

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**ALMASRYIA FOR OPERATING & MAINTAINING
TOURISTIC CONSTRUCTION Co., LLC**
Claimant

and

STATE OF KUWAIT
Respondent

(ICSID Case No. ARB/18/2)

**AWARD ON THE RESPONDENT'S APPLICATION UNDER RULE 41(5) OF THE
ICSID ARBITRATION RULES.**

Members of the Tribunal

Prof. Ricardo Ramírez Hernández, President

Mr. Pascal Dévaud, Arbitrator

Prof. Dr. Rolf Knieper, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

Date of dispatch to the Parties: 1 November 2019

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Agreement for the Promotion and Reciprocal Protection of Investments Between the Government of the Arab Republic of Egypt and the Government of the State of Kuwait
Claimant or Almasryia	Almasryia For Operating & Maintaining Touristic Construction Co., LLC
Ex. [C-] [R-]	Exhibit [Claimant] [Respondent]
Ex. [CL-] [RL-]	Legal Exhibit [Claimant] [Respondent]
Hearing	Hearing on Respondent's Preliminary Objections held in Paris, France on 14 December 2018
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18, March 1965
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
Request for Arbitration	Claimant's Request for Arbitration dated October 10, 2017.
Respondent	The State of Kuwait
Respondent's Preliminary Objections	Application of The State of Kuwait Pursuant to Rule 41(5) of the ICSID Arbitration Rules dated September 3, 2018.
Statement of Claimant	Claimant's Observations on Respondent's 41(5) Objections dated September 30, 2018.
Tr. H. [page:line]	Transcript of the hearing
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement for the Promotion and Reciprocal Protection of Investments Between the Government of the Arab Republic of Egypt and the Government of the State of Kuwait (the “**BIT**”), dated April 17, 2001 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the “**ICSID Convention**”).
2. The Claimant is Almasryia For Operating & Maintaining Touristic Construction Co., LLC (“**Almasryia**” or the “**Claimant**”), a company incorporated under the laws of the Arab Republic of Egypt.
3. The Respondent is the State of Kuwait (“**Kuwait**” or the “**Respondent**”). Almasryia and Kuwait are hereinafter collectively referred to as the “**Parties**.” The Parties’ respective representatives and their addresses are listed above on page 2.
4. The dispute relates to property rights over a piece of land located north of Al-Khafji city in the Kuwaiti Region of Wafra (the “**Land**”). The Claimant entered into a joint venture investment agreement on 15 May 2009 with Mr. Faisal Bandar Al-Otaibi and Bin Samar Contracting Co. to “develop and construct many touristic hotels, real estate and logistics projects” on the Land.¹ The Claimant allegedly purchased a 5% interest in the Land from Mr. Al-Otaibi in exchange for \$20 million dollars in accordance with the joint venture agreement.² Only after executing the Agreement, Mr. Al-Otaibi unsuccessfully attempted to secure a deed of ownership to the Land through legal proceedings “inside Kuwait” before Courts of Kuwait “in its own name.”³ According to Almasryia, Kuwait’s failure to grant Mr. Al-Otaibi a deed of ownership for the Land destroyed its joint venture investment in violation of Kuwait’s obligations under Articles 6 and 7 of the BIT. During the hearing,

¹ Request for Arbitration, p. e.

² *Ibid.*

³ Request for Arbitration, p. f, *see also* Statement of Claimant, p. 4.

Claimant withdrew the claim under Article 6 and affirmed that it only claimed under Article 7.⁴

5. The merits of such allegations are not the subject of this decision. This decision concerns a preliminary matter, namely Kuwait's application (the "**Preliminary Objections**") – submitted on 3 September 2018 – for dismissal of all of Almasryia's claims on the grounds that they are "manifestly without legal merit," pursuant to Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**").

II. PROCEDURAL HISTORY

6. On 24 October 2017, ICSID received a Request for Arbitration of the same date from Almasryia (the "**Request for Arbitration**"), as supplemented by letters of 5 December 2017, 5 January 2018, and 27 January 2018.
7. On 14 February 2018, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to agree on the number of arbitrators and the method of their appointment pursuant to Rule 7(c) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, and to constitute an arbitral tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.
8. On 20 May 2018, the Claimant requested that the Tribunal consist of three arbitrators, and that each Party appoint one arbitrator, with the President of the Tribunal to be appointed by agreement of the Parties, pursuant to Article 37(2)(b) of the ICSID Convention.
9. By letters of 28 May 2018, the Claimants appointed Mr. Pascal Dévaud, a national of Switzerland, and the Respondent appointed Prof. Dr. Rolf Knieper, a national of Germany.
10. On 10 July 2018, having failed to agree on the presiding arbitrator, ICSID communicated to the parties that the President would be appointed by the Chairman of the ICSID

⁴ Tr. H., p. 80:10-19.

Administrative Council (the “**Chairman**”) pursuant to Articles 38 and 40(1) of the ICSID Convention. Following consultations with the Parties, the Chairman appointed Prof. Ricardo Ramírez Hernández, a national of Mexico, in accordance with Article 38 of the ICSID Convention.

