customary international law. However, as the Court found that Greece had not proven the alleged treaty breaches had occurred, it said it was "*therefore, unnecessary for the Court to determine whether [the exceptio] doctrine forms part of contemporary international law*."[445] In the Tribunal's view, this statement implies that the status of the *exceptio* principle remained unsettled as a matter of international law.

454. Judge Simma wrote a Separate Opinion in the *Interim Accord* case where he stated that "*the pre-Vienna Convention exceptio is to be declared dead*".[446] Judge Simma relied *inter alia* on the decision in the *Gabčíkovo-Nagymaros Project* case in reaching the conclusion that Article 60 sets out exhaustively the consequences of treaty breach and that no version of the *exceptio* doctrine survived.[447]

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443 *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983, 2 ICSID Reports 3, 62 at 105 (I-182 / RL-175).

444 *Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment (Sept. 25, 1997), 1997 I.C.J. Reports 7, paras 99-100 (H-114 / CL-114).

445 *Interim Accord (The Former Yugoslav Republic of Macedonia v. Greece)*, 2011 ICJ 644, Judgment of 5 December 2011, p. 691 (I-249 / RL-242).

446 Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece), Separate Opinion of Judge Simma (Dec. 5, 2011), 2011 I.C.J. Reports 695, para 26 (H-179 / CL-179).

447 Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece), Separate Opinion of Judge Simma (Dec. 5, 2011), 2011 I.C.J. Reports 695, para 29 (H-179 / CL-179).

455. However, two other Judges in the *Interim Accord* case endorsed the *exceptio* principle. Judge ad hoc Roucounas stated that the *exceptio* principle: [448]

> "can be found in one form or another in every legal system. It is the corollary of reciprocity and synallagmatic agreements. It follows that Article 60 of the Vienna Convention on the Law of Treaties is not the sole form of expression of the *exceptio*. As a defence to the non-performance of an obligation, it is a general principle of law, as enshrined in Article 38, paragraph 1 (c), of the Statute of the Court … Article 60 does not deprive the injured party of the right to invoke the *exceptio*."

456. Judge Bennouna in the *Interim Accord* case acknowledged that "*the status of the exception [doctrine] in general international law remains uncertain*,"[449] but said that:[450]

> "The Court could have taken the opportunity […] to emphasize that the *exceptio* can only be contemplated, in general international law, under a strict construction of reciprocity in the implementation of certain international obligations, where the implementation of one is inconceivable without the other. These are obligations of a strictly interdependent nature."

457. In the *Yukos* decision, the tribunal (of which Judge Schwebel was a member) referred to Judge Simma's Separate Opinion, stating:[451]

> "Respondent has demonstrated that certain principles associated with the "clean hands" doctrine, such as *exceptio non adimpleti contractus* and *ex iniuria ius non oritur* have been endorsed by the PCIJ and the ICJ. However, the Tribunal notes that Judge Simma in his separate opinion in the *Application of the Interim*

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[448] *Interim Accord (The Former Yugoslav Republic of Macedonia v. Greece)*, 2011 ICJ 644, Judgment of 5 December 2011, at p. 745 (I-249 / RL-242).

[449] *Interim Accord (The Former Yugoslav Republic of Macedonia v. Greece)*, 2011 ICJ 644, Judgment of 5 December 2011, at p. 709 (I-249 / RL-242).

[450] *Interim Accord (The Former Yugoslav Republic of Macedonia v. Greece)*, 2011 ICJ 644, Judgment of 5 December 2011, at p. 709 (I-249 / RL-242).

[451] *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* PCA Case No. AA 227, Final Award, paras 1360-1363 (H-180 / CL-180).

> *Accord of 13 December 1995* raises doubt as to the continuing existence of the *exceptio non adimpleti contractus* principle …
>
> However, as Claimants point out, despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.
>
> The Tribunal therefore concludes that "unclean hands" does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case. The following authorities support the position that there is a lack of evidence to establish a separate *exceptio* doctrine."

458. The legal scholarship on the *exceptio* principle is equally equivocal.

a. Professor James Crawford SC and Simon Olleson opined in 2001:[452]

> "One can hardly avoid the conclusion that the exception of non-performance is under-theorised and that it has not established an independent place as a rule or principle of international law… even though results expressed in terms of the exception will often intuitively appeal to our sense of the just or appropriate outcome. Intuitions based on notions of reciprocity and mutual good faith are, after all, not difficult to generate. But they do not necessarily lead to specific legal doctrines, still less 'general principles of law'."

b. In the Max Planck Encyclopaedia of Public International Law, Danae Azaria states (emphasis added):[453]

> "To the extent that the *exceptio* is a rule of customary international law (or a general principle of law) it is available. <u>As far as customary international law is concerned, the foregoing analysis has shown the variety of contradictory</u>

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[452] J. Crawford and S. Olleson "The Exception of Non-Performance" 21 Aust YBIL, 55 (2001) (I-175 / RL-168).

[453] D. Azaria "Exception of Non- Performance" MPEPIL, February 2015, paras 27-31 (I-252 / RL-245).

> arguments in the practice of States in their statements before international courts, as well as the lack of international jurisprudence on the issue…
>
> The debate about the existence and function of the *exceptio* underscores the ongoing significance of reciprocity in international law, especially in the context of contractual obligations. It also illustrates the modern importance of the work of the ILC and the impact of this work on international law. While arguments concerning the existence or the 'death' of the *exceptio* beyond the rules codified in the VCLT (for responses to material breaches of the treaty) are logical, given the current inconclusiveness, future practice will better determine the *exceptio's* legal value."

c. Whereas, Professor Oscar Schachter opined in 1986 that:[454]

> "Apart from the right of suspension, a party has the right to refuse to perform an obligation corresponding to the obligation violated by the other party. The applicable customary law principle is known as *inadimplenti non est adimplendum*."

d. Professor Giegerich endorsed this view, while acknowledging limited application:[455]

> "one should not completely exclude resort to the *exceptio* to fill in gaps where this can be done without upsetting the balance of interests embodied in Article 60 of the VCLT… the *exceptio* can be used only to suspend performance of treaty obligations that are reciprocal to those that the defaulting State failed to perform."

459. The Tribunal also acknowledges that Judge Schwebel (Respondent's expert) supported the existence of a separate *exceptio* doctrine, saying that:[456]

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[454] O. Schachter, "In Defense of International Rules on the Use of Force" 53 University of Chicago Law Review (1986) 113, 128-9 (footnote 69) (K-53 / SS-53).

[455] Giegerich, "Article 60" in O. Dörr and K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties (2012) 1021, at 1043 (K-9 / SS-9).

[456] First Judge Schwebel Expert Report, paras 6 and 8.

> "The *exceptio non adimpleti contractus* – the principle that when faced with a contractual party that does not perform its contractual obligations, the counterparty may withhold performance of its own obligations which are reciprocal to those not performed by the other party – is a well-established principle of international law … I should note that Article 60 coexists with the principle *exceptio non adimpleti contractus*; it neither codifies nor replaces the latter."

460. It is evident from the above summary of the authorities before this Tribunal that the separate existence of the *exceptio* doctrine remains far from settled. However, the Tribunal finds that it need not decide whether or not that *exceptio* doctrine exists separately from Article 60 of the Vienna Convention because, even if it does, the Tribunal considers that it would not be applicable in the present situation for the reasons set out below.

461. The *exceptio* doctrine, if established, would be applicable to reciprocal or synallagmatic obligations only. In the Tribunal's view, the obligation under the ITP Agreements to load Iraqi oil in accordance with instructions from the Ministry of Oil is not a synallagmatic obligation. Iraq has no such reciprocal obligation under the ITP Agreements. In particular, this obligation is not reciprocal with either of the obligations allegedly breached: (i) the obligation to maintain the Pipelines; or (ii) the obligation to meet Minimum Guaranteed Throughputs. It may have been possible for the Respondent to suspend its own obligation to maintain the Pipelines following Iraq's alleged failure to do so (at least since March 2014). However, the Tribunal is not convinced that the wider obligation to operate the Pipelines in accordance with the ITP Agreements and, specifically, to comply with instructions from the Ministry of Oil could similarly be suspended under the *exceptio* doctrine. In short, the reciprocity element of the *exceptio* doctrine is not satisfied.

462. The *Yukos* case confirms that the *exceptio* doctrine requires "clean hands" on the part of the non-breaching party. As set out in paragraph 244 above, the Tribunal doubts whether the Respondent could satisfy this requirement, given its repeated reassurances to the FGI that it would not load oil on the KRG's instructions. Moreover, the Respondent's relationship with the KRG that led to the eventual loading breach began before the 46-inch Pipeline became unusable. The Claimant was still exporting oil through the ITP system at the time the Respondent established its relationship with the KRG. The Respondent cannot in good faith

state that its relationship with the KRG (and the loading of oil in accordance with the KRG's instructions) was the result of the FGI's inability to transport oil through damaged Pipelines.

463. The Tribunal also accepts the Claimant's submissions regarding acquiescence.[457] The Claimant contended that Article 45 of the Vienna Convention constitutes customary international law or, at least, that the relevant parts of Article 45 form part of the international law obligation of good faith.[458] Article 45 provides that a State cannot invoke the suspension or termination provisions of the Vienna Convention where it has expressly or impliedly agreed that the treaty remains valid following the breach. The failure to repair the 40-inch Pipeline and the failure to meet Minimum Throughput obligations were issues that existed at the time the 2010 Amendment was signed. Both of these issues were discussed by the Parties during meetings from 2007-2010 and during the negotiation of the 2010 Amendment.[459] The Respondent affirmed during those meetings that the ITP Agreements remained in effect and that it was willing to negotiate the 2010 Amendment. Also, after the Claimant objected to the Respondent transporting oil on behalf of the KRG, the Respondent confirmed that it was conducting its operations "*in accordance with its obligations under the ITP agreement*", despite alleging breaches by SOMO.[460] This was in March 2014. The Tribunal therefore finds that any suspension right, had it existed, was extinguished by the Respondent's continued affirmation that the ITP Agreements remained applicable and operable as between the Parties.

464. Consequently, the Tribunal dismisses the Respondent's affirmative defence that it was entitled to suspend its obligations under the ITP Agreements under either Article 60 of the Vienna Convention or the *exceptio* doctrine.

Application of *l'exception d'inexécution*

465. While the Tribunal has found that French law does not apply, the Tribunal confirms that the result would be the same under the *l'exception d'inexécution* doctrine.

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457 See Transcript (Merits Hearing), Day 1, 71-75; Claimant's Reply, paras 2.133-2.137.

458 Transcript (Merits Hearing), Day 1, 71:7-18.

459 See Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and Botaş, 2 August 2007 (HM-80 / C-36); Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 28 November 2008 (HM-91 / R-70); Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 25-26 February 2009 (HM-93 / C-35).

460 Letter from BOTAŞ to SOMO, 25 March 2014 (HM-238 / C-14).

466. In order to invoke *l'exception d'inexécution* (as with its international law analogues), the Respondent must prove that the Claimant was in breach of the ITP Agreements. The Claimant's breach must occur before or simultaneously with suspension. French law also requires a party seeking to rely on *l'exception d'inexécution* to establish that: (i) the obligations at issue are interdependent and reciprocal; and (ii) that the breach is "sufficiently serious" to justify suspension of the reciprocal obligations.[461]

467. The Respondent claimed that the Claimant breached the following obligations contained in the 2010 Amendment:[462]

a. Article 2.1: to maintain the ITP system in Iraq. The Respondent asserted that the 40-inch Pipeline had not been repaired or maintained since 1997 and that the 46-inch Pipeline had not been repaired or maintained since March 2014; and

b. Article 3: Minimum Guaranteed Throughputs. According to the Respondent, the Claimant has not met its Minimum Guaranteed Throughput obligations since 2003 and, since March 2014, has been unable to pump any oil through the Pipelines, other than through the KRG tie-in.

468. In its Counter-Memorial, the Respondent also claimed that the Claimant had breached Articles 2.2 (continuous flow) and 8.1 (minimum flow rate) of the 2010 Amendment.[463] However, these claims of breach were not pursued by the Respondent during the Hearing, and the Tribunal takes them to have been withdrawn. Should that not be the case, the Tribunal notes for completeness that Article 2.2 of the 2010 Amendment imposes continuous flow obligations on the Respondent, not the Claimant. Therefore, the Claimant could not be in breach of said Article for failure to maintain a continuous flow. Article 8.1 relates to the minimum flow rate required for secure operation of the system. There has been no specific evidence offered regarding minimum flow rates or any breach thereof.

469. As regards the primary allegations of breach of Article 2.1 (obligation to maintain the ITP system) and Article 3 (Minimum Guaranteed Throughput) of the 2010 Amendment, the

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461 Respondent's Counter-Memorial, paras 124-125.

462 Respondent's Counter-Memorial, paras 119-122; Respondent's Rejoinder, para 69.

463 Respondent's Counter-Memorial, para 131.

Claimant did not dispute the facts underlying these allegations, but disputed whether they resulted in a breach of the Claimant's obligations. The Claimant said that no breach occurred of either of these provisions due to (i) the *force majeure* circumstances that existed as a result of the conflict with ISIS (otherwise known as Daesh); and (ii) the KRG's refusal to sell oil to SOMO for which the Claimant says the Respondent was responsible.

470. With regard to the maintenance and repair of the ITP system, the Tribunal recalls that the bomb damage to the 46-inch Pipeline that rendered that Pipeline inoperable occurred on 2 March 2014. However, the Respondent began transporting oil on instruction from the KRG in January 2014 (with testing occurring in late 2013). At this time, the 46-inch Pipeline was operational and the Claimant was delivering crude oil through it.[464] As is evident from the communications summarised in paragraph 359 above, the Claimant had been strongly protesting these actions since late December 2013. Any violation of the ITP Agreements by the Claimant in relation to its failure to repair the 46-inch Pipeline post-dates the Respondent's own violations of its obligation to transport and store Iraqi oil in accordance with the instructions of the Iraqi Ministry of Oil. According to the doctrine, the Respondent may seek to invoke the *l'exception* doctrine as a defence only where the Claimant's alleged breach of the ITP Agreements had already occurred, or occurred simultaneously with, the Respondent's own breach of the allegedly suspended obligations. There is no basis on which the Respondent can therefore invoke the *l'exception* doctrine in relation to the failure to repair the 46-inch Pipeline.[465]

471. However, it is clear that the 40-inch Pipeline was inoperable for many years prior to construction and operation of the KRG's tie-in. That Pipeline had been damaged in 1997 and had been inoperable ever since. There is an open question as to whether the obligation to maintain the "ITP system" under Article 2.1 of the 2010 Amendment means that both Pipelines had to be operational at all times or whether having one operational Pipeline such that oil could flow through the ITP system was sufficient. Certainly, it is clear from Article 3.2 of 2010

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464 Claimant's Post-Hearing Brief, para 1.8.

465 It is acknowledged that the Claimant claimed *force majeure* in relation to the 46-inch Pipeline in August 2014 (see paragraph 501 below).

Amendment that the Parties contemplated the possibility that the full capacity of both Pipelines (70.9 MTA) may not be always available.[466]

472. Regardless of the extent of the obligation under Article 2.1 of the 2010 Amendment (which came into force in July 2011), it is clear from the evidence that steps were being taken by the Claimant to repair the 40-inch Pipeline and expand the capacity of the ITP system as a whole. The Respondent was aware of these steps, which are summarised below.

a. Plans for the expansion of the ITP system (via an Alternative Strategic Pipeline) were presented to the Respondent in July 2012.[467]

b. In April 2013, the Iraqi Council of Ministers adopted a new Integrated National Energy Strategy, based on the recommendations of a World Bank-sponsored study (publicly announced in June 2013). The Strategy included the rehabilitation of the 40-inch Pipeline and the connection of the ITP system in 2014 to a rehabilitated north-south link to the Basra area fields in southern Iraq.[468]

c. The Iraqi Ministry of Oil then held a tender process to choose a contractor to build a new 300 kilometre 40-inch pipeline to Fishkabur (the previous 40-inch Pipeline having been so badly damaged that it could not be repaired). By December 2013, the Ministry had selected K&M Ltd., a Ukrainian company, to undertake the project.[469] The Respondent was aware of these developments.[470]

473. In summary, the ITP system remained partly functional in Iraq at the time the Respondent began to transport and store oil for the KRG. The Claimant was taking steps to repair (or replace) the damaged 40-inch Pipeline and had been doing so since the 2010 Amendment came into force. The Respondent was aware of those steps and had expressed encouragement

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466 See paragraph 332 above.

467 Minutes of July 2012 Meetings, 19 July 2012 (HM-157 / C-57).

468 Claimant's Memorial, para 4.12; Iraq National Energy Strategy, Final Report of Iraq's Integrated National Energy Strategy, 25 September 2012, pp. 35, 103 (HM-163 / C-65).

469 Claimant's Memorial, paras 4.13. "K & M tipped for new Iraq-Turkey Pipeline construction" Iraq Oil Report, 30 December 2013 (HM-207 / C-66).

470 "Turkey to seek tripartite deal on Iraqi Kurds' oil, gas exports: Minister" Platts, 2 December 2013 (HM-196 / C-68).

for them – it considered the construction of the new 40-inch Pipeline to be "*an important step toward increasing the security of its export routes.*"[471] At no time prior to its submissions in this arbitration, had the Respondent expressed the view that the Claimant's steps towards replacing the 40-inch Pipeline (as described above) were insufficient to meet its obligations under the 2010 Amendment or that the Claimant was in breach of Article 2.1, such that all obligations under the ITP Agreements were suspended.

474. The Tribunal also recalls that the Respondent entered into the 2010 Amendment in the full knowledge that the 40-inch Pipeline was not operational. While the Claimant did commit to maintain the ITP system within Iraq in the 2010 Amendment, there was no specific commitment given by the Claimant to repair the 40-inch Pipeline within a certain time period.[472] While the Respondent submitted that it had an "expectation" the Claimant would take steps to repair the Pipeline[473] (and indeed the Claimant had been taking such steps, as described above), this expectation was not translated into a specific obligation to repair the 40-inch Pipeline by a certain time. The Tribunal recalls in this regard the paragraph in the non-binding Joint Declaration, signed on the same day as the 2010 Amendment, whereby the Parties "*note[d] the necessity for the renovation and construction of oil and gas pipeline network within Iraq and to this end encourage the active participation of experienced Turkish companies in such projects.*"[474] The issue of the state of repair of the 40-inch Pipeline was therefore considered by the Parties, but the Parties did not include any specific commitments regarding its repair in the 2010 Amendment. The obligation to "maintain the system" adopts largely the same formulation as the original 1973 Agreement.

475. There is no evidence that the Respondent raised the issue of the state of the 40-inch Pipeline with the Claimant prior to commencing transportation of oil for the KRG, other than providing encouragement for the steps the Claimant was taking to repair/replace the 40-inch Pipeline. When the Claimant raised a protest at the Respondent's activities in relation to the KRG oil,

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471 "Turkey to seek tripartite deal on Iraqi Kurds' oil, gas exports: Minister" Platts, 2 December 2013 (HM-196 / C-68).

472 The Tribunal also notes the Parties' acknowledgement in the Joint Declaration (HM-116 / C-55) of the "*necessity for the renovation and construction of oil and gas pipeline network within Iraq*."

473 Respondent's Counter-Memorial, para 120; Respondent's Post-Hearing Brief, para 84.

474 Joint Declaration of the Minister of Energy and Natural Resources of the Republic of Turkey and the Minister of Oil of the Republic of Iraq, 19 September 2010 (HM-116 / C-55).

the Respondent did not suggest that the ITP Agreements had been suspended. Quite the opposite – the Respondent specifically affirmed the 2010 Amendment and its obligation to comply with the Claimant's instructions.[475] For example, on 11 April 2014, the Turkish Minister of Energy wrote to his counterpart in Iraq stating that all oil coming from Iraq (including KRG oil) was "Iraqi oil" under the Agreements and that:[476]

> "I would like to confirm that both our country and BOTAŞ are working in the energy field in Iraq according to Articles two and three of the ITP agreement signed in 19 September 2010 which stipulate that "the Turkish side guarantees to load all crude oil coming from Iraq, to the tankers that will be instructed by the Iraqi side without delay and to do the necessary port and customs formalities for the departure of the tankers from the port" and also Articles 3 and 4 that stipulate "the pipeline system, tankers and other terminal facilities subjected to ITP shall exclusively be assigned to transport and load the crude oil coming from Iraq." (emphasis added)

476. Until March 2014, the Respondent was transporting oil for the Claimant through the 46-inch Pipeline in accordance with the Ministry's instructions. There is no suggestion that the 2010 Amendment did not apply to that oil. Both Parties were operating on the premise that the ITP Agreements remained in full force as at March 2014. Moreover, in November 2014, the FGI and the KRG reached an agreement whereby the KRG would sell 150,000 bpd of crude oil to the FGI, which would be transported through the KRG tie-in and into the ITP system.[477] The quantity of oil transported by the FGI was increased over the next few months. The KRG also allowed SOMO to transport some additional Kirkuk oil through the KRG tie-in and into the 40-inch Pipeline.[478] By mid-February 2015, the KRG was selling to the FGI 350,000 bpd, which was

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[475] In correspondence, the Respondent referred to the Claimant's failure to meet Minimum Guaranteed Throughput obligations (see Letter from BOTAŞ to SOMO, 25 March 2014 (HM-238 / C-14)). This suggests that the Respondent did turn its mind to the possibility of breach by the Claimant, but still did not raise any issue regarding the 40-inch Pipeline.

[476] Letter from Ministry of Energy and Natural Resources of Turkey to Iraqi Ministry of Oil, 11 November 2014 (HM-241 / C-38).

[477] The November Provisional Agreement, 14 November 2014 (HM-280 / R-5).

[478] Letter from SOMO to BOTAŞ, 23 January 2015 (HM-304 / R-16).

being exported through the ITP system.[479] As a result of these agreements, the Iraqi Ministry of Oil sent the Respondent instructions in relation to that oil.[480] BOTAŞ followed these instructions.[481] While both Parties reserved all rights, it is evident that they were acting in accordance with the 2010 Amendment during these transactions.

477. By March 2015, the Claimant proposed using both the 40-inch and the 46-inch Pipeline simultaneously to pump up to 650,000 bpd. Technical issues, including the need for the Respondent to install another pump, prevented this from occurring straight away, but the Respondent agreed to investigate the possibility of a capacity increase.[482] Nothing in the detailed discussions during this time (including discussions regarding connecting the new 40-inch Pipeline at the border) indicate that either Party considered the ITP Agreements to be suspended. On 23 November 2016, BOTAŞ purported to update the tariff arrangements under the 2010 Amendment in accordance with the 5-year review clause contained in Article 4.12 of the 2010 Amendment.[483] Again, this suggests that both Parties were acting throughout this period on the basis that the ITP Agreements were not suspended.

478. On the basis of the above, the Tribunal finds as follows.

a. The Respondent's breaches of the ITP Agreement occurred prior to the bombing of the 46-inch Pipeline that rendered the ITP system in Iraq inoperable, aside from through the KRG tie-in. The failure to repair the 46-inch Pipeline is not a basis upon which the Respondent can invoke the *l'exception d'inexécution* doctrine.

b. The Claimant had taken steps to repair the 40-inch Pipeline following the 2010 Amendment, with the approval of the Respondent. Such steps (combined with the operational 46-inch Pipeline) met the Claimant's obligations under Article 2.1 of the

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479 Letter from KRG to BOTAŞ, 13 February 2015 (HM-312 / R-23); Letter from SOMO to BOTAŞ, 15 February 2015 (HM-313 / R-19).

480 Letter from SOMO to BOTAŞ, 17 November 2014 (HM-282 / R-10); Letter from SOMO to BOTAŞ, 23 November 2014 (HM-286 / R-11); Letter from SOMO to BOTAŞ, 23 January 2015 (HM-304 / R-16); Letter from SOMO to BOTAŞ, 2 February 2015 (HM-309 / R-17); Letter from SOMO to BOTAŞ, 5 February 2018 (HM-311 / R-18) (although the KRG also issued instructions to the Respondent on the same basis – see exhibits at HM-281, HM-283, HM-303, HM-308, HM-310).

481 Letter from BOTAŞ to SOMO, 6 January 2015 (HM-298 / R-24).

482 See Minutes of Meeting, 30 March 2015 (HM-317 / R-114).

483 Letter from BOTAŞ to SOMO, 23 November 2016 (HM-355 / C-209).

2010 Amendment. The Claimant was not, therefore, in breach of its obligation to maintain the ITP system under Article 2.1 of the 2010 Amendment.

c. Both Parties affirmed by their actions and words that the ITP Agreements remained in force between them throughout the period from 2014 to 2016.

d. There is no basis upon which the Respondent could now assert that the *l'exception d'inexécution* doctrine (even if applicable) operated to suspend its obligations under the ITP Agreements since January 2014 due to lack of maintenance of the ITP system.

479. This leaves the alleged breach by the Claimant of the Minimum Guaranteed Throughput obligations. Both Parties acknowledge that the FGI (through SOMO) did not pump sufficient oil into the ITP system to meet the minimum amounts specified in Article 3 of the 2010 Amendment.[484] The throughput achieved by SOMO for the period from 2010 to 2013 is as follows:[485]

Year	MGT Obligation	Actual Throughput
2010	22 MTA	20 MTA
2011	27 MTA	22.4 MTA
2012	32 MTA	18.5 MTA[486]
2013	35 MTA	12.8 MTA

480. While the 2010 Amendment states that nothing except *force majeure* shall prevent the Iraqi side from complying with its Minimum Guaranteed Throughput obligations, the 2010 Amendment contemplates a specific remedy for any shortfall in throughput (as did the

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[484] See paragraph 679 below.

[485] Respondent's Chronology, Annex A; Respondent's Opening Slides, slide 69.

[486] The Claimant stated that the drop in oil flows in 2012 was caused by the KRG's refusal to deliver oil to SOMO (see Claimant's Memorial, footnote 40).

previous iterations of the Agreement). Article 4.5 of the 2010 Amendment states: "*Except force majeure conditions defined hereby, the amount to be paid to the Turkish Side by the Iraqi side in a calendar year shall not be less than the transportation charge for Minimum Guaranteed Throughput*."

481. Hence, the Respondent's minimum financial position was protected – either the Claimant transported the minimum quantities of oil through the ITP system and paid transportation fees accordingly or, if it failed to transport the minimum quantities, it had an obligation to pay transportation fees as if it had complied with those minimum requirements. In either case, the Respondent was guaranteed to achieve a certain minimum level of financial benefit from operating the ITP system in any given year (except in cases of *force majeure*).

482. In accordance with the 2010 Amendment, the Claimant paid transportation fees to the Respondent in the amount of US$550 million between July 2011 (when the 2010 Amendment came into force) and the end of 2013.[487] The obligation to pay reconciliation amounts in relation to the shortfall in Minimum Guaranteed Throughput over this period is not disputed. The only dispute is whether the amount to be paid has become due, as the Parties have not yet signed the Protocol required under Article 4.6 which states:

> "Final calculation of the remuneration payable during any calendar year shall be agreed upon in separate "Protocol" to be signed between SOMO and BOTAŞ. Settlement shall be made within one month from the date of the signature of such a Protocol."

483. In any case, there is now no dispute as the Claimant has agreed to "credit" the reconciliation amount against anything owed to it by the Respondent as a result of this arbitration. The Respondent did not refute the Claimant's assertion that the required protocols had not been agreed and therefore the reconciliation amounts had not technically become due.[488]

484. On this basis, the Tribunal concludes the Claimant failed to meet its Minimum Guaranteed Throughput obligations from July 2011 to December 2013 in breach of the 2010 Amendment, but that this is not a breach upon which suspension can be based. The remedy for this breach

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[487] Claimant's Memorial, para 4.10 and Claimant's Reply on the Counterclaims, para 2.10.

[488] See Respondent's Rejoinder, footnote 318.

is clearly stated in the 2010 Amendment as payment of transportation fees. In the Tribunal's view, there is no basis on which to find that the entire Agreement can be suspended, when the breach has been clearly anticipated by the Parties and a remedy provided.[489]

485. This conclusion is supported by the fact that issues around minimum throughputs had existed for several years prior to the 2010 Amendment.[490] Although the non-payment of Minimum Guaranteed Throughput fees was an outstanding issue between the Parties in 2010, the Respondent still entered into the 2010 Amendment. In the Tribunal's view, had the Claimant's failure to meet its Minimum Guaranteed Throughput obligations (or pay fees in lieu of meeting those obligations) been considered a serious breach by the Respondent, it is unlikely that the Respondent would have signed the 2010 Amendment without resolving the issue. The fact that the transportation fees still to be paid for the period from 2011-2013 (approximately USD 68 million) are significantly less than the fees actually paid by the Claimant over that period (USD 550 million), also supports a conclusion that the alleged breach was not sufficiently material to support a suspension argument. Transportation fees for the period prior to commencement of the 2010 Amendment are addressed at Section XIV below.

486. The Tribunal notes that a dispute has arisen between the Parties regarding payment of the fees following the Claimant's declaration of *force majeure* in 2014. This dispute is being considered by another tribunal in a separate arbitration and is not a claim that is at issue before this Tribunal.

487. In summary, the Tribunal finds that any breach by the Claimant of the 2010 Amendment relates solely to its failure to adhere to Minimum Guaranteed Throughput obligations. This breach is not sufficiently serious to allow the Respondent to invoke the *l'exception d'inexécution* doctrine, if it was to apply.

Change of Circumstances: *Rebus sic stantibus* / Article 62 of the Vienna Convention

488. The Tribunal now considers the Respondent's additional assertion that it is entitled to suspend the ITP Agreements due to a fundamental change of circumstances under the *rebus sic stantibus* doctrine, as codified in Article 62 of the Vienna Convention.

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489 See Claimant's Reply, para 2.187 (and para 2.202).

490 See discussion at Section XIV(A) below.

489. Article 62 is accepted by both Parties as representing customary international law. It states:

> "1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> (a) if the treaty establishes a boundary; or
>
> (b) if the fundamental change in the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
>
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

490. Article 62 embodies a restrictive doctrine whereby a change of circumstances that is fundamental and unforeseen may provide a ground upon which a treaty can be terminated or suspended. The circumstance in question must radically transform the obligations that remain to be performed. It can only be successfully invoked in exceptional circumstances.[491]

491. The Tribunal agrees with the Claimant that the KRG's suspension of oil supplies to SOMO in April 2012 did not constitute a fundamental change of circumstances. Supplies were suspended at the time the 2010 Amendment was signed,[492] therefore a further suspension should have been foreseeable. In any case, the primary impact of the KRG's suspension of oil supplies was that the Claimant could not meet its Minimum Guaranteed Throughput obligations under the 2010 Amendment. For the reasons discussed at paragraph 484 above, any failure to meet Minimum Guaranteed Throughput obligations under the 2010 Amendment

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[491] See *Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment (Sept. 25, 1997), 1997 I.C.J. Reports 7, para 104 (H-114 / CL-114).

[492] Claimant's Reply, para 2.119.

was addressed through the specific remedy set out in the ITP Agreements. It is not a basis upon which to invoke the *rebus sic stantibus* doctrine.

492. However, in the Tribunal's view, the bombing of the 46-inch Pipeline in March 2014 rendering it inoperable was a fundamental change of circumstances. From this time onwards, the ITP system has been effectively defunct within the territory of Iraq, aside from the KRG's pipeline and tie-in. Without a working ITP system in Iraq, the ITP Agreements simply cannot function as intended. The Claimant contended that the shutdown of the 46-inch Pipeline as a result of terrorism was a foreseeable event at the time the 2010 Amendment was signed.[493] The Tribunal disagrees. As is evident from the Tribunal's discussion of the nature of the attacks on the Pipeline between 2003 and 2013 (see paragraph 693 below), attacks on pipelines in Iraq had significantly decreased by 2010. From mid-2007, all damage to the 46-inch Pipeline had been repaired reasonably promptly. Although the Claimant pointed to the minutes of a meeting that took place in February 2009 where the "*Iraqi Party stated that as the situation in Iraq has not been settled yet*"[494] as evidence that the closure of the 46-inch Pipeline was foreseeable, there is nothing to suggest that Parties discussed or contemplated the possibility that the 46-inch Pipeline may become permanently disabled as a result of the attacks.

493. The Tribunal finds that the closure of the 46-inch Pipeline from March 2014 through to the present day due to bomb damage fulfils the requirements of Article 62. It constitutes:

a. a fundamental change of circumstances that existed at the time of the conclusion of the treaty;

b. that was not foreseen by the Parties;

c. the existence of which constituted an essential basis of the Parties' consent to be bound by the treaty; and

d. the change radically transformed the extent of obligations still to be performed under the ITP Agreements.

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493 Transcript (Merits Hearing), Day 1, 59:20-25.

494 Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 25-26 February 2009 (HM-93 / C-35); Transcript (Merits Hearing), Day 1, 60:8-15.

494. The Tribunal observes that the Article 62 defence was first invoked by the Respondent in its Counter-Memorial dated April 2017. No reference was made to suspension on the basis of a fundamental change of circumstances in the Respondent's Answer and Counterclaim in September 2014.[495] The Claimant asserted that the Respondent cannot now invoke Article 62 on the basis of acquiescence under Article 45 of the Vienna Convention (the same argument made in relation to the *exceptio* doctrine and Article 60). While the Tribunal accepted this argument in relation to the *exceptio* doctrine, it is less clear in relation to Article 62. In particular, the Tribunal does not consider that the Respondent's confirmation of the continued application of the ITP Agreements in March and April 2014[496] equates to acquiescence in the case of Article 62. The 46-inch Pipeline was damaged on 2 March 2014. When the Respondent sent its letters in late March and early April 2014 confirming the ITP Agreements remained in effect,[497] the long-term nature of the damage to the 46-inch Pipeline may not have been apparent to the Respondent.

495. The Tribunal notes that, although the Respondent did not refer to Article 62 in its Answer dated September 2014, from this time onwards the Respondent maintained a position that its obligations under the ITP Agreements were suspended on the basis of the Claimant's breach of the Agreements. In the Tribunal's view, the Respondent raised the suspension issue (in a broad sense) within a reasonable period of time of the 46-inch Pipeline being rendered inoperable within Iraq. The specific invocation of Article 62 was not made until after the jurisdiction phase of the arbitration had been completed. However, the Tribunal is not willing to find that the Respondent acquiesced in the continued application of the ITP Agreements, when suspension had been raised within a matter of months of the shutdown of the 46-inch Pipeline. It certainly cannot be said that, having become aware of the fundamental change in circumstances, the Respondent then confirmed the continued applicability of the obligations under the ITP Agreements.

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[495] See Respondent's Answer and Statement of Counterclaims, para 68 which is headed "Respondents' Obligations Under the ITP Agreements Are Extinguished or Suspended by Claimant's Breach of Its Own Obligations" and refers only to suspension on the basis of breach by the Claimant.

[496] Letter from BOTAŞ to SOMO, 25 March 2014 (HM-238 / C-14); Letter from the Turkish Ministry of Energy and Natural Resources to the Iraqi Ministry of Oil, 11 April 2014 (HM-241 / C-38).

[497] Letter from BOTAŞ to SOMO, 25 March 2014 (HM-238 / C-14); Letter from the Turkish Ministry of Energy and Natural Resources to the Iraqi Ministry of Oil, 11 April 2014 (HM-241 / C-38).

496. However, the Tribunal recalls the restrictive nature of the principle that the International Court of Justice made clear in the *Gabčikovo-Nagymaros Project* case. The Court said:[498]

> "The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases."

497. The facts at issue here must be assessed with the doctrine's restrictive nature in mind. The Tribunal recalls the duty imposed on States under international law to act in good faith in their treaty dealings. The Tribunal considers it material that the Respondent began transporting and storing crude oil for the KRG before the 46-inch Pipeline was damaged. The Respondent's conduct in working with the KRG was not motivated by the lack of a functioning ITP system in Iraq.

498. Moreover, it is also clear from the discussion above that the Respondent did not consider the ITP Agreements to be suspended at the time it began loading oil in breach of the ITP Agreements. Discussion of suspension first arose some months later. Certainly, the Respondent did not tell the Claimant that it was suspending the ITP Agreements when it began loading the oil on the KRG's behalf. Indeed, its communications at the time were on the basis that the ITP Agreements were still operative. On 11 April 2014, the Respondent wrote to the Claimant saying it "*would like to confirm that both* [Turkey] *and BOTAS are working in the energy field in Iraq according to Articles two and three of the ITP agreement signed in 19/September/2010 … and also Articles 3 and 4.*"[499]

499. The Tribunal considers that the Respondent cannot invoke Article 62 (or the *rebus sic stantibus* doctrine) for actions which, at the relevant time, it had not tied to the alleged suspension and where there is no evidence the Respondent considered the Agreements to be suspended at the time it breached its obligations.

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[498] *Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment (Sept. 25, 1997), 1997 I.C.J. Reports 7, para 104 (H-114 / CL-114).

[499] Letter from the Turkish Ministry of Energy and Natural Resources to the Iraqi Ministry of Oil, 11 April 2014 (HM-241 / C-38).

500. In the Tribunal's view, these facts are fatal to this defence. The Tribunal finds that the Respondent was not entitled to suspend the ITP Agreements due to a fundamental change of circumstances, as the doctrine cannot be used to justify a course of conduct which has already begun before the change of circumstances occurs.

Force Majeure

501. The Claimant declared *force majeure* on 17 August 2014 on the basis that it could not fulfil its Minimum Guaranteed Throughput obligations under the ITP Agreements due to the bombing of the 46-inch Pipeline and the impossibility of repair given that ISIS had taken control of the relevant area.[500] The Respondent disputes the validity of the *force majeure* declaration, although does not expressly provide reasons for doing so.[501] As *force majeure* was raised by the Respondent in the context of its affirmative defences, the Tribunal briefly addresses it here. *Force majeure* is considered in more detail in Section XIV below in the context of the Respondent's counterclaims.

502. The Tribunal recalls that the 46-inch Pipeline was severely damaged on 2 March 2014. The FGI made attempts to repair the Pipeline, but continued bombing and sabotage rendered these attempts futile. In June 2014, ISIS took control of the Pipeline corridor and surrounding area. ISIS remained in control of the area until late 2017. In June 2014, the Peshmerga prevented ISIS from taking control of the Kirkuk oil fields themselves (which remained under Kurdish control until October 2017).

503. In August 2014, the Claimant informed the Respondent that it would not be able to adhere to the Minimum Guaranteed Throughput requirements under the 2010 Amendment because of terrorist activity along the Pipeline corridor which prevented repair of the 46-inch Pipeline.[502]

504. By November 2014, the FGI had entered into an arrangement with the KRG, pursuant to which the KRG would sell SOMO 150,000 barrels of oil per day and transport that oil through the KRG

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[500] Letter from the Republic of Iraq Ministry of Oil Marketing Company to BOTAŞ, 17 August 2014 (HM-266 / R-71).

[501] See Respondent's Counter-Memorial, para 158 and Respondent's Rejoinder, para 95. The Respondent provides detail regarding the validity of force majeure in the 2003-2013 period, but not in relation to the period from 2014 onwards.

[502] Letter from the Republic of Iraq Ministry of Oil Marketing Company to BOTAŞ, 17 August 2014 (HM-266 / R-71).

tie-in for SOMO. The amount of oil available to the FGI through the tie-in increased in December 2014, with further arrangements entered into in August 2016 and early 2018.

505. The Tribunal recalls that the Minimum Throughput Obligations under the ITP Agreements relate to the volume of Iraqi crude oil being transported through the ITP system. The Tribunal has found that oil being transported through the Pipelines by the KRG is "Iraqi oil" under the ITP Agreements (i.e., crude oil flowing from Iraq). It is for this reason that the Respondent was in breach of the ITP Agreements, as its obligation under the 2010 Amendment was to follow the Iraqi Ministry of Oil's instructions in relation to all Iraqi crude oil flowing through the Pipeline system.

506. The natural corollary of this finding is that all Iraqi crude oil transported through the ITP system must count towards the Claimant's fulfilment of its Minimum Guaranteed Throughput requirements under the 2010 Amendment, regardless of whether the oil was sold by SOMO or the KRG. The Minimum Guaranteed Throughput obligation was placed on the Claimant as a whole, and not SOMO individually. The Tribunal understands that the following volumes have been transported through the ITP system by SOMO and the KRG since January 2014:[503]

Year	MGT Obligation	KRG Volume	SOMO Volume	TOTAL
2014	35 MTA	4.605	2.369	6.974
2015	35 MTA	18.098	6.448	24.546
2016	35 MTA	25.164	0.432	25.596
2017	35 MTA	24.670	0.794[504]	25.464
2018 [Q1-Q3]	26.25 MTA[505]	12.712[506]	unknown	

503 Volumes taken from Second Earnest Expert Report, Workpapers 48 to 54.

504 Based on 5.8 million barrels. See SOMO, Iraq Crude Oil Exports, December 2017 (HM-385 / C-240).

505 Pro-rata figure for 1 January – 30 September 2018.

506 Note that Federal forces had taken back control of the Kirkuk area in October 2017, meaning that the KRG no longer had access to previously controlled oil fields in the Kirkuk region (see *Abadi claims*

507. The total number of gross barrels of oil exported by the KRG from 21 May 2014 to 30 September 2018 is 622,061,679 barrels. Over the same period, SOMO exported 61,490,173 barrels of oil via the KRG tie-in. While these figures fall short of the required minimum volumes, from 2015 onwards they are significantly higher than the volumes transported during previous years. In short, significant volumes of Iraqi Oil continued to be transported through the ITP Pipeline to Ceyhan between 2014-2018.

508. The Claimant itself appears to admit this in its Post-Hearing Brief, where it submitted:[507]

> "In the "but for" world where the KRG turned over its crude oil production to SOMO for export, the volumes exported by SOMO would generally equal or exceed the MGT volumes, particularly because SOMO also would have been able to export volumes produced at the Kirkuk field by North Oil Company."

509. It is clear that, even though the 46-inch Pipeline remained damaged (and therefore oil could not be exported directly from the Kirkuk oilfields through the 46-inch Pipeline), the system itself remained operable because the KRG connection provided an alternative mechanism for oil to enter into the Pipelines within Iraq. Throughout this period, the Claimant was able to access the ITP system via the KRG tie-in and therefore was able to continue transporting oil. The reality is that throughout the period from 2014-2018, crude oil from the Republic of Iraq continued to flow through the ITP system and should have been treated by the Respondent as Iraqi Oil under the 2010 Amendment.

510. The Tribunal finds that performance remained possible for the Claimant from 2014 onwards as a result of its ability to export oil via the 40-inch Pipeline using the KRG tie-in near Fishkabur (in both the actual and counterfactual scenarios discussed in Section XIII below). On this basis, the Tribunal finds that the Claimant was not entitled to invoke *force majeure* in August 2014 and that both sides remained bound to perform their obligations under the ITP Agreements.

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agreement with Erbil to resume Kirkuk-Turkey oil exports 'soon', Rudaw, 28 February 2018, (HM-393 / R-148)).

[507] Claimant's Post-Hearing Brief, para 6.125.

It is on this very basis that the Respondent is seeking to cover unpaid MGT fees[508] from the Claimant in a separate arbitration.

Conclusion

511. In summary, based on the reasons set out above, the Tribunal dismisses the Respondent's affirmative defence that its obligations under the ITP Agreements were suspended as a matter of international law (and would have come to the same conclusion under French law, had it applied). The Tribunal finds that the Respondent was bound to adhere to its obligations under the ITP Agreements from 2014 onwards.

B. Was the Claimant responsible for controlling access to the Iraqi section of the Pipelines?

1. Respondent's submissions

512. The Respondent submitted that the crude oil that the Claimant complains was improperly transported, stored, and loaded using the ITP system was pumped into the system within Iraqi territory and that the Claimant did nothing to stop the flow of oil entering into the ITP system in Iraq.

513. Under the ITP Agreements, each Party *"guarantees to operate, maintain, manage and finance, and to provide all requirements for the part of the system located within its own territory to transport Crude Oil through the pipelines across Iraqi and Turkish territories and to deliver into Ceyhan terminal on the Mediterranean shore."*[509] The Respondent contended that the obligation to "operate" and "manage" the Pipelines within Iraq necessarily includes the pumping of oil into the Pipelines.[510] Consequently, the Claimant is responsible for allowing oil into the ITP system from that side of the border.[511]

514. As it was the Claimant that allowed the KRG to pump crude oil into the ITP system in Iraq, it is disingenuous for the Claimant to contend that the Respondent has caused Iraq any injury or loss. Only the Claimant was in a position to provide the KRG with access to the ITP system within Iraq, and did so. It is undisputed that SOMO and NOC were aware that the KRG was

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508 Defined at paragraph 660 below.

509 1973 Agreement, Article 1, as amended by 2010 Amendment, Article 2.1.

510 Respondent's Skeleton Submission, para 5a.

511 Respondent's Counter-Memorial, section III.A.

constructing a pipeline to tie into the ITP system and that the Claimant did not object to the KRG's construction of the pipeline that was eventually tied in to the 40-inch Pipeline.[512] The tie-in was effected 600 meters from Fishkabur on the Iraqi side of the border, in plain sight of the FGI. The Claimant did not take any steps to prevent oil from being pumped through it by the KRG into the 40-inch Pipeline.[513]

515. The Respondent argued that, as a result of allowing the tie-in to occur, the Claimant had acquiesced in the KRG's exports.[514]

516. According to the Respondent, once crude oil has been pumped into the Pipelines on the Iraqi side, the Respondent is obliged to ensure its "continuous flow and security" under the ITP Agreements.[515] There is no provision in the ITP Agreements for the Claimant to instruct the Respondent to close either of the Pipelines inside Turkey.

2. Claimant's submissions

517. The Claimant asserted that this defence is based on an obligation "invented" by the Respondent. The Claimant stated that it had no obligation under the ITP Agreements to "control access" to the Pipelines pursuant to Article 2.1 of the 2010 Amendment.[516]

518. The Claimant also contended that the Respondent had actively facilitated the KRG's construction of the tie-in and could not now complain that the Claimant had not prevented it. As to whether or not the Claimant could or should have prevented the tie-in from being constructed, the Claimant said that the FGI made substantial efforts to stop the KRG from exporting crude oil through the ITP system and used all peaceful means at its disposal for this purpose.[517]

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512 Respondent's Skeleton Submission, para 6.

513 Respondent's Rejoinder, paras 18-19.

514 Transcript (Merits Hearing) Day 1, 166:11-22.

515 Respondent's Counter-Memorial, para 4.

516 Claimant's Post-Hearing Brief, para 5.2.

517 Claimant's Post-Hearing Brief, para 5.7.

519. Dr. Al-Shahristani gave evidence during the hearing that the tie-in occurred in the KRI. The FGI had no military presence in the KRI and any attempt to use force to prevent the tie-in would have resulted in bloodshed. The FGI was not willing to take this risk. [518]

520. Moreover, according to the Claimant, the FGI was willing to authorise the use of the ITP facilities for exports by the KRG in December 2013. At that time, Deputy Prime Minister Al-Shahristani proposed a tripartite agreement, under which the proceeds of those exports would have been deposited in the OPRA/DFI account.[519] The Claimant said that it was the Respondent's actions in transporting KRG oil without permission from the Claimant that prevented this proposal from being adopted.

3. Tribunal's analysis

521. It is evident that the Claimant was the only Party that had the ability (leaving aside whether it had any legal obligation) to prevent the tie-in from being constructed within Iraqi territory. It is also evident that the FGI chose not to intervene to prevent the tie-in being constructed and, indeed, it is the Claimant's case that it was willing to authorise KRG exports on certain terms.

522. However, in the Tribunal's view, this does not have any bearing on the Claimant's allegations that the Respondent breached the ITP Agreement. The Claimant's allegation is not that the Respondent breached the ITP Agreements by failing to prevent the KRG from accessing the Pipeline, nor has the Respondent made an allegation against the Claimant in this regard in its counterclaims. It was the Respondent's treatment of the oil subsequent to its carriage through the 40-inch Pipeline which the Tribunal has found, subject to its ruling on Turkey's defences, to constitute a breach of the ITP Agreements. Consequently, in the Tribunal's view, the issue raised by the Respondent here is not a defence to the allegations of breach of the obligations to follow the instructions of the Iraqi Ministry of Oil.

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[518] See Transcript (Merits Hearing), Day 2, 99:4-5 and 134:1-3.

[519] Claimant's Post-Hearing Brief, para 3.7.

C. Did the Claimant have a legitimate claim to the crude oil entering the Pipeline?

1. Respondent's submissions

523. The Respondent submitted that the ITP Agreements do not confer upon the Claimant any rights of control over crude oil that the FGI does not independently enjoy under Iraqi law. The Respondent submitted that the Claimant was wrong to claim damages, without regard to the export rights attaching to the crude oil that is the subject of its claim.[520]

524. Moreover, as neither Pipeline was useable within Iraq (due to damage) from March 2014, the FGI concluded a series of interim agreements with the KRG as from November 2014 pursuant to which the KRG was to deliver to SOMO at Ceyhan specified quantities of crude oil transported by the KRG from both the KRI and Kirkuk through the KRG's pipeline system, including the tie-in, and the 40-inch Pipeline. Under those agreements, hundreds of millions of barrels of crude oil were transported to Ceyhan from November 2014 until September 2017. According to the Respondent, it follows from the agreements between the FGI and the KRG that the Claimant cannot have a valid claim against the Respondent for permitting the KRG to use the ITP system for the transportation, storage and loading of crude oil from November 2014.[521]

525. In relation to the Iraqi Supreme Court's decision in Case 59, the Respondent urged caution in applying that decision, saying that it was poorly reasoned and questioning the timing of the decision.[522] In response to the Claimant's suggestion that the Respondent's defences rely on the KRG's ownership of the oil, the Respondent also noted that "many of Turkey's defences to Iraq's claims of liability do not relate at all to issues of ownership of oil under Iraqi law."[523] However, the Respondent also contended that the Claimant's interpretation of the Case 59 Decision was oversimplified and that the Decision does not establish that the KRG has no right to the oil, especially when read consistently with the 2021 Budget Law.[524]

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520 Respondent's Rejoinder, para 30.

521 Respondent's Rejoinder, paras 39-41.

522 Respondent's 1 April 2022 Submission, paras 106-110.

523 Respondent's 13 May 2022 Submission, para 59.

524 Respondent's 13 May 2022 Submission, para 60.

2. Claimant's submissions

526. The Claimant rejected the Respondent's arguments on the basis that the Respondent had missed the fundamental point that, even if the KRG enjoyed a right to export crude oil under Iraqi law, this would not entitle the KRG to use the ITP facilities without the consent of Iraq's Ministry of Oil.[525] Ownership or control of the oil is therefore irrelevant.

527. Moreover, in the Case 59 Decision, the Iraqi Supreme Court has now confirmed that the KRG's Oil and Gas Law is unconstitutional and that all oil must be turned over to the FGI. Therefore, according to the Claimant, all the Respondent's defences that were based on lack of control must fail and have been "*irrevocably foreclosed*" by the Case 59 Decision.[526]

528. The Claimant also asserted that the 2010 Joint Declaration signed by Turkish Energy and Natural Resources Minister Yildiz and Iraqi Oil Minister Al-Shahristani, prevents the Respondent from relying on the KRG's alleged export rights under Iraqi domestic law, as the Declaration stated that all oil would be channelled through SOMO.[527]

3. Tribunal's analysis

529. As noted in paragraph 393 above, the Tribunal does not consider it necessary to determine issues of ownership of the oil under Iraqi constitutional law. This was the Tribunal's view even before the Case 59 Decision was admitted into evidence, whereby the Iraqi Supreme Court found that:[528]

> "Article (111) of the Constitution provides: "Oil and gas are owned by all the people of Iraq in all the regions and governorates." On that basis, the phrase "the Iraqi people" includes all Iraqis without exception, from north to south and from east to west, regardless of ethnicity or religion, and the oil and gas throughout Iraq are owned by the Iraqi people. No federal authority, local authority, regional authority, or governorate authority can derogate from this, and it demands the fair and equitable distribution of oil and gas revenues to all the people of Iraq regardless of

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525 Claimant's Reply, para 2.7.

526 Claimant's 1 April 2022 Submission, para 4.1.

527 Claimant's Reply, paras 2.7-2.11.

528 Case 59 Decision, 15 February 2022, p.12 (HM-443 / C-266).

> the areas in which that wealth is produced, so that the people of the non-producing regions are not deprived of it. It also necessitates that the Iraqi people are informed and aware of the amount of oil and gas revenues, the people being the owner of the same, in order to understand how such revenues are distributed. An owner cannot be unaware of the revenues from his property and how they are distributed."

530. The ITP Agreements are clear that the Respondent is obliged to deal with crude oil flowing from Iraq in accordance with the Iraqi Ministry of Oil's instructions. The Respondent cannot excuse its failure to do so on the basis of disputes internal to Iraq regarding which entity within Iraq was entitled to control the oil.

531. In letters exchanged by the Parties at the time the Respondent began transporting the KRG oil, the Respondent acknowledged the Iraqi Ministry of Oil's right to instruct it in relation to the transportation, storage and loading of all oil coming from Iraq. For example, the minutes of a meeting between the two sides on 27 January 2014 record:[529]

> "The head of the Turkish side also expressed the great attention of his government to have a constant relationship with Iraq. He stated that the quantities of oil from Kurdistan that reached the Ceyhan port aimed to raise the export capacities to maximum, and the actions taken were only for hydrostatic testing purposes. He claims that all these have been implemented in a transparent method, and <u>any sale process in the future will not happen without the permission of the Iraqi government</u>. He also stressed the necessity of the continuity of relationships based on the agreements concluded between both sides, and stated that the integrity of Iraq is highly significant for Turkey. In addition, he mentioned that they are not allowed to interfere in pipelines built in the Iraqi territory and <u>any quantities of Iraqi oil entering the Turkish territory will be regarded as Iraqi oil, and they are committed to load the oil that they receive, through the Oil Marketing Company (SOMO)</u>. The head of the Turkish side also emphasized that Turkey believes that the federal

[529] Minutes of Meeting on 27 January 2014, 3 March 2014 (HM-231 / C-13).

government and the government of Kurdistan are able to overcome this problem. (emphasis added)"

532. Consequently, the Tribunal dismisses the Respondent's defence that it was not obliged to follow the Iraqi Ministry of Oil's instructions on the basis that the oil was not owned by the FGI.

D. Would the Parties have breached their *Jus Cogens* obligations if the Respondent had followed the FGI's instruction to close the Pipelines?

1. Respondent's submissions

533. The Respondent contended that Daesh (also known as ISIS) activities occurring in the region required the Tribunal to *"consider carefully the repercussions of blocking the KRG's access to the ITP system"*.[530]

534. The Respondent submitted that the prevention and prohibition of genocide is one of the few peremptory norms considered to fall within the concept of *jus cogens,* whereby it is a *"norm from which no derogation is permitted"*.[531] Both States are also parties to the 1948 UN Genocide Convention which obliges them to prevent genocide.

535. According to the Respondent, international law requires that the ITP Agreements be read in a manner consistent with the obligation to prevent and not to commit genocide, which the Respondent considered was a threat posed during a substantial portion of the time over which the alleged breaches of the ITP Agreements took place.[532] The Respondent submitted that any obligation under a treaty which is incompatible with a *jus cogens* prohibition will justify the non-observance of that obligation as the obligation under *jus cogens "supersedes any competing treaty obligation"*.[533]

536. It was the Respondent's view that the Claimant's claims could not stand for the period when the ISIS threat was sufficiently grave so as to constitute genocide, as the proceeds from the oil

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[530] Respondent's Counter-Memorial, para 243.

[531] Respondent's Counter-Memorial, para 248.

[532] Respondent's Counter-Memorial, paras 243 and 248-249.

[533] Respondent's Counter-Memorial, para 249.

being transported from the KRI were needed to help challenge ISIS and prevent further genocide.[534]

2. Claimant's submissions

537. The Claimant accepted that an obligation to prevent genocide exists under the Genocide Convention to which both Iraq and Turkey are parties but rejected the contention that this obligation has the status of a rule of *jus cogens.* According to the Claimant, steps taken to prevent genocide, or to assist others in preventing genocide, must be consistent with the international law obligations of the State.[535]

538. The Claimant also rejected the Respondent's argument that, regardless of *jus cogens* status, the obligation to prevent genocide was relevant to the present facts. The Claimant submitted that the Respondent had not established that its operation of the Pipelines and ITP facilities under instruction from the KRG assisted in the prevention of genocide.[536] The Claimant also stated that the prevention of genocide could not have been the Respondent's motivation for transporting KRG oil as the Respondent began transporting the oil before the Yazidis people faced any risk of genocide by Daesh.[537]

3. Tribunal's Analysis

539. The Tribunal begins by observing that the Respondent offers this defence for a partial period of the alleged breach. It is clear that the Claimant's claims of breach begin in December 2013 and continue to the present day. The Respondent asserts that the genocidal events referenced began around mid-2014 and carried on until around October 2017 and concerned the plight of the Yazidi community in northern Iraq.[538]

540. The Tribunal does not doubt the scale of the atrocities perpetrated by Daesh against the Yazidis or the attempts by the military forces of the KRG (the Peshmerga) to protect the Yazidis. Nor can there be any doubt that, since both Iraq and Turkey are parties to the Genocide

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534 Respondent's Counter-Memorial, para 250.

535 Transcript (Merits Hearing), Day 1, 87:19-22.

536 Claimant's Skeleton Submission, paras VA-B.

537 Transcript (Merits Hearing), Day 1, 85:6-10; Claimant's Post-Hearing Brief, para 5.79.

538 Transcript (Merits Hearing), Day 1, 85:7-8 and 204:17.

Convention, they have an obligation to prevent genocide. The question is whether Turkey is correct in saying that this obligation justified conduct which would otherwise be in breach of the ITP Agreements.

541. In the Tribunal's view, this argument fails for a number of reasons. First, it is evident that the Respondent did not begin transporting, storing and loading oil for the KRG in order to prevent genocide. The Respondent's activities in this regard commenced before the alleged genocide began. They also continued after the Respondent admits that the genocide to which it refers had ceased. In addition, there was no mention by the Respondent of any alleged *jus cogens* obligation during the period when it maintains that genocide was taking place.

542. Secondly, the Respondent has provided little persuasive evidence to support its assertion that the sale of oil by the KRG was indispensable to attempt to prevent the genocide. The KRG asked the FGI for financial assistance to combat the Daesh threat, although much of this financial strain related to the housing of refugees fleeing the fighting.[539] The KRG also issued press releases stating that the main source of funding the Peshmerga forces was derived from oil pipeline revenues.[540] However, there is very little transparency in this arbitration as to (i) the amount of funds received by the KRG from oil sales; and (ii) for what those funds were used. The Respondent relies on broad statements and supposition to support its position here, extrapolating media reports and KRG budgets to surmise that without the ITP oil sales, the Peshmerga would not have had sufficient funds to combat Daesh. [541] In order to accept such an argument, the Tribunal would have required more than supposition, inference or conjecture. Moreover, as the Tribunal will explain later, when addressing the "but for scenario" (see from paragraph 637 below), had the Respondent not agreed to take oil from the KRG and then store and load it on the instructions of the KRG, the likeliest scenario is that the FGI and KRG would have concluded an agreement about the export of oil which would itself have provided substantial funds to the KRG.

543. Thirdly, the Respondent has failed to demonstrate that there is a conflict between the obligations under the ITP Agreements and the obligation to prevent genocide. Nothing in the

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539 KRG Letter to Iraqi Council of Ministers, 21 September 2014 (HM-275 / R-105).

540 KRG Press Release, 31 July 2015 (HM-323 / R-125).

541 See Account Statement of the Ministry of National Resources Kurdistan Regional Government 2014 (HM-34 / C-94).

ITP Agreements conflicts obviously with the prevention obligation. The Tribunal is not convinced that there was "*no other reasonable way*"[542] in which the Respondent could have worked with the KRG to combat the Daesh threat. The Tribunal therefore finds that the obligation to prevent genocide is not a defence that the Respondent could rely upon to excuse a breach of the ITP Agreements.

544. Those considerations make it unnecessary for the Tribunal to consider whether the obligation to prevent genocide, and the obligation to assist others in preventing genocide, has attained the status of *jus cogens*. Nevertheless, since that issue was fully argued by the Parties, the Tribunal will briefly address it.

545. The bar which must be crossed before an international law obligation can attain the status of *jus cogens* is a high one. To qualify as a norm of *jus cogens,* a rule must be accepted and recognized by the international community of States as a whole as one from which no derogation is permitted.[543] There are very few international norms that are recognized as having this status. Both Parties agree that the prohibition against genocide is a *jus cogens* obligation, but the Parties disagree as to whether the obligation to prevent genocide has attained *jus cogens* status.

546. The Respondent highlighted case law from the International Court of Justice that states that the obligation to prevent genocide is a principle recognised as part of customary international law and is of "*universal character*".[544] However, the Respondent has not shown that the obligation to prevent genocide (as opposed to the prohibition of genocide) has attained the status of *jus cogens*.[545] Indeed, one article cited by the Respondent in support of its case, referred to this issue as "*unexplored legal terrain.*"[546] The Respondent's primary argument in

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542 ILC Articles on State Responsibility, Article 24.

543 Vienna Convention, Article 53 (I-44 / RL-44).

544 *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 ICJ Reports 6, 3 February 2006, para 64 (H-209 / CL-209).

545 The ILC Commentary (2) to Article 26 of the Articles on State Responsibility states at page 85 "[t]hose peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination." (H-8 / CL-8). (emphasis added.)

546 Manuel Ventura, The Prevention of Genocide as a Jus Cogens Norm? A Formula for Lawful Humanitarian Intervention, Charles C. Jalloh and Olufemi Elias (eds), Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma 289 (2015), p.3 (I-312 / RL-305).

this regard is that, as the prohibition of genocide is considered to be *jus cogens*, so too must the obligation to prevent genocide. As stated by Mr Llamzon at the Merits Hearing: "*If the imperative to punish genocide is jus cogens, why not the obligation to prevent genocide which is a necessary means to ensure that genocide is not committed?*"[547] Given the high threshold required to attribute *jus cogens* status to an international norm, it is not enough for the Respondent's counsel to say "why not" include the obligation to prevent genocide as a *jus cogens* obligation. Turkey has not been able to point to any State practice which clearly supports the contention that this obligation has been recognized by the international community of States as a whole as one from which no derogation is permitted, nor has it shown any persuasive international judicial authority to that effect.

547. The Respondent appears to recognise the weaknesses of its case, as Mr Llamzon went on to say "*having said that, what we know is that at a minimum the prevention of genocide is a treaty and a customary obligation for both Iraq and Turkey*."[548] Yet an obligation to prevent genocide which does not have the status of *jus cogens* would not excuse non-compliance with other binding international legal obligations. Indeed, in addressing the question of the actions which a State may take to prevent genocide, the International Court of Justice has emphasised that the State must act within its international law obligations. The Court stated that:[549]

> "The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may act only within the limits permitted by international law."

548. The Tribunal therefore rejects the Respondent's argument that its breach of the ITP Agreements is justified – even for a limited period – by its duty to prevent, or assist in the prevention of, genocide.

549. In coming to this decision, the Tribunal has not taken any account of the fact that the Peshmerga were ultimately unsuccessful in defending the Yazidis people. The Tribunal does not agree with the Claimant that the fact that the Peshmerga were unable to prevent Daesh

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[547] Transcript (Merits Hearing), Day 1, 207: 4-7.

[548] Transcript (Merits Hearing), Day 1, 207: 17-20. See also Respondent's Post-Hearing Brief, para 123.

[549] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 2007 ICJ Reports 43, para 427 (H-205 / CL-205).

from attacking the Yazidis people is a reason to deny this defence.[550] The case law is clear that the success or otherwise of the measures taken to prevent genocide is irrelevant to the fulfilment of the obligation.[551]

XIII. REMEDIES

A. Relief Requested by the Claimant

550. The Tribunal has found that the Respondent breached Articles 3 and 7 of the 1976 Protocol and Article 4.4 of the 2010 Amendment by loading oil contrary to the instructions of the Ministry of Oil since May 2014.

551. Paragraph 275 above sets out the Claimant's prayer for relief. This was summarised in the Claimant's Pre-Hearing Skeleton as follows:[552]

a. Claimant is entitled to a declaration that Respondent is in breach of the ITP Agreements.

b. Claimant is entitled to an order requiring Respondent to comply with its obligations under the ITP Agreements and to cease accepting into the Pipelines, storing or loading crude oil except pursuant to the instructions of the Ministry of Oil, and provide full access to the ITP facilities to the Ministry of Oil and/or NOC/SOMO personnel.

c. Claimant is entitled to an order requiring Respondent to make appropriate assurances and guarantees of non-repetition.

d. Claimant is entitled to an order requiring Respondent to provide a full accounting of the proceeds and related payments from the oil transported, stored and loaded through the ITP facilities, including the amounts received by Respondent or its State-owned companies as commissions, transport or other fees, financing payments or other financial or non-financial benefits.

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[550] Transcript (Merits Hearing), Day 1, 85:15-23.

[551] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 2007 ICJ Reports 43, para 430 (H-205 / CL-205).

[552] Claimant's Skeleton Submission, Section VI(E), paras 4-6.

e. Claimant is entitled to full reparation pursuant to the rule of international customary law codified in Article 31 International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (***ILC Articles on State Responsibility***).

i. Claimant has suffered injury in the form of a complete loss of control over the ITP facilities and, as a direct consequence, over the Iraqi crude oil transported through them as a result of Respondent's violations of the ITP Agreements.

ii. Proceeds from the KRG's unauthorized oil sales that are allegedly received by the KRG, which are unproven, cannot deprive Claimant of the right to be made whole for Respondent's violations of the ITP Agreements, including on the basis of the principle of unjust enrichment.

iii. Claimant is entitled to restitution of any crude oil in the Ceyhan storage tanks as of the date of the award.

iv. Claimant is entitled to compensation in the amount of the fair market value of the oil wrongfully transported, stored and loaded through the ITP facilities.

v. In the alternative, Respondent is obliged to deposit into the OPRA/DFI account an amount corresponding to the proceeds from the oil transported, stored and loaded through the ITP facilities, plus any discount from fair market value.

vi. In the alternative, Claimant is entitled to the difference between the sums that the KRG allegedly received from the oil transported, stored and loaded through the ITP facilities (after deducting improper transport fees, commissions, and other similar amounts received by Respondent and its State-owned companies), and the fair market value of such crude oil.

552. The Respondent has not provided any specific submissions in regard to the declaratory relief requested by the Claimant or the orders regarding future conduct (assurances), aside from denying the underlying breaches.

553. The Respondent disputed that the Claimant is entitled to compensation as a result of any alleged breach of the ITP Agreements for the following reasons:[553]

a. the Claimant has suffered no injury as a matter of international law;

b. alternatively, if the Claimant has suffered injury, that injury was not caused by the Respondent; and

c. in any event, the Claimant's calculations of (i) compensation and (ii) interest are wrong.

B. Remedies Principles to be applied to Damages

554. Both Parties relied on principles of public international law in advancing their positions on remedies.

555. In Procedural Order No 7, the Tribunal asked the Parties about the position of remedies under French law, given the Respondent's position that French law primarily applied to the ITP Agreements after the 2010 Amendment.[554]

556. During the Closing Hearing, Mr Sprange (for Respondent) said:[555]

> "We say that as a matter of remedy, there is no material difference between the international and the French law, so whichever you adopt would not make a difference to the outcome."

557. Similarly, in its Post-Hearing Brief, the Respondent observed that:

> "In both international and French law, the basic form of compensation for failure to perform an obligation is full reparation, i.e., the victim should be placed in the situation in which it would have found itself but for the wrongdoer's acts, without loss or profit. Full reparation cannot exceed the amount of the actual prejudice the victim incurred as there is no concept of punitive damages in French law."

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553 See Respondent's Skeleton Submission, para 71 et seqq. and Respondent's Post-Hearing Brief, Part II(C).

554 Procedural Order 7, para 4(f)(iii).

555 Transcript (Closing Hearing), 131: 20-24.

558. The Claimant agreed. During the Closing Hearing, Dr Annacker (for Claimant) said:[556]

> "I note that until its Post-Hearing Brief, Turkey did not in this context make any reference to French law. Each of its arguments on remedies was based on international law. As the Tribunal noted in Procedural Order No. 7, until May of this year both parties approached quantum as being governed by international law principles.
>
> In its post-hearing briefs, Turkey has not identified any relevant differences resulting from the application of French law instead of international law. To the contrary, Turkey's submissions confirm that international law and French law set forth the same relevant requirements …
>
> Iraq does not disagree that the relevant leading standards under international and French law lead to the same results."

559. At the July 2022 Hearing, both Parties re-confirmed their position that there is no material difference between international law and French law on the issue of remedies when applied to this case.[557]

560. In relation to French law, the only submissions before the Tribunal as to remedies principles were made by Turkey in its Post-Hearing Brief:[558]

> "Turkey notes that the most relevant provisions of French law are set forth in Articles 1149 through 1151 of the French Civil Code, which concern "damages resulting from non-performance of an obligation." Consistent with international law, a party seeking damages must first establish that it suffered harm and that the harm alleged resulted proximately from the alleged wrongdoing.
>
> Only if those two prerequisites are met is it appropriate to award damages."

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556 Transcript (Closing Hearing), 53:8-21 and 54:9-11.

557 Transcript (New Evidence Hearing), 117:19 – 118:23.

558 Respondent's Post-Hearing Brief, paras 41-42.

561. The Tribunal has found that international law applies to breach under the ITP Agreements, but notes that the Parties are agreed that there is no material difference between the relevant international law and French law principles in any case.

562. With regard to its claim for reparation, the Claimant relies on the principles established in the well-known judgment of the Permanent Court of International Justice in the *Chorzów Factory* case.[559] In this case, the Court held:[560]

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

563. This principle is codified in Article 31 of the ILC Articles on State Responsibility, which requires a State to make full reparation for the injury caused by its internationally wrongful act. Reparation includes restitution and/or compensation as appropriate.

564. The Claimant thus contended that it is a "*firmly established rule of customary international law that the State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act*."[561] According to the Claimant:[562]

> "Respondent's violations of the ITP Agreements caused Claimant to lose control over the ITP facilities, and consequently over the Iraqi crude oil that flows through those facilities. To ensure full reparation, Claimant is therefore entitled to (i) the return of any oil still in the ITP storage facilities to Claimant's control; and (ii) the fair market value of the oil that cannot be returned to Claimant's control as a result of its sale to third parties."

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559 See Transcript (Merits Hearing), Day 1, 90: 2-6 and from 217.

560 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Claim for Indemnity, Judgment, Merits (13 September 1928), 1928 PCIJ (ser. A) No. 17, 47 (H-113 / CL-113).

561 Claimant's Memorial, para 6.10.

562 Claimant's Reply, para 3.2.

565. The Claimant has sought restitution in relation to any crude oil in the Ceyhan storage tanks as of the date of the award and compensation for oil already sold (i.e., damage that cannot be made good by restitution).

566. The Respondent submitted that in order for the *Chorzów Factory* principles to be applicable, an injury must have been caused by an internationally wrongful act. The Respondent contended that (i) no wrongful act had taken place; and (ii) even if there had been a wrongful act, no injury had been sustained by the Claimant.[563] Therefore, no reparation was due under the principles set out in the ILC Articles on State Responsibility or under the *Chorzów Factory* principles.

567. For its position that the Claimant had not suffered any injury, the Respondent relied on the principle of unjust enrichment. The Respondent submitted that the Claimant has suffered no injury as the KRG has received the value of the oil sold. To allow the federal government to also receive that value would be to allow the Claimant to recover twice for the same oil.

568. Judge Schwebel opined that the principle that a party is prohibited from seeking double recovery is "*rooted in the same underlying rationale against unjust enrichment both in national and international law*."[564] It is a concept initially derived from the civil law system.[565] Mr Sprange contended at the Merits Hearing that "*unjust enrichment is a flexible and broadly applied principle, both of national law but also international law*."[566]

569. The Tribunal recalls that *Chorzów Factory* endorses this principle in an international law context. The Court found that tribunals must "*arrive at a just appreciation of the amount [of loss], and avoid awarding double damages*."[567] Taking this into account, together with Judge Schwebel's comments, the Tribunal is satisfied that the prohibition against unjust enrichment and double recovery is applicable under both French and international law principles.

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563 Respondent's Counter-Memorial, para 254.

564 Second Judge Schwebel Expert Report, para 47.

565 See Lord McNair "The Seizure of Property and Enterprises" 6 Neth. Int. L. Rev. (1959) 218 (SS-70, K-70).

566 Transcript (Merits Hearing), Day 1, 212: 13-14.

567 *Case Concerning the Factory at Chorzów (Germany v. Poland),* Claim for Indemnity, Judgment, Merits (13 September 1928), 1928 PCIJ (ser. A) No. 17, at 49 (H-113 / CL-113)

570. Overall, the Tribunal is satisfied that there is no material difference between French and International law on remedies applicable to this case and the Tribunal will apply the international law principles set out above, as relied upon by the Parties.

C. Declaratory relief, restitution and orders regarding future conduct

571. As detailed at paragraph 551 above, the Claimant seeks declaratory relief, restitution of oil currently at Ceyhan (see also paragraph 565) through orders that such oil be loaded in accordance with the instructions of the Iraqi Ministry of Oil, and assurances in relation to future conduct. The Respondent has resisted all such relief on the basis that no breach of the ITP Agreements has occurred.[568]

572. The Parties agree that there is no possibility of restitution for oil that has already been sold.[569] However, in additional to declaratory relief regarding breach, the Claimant seeks restitution of oil that is in the storage tanks at Ceyhan as at the date of this Award and contended in its Reply submission that:[570]

> "Respondent does not contest that, if it is found to have breached its obligations under the ITP Agreements, Claimant is entitled to an order requiring Respondent to (i) abide by its obligations and cease accepting into the ITP pipeline, storing, and/or loading crude oil except pursuant to the instructions of the Ministry of Oil, while providing full access to the ITP facilities to personnel of the Ministry of Oil and/or NOC/SOMO; and (ii) provide appropriate assurances and guarantees of non-repetition of its breaches of the ITP Agreements."

573. The Tribunal finds that the Claimant is entitled to the declaratory relief requested in paragraph 551(a) above. On this basis the Tribunal grants the Claimant's request for a declaration that the Respondent, by operating the loading facilities at Ceyhan at the KRG's instruction, in disregard of the instructions of Iraq's Ministry of Oil (and without its authorization), is in breach of the ITP Agreements. In relation to the oil that is in the storage tanks at Ceyhan as at the date of this Award, the Tribunal directs that the Respondent must load all oil (including oil

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568 Respondent's Counter-Memorial, para 253; Respondent's Rejoinder, para 198.

569 Transcript (Merits Hearing), Day 1, 217:12-15.

570 Claimant's Reply, para 3.4.

currently in the storage tanks) in accordance with the instructions of the Ministry of Oil, as required by the ITP Agreements.

574. The Claimant also requested an order that the Respondent provide appropriate assurances and guarantees of non-repetition. During the New Evidence Hearing, Sir Christopher Greenwood asked for further information about precisely what sort of assurances the Claimant was seeking.[571]

575. The Claimant noted that seeking such assurances and guarantees was "*not uncommon*" in diplomatic practice and that the Respondent had not taken issue thus far with the Tribunal's power to issue such an order on assurances. The Claimant referred to Article 30 of the ILC Articles on State Responsibility which requires a defaulting State to "*to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.*"[572] The Claimant referred to the *LaGrand* case,[573] saying that the International Court of Justice confirmed the possibility of such a remedy.[574] The Claimant submitted that the assurances sought in its prayer for relief were specific and consistent with the Respondent's obligations under the ITP Agreements: "*Turkey will henceforth accept into the ITP pipelines, store and load Iraqi crude oil solely pursuant to the instructions of the Ministry of Oil or its wholly-owned companies, NOC and SOMO*."[575] The Claimant said that it was flexible as to who would provide the assurances sought.

576. The Respondent disagreed that such assurances were warranted. At the New Evidence Hearing, Mr Sprange said that there was "*no basis for them by reference to authority*" and referred to the International Court of Justice's ruling in the *Nicaragua v Colombia* case where the Court declined to grant such guarantees and assurances despite Colombia allegedly ignoring the Court's ruling in Nicaragua's favour.[576]

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571 Transcript (New Evidence Hearing), Day 1, 29:9-12.

572 Transcript (New Evidence Hearing), Day 2, 40:4-22.

573 *LaGrand (Germany v. United States of America)*, Judgment, 2001 I.C.J Reports 466 (27 June 2001) (H-111 / CL-111).

574 Transcript (New Evidence Hearing), Day 2, 40:23-24.

575 Transcript (New Evidence Hearing), Day 2, 41:3-11.

576 Transcript (New Evidence Hearing) Day 2, 82: 10-14. See Respondent's Rebuttal Slides (New Evidence Hearing), Slide 15 discussing *Alleged Violations of Sovereign Rights and Maritime Spaces (Nicaragua v. Colombia)*, Merits Judgment, 21 April 2022 (I.C.J. Reports 2022), paras 23-24, 197.

577. Having considered the Claimant's request for guarantees and assurances, the Tribunal has decided that such relief is not warranted in the present case. The Tribunal considers that the remedies granted below suffice to redress the Claimant's injuries in accordance with international law and that no further remedies or redress in the form of guarantees and assurances are required to make the Claimant whole.

D. Full Accounting

578. In its Reply, the Claimant requested that the Tribunal order the Respondent to provide a full accounting of the use of the proceeds from the Iraqi oil transited through the ITP facilities, the extent known to the Respondent, including, in particular, all financial benefits received by the Respondent and its State-owned companies from the KRG or KRG entities.[577] The Claimant said that the request was necessary as a result of the Respondent's failure to produce documents that would have provided this information. The request is made as the Claimant submits that the Respondent would have benefit from the arrangement with the KRG.

579. The Respondent objected to this request, stating that the Claimant had provided no justification for making such a request and, in any case, the Tribunal has no jurisdiction over other entities who are not parties to this arbitration. The Respondent said that the ITP Agreements do not entitle the Claimant to such information. The Respondent also objected to the fact that the request was introduced late, without requesting leave.

580. The Tribunal is satisfied that the request was timely, given that it was necessitated by the Respondent's refusal to produce documents. However, the Tribunal does not consider that there is any need for such an order, as the Award provides for compensation for losses including as a result of excess transportation charges and discounted sales. There is no evidence of any further injury and the Tribunal dismisses the request.

E. Damages

581. According to the principles espoused in the *Chorzów Factory* case, the injured party is to be returned to the position that it would have been in had the wrongful act not been committed. Consequently, the Tribunal must assess the extent to which the Claimant has suffered any loss

[577] Claimant's Reply, para 5.1; see also Claimant's Post-Hearing Brief, para 6.1.

or damage as a result of the Respondent's breach of the ITP Agreements and determine the quantum of any such loss or damage.

1. Unjust enrichment or double recovery

582. The principle of unjust enrichment seeks to prevent a party from being placed into a better position than it would have been, had the wrongful act not occurred. The principle applies where a claimant seeks to recover the same loss from multiple sources or where multiple claimants seek to recover from a single respondent for the same injury.[578] It is relevant to situations like the present case involving a federal State made up of constituent (regional) parts. In such cases, the Tribunal must ensure that any damages awarded reflect losses suffered by the claimant as a whole and not: (i) the defendant's gain; or (ii) the loss of any other entity within the claimant.[579]

583. The Respondent rejected the premise of the Claimant's claim for reparation in respect of KRG oil – that the value of that oil had been lost to Iraq. The Respondent said that this is manifestly untrue, given that the oil was sold by the KRG, who received approximately USD 27.1 billion for the oil.[580] The Respondent emphasised that Turkey has not kept the proceeds from the oil sales and contended that:[581]

> "Thus, any payment to Iraq of proceeds from the sale of crude oil that has already been received by the KRG would amount to double recovery and result in Iraq's unjust enrichment. Both the payment to the KRG and the payment to Iraq would have been for the same act (the sale of the oil at issue). More importantly, the Claimant – the Republic of Iraq – is financially in the same position, whether the KRG receives the proceeds from the sale of the oil directly or whether, as in the present case, the FGI counts such proceeds as part of the KRG budgetary allocation

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578 *SeaCo v. Iran* (1992) 28 Iran-U.S.C.T.R. 198 (K-96 / SS-96); *Harza et al. as Trustees v Iran et al.* (1986) 11 Iran-U.S.C.T.R. 76 (K-99 / S-99).

579 Second Judge Schwebel Expert Report, para 56; *Alfred Haber v Iran* (1989) 12 Iran-U.S.C.T.R. 133 para 16 (K-107 / SS-107) *SPP v Egypt* ICSID Case No.ARB/84/3, Award, 20 May 1992, para 247 (K-100 / SS-100); *Zeevi Holdings v Bulgaria and the Privatization Agency of Bulgaria* UNCITRAL Arbitration Case UNC 39/DK, Final Award, 25 October 20016, paras 859-860 (K-87 / SS-87).

580 See Respondent's Opening Presentation Slides (Merits Hearing), slide 105.

581 Respondent's Counter-Memorial, para 258.

> under the Iraqi federal budget. What Iraq cannot do is receive payment twice for that single sale, given that the FGI and the KRG are both constituent entities of Iraq. States cannot rely on their internal division of powers and competences or on internal arrangements to avoid liability for payment or to demand payment twice over."

584. The Claimant protested the Respondent's invocation of the unjust enrichment doctrine, stating that it had no application in the present circumstances. The Claimant said that the Respondent had not provided any proof as to the payments that had been made to the KRG or that such payments should be treated as payments to Iraq as a whole.[582] In particular, the Claimant noted that oil proceeds should have been paid to the Kurdistan Oil Trust Organisation (***KOTO***) under Kurdish law, and stated that there is no information as to whether this occurred. Moreover, according to the Claimant, KOTO is an organisation with separate legal personality and, therefore, payments to KOTO cannot be deemed to be payments to the KRG or to Iraq as a whole. The Claimant submitted that benefits received by subdivisions of a State or by separate legal entities cannot be transformed into benefits to the entire State simply by virtue of the ILC Articles on State Responsibility. In support of this contention, the Claimant cited *Saluka v Czech Republic* and *AMCO v Indonesia*[583] where the tribunals in each case were asked to determine whether the State had been enriched by benefits received by entities with separate legal personality. In each case, the tribunal declined to apply the unjust enrichment doctrine.

585. According to the Claimant, the use of the funds by the KRG was also important. The Claimant said that there was no evidence that the KRG used such funds for the benefit of Iraq (i.e., to pay government salaries or to support the Peshmerga in the fight against ISIS).[584] The Claimant suggested that the principle of good faith also prevents the invocation of unjust enrichment by

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582 Claimant's Post-Hearing Brief, paras 6.59 – 6.60. See also para 6.62, stating that revenues published by the KRG in 2014, 2015 and 2016 cannot be verified.

583 *AMCO Asia Corporation v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Proceeding, 5 June 1990, paras 11 and 156 (H-261 / CL-260); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 455 (H-262 / CL-261).

584 Claimant's Post-Hearing Brief, para 6.64.

the Respondent, as the situation has been brought about by the Respondent's own wrongdoing.[585]

2021 Budget Law

586. According to the Respondent, the 2021 Budget Law (and the Case 59 Decision) confirm that the Claimant has suffered no compensable injury because (i) it is able to settle the long-running dispute between the FGI and the KRG; and (ii) the Claimant (including the KRG) is a single State, and therefore any compensation claim in circumstances when the KRG has already received the oil revenue would unjustly enrich the Claimant.[586] To award compensation would result in an unjust windfall to Iraq.[587]

587. The Respondent also warned that any decision by the Tribunal regarding compensation risks disrupting the audit process currently being undertaken and submits that "*the Tribunal should act with prudence and refrain from engaging in any quantum analysis at this time*."[588]

588. The Claimant also submitted that the 2021 Budget Law did not change the Respondent's obligation to compensate for the losses suffered by the Claimant due to breaches of the ITP Agreements. A domestic budget law has no impact on any loss suffered by the claimant under international law, nor could it authorise illegal oil exports, including retroactively.[589] The Claimant also contended that the audit directed by the 2021 Budget Law had not progressed as the KRG had not provided the required information.[590]

589. In further responding to the impact of the 2021 Budget Law on the unjust enrichment doctrine, the Claimant again emphasised that unjust enrichment could not be invoked by the Respondent because any alleged unjust enrichment would come as a result of the Respondent's own wrongdoing.[591] Even if unjust enrichment were relevant, the Claimant said that it would not affect its alternative claim for compensation in the amount of USD 6.67 billion

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585 Transcript (Merits Hearing), Day 1, 94: 11-14.

586 Respondent's 1 April 2022 Submission, para 193.

587 Respondent's 1 April 2022 Submission, para 207.

588 Respondent's 1 April 2022 Submission, para 207.

589 Claimant's 13 May 2022 Submission, para 6.46.

590 Claimant's 13 May 2022 Submission, paras 2.54 and 7.4.

591 Claimant's 13 May 2022 Submission, para 6.45.

reflecting the discount at which the KRG sold oil that had not been received by any part of Iraq.[592]

Tribunal's Analysis

590. The Tribunal recalls that, in order to invoke the unjust enrichment principle, there must be an enrichment of one party to the detriment of the other party arising from the same set of circumstances.[593] In the Tribunal's view, the crux of the issue in the present case is whether the Claimant, the Republic of Iraq, has received the benefit of the sale of the KRG's oil by virtue of payments of the proceeds from those sales having been received by the KRG. In order to mitigate any risk of double recovery, the Tribunal must determine the actual loss (if any) suffered by the Claimant.

591. Iraq – as a federal State – comprises the various regions and governorates of Iraq. It is clear that the KRI (the Kurdish Region of Iraq) is a constituent part of the Republic of Iraq – the Claimant in this case. Although the Claimant suggested that KRG acts independently and therefore must be treated separately,[594] it is relatively uncontroversial that a federal State, under international law, is viewed as a unitary entity made up of its constituent parts. Actions of a state/regional government are generally attributable to the State as a whole under international law and, as noted by Judge Schwebel in his Second Expert Opinion in this case:[595]

> "The fact that the KRG is a sub-State entity does not necessarily mean that payment to it does not redound to the State's benefit. Quite the opposite in fact: in international law, the State is generally regarded as a unity. In the words of the International Law Commission, in most cases "the constituent units (of a State) have no separate legal personality of their own (however limited)."

592. In relation to whether the State has benefited in the current situation from payments made to the KRG, the Tribunal begins by considering whether the KRG has in fact received the proceeds from the oil sales. The Tribunal is satisfied that the evidence shows that the KRG received

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592 Claimant's 13 May 2022 Submission, para 6.48.

593 Second Judge Schwebel Expert Report, para 59.

594 Claimant's Post-Hearing Brief, paras 2.6-2.7.

595 Second Judge Schwebel Expert Report, para 69 (citing ILC Articles with Commentaries, Article 4, para. 10 (K-108 / SS-108).

funds from the oil sales. Although, as the Claimant pointed out, the exact payment flows for each sale may not be clear, there is sufficient evidence to support a finding that the KRG received funds throughout the relevant period as a result of its oil sales at Ceyhan. The Deloitte reports confirm amounts received by the KRG for oil sales for the periods covered by those reports.[596] Similarly, other financial records indicate oil revenue between 2014 and 2017.[597] The Tribunal does not consider that a precise breakdown of each transaction is required and is satisfied, on the basis of the evidence before it, that the KRG received the revenue from its oil sales.

593. The Tribunal is also satisfied that the proceeds of oil sales were used by the KRG to fund the operations of the regional government. As an example, the June 2016 oil statement records that the "*net income of $479.36m received by the KRG* [from oil sales], *plus other locally generated income by MNR, was used to fund June salaries of KRG employees*."[598] It is also clear that revenue from oil sales was the KRG's primary source of income between 2014-2018. Without such revenue, the regional government could not have continued to function.

594. For this reason, the Tribunal agrees with the Respondent that the Claimant's reliance on *Saluka* and *AMCO* is misplaced.[599] It is evident that the tribunals in both of those cases were faced with considerably different factual circumstances than the present case. In those cases, the entity that had received the benefit was a separate company with a commercial purpose. The tribunal in each case was required to consider whether that private benefit could be attributed to the State. As noted in *Saluka*, the tribunal was not convinced that the unjust enrichment principle applied when the beneficiary of the relevant act was not actually the State.

595. In the present case, the facts are very different. The Tribunal has found that the KRG received the funds and used them for the benefit of those Iraqi citizens living in the KRI. While the exact

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596 H2 2017 Deloitte Report, 31 July 2018 (HM-405 / C-242); Q1 2018 Deloitte Report, 12 August 2018 (HM-406 / C-243); Q2 2018 Deloitte Report, 11 December 2018 (HM-417 / C-244); Q3 2018 Deloitte Report, 26 February 2019 (HM-426 / C-245); and "Baghdad hikes monthly payment to Kurdistan" Iraq Oil Report, 14 March 2019 (HM-428 / R-171).

597 See Account Statement 2014 (J-2 / ST-2); Oil Production, Export, and Consumption Report 2015 (J-3 / ST-3); Production & Export Revenue Monthly Overview (June to October 2016) (J-18 to J-22 / ST-18 to ST-22).

598 Production & Export Revenue Monthly Overview (June 2016) (J-18 / ST-18). It is reasonable to draw similar conclusions for other years – see for example, Account Statement 2014 (J-2 / ST-2).

599 Respondent's Post-Hearing Brief, para 24.

use of the funds is unknown, the Tribunal accepts that these funds were likely used to fund the Peshmerga in their fight against ISIS. This being the case, the money was arguably being used to benefit all Iraqi citizens. The Tribunal also takes note of the Respondent's argument that the FGI did not pay the KRG out of federal funds for much of this period, arguably thereby accruing a benefit for the wider State.

596. The fact that it is unclear whether or not the funds were initially received by KOTO, does not change the Tribunal's view. The Tribunal is satisfied that the funds were received and used by the KRG to benefit Iraqi citizens and consequently, that the Claimant has received the benefit of those funds. Iraq's internal division of powers cannot be used to circumvent this reality and demand payment again.

597. The audit mechanism set out in the 2021 Iraqi Budget Law serves only to strengthen this position. Under that mechanism, account will be taken of funds allegedly due to the FGI. It is not appropriate for the Tribunal to speculate on the outcome of the audit process, but it does serve to confirm the Tribunal's view that the funds received to date are funds received by the Claimant for the benefit of the Iraqi people.

598. Based on the above, the Tribunal finds that the principle of unjust enrichment applies in the present case. The Tribunal will therefore take into account all monies paid to the Claimant (including oil proceeds paid to the KRG) when assessing the loss or injury (if any) that has been suffered by the Claimant as a result of the Respondent's breaches of the ITP Agreements.

2. Losses claimed by the Claimant

599. Taking into account its findings on unjust enrichment, the Tribunal must determine whether or not the Claimant has suffered any compensable loss or injury as a result of the Respondent's breaches of the ITP Agreements.

600. In the Tribunal's view, any compensable loss crystalises only when the oil is sold. It was in loading oil on the KRG's instructions that the Respondent breached the ITP Agreements and it was at this point (rather than in the transport and storage of the oil) that the Claimant suffered loss (if any).

601. In relation to oil that the Respondent has loaded on instruction of the KRG in breach of the ITP Agreements, it is for the Claimant to prove loss or injury. Consistent with the Tribunal's findings on unjust enrichment, the Claimant has received the benefit of the proceeds for the

sale of oil at Ceyhan by virtue of the fact that those proceeds have been received and used by the KRG for the administration and functioning of the KRI.

602. The Claimant submitted that, even if the Respondent's unjust enrichment case is accepted, it has suffered loss in the amount of approximately USD 6.67 billion[600] over and above the funds received by the KRG. This alleged loss is comprised of two parts:

a. discounts applied by the KRG to the price at which the oil was sold (USD 3.791 billion); and

b. transportation and other fees paid to the Respondent by the KRG, over and above those fees that would have been due under the ITP Agreements (USD 2.919 billion).

603. The Tribunal now considers these alleged losses.

3. Discounted sales price

604. The Claimant submits that the KRG sold its oil at a discounted price, compared with the price that the Iraqi Ministry of Oil (through SOMO) would have obtained for the same oil. The Claimant has claimed this price differential between the KRG's actual sale price and SOMO's alleged sale price in the counterfactual scenario.

605. The Claimant contended that the discounted price applied by the KRG was due to: (i) the KRG operating on a pre-pay system (i.e., pre-selling the oil), which typically incurs a discount; (ii) a perceived "moral hazard" in dealing with the KRG, given disputes about ownership of the oil; and (iii) the KRG typically selling its oil to oil traders who would on-sell the oil at a margin.[601] Mr Traver (the Claimant's quantum expert) calculated the amount of the discount to be

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[600] At the New Evidence Hearing, the Claimant said that the overall figure claimed was USD 6.78 billion based on Claimant's Supplement No.1 to Claimant's Adverse Inference Request, paras 2.5 and 3.7 (see also Transcript (New Evidence Hearing), Day 1, 70: 22-23 and Claimant's New Evidence Hearing Slides, side 95). However, the Tribunal notes that Mr Traver updated his figures at the Merits Hearing and these new figures (reflecting a loss of USD 6.67 billion) were referred to in the Claimant's Post-Hearing Brief. The Tribunal uses Mr Traver's updated figures (Traver Presentation (Merits Hearing), slide 23). See explanation in Claimant's Post-Hearing Brief, para 1.10.

[601] Transcript (Merits Hearing), Day 2, 171: 20 – 171:17; Claimant's Post-Hearing Brief, para 6.116.

between USD 3.6 billion and USD 3.791 billion on the volume of oil sold by the KRG between May 2014 and September 2018.[602]

606. The Respondent rejected the assertion that the KRG sold the oil at a discount, stating that KRG sold its oil at the same price that SOMO could have obtained for the oil. However, at the Merits Hearing, Mr Earnest (the Respondent's quantum expert) agreed that pre-sold oil was usually sold at a discount and that the KRG did pre-sell some of the oil. He agreed that a discount would have applied to this pre-sold oil.[603] Mr Earnest offered no calculation on the quantum of any such discount.

607. The Tribunal does not have evidence before it regarding the actual sales prices agreed by the KRG for individual sales or any discount that might have been applied during the relevant period. There is, however, some reported data on KRG sales. Both Parties were able to extrapolate the reported data available to them and estimate that the KRG received around USD 27 billion from oil sales between May 2014 and September 2018.[604] This figure is lower than the estimate of the fair market value of the oil, as calculated by both Mr Traver and Mr Earnest.

608. Based on these figures, it is reasonable to conclude that the KRG sold its oil at a discount to the fair market value. This is consistent with the KRG's practice of pre-selling oil, which both experts agreed demanded a lower price than oil that is not pre-sold. There is no evidence that SOMO pre-sold large volumes of oil. Indeed, the evidence before the Tribunal regarding the price at which SOMO sold oil over the relevant period confirms that the KRG was selling its oil at a lower rate. The Claimant provided the Tribunal with a contract between SOMO and TUPRAS (a Turkish oil refinery) showing the prices at which SOMO was selling oil over the relevant period.[605] Additionally, Mr Traver used sales data available for the first six months of 2017 to demonstrate the difference in pricing between the KRG and SOMO for that particular six-month period was USD 5.47.[606]

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602 Traver Presentation (Merits Hearing), slide 23.

603 Transcript (Merits Hearing), Day 3, 68: 4-9; see also Earnest Presentation (Merits Hearing), slide 14.

604 See Respondent's Opening Slides (Merits Hearing), slide 123; Traver Presentation (Merits Hearing), slide 29.

605 SOMO, Iraq Crude Oil Exports, December 2017 (HM-385 / C-240).

606 Traver Presentation (Merits Hearing), slide 21.

609. Based on the evidence before it, the Tribunal finds that the KRG sold its oil at a lower price than SOMO. The Tribunal now considers the value of that discount.

610. Based on all available data, Mr Traver estimated an average discount between June 2016 and September 2018 was USD 5.77 (Kirkuk differential price) and USD 6.09 (SOMO-Tupras price) per barrel was applied by the KRG.[607] Although Mr Earnest did not calculate the discount amount for individual barrels, he did provide an overall estimate of the revenue earned by the KRG and the fair market value of the oil (the difference between the two figures representing the discount). Determining the amount of the discount therefore requires the Tribunal to first consider whether it generally prefers the methodology adopted by Mr Traver or by Mr Earnest.

611. Both experts derive their fair market values by multiplying the volume of oil (622.1 million barrels[608]) by a proxy market price. The market price proxy adopted by Mr Traver was based initially on Dated Brent, discounted to take account of the differential in API[609] gravity between Dated Brent and Kurdish oil. Mr Traver called this the "Kirkuk differential" price. In his Second Report, Mr Traver used Brent Ninian instead of Dated Brent in his calculations.[610] Using this methodology, Mr Traver calculated that the fair market value of the oil sold by the KRG between May 2014 and September 2018 was USD 30.469 billion.[611] The Claimant submitted that the fair market value reflects the price at which SOMO would have sold the oil.

612. Mr Earnest did not provide an updated calculation of the fair market value of the oil through to September 2018. However, his calculation of the fair market value from May 2014 to September 2017 was USD 23.3 billion.[612] For the same period, Mr Traver estimated a market value of USD 22.6 billion. Mr Earnest's estimate was therefore around 3% higher than Mr Traver's estimate of fair market value for the period to September 2017. This difference in price is primarily due to Mr Earnest's preference to use the Platts Kirkuk price as a market proxy, rather than a discounted Dated Brent price. Mr Earnest stated that the Platts Kirkuk

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607 Traver Presentation (Merits Hearing), slides 23 and 29.

608 622.1 million barrels is the gross barrels sold by the KRG.

609 American Petroleum Institute.

610 Second Traver Expert Report, para 39; Claimant's Post-Hearing Brief, para 6.98; Traver Presentation (Merits Hearing), slide 32.

611 Traver Presentation (Merits Hearing), slide 4.

612 Second Earnest Expert Report, para 4.14.

price reflected the price of oil sold at Ceyhan – most of which was KRG oil. In his view, Mr Traver was mistaken to assume that the Platts Kirkuk price was based on the average API of oil extracted from Kirkuk oil fields. Rather, it reflected all oil sold at Ceyhan.[613]

613. The Tribunal accepts that both methodologies have merit and are credible approximations for the value of the oil (as reflected in the relatively small value difference between the two experts). However, for the following reasons, the Tribunal prefers the methodology adopted by Mr Traver.

614. The Tribunal considers Mr Traver's calculation to be robust and consistent with other market indicators. Mr Traver adjusted his calculations as further information became available, to ensure that he used the best available data. In particular, Mr Traver made adjustments to incorporate new information provided in Mr Earnest's Second Report and the Deloitte Reports covering the period from January 2017 to September 2018. With each adjustment, the Tribunal considers that Mr Traver's calculation has become more accurate.

615. Mr Traver also "sense checked" his calculation against the SOMO-Tupras Contract,[614] received by him after his Second Report. The Claimant stated that it obtained this contract from SOMO to respond to criticisms contained in Mr Earnest's Second Report about whether the KRG sold oil at a discount.[615] The Tribunal notes that Mr Traver's estimated fair market value based on his Kirkuk differential calculation (USD 30.469 billion) is almost the same as the value that SOMO would have obtained for the same volume of oil under the SOMO-Tupras contract (USD 30.457 billion). This indicates the general accuracy of Mr Traver's calculations.[616] The Tribunal recalls that the Claimant has actually claimed compensation of USD 30.457 billion in its Post-Hearing Briefs, being the lower of these two values.[617]

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613 Transcript (Merits Hearing), Day 3, 4: 19-23; see also Methodology and Specifications Guide, Crude Oil, S&P Global Platts (April 2017), p.24 (J-52 / ST-52).

614 SOMO, Iraq Crude Oil Exports, December 2017 (HM-385 / C-240). Turkish Petroleum Refineries Corporation (TUPRAS) is the largest crude oil buyer in Turkey. Mr Traver said that he had seen contracts from 2014 to 2017 and price did not change (Transcript (Merits Hearing), Day 2, 166). Mr Earnest also had a list of the cargoes delivered by SOMO (Transcript (Merits Hearing), Day 2, 170).

615 Transcript (Merits Hearing), Day 2, 166; Claimant's Post-Hearing brief, paras 6.107-6.108.

616 Transcript (Merits Hearing) Day 2, 149:10-15. See also Traver Presentation (Merits Hearing), slide 14.

617 Claimant's Post-hearing Brief, para 6.32.

616. The Tribunal finds it pertinent that, like Mr Traver, the SOMO-Tupras Contract derives the oil price by applying a discount to the Dated Brent price to account for the difference in the quality of the oil (that is, API gravity).[618] Similarly, it appears that the KRG also based its pricing regime on Dated Brent, with an appropriate quality discount.[619]

617. Finally, Mr Traver further sense-checked his calculation against data available for SOMO sales in 2017. Between January and June 2017, SOMO exported 5.8 million barrels of oil from Ceyhan for USD 266 million at an average price of USD 45.87 per barrel. Using Mr Traver's Kirkuk differential methodology produces an almost identical result, with a sales price of USD 45.98 per barrel (or 0.2% difference).[620]

618. For these reasons, the Tribunal accepts Mr Traver's Kirkuk differential pricing methodology. Based on this methodology, Mr Traver concluded that the fair market value of the oil was USD 30.469 billion and the discount applied by the KRG to its sales was (on average) USD 5.77 per barrel.[621] The Tribunal finds that:

a. the KRG sold the oil at a lower price than SOMO would have achieved for the same oil; and

b. the difference between the KRG's sales price and SOMO's likely sales price was USD 5.77 per barrel.

619. The question then arises as to whether this discount is a loss for which the Respondent should compensate the Claimant. The issue here is whether the loss was damage suffered as a result of the Respondent's breach of the ITP Agreements by loading the oil on the KRG's instructions, rather than those of SOMO.

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[618] In his First Report, Mr Traver used Bloomberg Dated Brent prices to estimate market price. In his Second Report, Mr Traver used Brent Ninian Blend (BNB) "because of its universal acceptance as an international crude oil benchmark" (Second Traver Expert Report, para 39). Mr Earnest criticised the use of both benchmarks (Transcript (Merits Hearing), Day 3, 72-75).

[619] See Transcript (Merits Hearing), Day 3, 44:14 – 45:10 discussing "KRG, Press Release: KRG Welcomes Positive Statements by Iraq's Federal Oil Minister al-Luaibi" 27 March 2017 (HM-384 / C-239). See also Investor Presentation, June 2016, p.5 (J-25 / ST-25), discussing the discount received for Taq Taq and Tawke crude oils from Platts Dated Brent.

[620] Traver Presentation (Merits Hearing), slide 15.

[621] Traver Presentation (Merits Hearing), slides 23 and 29.

620. The Tribunal has considered this issue carefully. On the one hand, the Tribunal understands that the Respondent did not sell the oil or agree the prices at which the KRG's oil was sold. This was done by the KRG alone. On the other hand, the KRG would not have been able to sell the oil (and presumably would not have negotiated sales agreements) if the Respondent had not facilitated the sale by loading the oil. To further complicate matters, the Respondent did not benefit financially from the discounted price (at least not directly).

621. Having considered all the facts, the Tribunal is satisfied that (subject to paragraphs 657-658 below) the Respondent's breach resulted in the loss suffered by the Claimant regarding the discounted price and that the Claimant should be compensated for that loss. Without the actions of the Respondent by loading the oil at Ceyhan on the KRG's instructions, the KRG's sale of oil would not have occurred (except in very small amounts that could be exported by truck).

622. The decisive points are:

a. the oil sales could proceed only if the Respondent loaded the oil at Ceyhan to the KRG's instructions. The oil could not have been loaded at Ceyhan by anyone except the Respondent. The Respondent's actions were, therefore, indispensable to the fulfilment of the oil sale agreements negotiated by KRG;

b. loading the oil in accordance with the KRG's instructions was in contradiction to the express instructions of the Iraqi Ministry of Oil and therefore constitutes a breach of the ITP Agreements (as found above); and

c. the loss therefore flowed directly from the loading of the oil on the KRG's instructions and would not have occurred had the Respondent followed the instructions of the Iraqi Ministry of Oil as it was obligated under the ITP Agreements.

623. The Tribunal finds that it is no defence for the Respondent to abdicate responsibility by saying it was the KRG that decided to discount the price (contributory fault is addressed at paragraphs 657-658). The Respondent was not entitled to load Iraqi oil on the directions of anyone except the Iraqi Ministry of Oil. In short, the Respondent's loading of the oil at Ceyhan was a breach of the ITP Agreements without which the discounted sales could not have gone ahead. The breach was thus a *sine qua non* of any loss suffered by the Claimant because of the discounted

sales. The claim is for damages occasioned by breach of treaty and it is irrelevant that that the Respondent may not have profited from the breach.

624. Finally, the Tribunal has considered the impact of the audit mechanism contained in the 2021 Iraqi Budget Law. While the Budget Law requires an audit to settle claims for the years 2004 to 2020, that audit relates to "*financial revenues and expenditures realised after deducted expenditures…*".[622] Nothing in the Budget Law suggests that the KRG's discounted oil price will be a factor in settlement discussions. This contrasts with requirements for 2021, where the Budget Law expressly states that the KRG is obligated to produce 460,000 barrels of oil per day and that the "*surrendered value of the amounts are not less than the sums realized from the sale of 250,000 barrels of crude oil a day at the SOMO price*."[623] Therefore, settlement in period from 2013-2018 involves amounts actually realised by the KRG (which would not include the discount) – there is no reference to the SOMO price for this period. The Tribunal cannot know the settlement terms that might eventually be reached pursuant to the audit mechanism, and can only be guided by what is expressly stated in the Budget Law.

625. The Tribunal finds that the Respondent is liable to compensate the Claimant for the discount applied to any of the KRG's oil that would have been sold by SOMO, had the Respondent not breached the ITP Agreements. The amount of oil that would have been sold by SOMO is considered from paragraph 637 below, in the counterfactual analysis.

4. Transportation Fees

626. The Claimant alleges that the KRG paid excess transportation fees to the Turkish state-owned company, Turkish Energy Company, of between USD 1.58 and USD 2.18 per barrel between July 2017 and September 2018, compared with transportation fees that would have been paid for the same oil under the ITP Agreements (USD 1.27 per barrel in 2017-2018).[624] The transportation fees were calculated based on the Deloitte Reports for 2017-2018[625] and the

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622 2021 Iraqi Budget Law, Article 11, First (HM-432 / R-177).

623 2021 Iraqi Budget Law, Article 11, Second (a) (HM-432 / R-177).

624 Claimant's Post-Hearing Brief, paras 6.126 – 6.127.

625 2017-2018 Deloitte Reports (HM-405 / C-242, HM-406 / C-243, HM 417 / C-244 and HM 426 / C-245); Claimant's Post-Hearing Brief, para 6.122.

Claimant asserts that "*there is no ambiguity or speculation regarding these amounts.*"[626] Using this information, Mr Traver calculated that the Respondent was overpaid transportation fees for the period from 1 July 2017 to 30 September 2018 in the amount of USD 312,593,135.

627. The reports for the period prior to 1 July 2017 either did not disclose the transportation fees paid by the KRG or have not been provided.[627] Therefore, Mr Traver has calculated transportation fees from 21 May 2014 to 30 June 2017 based on Asset Summary Valuations that indicate the transportation fee was around USD 3.50 per barrel.[628] The Claimant has requested that, in the absence of information to the contrary being provided by the Respondent, the Tribunal infer that the transportation fee for the period prior to June 2017 was USD 3.50.[629] Using this figure, Mr Traver calculated that the Respondent was overpaid for transportation by USD 1,012,348,452 between May 2014 and June 2017.[630] This figure takes account of an inflation adjustment to the transportation fees due to have occurred in January 2016 under the ITP Agreements. Following this adjustment, the ITP transportation fee would have risen from USD 1.18 per barrel to USD 1.27 per barrel.[631]

628. In total, the Claimant claimed that the Respondent has been overpaid by the KRG for the transportation of oil through the ITP system in the amount of USD 1,324,941,586 between 21 May 2014 and 30 September 2018.[632]

629. The Respondent objected to this claim on the basis that the Claimant had failed to take into account the Claimant's Minimum Guaranteed Throughput obligations which would have increased the transportation fees paid by the Claimant and that the FGI's decision to withhold the KRG's entitlement from the federal budget has more than compensated it for any alleged overpayments[633] (i.e., the Claimant overall remains in a better position than what it would have

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626 Claimant's Post-Hearing Brief, para 6.127.

627 Claimant's Post-Hearing Brief, para 6.128.

628 Email from Pars Kutay of Genel to Tashin Yazar of the Turkish Ministry of Energy and Natural Resources, 19 March 2016 (HM-381 / C-239).

629 Claimant's Application for Adverse Inferences, para 4.18.

630 See Claimant's Post-Hearing Brief, para 6.130.

631 Claimant's Post-Hearing Brief, para 6.126.

632 Claimant's Post-Hearing Brief, para 6.130.

633 Respondent's Rebuttal Post-Hearing Brief, para 77.

been had the oil been exported under ITP Agreements and the FGI had paid the KRG its share of the federal budget allocation).

630. The Tribunal accepts the Claimant's calculations as to the increased transportation rates paid by the KRG, compared with the rates that would have been charged under the ITP Agreements. The Respondent (despite being in a position to do so) has provided no evidence that Mr Traver's calculations are incorrect. The Tribunal recalls the Claimant's request for adverse inferences to be drawn regarding the Respondent's failure to disclose the agreements with the KRG and, in particular, its request to infer that the Respondent received a financial benefit from transporting, storing and loading crude oil through the ITP facilities in violation of the ITP Agreements (see paragraph 223 above). In relation to the transport fees, the Tribunal finds such inferences to be unnecessary as the Tribunal accepts Mr Traver's evidence (and calculation) of the transportation fees.

631. The Tribunal does not consider the internal issues regarding budget allocations or the 2021 Iraqi Budget Law to be relevant to its assessment of loss as a result of overpaid transportation fees. The Tribunal also rejects the Respondent's assertions regarding Minimum Throughput obligations on the basis that the recovery of any loss for the period from September 2018 onwards is being addressed by another tribunal in a separate arbitration. Therefore, if additional fees are due to the Respondent on account of the Claimant's failure to meet Minimum Guaranteed Throughputs, these fees will be paid to the Respondent separately.

632. The Tribunal finds that excess transportation charges should be refunded to the Claimant by the Respondent in relation to the KRG oil transported through the Pipelines. All of that oil was Iraqi oil and properly subject to the fees contained in the ITP Agreements. The oil should have been transported, stored and loaded under the ITP Agreements and, therefore, the transportation charges in the ITP Agreements apply. The Respondent was not entitled to charge a higher fee agreed separately with the KRG.

633. Consequently, the Tribunal finds that the Respondent is liable to reimburse the Claimant for overpaid transportation fees in the amount of **USD 1,324,941,586**.

5. Other overpayments

634. The Claimant submitted that the Respondent also received other financial benefits from its breaches of the ITP Agreements of which account must be taken. These benefits include

monies that, according to the Claimant, the Respondent received from the KRG for hydrostatic testing of the Pipeline, renovation of the Turkish Side of the Pipeline, TEC's participation in KRG oil sales in unspecified respects, providing technical assistance to the contractor that constructed the tie-in, management of oil revenue through Turkish State-owned HalkBank, and loans from Turkish State-owned companies. The Claimant claims loss of USD 1,554,468,790.

635. The Respondent rejected these allegations on the basis that payments have not been proved. The Respondent also said that the simple fact that the KRG spent that money on certain services, does not mean that the Claimant had not received the money in the first place.[634]

636. The Tribunal dismisses the Claimant's claim for these alleged overpayments. The Tribunal finds that the Claimant has failed to prove that these payments by the KRG to the Respondent are directly related to the Respondent's breach of the ITP Agreements or would not have occurred in the counterfactual scenario (discussed below). The Respondent's breach of the ITP Agreements did not occur until the KRG started exporting oil through the 40-inch Pipeline (i.e., after the KRG pipeline and tie-in had been constructed). Most of the costs indicated above appear to relate to the construction and testing of the tie-in and would have been incurred in any case. Indeed, the whole counterfactual scenario envisaged by the Claimant relies on SOMO having access to the KRG's tie-in in order to continue transporting Kurdish and Kirkuk crude oil through the ITP system after the 46-inch Pipeline was damaged.

6. Calculation of loss – Counterfactual

637. The Tribunal has found that:

a. the Claimant is not entitled to be compensated for amounts already paid to the KRG for oil transported through the ITP Pipelines and loaded at Ceyhan;

b. the KRG sold the oil at a lower price than SOMO would have sold the same oil and therefore any difference between the price at which SOMO would have sold oil in the "but for" scenario and the price obtained by the KRG is a compensable loss; and

634 Respondent's Rebuttal Post-Hearing Brief, para 78.

c. the Respondent is liable to compensate the Claimant for the overpayment of transportation fees in relation to oil that would have been sold by SOMO in the "but for" scenario.

638. In this section, the Tribunal considers the counterfactual (or "but for") scenario – that is, what would have happened had the Respondent not breached the ITP Agreements. There are two elements to assessing the "but for" scenario: (i) how much oil would SOMO have sold at Ceyhan had the Respondent not breached the ITP Agreements by failing to follow the Ministry of Oil's instructions; and (ii) what price would SOMO have obtained for that oil?

639. The Tribunal considers each of the issues in turn.

640. The Claimant has assumed that, had the Respondent adhered to its obligations under the ITP Agreements, the KRG would have sold its oil to SOMO for export through the ITP system. Therefore, the Claimant claims reimbursement for losses on the entire volume of oil (that is 622.1 million barrels) exported by the KRG at Ceyhan between 21 May 2014 and 30 September 2018.

641. The Respondent, on the other hand, claimed that the KRG would have simply left the oil in the ground rather than sell it to SOMO. Had the Respondent refused to sell KRG oil at Ceyhan on the instructions of the KRG and sold it instead according to the instructions of SOMO, the KRG would simply have stopped transporting oil to Ceyhan. The Respondent suggested that the International Oil Companies operating in the KRI would have refused to extract the oil, given that Dr Al-Shahristani confirmed at the Merits Hearing that the FGI would not have allowed Production Sharing Contracts in the KRI to continue.[635] On this scenario, no Kurdish oil would have been sold by SOMO (or the KRG) at Ceyhan in the counterfactual and the KRG's tie-in would have been idle.

642. In the Tribunal's view, neither scenario is a plausible counterfactual. It was in the interests of both the FGI and the KRG that Kurdish oil continued to be exported and sold through the ITP system and both the FGI and the KRG had negotiating leverage. The KRG relied upon oil sales for its primary income and needed access to the ITP Pipeline in order to export any significant volume of oil (only small volumes could be exported by truck). On the other hand, the FGI

[635] Respondent's Post-Hearing Brief, para 44.

needed access to the KRG tie-in in order to export any oil at all through the ITP system (including from Kirkuk).[636] These factors would likely have led to a compromise position being agreed.

643. In the Tribunal's view, the most likely scenario if the Respondent had not breached the ITP Agreements is that the KRG and SOMO would have reached an arrangement with each other whereby (i) the KRG would have provided a specified amount of oil to SOMO in return for federal funding; and (ii) in return for allowing SOMO to transport Kirkuk oil through the KRG's tie-in, SOMO would have allowed the KRG to export some oil through the ITP system itself. The KRG may also have exported a small amount of oil by truck, as it did prior to 2014, if required.

644. In determining how much oil the KRG may have sold to SOMO, the Tribunal considers the circumstances listed below to be relevant.

a. In 2011, the KRG agreed to provide SOMO with up to 85,000 barrels of oil per day from the Taouki and Taqtaq fields.[637]

b. In November 2014, the KRG agreed to sell SOMO 150,000 barrels of oil per day to be transported through the KRG tie-in. In December 2014, this figure was increased to 250,000 barrels per day, and the KRG agreed to transport an additional 300,000 barrels per day from the oil fields in Kirkuk to Ceyhan via the Pipelines. The Kirkuk oil fields were under the control of the KRG from June 2014 to October 2017.

c. In August 2016, the KRG and NOC agreed to split the oil delivered through the KRG tie-in to Ceyhan.[638] The federal budget for 2017 suggests that the FGI estimated that this would effectively mean that the KRG transferred to SOMO 550,000 barrels per day (in return for a 17% share of the federal budget).[639] This arrangement appears substantively similar to that agreed in 2014, whereby the KRG would transfer 250,000 barrels per day

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636 Respondent's Rebuttal Post-Hearing Brief, para 61.

637 Meeting Report of January 17, 2011 Meeting, 19 January 2011 (HM-124 / C-156).

638 B. Lando, Baghdad-Erbil oil deal leads to renewed SOMO Kirkuk Sales, Iraq Oil Report, 28 September 2016 (HM-351 / C-116).

639 "Iraq passes 2017 budget", Iraq Oil Report, 8 December 2016 (HM-356 / R-98).

of Kurdish oil to SOMO and would transport through the tie-in an additional 300,000 barrels per day for NOC (from Kirkuk).

d. In early 2018, a further agreement was reached allowing the FGI to export more than USD 100 million dollars' worth of oil per month through the KRG's pipeline.[640]

e. The 2021 Budget Law required that the KRG produce an average of 460,000 barrels of crude oil per day. Of those barrels, the value of at least 250,000 barrels per day (at the SOMO price) must be surrendered to the FGI. The remainder may be locally consumed, or the proceeds of export by the KRG (through the ITP system) may be used to cover the cost of production/transport and the KRI's share of petrodollars.[641]

645. Given the balance of power and both Parties' mutual interest in co-operating, the Tribunal considers that an arrangement of the nature agreed by the KRG and FGI in 2016 or contained in the 2021 Budget Law reflects the mostly likely counterfactual scenario. It is also similar to arrangements reached (and complied with for a time) in late 2014. Throughout 2015 and 2016, the KRG was exporting somewhere around 500,000 barrels of oil per day through the ITP Pipeline.[642] Effectively, the deal struck between the Parties in 2016 (and in December 2014) meant that approximately half (250,000 barrels) of the Kurdish oil exported by the KRG thorough Ceyhan was allocated to SOMO to sell and approximately half could be sold by the KRG in its own right. In addition, SOMO was able to transport a certain amount of Kirkuk oil through the KRG tie-in. The KRG was to receive an allocation from the federal budget in return for the oil and transportation services provided by the KRG, which may be wholly or partly covered by direct exports. This agreement appears to balance the Parties' competing interests and needs.

646. The Tribunal acknowledges that arrangements of this nature worked periodically between the KRG and the FGI between 2014-2018, before each side began to accuse the other of non-compliance and the relationship broke down. From the information provided by the

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640 "Baghdad hikes monthly payment to Kurdistan" Iraq Oil Report, 14 March 2019 (HM-428 / R-171).

641 2021 Iraqi Budget Law, Article 11, Second (a) (HM-432 / R-177).

642 See, for example, Production & Export Revenue Monthly Overview (June to October 2016) (J-18 to J-22 / ST-18 to ST-22).

Respondent and Mr Earnest,[643] it appears that compliance with arrangements occurred between November 2014 and June/July 2015 (around 9 months) and August to December 2016 (around 4 months).

647. In the counterfactual, there would have been more incentive for the KRG to continue the arrangement in order to access ITP facilities at Ceyhan. From March 2014, the FGI needed access to the KRG's pipeline and tie-in to use the ITP facilities. As oil revenues elsewhere in Iraq fell, the incentive on the FGI to export as much oil as possible from the Claimant's northern oil fields grew.[644]

648. On this basis, the Tribunal finds that, had the Respondent refused to load any oil for the KRG without SOMO's permission, SOMO would likely have reached an arrangement with the KRG whereby SOMO would have sold around half of the quantity of oil exported by the KRG from late May 2014 to September 2018 (approximately 311,050,000 barrels, being half of the 622,100,000 barrels (approx.) exported over that period). The KRG would have exported the remainder itself, with SOMO's permission. For at least 13 of these 52 months (or 25% of the time), SOMO received oil from the KRG. This should be factored into the compensation, meaning that the volume of oil that would have been provided to SOMO in the counterfactual should be reduced by 25% to 233,287,500 barrels.

649. The Claimant's loss resulting from being unable to export these 233,287,500 barrels at the SOMO price (being USD 5.77 per barrel higher than the KRG price) is USD 1,346,068,875.00.

7. Causation and contributory fault

650. The Respondent submitted that, even if the Claimant did suffer loss, the Claimant has failed to show that the Respondent caused that loss through any breach of the ITP Agreements. The Respondent should not be liable to compensate the Claimant for the loss.[645]

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643 Counter-Memorial, paras 81-83 and 85; Second Earnest Expert Report, Workpaper 56.

644 K. Al-Najar, B. Lando, "Iraq's March oil exports fall by 400k bpd" Iraq Oil Report, 25 April 2014 (HM-247 / C-231).

645 Counter-Memorial, para 269; Rejoinder, para 219. See also Respondent's 1 April 2022 Submission, para 184.

651. The Tribunal does not consider that there is any real dispute as to this well-established principle –international law requires a causal link between an internationally wrongful act and the damage claimed for there to be an entitlement to an award of compensation.[646]

652. The Claimant did not challenge the requirement to establish a causative link, but submitted that the fact that there may be more than one cause of loss does not absolve a State from liability. The Claimant cited the ILC's Commentary to Article 31 of the ILC Articles on State Responsibility which provides that, even if "*the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes*…"[647]

653. In the Tribunal's view, a causative link between the Respondent's breach of the ITP Agreements and loss suffered by the Claimant has been clearly established. The commentary to Article 31 confirms that "[t]*he notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase*."[648] The commentary confirms that notions of causality and proximity are important, but other factors may also be relevant including whether State organs deliberately caused the harm in question.[649]

654. The Tribunal is satisfied that, but for the Respondent's breach of the ITP Agreements, the KRG could not have sold (and continued to sell) oil by loading it at Ceyhan. Oil sales through Ceyhan would have ceased and, there being no viable alternative for exporting such large quantities of oil, the loss would not have been suffered (as discussed in the counterfactual). As the Turkish Minister of Energy and Natural Resources stated, "*the oil transfer could not have materialised*

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[646] Rejoinder, para 219. Articles on State Responsibility, Arts. 31(2), 36 and 39; B. Stern, 'The Obligation to Make Reparation', in J. Crawford/A. Pellet/S. Olleson (eds.), *The Law of International Responsibility* (2010) 563, 567 (I-292 / RL-285); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, YB of the ILC (2001), Vol. II, Part II, at pp. 98-99 (I-293 / RL-286).

[647] Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, Yearbook of the International Law Commission (2001), Vol. II, Part 2, 26 at 93 (H-8 / CL-8).

[648] Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, Yearbook of the International Law Commission (2001), Vol. II, Part 2, 26 at 93 (H-8 / CL-8).

[649] Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, Yearbook of the International Law Commission (2001), Vol. II, Part 2, 26 at 93 (H-8 / CL-8).

if Turkey was not involved."[650] The Tribunal finds that there is a direct causal link between the Respondent's conduct and the injuries suffered by the Claimant.

655. However, the Tribunal also agrees with the Respondent that the Claimant's contributory fault must be taken into account. The Respondent highlighted that the Claimant had omitted six important words from its above quotation of the commentary to Article 31 of the ILC Articles on State Responsibility: "*except in cases of contributory fault*". The Respondent clarified that, in situations where there are concurrent causes of injury, a reduction or attenuation of reparation is mandated in cases of contributory fault.[651] The Respondent submitted that, if it is found to have breached the ITP Agreements and that the breach caused loss to the Claimant, the Claimant's contribution to causing the loss must be recognised.

656. The Respondent referenced Article 39 of the ILC Articles on State Responsibility, which provides that when determining reparation "*account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought*."[652] The International Court of Justice recognised the role of contributory fault in the *LaGrand* case,[653] and many investment treaty arbitrations have apportioned loss on the basis of contributory fault.[654]

657. In the present case, the Tribunal considers that the Claimant did wilfully contribute to the loss and must bear some responsibility. The KRG (whose conduct is attributable to the Claimant, as an organ of the State) was the party that agreed the discounted price for the oil – not the Respondent. Account must be taken of this fact which clearly contributed in a material way to

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650 "Turkey plays 'key role' in transferring Iraqi Kurdish oil" Hurriyet Daily News, 16 August 2015, (HM-324 / C-54).

651 Rejoinder, footnote 280.

652 Rejoinder, footnote 280; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, YB of the ILC (2001), Vol. II, Part II, pp. 98-99 (I-293 / RL-286).

653 *LaGrand (Germany v. United States of America)*, Judgment, 2001 I.C.J Reports 466, para 116 (H-111 / CL-111). See also *Delagoa Bay Railway* case, cited at footnote 625 of the Commentary to Article 39 (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, YB of the ILC (2001), Vol. II, Part II, p. 110 (I-293 / RL-286)).

654 For example, *Cargill v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award (I-361 / RL-354); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award (H-180 / CL-180). *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (I-3 / RL-3); *Eudoro Armando Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001 (I-351 / RL-344).

the loss suffered. Moreover, the tie-in was constructed on Iraqi soil, with the Claimant's knowledge. The Claimant did not attempt to prevent the tie-in from being constructed or activated. The Tribunal recalls Dr Al-Shahristani's evidence that Iraq did not intervene with the tie-in's construction to prevent further bloodshed.[655] However, it is also clear that the 40-inch Pipeline had been inoperable in Iraq due to damage for some time. The Claimant had an interest in allowing the tie-in to proceed so that the 40-inch Pipeline would become useable again through the KRG connection. While the Respondent's breach was directly causative of the loss as described above, the significant contribution of the Claimant must be recognised.

658. There is no exact methodology for measuring such contribution and tribunals are provided a general discretion to make appropriate estimations.[656] As is often the case with situations of contributory fault, the Claimant and the Respondent have both contributed to the loss in different but important ways. The KRG's role in agreeing the discount is clearly significant, as is the Respondent's role in facilitating the sales. Both the KRG (an organ of the Claimant) and the Respondent worked closely together to enable the sales and should, in the Tribunal's view, share responsibility for the resulting injury to the Claimant as a whole. On this basis, the Tribunal finds it appropriate to discount the loss for which the Respondent is liable by 50% to take account of the Claimant's contributory fault. On this basis, the Respondent is liable to compensate the Claimant for loss resulting from the discounted price in the amount of **USD 673,034,437.50**.

8. Conclusion on Quantum for the Claimant's claims

659. Based on the above, the Tribunal finds that the Claimant is entitled to compensation for loss as a result of the discounted oil price in the amount of USD 673,034,437.50. When this figure is added to the compensation for overpaid transportation fees at paragraph 633 above (USD 1,324,941,586), the Tribunal finds that the Respondent is liable to compensate the Claimant for injuries resulting from the Respondent's breaches of the ITP Agreement in the amount of **USD 1,997,976,023.50**.[657]

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655 Transcript (Merits Hearing), Day 2, 134:17-21.

656 See generally, *Cargill v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, para 670 (I-361 / RL-354); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, para 1600 (H-180 / CL-180).

657 This figure does not take into account the Respondent's counterclaims, considered in the next section.

XIV. ANALYSIS OF TURKEY'S COUNTERCLAIMS

A. Minimum Guaranteed Throughput Fees

660. Under the ITP Agreements, the Claimant pays the Respondent transport charges based on the volume of crude oil transported through the Pipelines. The Claimant is obliged to transport a minimum amount of crude oil through the Pipelines each year, defined as the Minimum Guaranteed Throughput. According to the ITP Agreements, where the Claimant fails to meet its Minimum Guaranteed Throughput obligations in any given year, it must pay the Respondent an amount equal to the transportation charges that would have been charged had it complied with its Minimum Guaranteed Throughput obligations (***MGT fees***). The payment of MGT fees ensures that the Respondent receives the minimum revenue envisaged under the Agreements, regardless of whether the Claimant transports the minimum amount of crude oil required.

1. Respondent's submissions

661. The Respondent claims that the Claimant has failed to meet its Minimum Guaranteed Throughput obligations and has failed to pay the MGT fees that have accrued as a result. The claim relates to the period from 2003 to 2013.

662. The Respondent claims USD 1,183,633,570.35 plus interest for breach of these obligations, as set out in the table below.

TABLE 1

Period / Item	Respondent's Position	Claimant's Position[11]
Pre-2010 Amendment (2003 to July 27, 2011)		
Transportation Charges	$80,854,514.43	$(7,234,688.02)
MGT Fees	$1,035,172,031.30	0
Total	*$1,116,026,545.73*	*$(7,234,688.02)*
Post-2010 Amendment (July 27, 2011 to 2013)		
Transportation Charges	0	0
MGT Fees (reconciliation amounts)	$67,607,024.62	$67,607,024.62
Total	*$67,607,024.62*	*$67,607,024.62*
Total 2003 - 2013	**$1,183,633,570.35**	**$60,372,336.60**

Note: Amounts shown are net of water handling treatment charges, excess crude oil losses, and loading arm drainage costs. See, Detailed Calculation of Parties' Positions on Claims for Transportation Charges and MGT Fees (2003-2013) (Exhibit C-208). Amounts shown for the post-2010 Amendment Period represent reconciliation amounts that are not due.

663. The Claimant's obligation to pay fees equivalent to the Minimum Guaranteed Throughput from 2003 until the 2010 Amendment came into effect on 27 July 2011 is contained in Article 2.7 of the 1985 Amendment. Article 2.7 states:

> "Except in cases of Force Majeure the sum payable by the Iraqi Side to the Turkish Side for any full calendar year shall not be less than the total remuneration payable for the guaranteed minimum throughput stipulated in paragraph (1) of this Article."

664. After 27 July 2011, the obligation is found in Article 4.5 of the 2010 Amendment (amending Article 11 of the 1973 Agreement). Article 4.5 states:

> "Except [in] force majeure conditions defined hereby, the amount to be paid to the Turkish side by Iraqi side in a calendar year shall not be less than the transportation charge for Minimum Guaranteed Throughput."

665. According to the Respondent, the Claimant has failed to adhere to its Minimum Guaranteed Throughput obligations since 2003 and has failed to abide by its further obligation to pay remuneration to the Respondent in the amount of the transportation charges that would have been due had the Minimum Guaranteed Throughput been met. According to Mr Earnest – the Respondent's quantum expert – the Claimant's shortfall in its payment of MGT fees for the years 2003 to 2013 amounts to just under USD 1.184 billion.[658]

666. The Respondent emphasised that it was obliged to expend substantial sums over the relevant years to ensure that the ITP system remained fully functional and ready to receive crude oil coming from Iraq at all times, but the Claimant has continuously failed to satisfy its financial obligations. This has placed an increasing financial burden on the Respondent.[659]

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[658] Second Earnest Expert Report, paras 2.6-2.11; Respondent's Rejoinder, para 245.

[659] Respondent's Counter-Memorial, para 292.

667. The Respondent noted that both Parties agree that the Claimant has failed to meet its Minimum Guaranteed Throughput obligations between 2003 and 2013 – the only question is whether the Claimant is excused from the consequence of breaching these obligations because of a limitation or force majeure defence.[660]

668. According to the Respondent, the Claimant's *force majeure* defence must fail for the following reasons.[661]

a. Under international law, force majeure requires performance to be "materially impossible" for the duration of the event. It entitles the party to suspend performance of the specific obligations affected by the event, and only for the period that force majeure conditions continue to make performance materially impossible.

b. Therefore, to succeed in its argument, the Claimant must prove that events of force majeure made it materially impossible for it to perform its obligations during the entire period from 2003 to 2013. The Claimant has failed to provide such proof. The Claimant has not been sufficiently specific in its pleadings or through its evidence as to which events constituted *force majeure* and for how long.

c. Between 2003 and 2013, the Claimant did not send any *force majeure* notices to the Respondent.

d. There is no evidence of a *force majeure* event of sufficient duration to excuse the Claimant's total failure to perform its Minimum Guaranteed Throughput obligations for 10 years. To the contrary, the Claimant produced significant quantities of oil during this period, and pumped oil through the 46-inch Pipeline from Kirkuk. The Claimant accepted that the shutdowns were not permanent and became less frequent.

e. The Claimant has stated that it overpaid transportation charges during the pre-2010 Amendment period. The Respondent, supported by Mr Earnest, contended that overpayment of transportation charges was not consistent with the Claimant's position of a force majeure situation throughout that period.

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660 Respondent's Skeleton Submission, paras 87-88.

661 Respondent's Skeleton Submission, para 91.

669. Insofar as the Claimant relies on the French statute of limitation to bar claims for amounts due for the period prior to 3 September 2009, the Respondent states that international law, not French law, is applicable.[662] According to the Respondent, French law became applicable to the Parties' relations under the ITP Agreements after the 2010 Amendment entered into force, i.e., after 27 July 2011.

2. Claimant's submissions

670. The Claimant denied that it owes the Respondent any fees for failing to meet its Minimum Guaranteed Throughput obligations for the period from 2003 to July 2011 (when the 2010 Amendment came into force) on the basis of its invocation of *force majeure*.

671. The Claimant relied upon Article 2.7 of the 1985 Addendum which specifies that *force majeure* is an exception to the obligation to pay remuneration equivalent to the transportation charges for the Guaranteed Minimum Throughput.[663]

672. The Claimant noted Article 19 of the 1973 Agreement defines "*force majeure*" as follows:[664]

> "… events for whose occurrence the side concerned was not responsible and whose occurrence and consequences cannot be foreseen and prevented or avoided by the said side."

673. According to the Claimant, "*the record is replete with independent reports of sabotage, explosions and attacks that directly affected the ITP infrastructure and personnel*."[665] The violence referred to by the Claimant took place following the 2003 invasion of Iraq by US-led military forces and, according to the Claimant, lasted until the 2010 Amendment came into force on 27 July 2011.[666] The Claimant maintained that these incidents of violence constituted *force majeure*.

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662 Respondent's Rejoinder, para 247.

663 Claimant's Reply, para 4.18.

664 Claimant's Reply, para 4.19.

665 Claimant's Post-Hearing Brief, para 7.7.

666 Claimant's Post-Hearing Brief, para 7.9; Transcript (Merits Hearing) Day 2, 12:20-22.

674. In addition, the Claimant submitted that any of Respondent's counterclaims relating to breaches that were alleged to have occurred prior to 3 September 2009, were barred by the statute of limitations under French law.

675. The Claimant's *force majeure* defence relates to the fees owed prior to the entry into force of the 2010 Amendment. After this Amendment entered into force in July 2011, the Claimant admitted that it still was unable to meet the Minimum Guaranteed Throughput obligations, but it does not maintain its *force majeure* defence for this period. The Claimant acknowledged that MGT fees have accrued for this period from July 2011 in the amount of USD 67,607,024.62. According to the Claimant, this figure does not become due and payable until the Parties have signed a separate protocol as provided for in Article 4.6 of the 2010 Amendment. As this protocol has not been signed, the amount is not yet due.

676. The Claimant also submitted that it had previously overpaid transportation charges by USD 7,234,688.02, so the total fees accrued for the post-2010 Amendment period (less the previously overpaid amount) was USD 60,372,336.60.

3. Tribunal's Analysis

677. The Minimum Guaranteed Throughput under the 1973 Agreement was 35 million metric tons of crude oil per year (roughly equivalent to 750,000 barrels per day).[667] Under the 2010 Amendment, those figures were revised as follows:[668]

2010	22 million metric tons per annum
2011	27 million metric tons per annum
2012	32 million metric tons per annum
2013 (onwards)	35 million metric tons per annum

678. As explained in paragraph 660 above, under the ITP Agreements the Claimant must pay MGT fees where it fails to meet the Minimum Guaranteed Throughput, except in cases of *force majeure*.[669]

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667 See Transcript (Merits Hearing), Day 2, 15:5-15; Art 3 of the 1985 Addendum (see First Earnest Expert Report, para 4.7).

668 Art 3.2 of the 2010 Amendment.

669 See Art 2.7 of the 1985 Amendment and Art 4.6 of the 2010 Amendment (set out in paras 663 and 680 above).

679. There is no dispute between the Parties regarding the amount of oil transported through the Pipelines by the Respondent on behalf of the Claimant between 2003 and 2013. There is also no dispute that the volume of oil transported in each year between 2003 and 2013 was insufficient to meet the Claimant's Minimum Guaranteed Throughput obligations under the ITP Agreements.[670] The table below shows the number of metric tons of crude oil transported through the Pipelines in each relevant year and the shortfall compared to the Claimant's Minimum Guaranteed Throughput obligations.[671]

WORKPAPER 3

MGT DEFICIENCY QUANTITIES

(Metric Tons per Year)

	Gross Shipments		*MGT Obligation*		*MGT Obligation Shortfall*	
Year	*1985 Addendum*	*2010 Amendment*	*1985 Addendum*	*2010 Amendment*	*1985 Addendum*	*2010 Amendment*
2003	8,196,124.914	-	35,000,000.000	-	26,803,875.086	-
2004	5,238,918.637	-	35,000,000.000	-	29,761,081.363	-
2005	1,712,753.149	-	35,000,000.000	-	33,287,246.851	-
2006	1,415,004.918	-	35,000,000.000	-	33,584,995.082	-
2007	5,385,841.565	-	35,000,000.000	-	29,614,158.435	-
2008	18,449,735.291	-	35,000,000.000	-	16,550,264.709	-
2009	22,762,093.981	-	35,000,000.000	-	12,237,906.019	-
2010	20,066,370.772	-	35,000,000.000	-	14,933,629.228	-
2011	13,420,886.295	9,003,155.955	19,849,315.068	11,687,671.233	6,428,428.773	2,684,515.278
2012	-	18,457,487.686	-	32,000,000.000	-	13,542,512.314
2013	-	12,794,862.093	-	35,000,000.000	-	22,205,137.907
Total	**96,647,729.522**	**40,255,505.734**			**203,201,585.546**	**38,432,165.499**
Grand Total						**241,633,751.045**

Minimum Guaranteed Throughput Obligations from 2011-2013

680. The claim is divided into two distinct periods – the period from 2003 to 27 July 2011 (under the 1985 Addendum) and the period from 27 July 2011 to 2013 (under the 2010 Amendment). For the latter period from 27 July 2011 to the end of 2013, the Claimant agreed with the Respondent that MGT fees in the amount of USD 67,607,024.62 have been accrued. No *force majeure* claim is made for this period. However, the Claimant states that the "reconciliation amount" of USD 67,607,024.62 is not yet due and payable. This is because Article 4.6 of the

670 See Respondent's Rejoinder, para 243.

671 First Earnest Expert Report, para 4.8 (Workpaper 3).

2010 Amendment requires the Parties to first sign a protocol, with the reconciliation amount being payable one month after such protocol is signed.[672] Article 4.6 states:

> "… Final calculation of the remuneration payable during any calendar year shall be agreed upon in separate "Protocol" to be signed between SOMO and BOTAŞ. Settlement shall be made within one month from the date of the signature of such a Protocol."

681. The Respondent did not dispute that the Protocol had not been signed. [673]

682. Nonetheless, the Claimant has agreed that this amount, subject to paragraph 683 below, may be credited against any amount for which the Respondent may be liable to the Claimant as a result of this arbitration.[674] The Respondent stated that it saw no obstacle to the Tribunal awarding the reconciliation amount to the Respondent, even if it is not found liable to pay the Claimant damages.[675]

683. The Claimant also submitted that it had overpaid transportation charges between 2003 and 2011 by an amount of USD 7,234,688.02. In order to account for this alleged overpayment, the Claimant deducted the overpayment from the USD 67 million that it says will become due once the protocol has been signed in accordance with Article 4.6. This leaves a reconciliation figure USD 60,372,336.60. The Respondent disputed that any overpayment was made.

684. The difference between the Parties regarding the overpayment issue becomes relevant only if the Tribunal determines that no MGT fees are due and payable for the first period from 2003 to July 2011. This is because, if the Claimant is correct that no MGT fees were due during the pre-July 2011 period because of *force majeure*, then all payments made prior to that time are allocated to cover transportation which would have therefore been overpaid.[676] As set out in the following section, the Tribunal finds that MGT fees were payable from mid-2007 onwards.

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672 Claimant's Reply, paras 4.14-4.15.

673 Respondent's Rejoinder, footnote 318. See also Claimant's Rejoinder on Counterclaims, para 5.3.

674 Claimant's Reply, para 4.15; Claimant's Rejoinder on Counterclaims, para 5.4.

675 Post-Hearing Brief, para 181.

676 See Claimant's Rejoinder on the Counterclaims, para 2.5.

As MGT fees were due in the period from mid-2007 to 2011, the Claimant's position on the overpayment of USD 7,234,688.02 cannot be sustained.

685. Although no protocol was signed by the Parties in accordance with Article 4.6 of the 2010 Amendment, the Claimant has agreed to credit the reconciliation amount against any sum the Respondent is required to pay in this Award. The Respondent did not oppose this position. The Tribunal finds that the appropriate reconciliation amount is **USD 67,607,024.62** and that this amount shall be credited against the amount that the Tribunal has found the Respondent liable to pay the Claimant.

Minimum Guaranteed Throughput Obligations from 2003-2011

686. In relation to the period from 2003 to 27 July 2011, the Respondent has claimed the amount of USD 1,116,026,545.75 in MGT fees. The Claimant maintained that it is not liable to pay any MGT fees for this period on the basis that *force majeure* conditions existed throughout this time which relieves it of any obligation to pay the MGT fees.

687. Article 2.7 of the 1985 Amendment is the applicable provision prior to the 2010 Amendment coming into force on 27 July 2011. It provided that MGT fees were due "[e]*xcept in the cases of Force Majeure*". *Force majeure* was defined in the 1973 Agreement as an unforeseeable event for which the side concerned was not responsible and that it could not have prevented or avoided.

688. Under international law, *force majeure* precludes wrongfulness where the state of affairs is the result of an unforeseen event beyond the control of a State, making it materially impossible in the circumstances to perform the obligation.[677] It is a principle of customary international law codified in Article 23 of the ILC Articles on State Responsibility. The Arbitral Tribunal stressed in the *Rainbow Warrior* case that the test for *force majeure* was one of "*absolute and material impossibility.*" A circumstance that makes compliance with an obligation more difficult or burdensome will not suffice to meet this high threshold.[678]

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[677] Article 23 of the ILC Articles. See Respondent's Rejoinder, para 254.

[678] *Rainbow Warrior Affair (New Zealand v. France)*, 82 I.L.R 499 at 553 (H-120 / CL-120). See also *Case Concerning the Payment of Various Serbian Loans Issued in France*, Judgment of July 12, 1929, 1929 PCIJ Ser. A (Nos. 20/21), pp. 39-40 (I-309 / RL-302).

689. This definition is further clarified in the *Max Planck Encyclopaedia of Public International Law*:[679]

> "Irresistibility may be due to … events caused by human acts (e.g. terrorist attacks or insurrectional movements) … It refers to events or situations that are unavoidable or impossible to overcome."

690. It is noted that *force majeure* would not usually justify the failure to pay a State debt.[680] However, the Tribunal agrees with the Claimant that in the present case the situation is different because of the direct application of Article 2.7 of the 1985 Amendment, whereby the Parties expressly agreed that MGT fees would not be payable in circumstances of *force majeure*.

691. The issue for the Tribunal to determine is whether a situation of *force majeure* existed in Iraq from 2003 to 27 July 2011, such that it was impossible for the Claimant to meet its Minimum Guaranteed Throughput obligations. The elements to be considered are: (i) the foreseeability of the event; (ii) whether there was impossibility of performance; and (iii) externality - the absence of a causal link between the situation of *force majeure* being invoked and the acts of the party invoking it.[681]

692. Turning to the first criterion – lack of foreseeability. On the basis of the evidence before it, the Tribunal is satisfied that the invasion of Iraq by US-led forces in March 2003 and the instability that followed the removal of Saddam Hussein's regime was not a foreseeable event. The insurgency created in its wake continued for a considerable period of time. Warfare, terrorist attacks and insurrectional movements qualify as events that may lead to a *force majeure* situation.

693. The second consideration is whether events in Iraq made it impossible for the Claimant to comply with its Minimum Guaranteed Throughput obligations under the 1985 Amendment, as

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679 S. Hentrei, X. Soley, Force Majeure, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, para 12 (H-233 / CL-232).

680 S. Hentrei, X. Soley, Force Majeure, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, para 13 (H-233 / CL-232).

681 See S. Hentrei, X. Soley, Force Majeure, in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (H-233 / CL-232).

alleged by the Claimant. The Claimant offered as proof of the severity of the *force majeure* circumstances a series of news articles that reported multiple bomb blasts and attacks of the ITP facilities over the relevant years. These included:

a. 16 June 2004: "Two oil pipelines in southern Iraq and one in the north were blown up by saboteurs yesterday. The attacks cut oil exports by two thirds … The attacks, which follow efforts by the American-led coalition to improve pipeline security, will cut export rates from about 1.7 million barrels per day to below 500,000 … The 600-mile Kirkuk pipeline in northern Iraq, which pumps oil to the Turkish port of Ceyhan, has also been attacked and has been out of action for a fortnight."[682]

b. March 2008 (considering period from 2003): "An average of one to two sabotage attacks a week against Iraq's oil pipelines has crippled the country's oil industry, hindering its ability to export crude."[683] According to the Claimant, this report provided evidence of 66 attacks on ITP-related facilities in 2004, 30 attacks in 2005, 14 attacks in 2006 and 11 attacks in 2007.[684]

c. April 2010: "Iraq's oil infrastructure [came] under attack frequently since 2003, hampering Iraqi efforts to boost […] oil production and exports above pre-invasion levels."[685]

d. April 2010: "An explosion in Iraq's northern province of Nineveh damaged the Iraq-Turkey oil pipeline and it may take as much as a week to restart exports, Iraqi officials said on Thursday … While overall violence in Iraq has fallen sharply, sectarian tensions were stoked last month after an election that produced no outright winner … The pipeline from the Kirkuk oilfields to the Turkish port of Ceyhan, which carries around a quarter of Iraq's exports, was last attacked in December. Technical problems halted the flow of oil in January for several hours."[686]

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682 T. Harnden, Pipeline attacks sabotage Iraq oil exports, The Telegraph, 16 June 2004 (HM-62 / C-198).

683 Institute for the Analysis of Global Security, Iraq Pipeline Watch (HM-85 / C-197).

684 Claimant's Post-Hearing Brief, footnote 438; Claimant's Reply, para 4.22.

685 J. al-Badrani, Blast halts Iraq-Turkey oil pipeline flow, Reuters, 22 April 2010 (HM-108 / C-200).

686 J. al-Badrani, Blast halts Iraq-Turkey oil pipeline flow, Reuters, 22 April 2010 (HM-108 / C-200).

e. 14 June 2010: "Iraq's Oil Ministry said it had resumed crude oil exports to Turkey through its northern Kirkuk-Ceyhan pipeline after suspected sabotage stopped flows earlier this month… Pumping was halted after a two-metre section of the pipeline was damaged on 6 June near the town of Shirqat, south of the northern city of Mosul and about 300 kilometres north of Baghdad. Officials blamed sabotage."[687]

f. July 2010: The headline reads "PKK bombs Iraq to Turkey pipeline in rare attack".[688] The article stated that "[t]he flow of oil on Iraq's main pipeline to Turkey was halted for a third day on Sunday after a technical problem on the Iraqi side was compounded by a bomb attack by suspected PKK rebels in Turkey."

g. February 2011: "During sectarian violence in Iraq in 2005 and 2007, al Qaeda militants and other terrorist groups carried out many attacks on oil pipelines and refineries."[689]

h. March 2011: "A bomb planted under an oil pipeline exploded in northern Iraq preventing the flow of thousands of barrels of oil, an Oil Ministry spokesman said Thursday … It will take a few days to make repairs to the pipeline and resume pumping oil … The attacks on oil facilities are reminiscent of those carried out in the height of the Iraq war when terrorist groups targeted pipelines and refineries."[690]

i. April 2014: "During the U.S. invasion, the Kirkuk-Ceyhan line was shut for 25 days, officials said. Damaged by Western bombing in the 1990 Gulf War and then kept closed by U.N. sanctions imposed on Saddam, it reopened in 1996 when some oil exports were allowed.

Occasional attacks in the past decade have been repaired more quickly. But the latest sabotage has forced the NOC to shut down some production stations in two major

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687 Iraq Resumes Turkish Exports, Iraq Business News, 14 June 2010 (HM-110 / C-227).

688 PKK bombs Iraq to Turkey pipeline in rare attack, Reuters, 4 July 2010 (HM-111 / C-229).

689 M. Tawfeeq, 4 killed in attack on Iraq's largest oil refinery, CNN, 26 February 2011 (HM-127 / C-202).

690 M. Tawfeeq, Iraqi oil pipeline bombed, CNN, 10 March 2011 (HM-128 / C-201).

oilfields at Kirkuk, squeezing total production to around 225,000 barrels per day (bpd) from around 550,000 bpd before the attack, officials said."[691]

694. The Tribunal accepts that the security situation in Iraq, especially immediately following the US-led invasion, was precarious as shown by these press reports and, therefore, there is a *prima facie* case of *force majeure*. However, balanced against these reports are other factors raised by the Respondent that may militate against a finding of *force majeure*.

695. For example, the Claimant did not assert or claim *force majeure* at the time of these events, with the exception of one meeting in 2007 where the Iraqi delegation told the Turkish delegation that "*difficulties created by circumstances beyond their control especially the security and unpredictability which prevented Iraq from giving a firm annual transportation commitment planning and programming*".[692] If the Claimant had genuinely believed that an ongoing *force majeure* situation existed from 2003 onwards, it would be expected that the Claimant would have directly raised this issue with the Respondent. This is especially so during the negotiations of the 2010 Amendment where the Guaranteed Minimum Throughput was directly at issue. The Tribunal acknowledges, however, that formal notice of *force majeure* is not a requirement under the ITP Agreements.

696. Another factor for consideration is that the Parties agree that Iraq produced sufficient crude oil during the years from 2003 to 2011 to satisfy its Minimum Guaranteed Throughput obligations under the ITP Agreements.[693] However, most of this oil was produced in the South of Iraq, rather than the Northern Kirkuk fields. The Respondent maintained that oil could be moved between the southern and northern areas of Iraq through a strategic pipeline,[694] but the Claimant provided evidence that the strategic pipeline had not been operational since the

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691 Z. al-Sinjary, A. Rasheed, At "Donkey Springs", bombers choke off Iraq oil exports, Reuters, 10 April 2014 (HM-240 / C-181).

692 Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and Botaş, 2 August 2007, para 4 (HM-80 / C-36).

693 Respondent's Post-Hearing Brief, para 185; "Iraq Crude Oil Production by Year" (HM-4 / R-142).

694 Respondent's Post-Hearing Brief, para 185; Transcript (Merits Hearing), Day 2, 15:21-16:13. See also Ulutaş Witness Statement, para 13.

1990 Gulf War.[695] The Tribunal accepts this evidence and observes that the relevant issue is the amount of oil being produced in the Kirkuk oil fields, rather than in Iraq as a whole.

697. A further factor raised by the Respondent is that the Claimant has not provided details of each alleged act of violence and the impact that it had on the ability to produce oil or transport that oil through the Pipelines. In short, the Respondent alleged that the Claimant had not satisfied its burden of proof.

698. The third criterion is "externality". Again, the Respondent has raised objections in this regard. A number of news reports relied upon by the Claimant in support of its *force majeure* claim also note that some outages and issues that occurred during the period from 2003 to 2013 were the result of lack of investment by the Claimant in its oil infrastructure. For example, one report stated that "*Iraq's oil infrastructure is dilapidated after decades of war, sanctions and underinvestment and the U.S. military has in the past said it found no evidence of sabotage, only of metal fatigue, after explosions Iraqi officials blamed on bomb blasts*."[696]

699. Various other sources support this view as follows (emphasis added):

> "Security has improved but insurgents still target the pipeline from time to time and it also suffers <u>frequent technical issues</u> because of its age and poor maintenance over the years."[697]
>
> "Iraqi oil exports through the pipeline to Turkey have been <u>stopped due to technical malfunctions</u> on the Iraqi side."[698]
>
> "<u>Sabotage and technical problems</u> kept the Iraq-Turkey route mostly idle until 2007 following the US-led invasion of Iraq in 2003. Flows have increased since 2007, partly due to tighter security."[699]

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695 U.S. Energy Information Administration, Country Analysis Briefs – Iraq, June 2005, p.6 (HM-63 / C-214). Claimant's Rebuttal Post-Hearing Brief, para 6.5.

696 J. al-Badrani, Blast halts Iraq-Turkey oil pipeline flow, Reuters, 22 April 2010 (HM-108 / C-200).

697 "PKK bombs Iraq to Turkey pipeline in rare attack" Reuters, 4 July 2010 (HM-111 / C-229).

698 "Malfunction Stops Iraq's Oil Pipeline to Turkey" Iraq Business News, 8 June 2010 (HM-109 / C-228).

699 "Iraq Resumes Turkish Exports" Iraq Business News, 14 June 2010 (HM-110 / C-227).

700. The Tribunal is satisfied that the evidence shows beyond doubt that oil production was difficult for the FGI in the years following the 2003 invasion. There were frequent attacks on Pipeline infrastructure and it was difficult for the Government to invest in oil infrastructure over this period. While acknowledging these challenges and difficulties that undoubtedly faced the FGI, the task of this Tribunal is to determine whether these general difficulties and challenges were sufficient to fulfil the criteria for a *force majeure* event.

701. In the Tribunal's view, the evidence demonstrates that there was a marked difference in circumstances between the period from mid-2003 to mid-2007 and the period from mid-2007 to mid-2011.

702. In relation to the period from mid-2003 to mid-2007, the Tribunal finds it clear from the evidence that the violence during this period was significantly greater than in the years that followed. The Claimant has provided evidence that there were 22 attacks on the ITP infrastructure between June and December 2003. There were a further 66 attacks in 2004, 30 in 2005, 14 in 2006 and 11 in 2007.[700] There were other attacks on oil installations in and around Kirkuk more generally.

703. A "Country Analysis Brief" of the Iraqi oil industry in June 2005 reported:[701]

> "Unfortunately, Kirkuk-Ceyhan has been a main target for sabotage since June 2003, and is open only sporadically. Capacity on the line is believed to be as high as 600,000 bbl/d, with significant repairs still required. Among other problems, the line was damaged by a bridge ("Al Fatha," located near Baiji) that collapsed on it after being bombed by U.S. planes during the war, requiring major repairs, including the drilling of a new tunnel under the Tigris River. In addition, the IT-1 pumping station on the Kirkuk-Ceyhan line was damaged by looters, but reportedly is operable manually. The IT-2 pumping station on the same line reportedly was looted and destroyed …

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[700] Claimant's Post-Hearing Brief, para 7.12; Institute for the Analysis of Global Security, Iraq Pipeline Watch (HM-85 / C-197).

[701] U.S. Energy Information Administration, Country Analysis Briefs – Iraq, June 2005, pp.5-6 (HM-63 / C-214).

> Iraqi oil sales and exports currently are being handled by the State Oil Marketing Organization (SOMO). The war and its aftermath seriously disrupted SOMO operations, but the organization has now been reconstituted and has resumed many of its operations."

704. This view of the situation was reinforced at a meeting that took place between the Parties from 31 July to 2 August 2007 in Ankara, Turkey. The minutes of this meeting record that the Turkish delegation raised concerns about low capacity utilization by the Iraqi delegation.[702] The Claimant raised *force majeure*, referring to the difficulties they were experiencing due to the unpredictable security situation.[703] During the Merits Hearing, Mr Schwartz (counsel for Turkey) acknowledged this, stating "*in all fairness to the claimant I should point out to you that …. Iraqi side expressed that minimum throughput obligation could not be fulfilled because of the force majeure*."[704] According to the Respondent, this meeting in July/August 2007 is the only occasion on which *force majeure* was raised prior to this arbitration.

705. During the meeting of 31 July – 2 August 2007, it was decided that the Parties would form a joint technical team to analyse the issues and devise solutions to improve the existing operation. When the Respondent suggested that Turkey could use the spare capacity for other purposes, the Claimant said no and "*expressed its willingness of using the capacity of the pipeline during the forthcoming period*".[705]

706. The decision of the Parties to form a "technical team" is consistent with the view that technical problems also played a role during the 2003-2007 period, as suggested in news reports of the time:

> "Sabotage and technical problems kept the Iraq-Turkey route mostly idle until 2007 following the 2003 U.S.-led invasion of Iraq"[706]

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[702] Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and Botaş, 2 August 2007, para 2 (HM-80 / C-36).

[703] Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and Botaş, 2 August 2007, para 4 (HM-80 / C-36).

[704] Transcript (Merits Hearing), Day 2, 12:1-7.

[705] Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and Botaş, 2 August 2007, para 4 (HM-80 / C-36).

[706] PKK bombs Iraq to Turkey pipeline in rare attack, Reuters, 4 July 2010 (HM-111 / C-229).

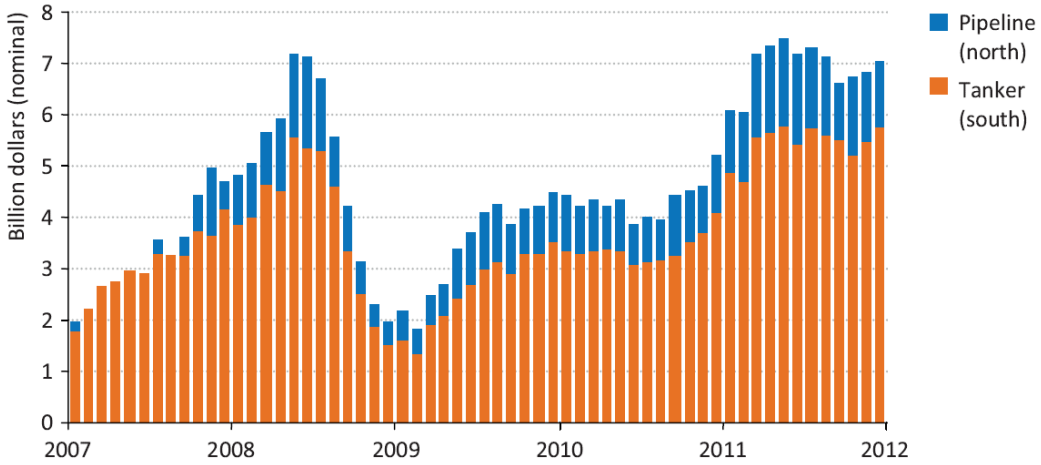
"A combination of sabotage and technical problems meant the pipeline was mostly shut from the 2003 U.S.-led invasion of Iraq until 2007."[707]

707. While it is clear that technical problems played a role in the issues facing the Claimant, as well as attacks,[708] the Tribunal accepts that regular maintenance would have been extremely problematic for the Claimant and could not be expected during the period of warfare and civil strife that persisted from 2003 to mid-2007.

708. A graph produced by the Respondent shows the Iraqi oil production by year between 1980 and 2014.[709] This graph clearly shows that after 2007 Iraqi crude oil production rose steadily and by 2012 had eclipsed any other year since 1980. The graph records a sharp dip in oil production in 2003 as would be expected, but a relatively quick recovery by 2004 with oil production between 2004 and 2007 remaining relatively steady.

709. The following graph makes it clear that oil flowed through the Pipeline every month from around September 2007.[710]

Figure 1.15 ▷ Iraq monthly oil export revenues by route



Note: Iraq also receives additional revenue from exporting a small amount by truck.

Sources: Direct communication with Iraq's State Oil Marketing Organization; IEA analysis.

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707 Factbox: Recent attacks on Kirkuk-Ceyhan pipeline, Reuters, 3 September 2010 (HM-114 / C-226).

708 Respondent's Post-Hearing Brief, para 188.

709 "Iraq Crude Oil Production by Year" (HM-4 / R-142).

710 International Energy Agency, "Iraq Energy Outlook, World Energy Outlook Special Report" 9 October 2012, p.34 (HM-165 / R-143).

710. This graph is consistent with a report from the Institute for Analysis of Global Security entitled "Iraq Pipeline Watch" (dated 27 March 2008) which shows a significant drop in attacks on pipelines and oil installations in Iraq from July 2007.[711] This report makes it clear that Iraq's oil industry as a whole was under considerable and sustained attack from June 2003 to July 2007. While many of these attacks did not directly damage the Pipelines, the Tribunal accepts that attacks on Kirkuk oil fields and other installations would have impacted the Claimant's ability to meet is Minimum Guaranteed Throughput obligations.

711. This conclusion is consistent with Mr Earnest's analysis of Pipeline flows over this year.[712] The Table below demonstrates that significantly less crude oil flowed through the Pipelines from 2003 to 2007. Thereafter, volumes increased markedly.

Table 1

ANNUAL CRUDE OIL SHIPMENTS ON ITP

(Gross Barrels per Year)

Year	*1985 Addendum*	*2010 Amendment*
2003	60,161,804	-
2004	38,557,498	-
2005	12,667,775	-
2006	10,446,084	-
2007	39,833,221	-
2008	136,121,633	-
2009	167,977,592	-
2010	147,104,874	-
2011	97,814,682	65,558,998.0
2012	-	134,145,082.0
2013	-	92,578,869.0

712. The Parties' behaviour at the time also supports the conclusion that there was a marked difference in the impact of the attacks after July 2007. While the Claimant raised the security

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711 Institute for the Analysis of Global Security, Iraq Pipeline Watch (HM-85 / C-197).

712 First Earnest Expert Report, para 4.6.

problems as a reason for its poor capacity issues in 2007 (see paragraph 704 above), at a meeting of the Parties in 2009 to discuss Minimum Guaranteed Throughput levels for the 2010 Amendment, *force majeure* was not mentioned by the Claimant. During the 2009 meeting, the Claimant stated that the situation in Iraq "*has not been settled yet*" so it wished to extend the current Agreement, rather than negotiate a new one. The Claimant also stated that it was "*not content with the existing guaranteed minimum throughput and … requested to decrease this amount in the future*." The Respondent, for its part, was unhappy with the revenue from transportation charges and wanted to revise the formula to cover its costs and protect the Parties against inflation and cost fluctuations.[713] There was no mention of *force majeure* by either Party. In the Tribunal's view, the Claimant's reference to the situation not being settled cannot be seen as a reference to *force majeure* in relation to which it must be shown that compliance with the Claimant's obligations was materially impossible.

713. While there may have been short periods (lasting a few days each) from mid-2007 to 2011 where the Pipeline was closed due to damage, there is no suggestion that such closures were long term. There is also no evident increase in the flow of oil after 27 July 2011, the date when the 2010 Amendment came into force and the date on which the Claimant has said the *force majeure* situation ended. The individual acts of sabotage were far less frequent from around mid-2007 and appeared to impact Pipeline flows for short periods only. The Claimant notes that there was an increase in attacks in 2009, but the Tribunal is satisfied that this did not impact the Pipeline's capacity significantly as can be seen from the graph at paragraph 709 above.

714. This view is consistent with contemporaneous media reports which do not suggest any significant damage during this period. For example, a report on an attack in October 2009 stated that. "*the Kirkuk pipeline, which carries Iraqi oil for export to the Turkish port of Ceyhan, has been damaged in an insurgent attack, but officials expect flows along the link to resume shortly*."[714] The report notes that this was "*the first significant strike on the pipeline in months*" and that "*Iraqi crude exports had not been affected.*"[715]

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[713] Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 25-26 February 2009 (HM-93 / C-35).

[714] "Blast rocks Kirkuk export link" Upstream, 28 October 2009 (HM-102 / C-224).

[715] "Blast rocks Kirkuk export link" Upstream, 28 October 2009 (HM-102 / C-224).

715. The Tribunal is satisfied that the impacts of these attacks are not sufficient to relieve the Claimant of its obligation to pay MGT fees on an annual basis during the years after mid-2007. The evidence suggests that the reason that the Claimant could not fulfil its MGT obligations during these years was due to under-investment and not due to the attacks themselves.[716] Technical problems plagued the Pipelines, as is evident from the news reports set out in paragraph 693 above. The Claimant said that after years of violence and trade embargoes which were (at least partly) to blame for the underinvestment in the system, it is not reasonable to assume that Iraq could operate the Pipelines at "their nameplate capacity" straight away. This may have been true, but the evidence shows the continued and steady decrease in violence throughout 2005, 2006 and 2007, such that by 2007, the FGI should have been in a position to ensure that the 46-inch Pipeline was not being disrupted constantly by technical issues.

716. Moreover, the evidence shows that sporadic attacks on oil infrastructure continued after 27 July 2011, in the same fashion as before this date. The Tribunal finds that there is no justification for the Claimant's position that *force majeure* conditions lifted on 27 July 2011, other than convenience for the Claimant.

Conclusion on *force majeure* defence

717. As a result, the Tribunal finds that from 1 March 2003 to 31 July 2007 a situation of *force majeure* existed in Iraq, such that the Claimant is excused from payment of MGT fees during this period. However, the Tribunal further finds that after July 2007 the situation facing the Claimant did not meet the criteria for *force majeure* under the ITP Agreements or under international law more generally. In particular, the Tribunal finds that the requirements of material impossibility and externality were not met after July 2007 – the Claimant had a choice whether or not to invest in its infrastructure from this point onwards and attacks on the ITP infrastructure decreased significantly.

[716] See "Malfunction Stops Iraq's Oil Pipeline to Turkey" Iraq Business News, 8 June 2010 (HM-109 / C-228), whereby oil exports were "stopped due to technical malfunctions on the Iraqi side."

718. The MGT fees claimed for each year were set out at Workpaper 8 of Mr Earnest's Second Report. The shortfall in MGT fees for 2008 to 26 July 2011 amounted to a total of USD 276,568,540.25.

719. The Respondent claimed a further shortfall of USD 113,145,064.00 for the 2007 year, but no specific monthly breakdown of this figure was provided.

720. Workpaper 7 of Mr Earnest's Second Report indicates that the Claimant paid the Respondent transport fees of USD 24,999,968.00 for the period from 1 August to 31 December 2007. If the transportation fee was USD 0.75 per barrel, this means that 33,333,291 barrels were transported between August and December 2007. As the Claimant's total Minimum Guaranteed Throughput obligation for 2007 was 258,860,000 barrels,[717] on a pro rata basis this means the Claimant should have transported 107,858,333 barrels for the period from 1 August to 31 December 2007. If only 33,333,291 barrels were transported during this period, this leaves a shortfall of 74,525,042 barrels. Applying a transportation fee of USD 0.75 per barrel, the Tribunal calculates that USD 55,893,781.50 of MGT fees remain outstanding.

721. Mr Earnest's Workpaper 8 indicates that MGT fees of USD 51,125,020.25 were paid by Iraq in 2007. As no fees were due prior to July 2007 on account of *force majeure*, the Tribunal considers that this entire fee should be applied to the August-December 2007 period. Consequently, the Claimant is liable to pay the Respondent a further USD 4,768,761.25 for the period from August to December 2007.

722. Adding this figure to MGT fees for the period from 1 January 2008 to 26 July 2011 (see paragraph 718), the Tribunal finds that the Claimant is liable to pay the Respondent the amount of **USD 281,337,301.50**.

The Claimant's defences of limitation and abandonment

723. It is unclear whether the Claimant still maintains its limitation argument, as it was not referred to by the Claimant in its Post-Hearing submissions. While the Tribunal considers it likely that the Claimant has withdrawn this particular defence, out of an abundance of caution and for the sake of completeness, the Tribunal briefly addresses it here.

[717] Second Earnest Expert Report, Workpaper 6.

724. The Tribunal dismisses the Claimant's submission that the Respondent's counterclaim is subject to limitation restrictions under French law. It is accepted by both Parties that French law was inapplicable prior to the 2010 Amendment. Therefore, any limitation argument based on French law cannot succeed in relation to pre-2010 Amendment claims. In relation to the period after the 2010 Amendment came into force, there is no suggestion by the Claimant that the limitation periods under French law (even if applicable) would bar a claim being brought.

725. Under international law, applicable prior to the 2010 Amendment, there is no defined limitation period. However, a party may be prevented from pursuing a claim if there is an unreasonable delay. Whether an unreasonable delay exists depends upon the individual circumstances. The Tribunal is satisfied that the claims brought by the Respondent were raised within a reasonable time. The Respondent notified the Claimant of these claims and reserved its right to pursue them on a number of occasions prior to this arbitration, including at the meeting between the Parties on 31 July – 2 August 2007.[718]

726. The Claimant also contended that, as a matter of international law, the Respondent should be considered to have abandoned or settled its claims when it signed the 2010 Amendment. The Tribunal finds that there is no evidential basis to support this position, especially given the Respondent's reservation of rights noted above. The Tribunal agrees with the Respondent's submission that:[719]

> "The 2010 Amendment was not a settlement agreement, nor did it purport to settle any claims. To the contrary, it was entered into for the purpose of renewing and amending certain specified provisions of the ITP Agreement."

727. Therefore, for the above reasons, the Claimant's defences of limitation and abandonment are dismissed.

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[718] Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and Botaş, 2 August 2007 (HM-80 / C-36).

[719] Respondent's Post-Hearing Brief, para 195.

B. Failure to pay transportation charges

1. Respondent's submissions

728. The Respondent has also alleged that the Claimant has failed to pay transportation charges in respect of oil transported through the ITP system in 1990 in the sum of USD 132,138,255.91, as verified by the Respondent's quantum expert, Mr Earnest.[720] The Respondent withdrew similar claims for the years 2003 to 2013, as they were accounted for in the claim for MGT fees (except to the extent that force majeure applies and therefore transportation fees for the actual amount of oil transported are due).[721]

729. According to the Respondent, between January and August 1990, the Claimant transported 45,881,103 metric tons of Iraqi crude oil through the Pipelines (or 341,353,919 barrels[722]). The Respondent invoiced the Claimant for transport charges of this oil at a rate of USD 0.40 per barrel. The total amount due was USD 135,705,597.08. The Claimant paid USD 75,244,016.34, but USD 60,461,580.64 remains outstanding (***Unpaid Invoices Claim***).[723]

730. In August 1990, oil transportation through the Pipelines was suspended as a result of the sanctions and trade embargo imposed upon Iraq following its invasion of Kuwait. No further oil was transported through the Pipelines. As a result, the total volume of oil transported in 1990 was considerably lower than Turkey had been expecting when it applied the transportation rate of USD 0.40 per barrel. The Respondent alleged that the correct transportation rate for the amount of oil actually transported in 1990 was USD 0.6081 per barrel. As a result, the Respondent claimed additional transportation charges of USD 70,676,675.27 (***Differential Claim***).

731. The Respondent initially submitted the Differential Claim to the UN Compensation Commission (***UNCC***), as it considered it was a loss suffered as a result of the War. However, the UNCC rejected the claim, saying that the loss was caused by the trade embargo and not directly as a

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720 Second Earnest Expert Report, para 2.5.

721 Respondent's Rejoinder, footnote 348.

722 First Earnest Expert Report, para 4.3.

723 Respondent's Post-Hearing Brief, para 202.

result of Iraq's invasion of Kuwait. The Respondent did not submit the Unpaid Invoices Claim to the UNCC as it did not fall within the UNCC's temporal jurisdiction.

732. The Respondent said that it has repeatedly requested that the Claimant pay both the Unpaid Invoices Claim and the Differential Claim.[724] In 2012, the Claimant admitted liability for USD 58 million of the total requested, but asked for this sum to be forgiven.

733. The Respondent contended that, although this claim was old, it had been repeatedly asserted by the Respondent and was a straightforward claim – "*Iraq, without any good reason, has simply refused to settle debts indisputably owed to Turkey for the transportation of oil under the ITP Agreement.*"[725]

2. Claimant's submissions

734. The Claimant's primary objection to this claim is that the Respondent has not provided sufficient underlying documentation to substantiate it. The Claimant also contended that the Respondent has not provided evidence of how much has been paid by Iraq to date.[726] The Claimant's overall position was that the Respondent had failed to prove its claim.

735. The Claimant also objected to the Differential Claim on the basis that the claim has already been decided and rejected by the UNCC pursuant to Security Council Resolution No. 687 of 1991.[727]

3. Tribunal's Analysis

<u>1990 Transportation Charges Claim</u>

736. The Tribunal begins by addressing the first "limb" of the transportation charges claim – the 1990 transportation charges. The Tribunal notes that there is no dispute as to the actual volume of oil transported through the Pipelines in 1990. The Claimant does not challenge the

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724 See, for example, Letter from BOTAŞ to SOMO, 19 June 2008 (HM-89 / R-109).

725 Respondent's Post-Hearing Brief, para 201.

726 Claimant's Post-Hearing Brief, paras 7.21 – 7.25.

727 Respondent's Reply, para. 4.33.

volume asserted by the Respondent (45,881,103 metric tons) and the UNCC also verified the amount in its report.[728] Mr Earnest corroborated these volumes using available data.[729]

737. On this basis, the Tribunal is satisfied that the volume of oil transported through the Pipelines during 1990 was correctly stated at 45,881,103 metric tons (or 341,353,919 barrels). This oil was transported between January and August 1990, thereafter no oil was transported from Iraq due to the trade embargo imposed on Iraq following the 1990 Gulf War.

738. Article 3 of the 1985 Addendum establishes a sliding scale for calculating the per barrel transportation charge for Iraqi crude oil transported through the Pipeline. As stated above, the Respondent has said that it used a lower transportation rate (USD 0.40 per barrel) for the 45,881,103 metric tons transported between January and August 1990, on the assumption that the total volume transported in the full calendar year would exceed 70 million metric tons. Due to the embargo, this did not eventuate.

739. Mr Earnest, the Respondent's expert, calculated that the correct transportation charge for 45,881,103 metric tons was USD 0.6081, resulting in the Respondent undercharging the Claimant by USD 70,676,675.27. This is the amount of the Differential Claim.

740. The Claimant denied the Differential Claim on the basis that (i) it was rejected by the UNCC and (ii) it has not been sufficiently proven by the Respondent. The Tribunal agrees with the Respondent that the Differential Claim was not determined by the UNCC. The UNCC clearly considered that the claim was one arising solely out of the trade embargo rather than the war itself. The UNCC therefore had no jurisdiction in relation to this claim. As the UNCC stated that the claim did not arise as a result of Iraq's unlawful invasion and occupation of Kuwait, its finding was as follows:[730]

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728 United Nations Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment of "E1" Claims, S/AC.26/2001/18, 28 September 2001, paras 117-118 (H-235 / CL-234).

729 See First Earnest Expert Report, paras 4.3 and 4.30; Second Earnest Expert Report, para 2.3.

730 United Nations Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of "E1" Claims, S/AC.26/1999/10, 24 June 1999, paras 3 and 18 (I-311 / RL-302). See also United Nations Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment of "E1" Claims, S/AC.26/2001/18, 28 September 2001, para 121 (H-235 / CL-234).

> "Thus, the Panel finds that the circumstances giving rise to BOTAS' claim with respect to the TFD were caused solely by the trade embargo. Accordingly, the Panel recommends no compensation for this portion of the claim."

741. Consequently, the Tribunal finds that the UNCC rejected the Differential Claim on the basis that it was outside UNCC jurisdiction. Therefore, in the Tribunal's view, the UNCC result does not affect the ability of this Tribunal to determine the issue.

742. Turning now to the Claimant's second objection, that of proof, the Tribunal has reviewed the expert reports submitted by the Parties. Mr Earnest demonstrates his calculations at paragraph 4.4 of his first report, explaining in his second report that this calculation is "*simply the straightforward mathematical expression of the linear interpolation protocol for ITP tolls detailed in Article 3 of the 1985 Addendum*".[731] Mr Traver, the Claimant's expert, did not provide an alternative calculation nor did Claimant's Counsel cross-examine Mr Earnest on the 1990 transportation claim during the Merits Hearing. The Claimant's position relies on a lack of "underlying documents" presented by the Respondent to prove the claim. It is unclear what underlying documents the Claimant seeks, given it is clear that the Differential Claim was never invoiced and that the method for calculating the claim is set out in the 1985 Amendment.

743. Taking all of this into account, the Tribunal accepts Mr Earnest's calculations for the Respondent regarding the Differential Claim. The Tribunal also accepts that the Respondent is entitled to the differential between the amount invoiced at USD 0.40 per barrel and the correct transportation rate of USD 0.6081 per barrel on the basis of the 1985 Amendment. Consequently, the Tribunal finds that the Claimant is liable to pay the Differential Claim in the amount of **USD 70,676,675.27**.

Unpaid Invoices Claim

744. The Tribunal now considers that second "limb" of the transportation charges claim – the Unpaid Invoices Claim. The Respondent asserts that the Claimant paid USD 75,244,016.34 of the amounts invoiced by the Respondent, but failed to pay the remaining USD 60,461,580.64. The Claimant asserted that the Respondent had not sufficiently proved its claim through

[731] Second Earnest Expert Report, para 2.4.

providing the underlying documentation to support that amount invoiced and the amount paid by the Claimant.

745. Mr Earnest noted in his First Expert Report that he had been informed (presumably by the Respondent's Counsel) that "*source documents concerning shipments and payments cannot be located.*"[732] He therefore based his analysis on the information provided by the Respondent.

746. The Tribunal notes that the Claimant has not provided any documentation to rebut the Respondent's assertion that the amount paid by the Claimant was USD 75,244,016.34. Presumably the Claimant also cannot locate the source documents, but of course this is not the Claimant's claim to prove.

747. In the Tribunal's view, the evidence supports the Respondent's position that the 1990 transportation charges were underpaid. The Respondent repeatedly asserted this claim in meetings between the Parties, as evidenced below.

a. In a letter dated 10 May 2007, the Respondent stated that "[w]*e are sending, the messages sent to Iraq side in relation to the protocols indicating the receivables arising out of actual transportation made via pipeline in 1990 and the accrued fee within the context of actual transportation …*"[733]

b. At a meeting on 31 July – 2 August 2007 the "*two sides reviewed the receivables as claimed by BOTAŞ that date back to 1990 resulting from the implementation of the pipeline Agreement … remaining amount of total cost of actual transported oil for 1990, USD 127,161,580.00*."[734]

c. At a meeting on 27-28 November 2008, it was acknowledged that:

> "BOTAŞ's claim of the amount of $127,161,580 is divided into two parts as follows;

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[732] First Earnest Expert Report, para 4.3.

[733] Letter from BOTAŞ to Prime Minister, 10 May 2007 (HM-778 / R-74).

[734] Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and BOTAŞ, 2 August 2007 (HM-80 / C-36).

> 1. $65,700,000 (transportation cost according to Article 3 of the Agreement) was previously submitted by BOTAŞ to the United Nations Compensation Commission and had been rejected. Therefore, the Iraqi Party stated that it is not in a position to accept otherwise. But, the Turkish Party stated that it has not received the due payment so far neither from UN Commission nor from SOMO or any other source.
>
> 2. $61,461,580. The Iraqi Party agree to pay the actual amount of $61,461,580 upon checking the relevant document."

d. At a meeting on 16-19 July 2012, the Respondent requested the payment of the outstanding debt for the amount of realised transportation which it said was USD 61,641,580.64 for the period between May and August 1990.[735] The meeting notes record that:

> "The Iraqi Party notes that there is an outstanding debt for the amount of realized transportation for the period between May and August 1990, however states that this amount is not $61.461.580,64 but approximately 58 million $. Besides that, Iraqi Party expresses their request for this debt to be exempted, based upon regulations of Paris Club for the debt to be written off or decreased by putting in the status of the old receivables."

748. The Tribunal finds on the basis of this evidence that the Claimant did underpay the invoices and that it owes the Respondent outstanding transportation fees for 1990. However, these meetings do not establish the quantum of the claim. The Tribunal agrees with the Claimant that the Respondent has failed to provide evidence to establish that its quantum figure of USD 60,461,580.64 is correct.

749. The Parties agreed during the July 2012 meeting that compensation in the amount of USD 58 million was owed by the Claimant to the Respondent in respect of unpaid transportation charges. The Tribunal accepts that the Claimant is liable to pay compensation in this amount to the Respondent. Anything more than that amount has not been proven by the Respondent.

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[735] Minutes of July 2012 Meetings, 19 July 2012 (HM-157 / C-57).

Consequently, the Tribunal finds that the Claimant is liable to pay the Respondent a total of **USD 58,000,000.00** for the 1990 transportation claim.

Unpaid Actual Transportation Charges between 2003 and 2007

750. The Tribunal has found that the Claimant was entitled to claim *force majeure* between 2003 and mid-2007. Transportation charges from mid-2007 to 2011 have therefore been addressed as part of the Minimum Guaranteed Throughput Obligation. For the period where *force majeure* does apply, small quantities of oil were pumped through the 46-inch Pipeline. Between 2004 and 2006, the Claimant did not pay the actual transportation charges due for those quantities of oil (transportation charges were paid in 2003 and 2007). The undisputed actual transportation charges due (but not paid) are:[736]

a. 2004: USD 28,918,123.50

b. 2005: USD 9,500,831.25

c. 2006: USD 7,834,563.00

751. This is a total of USD 46,253,517.75 of actual transportation charges that were not paid by the Claimant to the Respondent between 2003 and 2007. The Tribunal finds that the Claimant is liable to reimburse the Respondent for unpaid transportation charges between 2003 and 2007 in the amount of **USD 46,253,517.75**.

C. Failure to reimburse for equipment and personnel

1. Respondent's submissions

752. The Respondent claimed that the Claimant failed to reimburse the Respondent for equipment and personnel expenses, in the total sum of USD 3,432,131.23.

753. The Respondent alleged that the Claimant owes to the Respondent USD 2,792,851.92 in respect of personnel expenses in Ceyhan from 1997-2013.[737] The Respondent provided

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[736] Second Earnest Expert Report, Workpapers 2 and 8.

[737] Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 28 November 2008 (HM-91 / R-70) and Letter from BOTAŞ to Prime Minister, 10 May 2007 (HM-78 / R-74).

documentary evidence to show that these costs have been repeatedly discussed between the Parties and, until now, the Claimant had not contested their legitimacy.[738]

754. The Respondent also claimed USD 639,278.31 for equipment purchased on behalf of Iraq between 1997 and 2001. The Respondent stated that the Claimant refused to take delivery of equipment, despite having ordered it and knowing that payment was due.[739] The Respondent has evidenced the expenses by providing to the Tribunal a list of purchased materials and prices.[740]

755. According to the Respondent, the Claimant had established an irrevocable Letter of Credit in an amount of USD 1,477,060.00,[741] from which the Respondent was to draw payments to reimburse it for the costs of certain equipment.[742] Payments in an amount of USD 837,780.69 were drawn down from the Letter of Credit by the Respondent between 1997 and 2001. The equipment that the Claimant has refused to accept was worth USD 639,278.31 (the value of the outstanding balance of an irrevocable Letter of Credit). Consequently, the Respondent has not been reimbursed for the amount that it expended in respect of that equipment and, according to the Respondent, it is entitled to compensation in this amount.

2. Claimant's Submissions

756. The Claimant rejected this counterclaim, stating that the amounts claimed were unsupported and unproven.[743]

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738 Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 28 November 2008 (HM-91 / R-70); Letter from BOTAŞ to Prime Minister, 10 May 2007 (HM-78 / R-74); Letter from BOTAŞ to SOMO, 19 June 2008 (HM-89 / R-109).

739 Respondent's Skeleton Submission, para 96.

740 See List of Purchased Materials and their Prices, 29 March 1997 (HM-52 / R-145); Letter from BOTAŞ to SOMO, 30 March 2009 (HM-96 / R-75); Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 28 November 2008 (HM-91 / R-70), Minutes of July 2012 Meetings, 19 July 2012 (HM-157 / C-57); Letter of Credit between Iraq and the BNP AK Dresdner Bank AS 35662t, 20 August 1997, (L-29 / MS-29); see also Invoices, 1998 (L-30 / MS-30); Invoices, 1997-1998 (L-31 / MS-31).

741 Letter of Credit between Iraq and the BNP AK Dresdner Bank AS 35662t, 20 August 1997, (L-29 / MS-29).

742 Letter of Credit between Iraq and the BNP AK Dresdner Bank AS 35662t, 20 August 1997, (L-29 / MS-29); Invoices, 1998 (L-30 / MS-30); Invoices, 1997-1998 (L-31 / MS-31).

743 Claimant's Skeleton Submission, para VII-C.

757. Specifically, the Claimant contended that the claim for payment of costs associated with Iraqi personnel had not been proven by the Respondent and nor was there any basis in the ITP Agreements upon which Turkey could charge these costs to Iraq. However, the Claimant agreed that it had committed in 2007 to pay any properly reimbursable amounts following review of relevant documentation.[744]

758. In relation to the equipment, the Claimant stated that the equipment had never been delivered. According to the Claimant, the Letter of Credit relied upon by the Respondent expired in 1997. Additionally, the Claimant submitted that Turkey relied upon a separate supply contract to support its claim, that is not connected to this arbitration.[745]

759. In sum, the Claimant has asserted in relation to the claim for equipment that:[746]

> "Turkey fails to explain how a claim arising under a separate supply contract can be asserted in the present arbitration, which concerns claims under the ITP Agreements, why it ordered equipment from 1997 to 2001 when the letter of credit expired in 1997, why it is seeking payment without U.N. approval, and why (most fundamentally) it should be paid for equipment that Turkey admits it never delivered. Turkey's equipment claim has no evidentiary basis and should be dismissed."

3. Tribunal's Analysis

760. There are effectively two separate claims under this counterclaim – the Respondent's claim for reimbursement of costs of personnel in Ceyhan and its claim for reimbursement of costs incurred when purchasing equipment on behalf of the Claimant. The Tribunal considers each claim separately below.

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744 Claimant's Post-Hearing Brief, para 7.29; Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and BOTAŞ, 2 August 2007 (HM-80 / C-36).

745 Contract for the Supply of Minimum Spare Parts and Materials Required for the Continuous Operation of Iraq-Turkey Pipeline, 29 March 1997 (HM-53 / R-144).

746 Claimant's Post-Hearing Brief, para 7.28.

Personnel Claim

761. Iraqi personnel are stationed at the Terminal in Ceyhan to monitor and perform tasks on behalf of the Claimant. The Respondent claimed that it has incurred Iraqi personnel expenses in the amount of USD 2,792,851.92 between 1997 and 2013. The Claimant disputed this claim on two grounds: (i) the Respondent has not provided any supporting evidence for these costs; and (ii) Article 16.1 of the 1973 Agreement exempts the Claimant from all charges regarding its personnel at Ceyhan.

762. In his Witness Statement, Mr Ulutaş explained that: [747]

> There are accommodation places, cars with drivers for transportation and work offices with furniture, phones, fax, computers and necessary equipment for use by SOMO and NOC staff authorized on behalf of Iraq at Ceyhan Terminal … BOTAŞ provided financial and other assistance to Iraqi staff at Ceyhan, including accommodation, transportation, food and healthcare.

763. These costs are similarly described by Mr Earnest in his Expert Reports as consisting of "*the costs of residence, transport, accommodation, food, healthcare, telecommunications, clothing, and other materials*."[748]

764. The Claimant's primary argument against liability for these costs is that the Respondent had failed to provide any evidence to support the figure claimed.

765. It is true that the Respondent has not provided invoices to support the costs claimed from 1997 to 2013. The Parties have, however, provided evidence of the discussions between the Parties about these costs. The Tribunal finds this evidence to be relevant and helpful when considering whether the Respondent has substantiated its claim.

766. Although the Claimant complained that the Respondent has not substantiated its claim for expenses in this arbitration, it does appear that the Respondent has done so in the past. A letter dated 10 May 2007 from the Respondent to the Claimant stated: "*Copies of detailed documents indicating expenses of Iraqi personnel residing at Turkey, amount of which is also*

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[747] Ulutaş Witness Statement, para 17.

[748] First Earnest Expert Report, para 4.34.

accepted by Iraq, are submitted to your under secretariat as an attachment of (b) relevant letter".[749]

767. A short time later, the Parties met to discuss this and other outstanding issues between them. This meeting took place in Ankara between 31 July and 2 August 2007. At that meeting, the minutes record that the Respondent reiterated its request for payment of USD 2,071,739.00 for accommodation, food and health expenses of Iraqi personnel in Ceyhan. This debt was accrued between 1997 and 2007. In relation to all debts claimed by the Respondent at that meeting:[750]

> "The Iraqi Side declared their readiness to pay the amounts upon review and auditing of the related documents as supplied by BOT AS and expressed its commitment to timely fulfill Iraq's payment obligations in the future, as stipulated in the Agreement. Following review of BOTA$ financial claims referred to in the above, the Iraqi side will' spend its best effort to effect the payment at earliest possible date in the same way used by SOMO or the Ministry of Finance."

768. As noted above, the 10 May 2007 letter from the Respondent recorded that detailed documents indicating expenses had been provided. In addition, a letter from the Respondent to the Claimant in June 2008 confirmed that all relevant documents were provided to the Claimant within one month of the meeting.[751] The letter also confirmed that, although some payments were made by the Respondent following the 2007 meeting, a total of USD 106 million remained outstanding.

769. A further meeting was held on 27-28 November 2008. The minutes of that meeting record that the Parties had agreed at the meeting of 31 July 2007 that "[d]*ebt for accommodation, food and health expenses of Iraqi personnel for the period of 1997 to 2007 is $2,071,739*."[752] During the November 2008 meeting, the Claimant requested that BOTAŞ "*eliminate the due*

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749 Letter from BOTAŞ to Prime Minister, 10 May 2007 (HM-78 / R-74).

750 Minutes of Meeting between the Representatives of the Iraqi Ministry of Oil and BOTAŞ, 2 August 2007 (HM-80 / C-36).

751 Letter from BOTAŞ to SOMO, 19 June 2008 (HM-89 / R-109).

752 Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 28 November 2008, p.1 (HM-91 / R-70).

amount" for personnel costs between 1997 and 2006.[753] BOTAŞ said it would convey the request to its Board.

770. In the Tribunal's view, the November 2008 meeting minutes support the Respondent's position that the Parties agreed that the amount owing in relation to Iraqi personnel from 1997 to 2007 was USD 2,071,739.00. It is also consistent with the Respondent's letters stating that supporting documentation had been provided. Presumably, it was following provision of this documentation that the amount was agreed by the Parties. There is no suggestion in the November 2008 minutes that the Iraqi side was awaiting further evidence or supporting documentation in order to verify the amount – to the contrary, it appears that the amount was accepted and the position of the Iraqi side was to request that the debt be waived.

771. The Minutes of a meeting in 2012 record that the BOTAŞ Board refused the exemption on the grounds that the expenses were not excused under Article 16.1 of the 1973 Agreement.[754] The Claimant stated at the meeting that it was not satisfied with this response. At that same meeting in 2012, the Respondent asked the Claimant once again to reimburse staff expenses in the amount of USD 2,405,270.78 (expenses for the period 1997-2008).

772. While the Tribunal is satisfied that the Respondent provided sufficient evidence to the Claimant to verify the figure of USD 2,071,739.00, no further evidence has been provided to substantiate the remainder of the requested sum in this arbitration (USD 721,112.92). This presumably is the amount accrued between 2007 and 2013. While the Tribunal acknowledges that the Respondent likely did incur expenses for Iraqi personnel over this period, it is the Respondent's burden to prove the amount of its expenses and it has not done so. Consequently, the Tribunal finds that the Respondent has shown that the amount of USD 2,071,739.00 is due from the Claimant to the Respondent, but insufficient evidence has been provided by the Respondent to support its claim that the further amount of USD 721,112.92 is due and owing.

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[753] Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 28 November 2008, Article c (HM-91 / R-70). See also Minutes of July 2012 Meetings, 19 July 2012 (HM-157 / C-57).

[754] Minutes of July 2012 Meetings, 19 July 2012 (HM-157 / C-57).

773. In relation to the amount of USD 2,071,739.00, the Tribunal now considers the Claimant's second objection to the claim – that the Claimant is not responsible for these costs under the ITP Agreements.

774. The Claimant noted that during discussions between the Parties the Iraqi side raised the issue that it had no obligation to pay the costs and expense of its staff at Ceyhan because Article 16.1 of the 1973 Agreement states that the office at Ceyhan will be exempt from "taxes, duties and charges". Article 16.1 states:

> "The Turkish side agrees that the Iraqi side will establish an office at the terminal [in Ceyhan]. The said office and its operations, duties and all documents prepared and equipment used by this office in connection with its operations and duties shall be exempted from all taxes, dues, charges and any other financial burden. The Turkish side also undertakes to provide all the necessary facilities including permits for entry, residence and work for the personnel who will manage the operations of the office or work in it."

775. The Respondent disputed this and its position was expressed to the Claimant during discussions prior to this arbitration. The minutes of a meeting between the Parties in 2012 record:[755]

> "The Iraqi party states that this issue had been discussed in the meetings which took place during the period of 27th-28th of November 2008 and BOTAŞ noted the request of Iraqi Party and showed intention to convey the issue to the Board of BOTAŞ (for exemption).
>
> The Turkish Party states that the expression of "any other financial burden" in Clause 16 of the previous Agreement means the financial obligations like "taxes, dues or charges", but does not include the service charges like communication and transportation {including but not limited to food, mobile telephone, landline, vehicles.

[755] Minutes of July 2012 Meetings, 19 July 2012 (HM-157 / C-57).

> The Iraqi Party is not satisfied with the above mentioned statement but then states that he has "not been provided with source documents."

776. The Minutes of the meeting between the Parties in November 2008 support the Respondent's interpretation. The minutes were signed by both Parties and record that they agreed:[756]

> "All food, accommodation and medication (except for visits to BOTAŞ's medical center) expenses of Iraqi personnel shall continue to be covered by the Iraqi Party. Only the transportation for work purposes will be covered by the Turkish party. The Iraqi Party asked the Turkish Party to eliminate the due amount covering the period of 1997-2006. BOTAŞ noted the request of the Iraqi Party and showed intention to convey the issue to the BOTAŞ Member of Board."

777. The Tribunal considers that the plain meaning of Article 16.1 is that the exemption from "all taxes, dues, charges and any other financial burden" relates to the office at Ceyhan and its operations, duties, equipment etc. It was for the Respondent to establish that office, and related facilities, at its own cost. It does not extend to providing food, healthcare, clothing or other amenities to Iraqi staff at Ceyhan.

778. Nothing in Article 16.1 referred to staffing costs at all. Indeed, staffing arrangements were addressed separately in Article 16.2 which stated "*Functions, duties and number of personnel of the office mentioned in paragraph (1) above shall be agreed upon in "the Protocol"*. The 1976 Protocol provides further clarification at Article 4:

> "… The Turkish side undertakes to provide living accommodation and privileges to the representatives and employees of the Iraqi side appointed for the said office(s) at charges equal to these applied to Turkish employees according to the requirement of the Iraqi side up to 3 family houses and 25 bachelor's quarters."

779. The Protocol clearly indicates that the Claimant would be responsible for the cost of accommodation. There is no suggestion by the Parties or in any of the contemporaneous

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[756] Minutes of Meeting between the Representatives of Iraqi Ministry of Oil and BOTAŞ, 28 November 2008, Article c (HM-91 / R-70).

documents that the charges levied by the Respondent were greater than those charged to Turkish employees.

780. The 1976 Protocol is also consistent with the Parties' understanding as recorded at the November 2008 meeting whereby the costs of Iraqi personnel would "*continue to be covered*" by the Claimant.

781. No doubt due to the difficulties that the Respondent had experienced in seeking reimbursement for personnel costs from the Claimant, the amendment introduced by Article 7 of the 2010 Amendment clarified the situation further. This provision amended Article 16 of the 1973 Agreement as follows:[757]

> "The Turkish Side undertakes that the Iraqi office at Ceyhan Terminal and its services, duties and all documents prepared and equipment used by the office in connection with its operations shall be exempted from all taxes, dues, charges and any other financial burden. The Turkish Side also undertake to facilitate the entry permits, residence and work offices for the personnel who will manage the operations of office or work.
>
> The Turkish Side will provide the facilities required for the said office such as communication, cars and furniture against remuneration.
>
> <u>The Iraqi Side bears all the expenses related to the Iraqi Personnel working in the office in terms of their food and accommodations</u>.
>
> Details regarding as to which Side will bear the expenditures arising under this Article will be defined by a separate protocol between BOTAŞ and NOC."

782. Based on the above evidence, the Tribunal finds that the Claimant is liable to pay expenses incurred by the Respondent in relation to Iraqi personnel at Ceyhan in the amount of **USD 2,071,739.00**.

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[757] Article 7 of the 2010 Amendment.

Equipment Claim

783. The second part of the Respondent's counterclaim for reimbursement of expenses relates to equipment the Respondent alleged was purchased on behalf of the Claimant. According to the Respondent, the Claimant refused delivery of the equipment and has refused to pay for it.

784. The Respondent has provided adequate evidence in support of this claim in the amount of USD 639,279.31, including invoices and contemporaneous list of purchased materials and prices.[758] The equipment to be purchased by the Respondent on the Claimant's behalf was also set out in the supply agreement signed by the Parties.[759]

785. The Claimant had established an irrevocable Letter of Credit with the BNP AK Dresdner Bank AS in Istanbul for a total of USD 1,477,060.00 from which the Respondent was to draw payments to reimburse the costs of equipment purchases and supply. The Respondent submitted that USD 837,780.69 of the Letter of Credit amount was drawn down to reimburse equipment purchases. The remainder was to be used to pay for the equipment at issue in this arbitration.

786. The Claimant countered that the Letter of Credit expired in 1997 and that it should not be required to pay for equipment never received. The Tribunal finds that the Letter of Credit expired in 1997 (and the Respondent has not disputed this in its submissions). Consequently, no payment can be made from the Letter of Credit, but that does not mean that the equipment should not be paid for by the Claimant.

787. Like the staff expenses, this claim was discussed by the Parties at numerous meetings from 2007 onwards. The Claimant did not suggest at any juncture that it had never ordered the equipment or that it did not want the equipment. Indeed, at a meeting between the Parties in 2012 the Parties agreed as follows:[760]

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[758] See List of Purchased Materials and their Prices, 29 March 1997 (HM-52 / R-145); Invoices, 1998 (L-30 / MS-30); Invoices, 1997-1998 (L-31 / MS-31).

[759] Contract for the Supply of Minimum Spare Parts and Materials Required for the Continuous Operation of Iraq-Turkey Pipeline, 29 March 1997 (HM-53 / R-144).

[760] Minutes of July 2012 Meetings, 19 July 2012 (HM-157 / C-57) (emphasis added).

> "The Iraqi party emphasizes their request for the materials of $639.279,31 stored for the Iraqi party at the stocks in Ceyhan, however, this amount can be released for the Turkish Party in full compliance with the finance mechanism between the Central Bank of Iraq, DFI (Development Fund of Iraq) and the United Nations. The Iraqi party notices that they will take the materials and make the payment as soon as possible after the finance mechanism has been applied by the above mentioned institutions.
>
> The Turkish Party reserves any and all of its rights arising from the materials waiting at the Ceyhan stocks and requests the Iraqi Party to take the materials and make the payment as soon as possible and use its best endeavours to facilitate the so-called finance mechanism."

788. It is unclear to the Tribunal whether the equipment is still being stored at Ceyhan on behalf of the Claimant. However, the Tribunal does not consider that the Claimant can use the fact that it refused delivery of the equipment as a reason to refuse payment.

789. The Claimant also alleged that the purchase of the equipment took place pursuant to a supply contract that was separate to the ITP Agreements, therefore the claim does not properly belong in this arbitration. The supply contract is entitled "*Contract for the Supply of Minimum Spare Parts and Materials for the Continuous Operation of the Iraq-Turkey Pipeline*."[761]

790. The Tribunal notes the breadth of the arbitration clause as set out at paragraph 34 above. Disputes covered by the arbitration clause include: "*If any conflict or disparity arises between the Sides about the implementation and interpretation of this Amendment or any other issue that is not specified in the Agreement.*"

791. Although the purchase of the equipment may have been subject to a supply agreement, it was clearly purchased for use on the ITP facilities and in order to fulfil the Claimant's obligations under the ITP Agreements. All discussions between the Parties on this issue have all taken place during meetings about the ITP Agreements and there was no suggestion by the Claimant that the matter was somehow separate at that time. The Tribunal is satisfied that it falls within

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[761] Contract for the Supply of Minimum Spare Parts and Materials Required for the Continuous Operation of Iraq-Turkey Pipeline, 29 March 1997 (HM-53 / R-144).

the jurisdiction conferred by the arbitration clause as "any other issue that is not specified in the Agreement".

792. The Tribunal is satisfied that the Respondent has sufficiently proved its claim with respect to the purchase of equipment. The Tribunal finds that the Claimant is liable to the Respondent for the equipment in the amount of **USD 639,279.31**.

XV. CONCLUSION ON QUANTUM

793. The Tribunal has found that the Respondent is liable to pay the Claimant **USD 1,997,976,023.50** in respect of its loading claim.[762]

794. The Tribunal has also found that the Claimant is liable to pay the Respondent a total of **USD 526,585,537.45** in respect of its claims for Minimum Guaranteed Throughput fees, transportation charges and reimbursement claims.

795. When set off against each other, the Respondent is liable to pay the Claimant **USD 1,471,390,486.05** (subject to adjustments for interest as set out in the next section).

XVI. INTEREST

A. Parties' Submissions

796. The Claimant requested that the Tribunal award interest at a rate calculated for each month, equal to the yield on U.S. dollar-denominated Turkish government bonds with a maturity as close as possible to the award date.[763] The Claimant submitted that this was the rate of interest that the Claimant would have earned had it received the fair market value of the crude oil in each month, and invested it in Turkish government bonds (which by definition carry the same credit risk as Respondent's compensation obligation). The Claimant provided the Tribunal with interest calculations on the basis of the monthly average, for each month from May 2014. The

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[762] See paragraph 659 above.

[763] Claimant's Memorial, para 6.58.

Claimant applied the interest rate to the cumulative fair market value of the crude oil exported from Ceyhan as of the first day of the relevant month.[764]

797. The Respondent rejected the Claimant's suggested interest rate, stating that it is not based, as it should be, on the legal rate under the governing French law.[765] The Respondent also contended that the Claimant's interest claim was based on the unreasonable assumption that, but for Turkey's alleged breaches, the FGI would have sold the crude oil in the same volumes and on the same dates as the KRG.[766] The Respondent requested interest on its counterclaims and submitted that the appropriate interest rate under French law was 0.90% as of April 2017.[767] It requested that such interest accrue from the date that the damages were incurred until payment by the Claimant in full.

798. It appears from the Parties' submissions and the reports of their quantum experts that they expected that the interest would be calculated until the date of the actual payment in full of the compensation awarded.

B. Tribunal's Analysis

799. The Tribunal has the power to grant a party interest under international law principles in order to ensure full reparation for the injury sustained. Pursuant to Article 38 of the ILC Articles on State Responsibility, the interest rate and mode of calculation shall be set to achieve that result:

> "1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."

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764 See Claimant's Memorial, note 210 (an example calculation of interest to 31 July 2019, based on the full amount of Claimant's claim, is at HM-366-Supp / C-194-Supp).

765 Respondent's Counter-Memorial, paras 237 and 282.

766 Respondent's Counter-Memorial, para 281.

767 Respondent's Counter-Memorial, para 309.

800. The Tribunal does not consider that the default interest rate under French law (as proposed by Respondent) is appropriate in the present case, given the Tribunal's finding that French law does not apply to the substantive dispute. The Respondent's submission on interest was premised largely on its view that French law is the law applicable to the dispute. Moreover, as the damages have been assessed in US dollars, the Tribunal does not consider the default French interest rate to be appropriate in any case.

801. Typically, damages are assessed and paid in one currency (as is the case here) and the interest rate used is derived from market interest rates on that currency's securities. As it is the Turkish government that is liable to pay most of the damages, the Tribunal finds it appropriate to award interest based on the average annual yield on U.S. dollar-denominated Turkish government bonds rate with a maturity as close as possible to the date of this Award. The Tribunal finds this to be a commercially sensible rate that will appropriately compensate the Parties for the losses suffered as a result of the various treaty breaches that have been found in this Award.

802. While the Claimant requested that interest be calculated on a monthly basis, using a rate calculated for each month equal to the average yield on U.S. dollar-denominated Turkish government bonds rate, the Tribunal considers it more prudent and practical to calculate interest on an annual basis. This is particularly so when the same interest rate is to be applied to the Respondent's counterclaims.

803. Both Parties have been partially successful in their claims and both are due interest on the amounts awarded. The Tribunal now considers the date from which interest should be calculated.

804. As for the Claimant, the Tribunal considers that the most practical method of calculating interest in the present circumstances is for the Parties to calculate the amount owed by the Respondent to the Claimant for breach of the loading instructions in the ITP Agreements on 31 December each year from 2014 to 2018. Interest shall apply on that amount from 1 January of the following year until the date of this Award.

805. As for the Respondent:

a. Interest on the Minimum Guaranteed Throughput fees shall be calculated from 1 January of the year following which the fee was incurred until the date of this Award.

b. Interest on the 1990 transportation charges shall be calculated from 1 January 1991 until the date of this Award.

c. Interest on transportation charges from 2004 to 2007 shall be calculated from 1 January of the year after they were incurred (see paragraph 750) until the date of this Award.

d. Interest on charges for personnel and equipment will run from the date on which the invoice (if there was one) was due. In cases where no invoice was rendered, interest will run from 1 January of the year after the cost was incurred until the date of this Award.

e. No interest is to accrue on the USD 67,607,024.62 that has been credited to the Respondent for MGT fees for the period from July 2011 to the end of 2013. This is because this figure did not technically become due on a particular date, as no protocol was signed by the Parties in accordance with Article 4.6 of the 2010 Amendment.

806. The Parties have both sought interest on a compound basis.[768] The Tribunal considers that interest compounded annually is appropriate, commercially sensible, and consistent with modern international arbitration practice. As the tribunal in *LG&E Energy Corp v. Argentina* noted, "*compound interest would better compensate the Claimants for the actual damages suffered since it better reflects contemporary financial practice*."[769] The Tribunal orders that interest be compounded annually.

807. On the basis that the Respondent will be required to make a payment to the Claimant once all interest has been calculated and the total amount owed to the Respondent by the Claimant has been set-off against the total amount owed by the Respondent to the Claimant, the Tribunal awards the Claimant post-Award interest on the final amount that the Respondent is liable to pay after set-off. As mentioned at paragraph 798 above, both Parties appeared to expect that interest would be calculated until payment of the Award in full. Neither Party made any submissions on the ability of arbitral tribunals to award post-Award interest. Nonetheless, it is well established in the case law of international tribunals that post-Award interest is

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768 Claimant's Memorial, para 6.58 (and n. 210); Respondent's Rejoinder, para 275.4.

769 *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007), para 103 (H-213 / CL-213); see also *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Summary Minutes of the Session of the Tribunal held in Paris (25 May 1999), International Legal Materials, Vol. 41 (2002) 881 at 919 (H-222 / CL-222).

required in order to satisfy the principle of full reparation in the *Chorzów Factory* case. The Tribunal finds that post-Award interest shall apply on the total amount owed by the Respondent to the Claimant as at the date of this Award at the average annual US dollar denominated Turkish bond rate, compounded annually, until the Award has been paid in full.

XVII. COSTS

808. Each Party has claimed its costs in the arbitration. Following the July 2022 Hearing, the Tribunal invited the Parties to provide submissions on costs.

A. Claimant's Submissions

809. The Claimant claims that, if successful, should be awarded all of its costs in bringing this arbitration because of the Respondent's persistent breaches of the ITP Agreements.[770]

810. According to the Claimant, the "*costs follow the event*" principal applies, but the Tribunal is also entitled to take into account party conduct when allocating costs.[771] The Claimant stated that its costs are significantly higher due to the Respondent's conduct during the arbitration. For example:

a. The Respondent refused to comply with the Tribunal's document production orders of 16 June 2017, the Special Master procedure and produced with its own submissions selectively redacted customs documentation that should have been produced earlier.

b. The Respondent's application to admit new evidence and attempt to relitigate jurisdiction and admissibility issues. In particular, the Claimant devoted resources to rebutting the Respondent's submission that the 2021 Iraqi Budget Law retroactively authorised the KRG's oil exports.

811. The Claimant contended that the Tribunal should take account of this conduct when exercising its costs discretion.[772]

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[770] Claimant's Memorial, paras 6.61 – 6.62.

[771] Claimant's Costs Submission, p.1.

[772] Claimant's Costs Submission, p.2.

812. The Claimant claims total costs of USD 14,175,821.07 as follows:

a. Vinson & Elkins legal fees: USD 4,166,695.50

b. Cleary Gottlieb legal fees: USD 8,886,313.66

c. Expert opinions: USD 324,567.96

d. Other costs: USD 798,243.95

B. Respondent's Submissions

813. The Respondent has claimed its costs in these proceedings,[773] but in its costs submissions, the Respondent acknowledged that costs are generally not allocated to one side in inter-State dispute settlement, on the basis of international comity.[774] The Respondent therefore stated that "*it would not be proper for either Iraq or Turkey to obtain an adverse costs order against each other in this important inter-State arbitration*."[775]

814. Despite these submissions, the Respondent went on to contend that it was nonetheless entitled to costs in the present case due to exceptional circumstances. In particular, the Claimant had failed to meet its most basic obligations under the ITP Agreements and that the Claimant's wrongdoing was the proximate cause of its impasse with the KRG.[776]

815. The Respondent claims costs, fees and expenses of USD 8,942,445.17 and EUR 408,852.00, as follows:[777]

a. Counsel legal fees: USD 5,400,000.00

b. Expert opinions: USD 912,187.47 and EUR 403,250.00

c. Tribunal/ICC Costs: USD 914,090.26 and EUR 5,602.00

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773 Respondent's Counter-Memorial, para 310(6).

774 Respondent's Costs Submission, para 3.

775 Respondent's Costs Submission, para 3.

776 Respondent's Costs Submission, para 4.

777 Respondent's Costs Submission, para 5.

d. Costs/expenses:[778] USD 1,716,167.44

816. The Respondent also claimed post-award interest on its costs, at a compound interest rate to be determined by the Tribunal, until the date of the Claimant's full satisfaction of the Final Award.[779]

C. Costs fixed by the ICC Court

817. The advance on costs was fixed by the ICC Court at USD 1,810,000. The Parties have each paid the advance on costs in equal shares in the amount of USD 905,000 each.

818. On 21 December 2022, the ICC Court fixed the final amount of the costs of arbitration, including the fees and expenses of the Tribunal (including all former members of the Tribunal) and the administrative expenses, at USD 1,810,000.

D. Tribunal's Analysis

819. Article 37 of the ICC Rules (2012) provides the Tribunal with broad discretion in awarding costs. Article 37 states:

> "Article 37: Decision as to the Costs of the Arbitration
>
> 1) The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.
>
> 2) The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.
>
> At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.

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[778] Includes Counsel costs.

[779] Respondent's Costs Submission, para 7.

> 4) The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
>
> 5) In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.
>
> 6) In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs."

820. Article 37 expressly recognises the Tribunal's broad discretion to award costs and its ability to "*take into account such circumstances as it considers relevant.*"

821. The Tribunal also recalls the arbitration agreement which states:

> "The charges of the arbitration process shall be determined by the arbitration board. However the charges that shall be determined shall not be more than the charges that are specified in the tariff which is issued in compliance with the rules of the International Chamber of Commerce."

Neither Party suggested that the wording of the arbitration agreement might somehow limit the power of the arbitral tribunal to decide on costs (whether legal or ICC costs).

822. The default position in international arbitration is that costs should follow the event. Both Parties acknowledge this position, albeit that the Respondent also highlighted practice in State-State cases where tribunals have let costs lie where they fall.

823. In the present case, neither Party can properly be considered the sole successful party. The Claimant has been successful in one of its liability claims, but not the other four claims. It has also been awarded compensation, but in a much smaller amount than originally claimed. The

Respondent has also been successful in most of its counterclaims and in defending a considerable portion to the Claimant's claim but was not successful in vigorously pursued affirmative defences and has ultimately been found liable for breach of the ITP Agreements. While the Tribunal has ordered payment from the Respondent to the Claimant, it considers that – overall – both Parties have been successful to some degree in their claims and counterclaims, but similarly unsuccessful in other aspects of their claims or defences.

824. On this basis, the Tribunal finds it appropriate that the Parties should bear equally the costs of the arbitration fixed by the ICC Court and that legal costs and expenses should lie where they fall. In coming to this conclusion, the Tribunal has considered each Party's claim that the behaviour of the other Party has increased costs and expenses in the arbitration. While the Tribunal agrees that, at times, the Parties' behaviour and continued correspondence has likely led to an increase in costs, the Tribunal considers that this is true of both Parties. The Tribunal therefore has not taken account of the Parties' conduct when allocating costs.

825. Based on its discretion under Article 37(4) of the ICC Rules to award costs, the Tribunal finds that each Party shall bear equally the costs of the arbitration fixed by the ICC Court in the amount of USD 1,810,000 (being USD 905,000 each) and that each Party shall bear its own legal costs and expenses.

XVIII. FINAL AWARD

826. For all of the foregoing reasons, and rejecting all submissions to the contrary, the Tribunal hereby FINDS, DECLARES, CONFIRMS AND AWARDS as follows in relation to the issues arising for determination in these proceedings:

a. CONFIRMS the findings set out in paragraph 303 of the Partial Award on Jurisdiction dated 16 June 2016 (which findings are attached as Dispositive Exhibit 1).

b. DECLARES that the Respondent has breached Articles 3 and 7 of the 1976 Protocol and Article 2.3 of the 2010 Amendment by loading Iraqi oil at Ceyhan in breach of instructions issued by the Iraqi Ministry of Oil since 21 May 2014.

c. DECLARES that the Respondent has breached Article 4.4 of the 2010 Amendment by denying Iraqi personnel access to the Iraqi office at the Ceyhan port facility between January and March 2014.

d. ORDERS that the Respondent shall load all oil in the storage tanks at Ceyhan as at the date of this Award in accordance with the instructions of the Iraqi Ministry of Oil, as required by the ITP Agreements.

e. DECLARES that the Respondent is liable to pay the Claimant forthwith compensation in the amount of **USD 1,997,976,023.50** (one billion, nine hundred and ninety-seven million, nine hundred and seventy-six thousand and twenty-three US dollars and fifty cents) as a result of the breaches set out in (b) and (c) above.

f. DISMISSES the Claimant's claims for breach of Article 2.4 of the 2010 Amendment in relation to the exclusive use of the Pipelines.

g. DECLARES that a situation of *force majeure* existed in the Republic of Iraq between 1 March 2003 and 31 July 2007, such that the Claimant was excused from performing its Minimum Guaranteed Throughput obligations under the 1985 Addendum between these dates.

h. DECLARES that the Respondent is credited the sum of **USD 67,607,024.62** (sixty-seven million, six hundred and seven thousand and twenty-four US dollars and sixty-two cents) for Minimum Guaranteed Throughput fees payable by the Claimant between 27 July 2011 and 31 December 2013, in accordance with article 3.2 of the 2010 Amendment, such amount to be set off against the Respondent's liability in (e) above.

i. DECLARES that the Claimant breached article 2.7 of the 1985 Addendum between 1 August 2007 and 26 July 2011 and is liable to pay the Respondent **USD 281,337,301.50** (two hundred and eighty-one million, three hundred and thirty-seven thousand, three hundred and one US dollars and fifty cents) as a result of this breach, such amount to be set off against the Respondent's liability in (e) above.

j. DECLARES that the Claimant is liable to pay the Respondent **USD 58,000,000.00** (fifty-eight million US dollars) in respect of outstanding transportation fees from 1990, such amount to be set off against the Respondent's liability in (e) above.

k. DECLARES that the Claimant is liable to pay the Respondent **USD 70,676,675.27** (seventy million, six hundred and seventy-six thousand, six hundred and seventy-five US dollars and twenty-seven cents) in respect of underpaid transportation fees from 1990, such amount to be set off against the Respondent's liability in (e) above.

l. DECLARES that the Claimant is liable to pay the Respondent **USD 46,253,517.75** (forty-six million, two hundred and fifty-three thousand, five hundred and seventeen US dollars and seventy-five cents) in respect of outstanding transportation fees from 2003-2007, such amount to be set off against the Respondent's liability in (e) above.

m. DECLARES that the Claimant is liable to pay the Respondent **USD 2,071,739.00** (two million, seventy-one thousand, seven hundred and thirty-nine US dollars) for reimbursement of expenses incurred by Iraqi personnel at Ceyhan, such amount to be set off against the Respondent's liability in (e) above.

n. DECLARES that the Claimant is liable to pay the Respondent **USD 639,279.31** (six hundred and thirty-nine thousand, two hundred and seventy-nine US dollars and thirty-one cents) for reimbursement of expenses relating to equipment, such amount to be set off against the Respondent's liability in (e) above.

o. ORDERS the Respondent to pay forthwith to the Claimant the sum of **USD 1,471,390,486.05**, after set off of the amounts in (e) and (h)-(n) above, subject to appropriate adjustments for interest.

p. ORDERS the Respondent to pay the Claimant interest on the amount in paragraph (e) above at the average annual US dollar denominated Turkish bond rate from 1 January of the year following which the amount was incurred, compounded annually to the date of this Award.

q. ORDERS the Claimant to pay the Respondent interest on the amounts set out in paragraphs (i)-(l) above at the average annual US dollar denominated Turkish bond rate from 1 January of the year following which the amount was incurred, compounded annually to the date of this Award.

r. ORDERS the Claimant to pay the Respondent interest on the amounts set out in paragraphs (m)-(n) above at the average annual US dollar denominated Turkish bond rate from the date on which the debt was due or, if not such date is identifiable, from 1 January of the year following which the amount was incurred, compounded annually to the date of this Award.

s. ORDERS the Respondent to pay the Claimant interest on the amount due to be paid to the Claimant after all amounts owed by the Claimant to the Respondent have been set-

off, at the average annual US dollar denominated Turkish bond rate, compounded annually from the date of this Award until payment in full.

t. ORDERS that each Party shall bear equally the costs of the arbitration fixed by the ICC Court in the amount of USD 1,810,000 and that each Party shall bear its own legal costs and expenses.

u. DISMISSES all adverse inference requests by both Parties.

v. DISMISSES all other claims made in this arbitration.

Place of arbitration: Paris (France)

Date: 13 February 2023

Sir David A R Williams KNZM, KC

(**President**)

Sir Christopher Greenwood GBE CMG KC

(**Co-arbitrator**)

H.E. Judge Peter Tomka

(**Co-arbitrator**)

Appendix 1

Dispositive Exhibit 1 – Findings from the Jurisdiction Award

VIII. PARTIAL FINAL AWARD ON JURISDICTION

303. For all of the foregoing reasons, and rejecting all submission to the contrary, the Tribunal HEREBY FINDS, DECLARES AND AWARDS as follows in relation to this jurisdictional phase of proceedings:

a. The Claimant's claims under the ITP Agreements are arbitrable.

b. The Claimant's claims under the ITP Agreements fall within the scope of the arbitration agreement.

c. The Tribunal does not have jurisdiction *ratione materiae* over the Claimant's claims under the 1946 Treaty.

d. The Tribunal does not have jurisdiction *ratione personae* over BOTAŞ.

e. All other requests and claims, including claims for costs, are reserved for a further award.

Appendix 2: Lists of Issues

Claimant's List of Issues

General Issue 1: Alleged Breaches of the ITP Agreements by Respondent

1. *"Transportation" Claim*

   A. Has Respondent breached the ITP Agreements, in particular Articles 3 and 7 of the 1976 Protocol, by transporting crude oil through the ITP pipeline upon the instructions of the KRG, and contrary to the instructions of Claimant's Ministry of Oil?

      i. Do the ITP Agreements, in particular Articles 3 and 7 of the 1976 Protocol, require Respondent to follow the instructions of Claimant's Ministry of Oil in respect of transport of crude oil coming from Iraq?

      ii. Did the Ministry of Oil's instructions relating to transportation amount to an instruction to close the ITP system, and if so did ITP Agreements require Respondent to give effect to such an instruction?

      iii. Was Respondent entitled not to give effect to the instructions of Claimant's Ministry of Oil on the ground that Claimant had an obligation to control access to the ITP facilities in Iraq and failed to control such access, or that any failure to control access constitutes consent to the transportation of crude oil upon the instructions of the KRG?

      iv. Was Respondent entitled not to give effect to the instructions of Claimant's Ministry of Oil on the ground that they were abusive or given in bad faith?

2. *"Storage" Claim*

   A. Has Respondent breached the ITP Agreements, in particular Article 7 of the 1976 Protocol, by storing crude oil upon the instructions of the KRG and allocating storage tanks for the KRG, contrary to the instructions of Claimant's Ministry of Oil?

      i. Do the ITP Agreements, in particular Article 7 of the 1976 Protocol, require Respondent to store the oil at issue solely in accordance with the instructions of Claimant's Ministry of Oil?

      ii. Does the Ministry of Oil's instruction right relating to storage of crude oil depend on whether the Iraqi Federal Government has export and/or ownership rights over that crude oil under Iraqi law?

3. *"Loading" Claim*

   A. Has Respondent breached the ITP Agreements, in particular Articles 3, 7 and 9 of the 1976 Protocol and Article 2.3 of the 2010 Amendment, by loading crude oil on tankers in accordance with the instructions of the KRG, and contrary to the instructions of Claimant's Ministry of Oil?

      i. Do the ITP Agreements, in particular, Articles 3, 7 and 9 of the 1976 Protocol and Article 2.3 of the 2010 Amendment, require Respondent

to load the oil at issue solely upon the instructions of Claimant's Ministry of Oil?

ii. Does the Ministry of Oil's instruction right relating to loading of crude oil depend on whether the Iraqi Federal Government has export and/or ownership rights over that crude oil under Iraqi law?

4. "Exclusive" Use Claim

A. Has Respondent breached the ITP Agreements, in particular Article 2.4 of the 2010 Amendment, by allowing the KRG to use the ITP facilities without the consent of Claimant's Ministry of Oil?

i. Do the ITP Agreements, in particular Article 2.4 of the 2010 Amendment, require Respondent to use the ITP facilities exclusively with the consent of the Claimant's Ministry of Oil, to the exclusion of use by the KRG without the consent of Claimant's Ministry of Oil?

5. "Access" Claim

A. Has Respondent breached the ITP Agreements, in particular Articles 4 and 5 of the 1976 Protocol and Articles 4.4 of the 2010 Amendment, by preventing representatives of the Iraqi Side from accessing certain ITP facilities in Ceyhan, Turkey?

i. Do the ITP Agreements, in particular Articles 4 and 5 of the 1976 Protocol and Article 4.4 of the 2010 Amendment, require Respondent to allow representatives of the Iraqi Side to access certain ITP facilities in Ceyhan?

ii. Did Respondent in fact prevent representatives of the Iraqi Side from accessing certain ITP facilities in Ceyhan?

General Issue 2: Suspension of the ITP Agreements

1. Would suspension of the operation of the ITP Agreements create a right for Respondent to transport, store, and load Iraqi crude oil pursuant to the instructions of the KRG?
2. Has Respondent lost any right to invoke the suspension of the operation of the ITP Agreements by express agreement that the ITP Agreements continue in operation and/or by having acquiesced in their continued operation?
3. Has Respondent validly invoked any right to suspend the operation of the ITP Agreements?

4. Has Respondent established a right to suspend its obligations under the ITP agreements pursuant to the principle *exceptio non adimpleti contractus*?

    A. Has Respondent established that the *exceptio non adimpleti contractus* is an independent principle of international law that coexists with Article 60 VCLT?

    B. If so, has Respondent established that the conditions for the *exceptio non adimpleti contractus* have been met, including that Respondent's obligation to transport, store, and load Iraq crude oil exclusively under Claimant's instruction was synallagmatically linked to Claimant's throughput, payment, operation, and maintenance obligations under the ITP Agreements?

5. Has Respondent established a right to suspend the operation of the ITP Agreements in response to alleged violations of the ITP Agreements by Claimant, pursuant to the customary international law rule reflected in Article 60 VCLT?

6. Has Respondent established a right to suspend the operation of the ITP Agreements as a result of a fundamental change of circumstances, pursuant to the customary international law rule reflected in Article 62 VCLT?

    A. Has Respondent established that there was a supervening, fundamental change of circumstances?

    B. Has Respondent established that the change in circumstances it invokes was not foreseen by the Parties?

    C. Has Respondent established that the circumstances it invokes constituted an essential basis of the Parties' consent to be bound by the ITP Agreements?

    D. Has Respondent established that the change in circumstances it invokes radically transformed the extent of the obligations still to be performed under the ITP Agreements?

    E. Is Respondent precluded from invoking a fundamental change of circumstances as a result of its own breaches of the ITP Agreements and/or the obligation of non-intervention under customary international law and the 1946 Treaty on Friendship and Neighbourly Relations?

7. Did Claimant's invocation of *force majeure* pursuant to Article 19 of the ITP Agreements following the bombing of the ITP facilities in 2014 suspend Respondent's obligation to follow the instructions of the Iraqi Side in transporting, storing and loading crude oil under the ITP Agreements?

8. Does French law govern the suspension of the ITP Agreements?

9. If so, has Respondent established a right to suspend the operation of the ITP Agreements pursuant to French law?

    A. Has Respondent validly invoked the *exception d'inexécution*?

    B. If so, has Respondent established that the conditions for the *exception d'inexécution* are met, including that Respondent's obligation to transport, store, and load Iraq crude oil exclusively under Claimant's instruction was reciprocal to Claimant's throughput, payment, operation, and maintenance obligations under the ITP Agreements?

General Issue 3: Jus Cogens Obligations

1. Is the obligation to prevent genocide, including by assisting third parties in the prevention of genocide, a *jus cogens* norm, distinct from the *jus cogens* obligation not to commit acts of genocide?
2. Has Respondent established that it would have violated a *jus cogens* obligation if it had followed the instructions of Claimant's Ministry of Oil relating to the transportation, storage and loading of crude oil under the ITP Agreements?

General Issue 4: Remedies

1. Is Claimant entitled to a declaration that Respondent is in breach of the ITP Agreements?
2. Is Claimant entitled to an order requiring Respondent to comply with its obligations under the ITP Agreements?
3. Is Claimant entitled to an order requiring Respondent to make appropriate assurances and guarantees of non-repetition?
4. Is Claimant entitled to an order requiring Respondent to provide a full accounting of the proceeds and related payments from the oil transported, stored and loaded through the ITP facilities, including the amounts received by Respondent or its State-owned companies as commissions, transport or other fees, financing payments or other non-financial benefits?
5. Is Claimant entitled to full reparation?
    A. Has Claimant suffered injury?
    B. Did Respondent cause Claimant's injury?
    C. If so, is Claimant entitled to restitution of any crude oil in the Ceyhan storage tanks as of the date of the award?
    D. Is Claimant entitled to any compensation?
    E. If so, is Claimant entitled to the fair market value of the oil transported, stored and loaded through the ITP facilities?
    F. If not, is Claimant entitled to the difference between the proceeds that the KRG actually received from the oil transported, stored and loaded through the ITP facilities, and the fair market value of such crude oil?
    G. What is the appropriate method to calculate the fair market value of the oil transported, stored and loaded through the ITP facilities?
    H. *In eventu*, is Respondent obliged to deposit into the OPRA/DFI account an amount corresponding to the proceeds from the oil transported, stored and loaded through the ITP facilities, plus any discount against fair market value?
    I. Is Claimant entitled to interest on any sums awarded? If so, what is the applicable interest rate?

General Issue 5: Respondent's Counterclaims

1. Was Claimant exempted from its obligation to pay MGT fees from 2003 to July 27, 2011 pursuant to Article 2.7 of the 1985 Addendum and Article 19 of the 1973 Agreement?
2. What is the amount, if any, of unpaid actual transportation fees and unpaid MGT fees owed by Claimant for the period from 2003 until July 27, 2011?
3. What is the amount of any unpaid actual transportation fees and unpaid MGT fees owed by Claimant, but not yet due, for the period July 27, 2011, the date of the entry into force of the 2010 Amendment, through 2013?
4. What is the amount, if any, of actual transportation fees owed by Claimant for crude oil transported through the ITP facilities in 1990?
5. What is the amount, if any, of reimbursement owed by Claimant for the costs of equipment allegedly purchased by BOTAŞ between 1997 and 2001?
6. What is the amount, if any, of reimbursement owed by Claimant for staff expenses for Iraqi personnel and offices at the Ceyhan ITP terminal allegedly incurred by Respondent?
7. Are any of Respondent's counterclaims time-barred?
8. Is Respondent entitled to interest on any sums awarded on its counterclaims? If so, what is the applicable interest rate and from which date does it apply?

Respondent's List of Issues

General Issue 1: Alleged Breaches of the ITP Agreements by Respondent

1. *"Transportation" Claim*
    A. Prior to November 2014, did Respondent breach the ITP Agreements, in particular Articles 3 and 7 of the 1976 Protocol, by failing to give effect to any instructions of Claimant's Ministry of Oil or its representatives contained in their letters of 5,6 and 9 January 2014, 18, 20 and 25 February 2014, 7 April 2014, and 21 May 2014 ?
        i. Do the ITP Agreements, in particular Articles 3 and 7 of the 1976 Protocol, require Respondent to follow the instructions of Claimant's Ministry of Oil in respect of transport of crude oil coming from Iraq?
        ii. Do the ITP Agreements, in particular Articles 3 and 7 of the 1976 Protocol, entitle the Claimant's Ministry of Oil or its representatives to instruct Turkey to "close the 40-inch pipeline that lies in the territory of Republic of Turkey" (SOMO letter, dated 18 February 2014)?
        iii. If not, would it have been physically possible for Respondent to give effect to any of the instructions of Claimant's Ministry of Oil or its representatives without closing the 40-inch pipeline inside Turkey?

iv. Did the Claimant's Ministry of Oil impliedly consent to the transport of crude oil coming from the KRI by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

v. If not, could the Claimant's Ministry of Oil in good faith refuse to consent to the transport of crude oil coming from the KRG and/or did any of the Ministry's instructions constitute an abuse of right?

B. As from November 2014, when the FGI and the KRG agreed on the allocation of oil transported through the ITP pipelines to Ceyhan, has Respondent committed any breach of the ITP Agreements by failing to give effect to any instruction of the Claimant's Ministry of Oil or its representatives?

i. If so, which specific instructions of the Ministry from November 2014 onwards did Respondent violate?

ii. Did the Claimant's Ministry of Oil impliedly consent to the transport of crude oil coming from the KRI by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

iii. If not, could the Claimant's Ministry of Oil in good faith refuse to consent to the transport of crude oil coming from the KRG and/or did any of the Ministry's instructions constitute an abuse of right?

C. Was Respondent entitled to suspend its performance of the ITP Agreements, and accordingly, not give effect to the instructions of the Claimant's Ministry of Oil due to (i) Claimant's alleged breaches of those agreements, (ii) a fundamental change in circumstances and/or (iii) Claimant's invocation of *force majeure*? If so, as from what date? With respect to (iii):

i. Is Claimant's instruction right reciprocal to or linked with its throughput, payment, operation, and maintenance obligations under the ITP Agreements? If so, does French and international law permit the suspension of performance of reciprocal obligations by the counterparty, or is the counterparty required to continue to perform its obligations?

ii. Did Respondents obstruct the ability of Claimant to resume operation of the ITP Agreements should it have been able to pump oil into the ITP system**?**

iii. Would suspension of the operation of the ITP Agreements create a right for Respondent to transport, store, and load Iraqi crude oil pursuant to the instructions of the KRG?

iv. Has Respondent lost any right to invoke the suspension of the operation of the ITP Agreements by express agreement that the ITP Agreements continue in operation and/or by having acquiesced in their continued operation?

D. If Respondent would have shut down the pipeline by following the instructions of Claimant's Ministry of Oil relating to the transportation, storage and loading of crude oil under the ITP Agreements, would it have violated a *jus cogens* or customary international law obligation?

i. Is the obligation to prevent genocide, including by assisting third parties in the prevention of genocide, a *jus cogens* norm or a principle of customary

international law, distinct from the *jus cogens* obligation not to commit acts of genocide?

2. *"Storage" Claim*

   A. Prior to November 2014, did Respondent breach the ITP Agreements, in particular Article 7 of the 1976 Protocol, by allowing storage tanks to be used by the KRG, contrary to the instructions of Claimant's Ministry of Oil or its representatives contained in their letters of 5,6, 9 and 15 January 2014, and 20 and 25 February 2014?

      i. Do the ITP Agreements, in particular Article 7 of the 1976 Protocol, require Respondent to store the oil at issue solely in accordance with the instructions of Claimant's Ministry of Oil?

      ii. Did the Claimant's Ministry of Oil impliedly consent to the storage of crude oil by the KRG by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

      iii. Does Article 7 entitle the Claimant's Ministry of Oil or its representatives to instruct Respondent to store KRG oil to the order of the FGI (letter dated 18 February 2014) in respect of which the FGI has no rights of control under Iraqi law?

   B. As from November 2014, when the FGI and the KRG agreed on the allocation of oil transported through the ITP pipelines to Ceyhan, has Respondent committed any breach of the ITP Agreements by failing to give effect to any instruction of the Claimant's Ministry of Oil or its representatives?

      i. If so, which specific instructions of the Ministry from November 2014 onwards did Respondent violate?

      ii. Did the Claimant's Ministry of Oil impliedly consent to the storage of crude oil by the KRG by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

   C. Was Respondent entitled to suspend its performance of the ITP Agreements for the reasons provided in General Issue (1)(C) and (D) above?

3. *"Loading" Claim*

   A. Prior to November 2014, did Respondent breach the ITP Agreements, in particular Articles 3, 7 and 9 of the 1976 Protocol and Article 2.3 of the 2010 Amendment, by loading crude oil on tankers in accordance with the instructions of the KRG, and contrary to the instructions of Claimant's Ministry of Oil or its representatives contained in their letter of 18 February 2014?

      i. Do the ITP Agreements, in particular, Articles 3, 7 and 9 of the 1976 Protocol and Article 2.3 of the 2010 Amendment, require Respondent to load the oil at issue solely upon the instructions of Claimant's Ministry of Oil?

      ii. Did the Claimant's Ministry of Oil impliedly consent to the loading of crude oil coming from the KRG by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

      iii. Do the provisions upon which Claimant relies entitle the Claimant's Ministry of

Oil or its representatives to instruct Respondent to load and/or refuse to load KRG oil in respect of which the FGI has no rights of control under Iraqi law?

B. As from November 2014, when the FGI and the KRG, agreed on the allocation of oil transported through the ITP pipelines, to Ceyhan, has Respondent committed any breach of the ITP Agreements by failing to give effect to any instruction of the Claimant's Ministry of Oil or its representatives?
   i. If so, which specific instructions of the Ministry from November 2014 onwards did Respondent violate?
   ii. Did the Claimant's Ministry of Oil impliedly consent to the loading of crude oil by the KRG by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

C. Was Respondent entitled to suspend its performance of the ITP Agreements for the reasons provided in General Issue (1)(C) and (D) above?

4. *"Exclusive" Use Claim*

A. Prior to November 2014, did Respondent breach the ITP Agreements, in particular Article 2.4 of the 2010 Amendment, by allowing the KRG to use the ITP facilities?
   i. Do the ITP Agreements, in particular Article 2.4 of the 2010 Amendment, require Respondent to allow the ITP facilities to be used exclusively with the consent of the Claimant's Ministry of Oil, to the exclusion of use by the KRG for "Crude Oil coming from Iraq", without the consent of Claimant's Ministry of Oil?
   ii. If so, did the the Claimant's Ministry of Oil impliedly consent to the use of the ITP facilities by the KRG by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

B. As from November 2014, when the FGI and the KRG, agreed on the allocation of oil transported through the ITP pipelines, to Ceyhan, has Respondent committed any breach of the ITP Agreements by failing to give effect to any instruction of the Claimant's Ministry of Oil or its representatives?
   i. If so, which specific instructions of the Ministry from November 2014 onwards did Respondent violate?
   ii. Did the Claimant's Ministry of Oil impliedly consent to the use of the ITP facilities by the KRG by allowing it to be pumped into the 40-inch pipeline within the territory of Iraq?

C. Was Respondent entitled to suspend its performance of the ITP Agreements for the reasons provided in General Issue (1)(C) and (D) above?

5. *"Access" Claim*

A. Has Respondent breached the ITP Agreements, in particular Articles 4 and 5 of the 1976 Protocol and Articles 4.4 of the 2010 Amendment, by preventing representatives of the Iraqi Side from accessing certain ITP facilities in Ceyhan, Turkey?
   i. Do the ITP Agreements, in particular Articles 4 and 5 of the 1976 Protocol and Article 4.4 of the 2010 Amendment, require Respondent to allow

representatives of the Iraqi Side to access certain ITP facilities in Ceyhan?

ii. Did Respondent in fact prevent representatives of the Iraqi Side from accessing certain ITP facilities in Ceyhan?

General Issue 2: Claimant's Remedies

1. Declaratory and Injunctive Relief

   A. Is Claimant entitled to a declaration that Respondent is in breach of the ITP Agreements?

   B. Is Claimant entitled to an order requiring Respondent to comply with its obligations under the ITP Agreements?

   C. Is Claimant entitled to an order requiring Respondent to make appropriate assurances and guarantees of non-repetition?

   D. Is Claimant entitled to an order requiring Respondent to provide a full accounting of the proceeds and related payments from the oil transported, stored and loaded through the ITP facilities, including the amounts received by Respondent or its State-owned companies as commissions, transport or other fees, financing payments or other non-financial benefits?

2. Monetary Relief

   A. Has Claimant suffered injury?

      i. Can Claimant claim injury entitling it to monetary damages without the FGI establishing that it, and not the KRG, has the right of control and export of crude oil from the KRI?

   B. Did Respondent cause Claimant's injury?

   C. If so, was Claimant in a position to prevent or mitigate any such injury and has it done so?

   D. Is any of Claimant's injury compensable under international law?

   E. If so, is Claimant entitled to damages and, if so, how much?

   F. Is Claimant entitled to restitution of any crude oil in the Ceyhan storage tanks as of the date of the award?

   G. *In eventu*, is Respondent obliged to deposit into the OPRA/DFI account an amount corresponding to the proceeds from the oil transported, stored and loaded through the ITP facilities, plus any discount against fair market value?

   H. Is Claimant entitled to interest on any sums awarded? If so, what is the applicable interest rate?

General Issue 3: Respondent's Counterclaims

1. Was Claimant exempted from its obligation to pay MGT fees from 2003 to July 27, 2011 pursuant to Article 2.7 of the 1985 Addendum and Article 19 of the 1973 Agreement?

2. What is the amount, if any, of unpaid actual transportation fees and unpaid MGT fees owed by

Claimant for the period from 2003 until July 27, 2011?

3. What is the amount of any unpaid actual transportation fees and unpaid MGT fees owed by Claimant, but not yet due, for the period July 27, 2011, the date of the entry into force of the 2010 Amendment, through 2013?
4. What is the amount, if any, of actual transportation fees owed by Claimant for crude oil transported through the ITP facilities in 1990?
5. What is the amount, if any, of reimbursement owed by Claimant for the costs of equipment allegedly purchased by BOTAŞ between 1997 and 2001?
6. What is the amount, if any, of reimbursement owed by Claimant for staff expenses for Iraqi personnel and offices at the Ceyhan ITP terminal allegedly incurred by Respondent?
7. Are any of Respondent's counterclaims time-barred?
8. Is Respondent entitled to interest on any sums awarded on its counterclaims? If so, what is the applicable interest rate and from which date does it apply?