11. On 2 August 2018, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General of ICSID notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Catherine Kettlewell, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal.
12. On 3 September 2018, the Respondent filed its Preliminary Objections pursuant to Arbitration Rule 41(5).
13. On 21 September 2018, the Tribunal held a first session by telephone conference in accordance with Arbitration Rule 13(1).
14. On 30 September 2018, the Claimant filed observations on the Respondent’s Preliminary Objections pursuant to Arbitration Rule 41(5).
15. On 22 October 2018, the Tribunal issued Procedural Order No. 1 concerning procedural matters.
16. On 2 November 2018, the Tribunal requested the Claimant to provide an update on the status to obtain a visa to travel for the hearing.
17. On 9 November 2018, the Tribunal invited the Parties to confer and propose an agenda and timetable for the upcoming hearing on the Respondent’s Preliminary Objection. On 26 November 2018, the Respondent submitted the exchanges of the Parties regarding this matter and provided its proposal and comments. On 30 November 2018, the Tribunal issued its decision on the agenda and timetable for the hearing. The Tribunal also indicated that the Claimant’s request for translation English/Arabic was granted.
18. A hearing on the Respondent’s Preliminary Objections was held at the World Bank facilities in Paris on 14 December 2018 (the “**Hearing**”). The following persons were present at the Hearing:

Tribunal:

Professor Ricardo Ramírez Hernández	President
Mr. Pascal Dévaud	Arbitrator
Professor Dr. Rolf Knieper	Arbitrator

ICSID Secretariat:

Ms. Catherine Kettlewell	Secretary of the Tribunal
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For the Claimant:

Dr. Ezzat Ahmad Mohammed Youssef
Dr. Mohamed Tanweer Mohamed El-Rafie

For the Respondent:

Mr. Charles L. O. Buder	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Álvarez Ávila	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Luciana Ricart	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Mariana Gómez Vallín	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Saud Alqemlas	Legal Advice and Legislation Department – Council of Ministers, State of Kuwait
Ms. Noura Al Roudan	Legal Advice and Legislation Department – Council of Ministers, State of Kuwait
Ms. Dhuha Alyaseen	Legal Advice and Legislation Department – Council of Ministers, State of Kuwait
Ms. Dhuha Al-Sayer	Legal Advice and Legislation Department – Council of Ministers, State of Kuwait
Mr. Talal Alzimami	Legal Advice and Legislation Department – Council of Ministers, State of Kuwait

Court Reporter:

Ms. Anne-Marie Stallard	The Court Reporter Ltd.
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Interpreters:

Ms. Maha El-Metwally	English-Arabic interpreter
Ms. Michele Antaki	English-Arabic interpreter

19. On 17 December 2018, the Tribunal referred to section 21.3 of Procedural Order No. 1 and gave instructions to the Parties regarding corrections to the transcript. Pursuant to the Tribunal's instruction, any transcript corrections agreed by the Parties or adopted by the Tribunal would be entered by the court reporter. On the same date, the Centre informed

the Parties that the audio recording of the Hearing was available in the file sharing platform created for this case.

20. On 7 January 2019, the Respondent submitted its proposed corrections to the transcript and indicated that it had not received comments from the Claimant. On 9 January 2019, the Tribunal invited the Claimant to briefly comment on the Respondent's proposed revisions. On the same date, the Claimant indicated that it had no comments. On 10 January 2019, the court reporter provided the revised transcripts to the Parties and the Tribunal.
21. On 17 June 2019, the Tribunal invited the parties to provide their submission on costs for this phase of the proceeding by 1 July 2019. On 1 July 2019, being a simultaneous submission, the Secretary of the Tribunal received Respondent's submission on costs. On 2 July 2019 and not having received Claimant's submission on costs, the Tribunal granted Claimant an extension until 9 July 2019. The Tribunal instructed the Secretary of the Tribunal not to forward Respondent's submission on costs until she received both submissions pursuant to section 12.2 of Procedural Order No. 1. The Secretary of the Tribunal informed the Tribunal that she had not received Claimant's submission on costs by the extended deadline. Thereafter, the Tribunal instructed the Secretary to acknowledge receipt of Respondent's Submission on Costs, to copy Claimant's counsel and to forward it to the Tribunal.
22. The proceeding was closed on 1 November 2019.

III. THE TRIBUNAL'S ANALYSIS

23. This procedure concerns the Preliminary Objection submitted by the Respondent under Arbitration Rule 41(5) which provides the following:

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

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

24. According to this rule, unless the parties have agreed to another expedited procedure, objections on whether a claim is “manifestly without legal merit” are allowed provided that they are filed “no later than 30 days after the constitution of the Tribunal” and in any event “before the first session of the Tribunal.” It is undisputed that the Parties have not agreed to another expedited procedure for making preliminary objections. However, compliance with the time limit of 30 days was questioned by the Claimant at the hearing.⁵ The Tribunal will address first this allegation and then proceed with its analysis under the provision at issue.

A. Whether the Preliminary Objections Filed by the Respondent were Timely

25. Regulation 29 of ICSID’s Administrative and Financial Regulations establishes that:

“(1) *All time limits, specified in the Convention or the Rules or fixed by a Commission, Tribunal, Committee or the Secretary-General, shall be computed from the date on which the limit is announced in the presence of the parties or their representatives or on which the Secretary-General dispatches the pertinent notification or instrument (which date shall be marked on it). The day of such announcement or dispatch shall be excluded from the calculation.*

(2) *A time limit shall be satisfied if a notification or instrument dispatched by a party is delivered at the seat of the Centre, or to the Secretary of the competent Commission, Tribunal or Committee that is meeting away from the seat of the Centre, before the close of business on the indicated date or, if that day is a Saturday, a Sunday, a public holiday observed at the place of delivery or a day on which for any reason regular mail delivery is restricted at the place of delivery, then before the close of business on the next subsequent day on which regular mail service is available.*” (Emphasis added)

26. The application containing the Respondent’s Preliminary Objections filed by the Respondent was submitted on 3 September 2018. In light of this provision, the Tribunal disagrees with the Claimant that this application is “on its face ... non-compliant.” The Secretary-General notified the Parties of the Tribunal’s constitution on 2 August 2018.

⁵ Tr. H., p. 55:18-25, 56:1-2.

According to this Regulation 29, the day of dispatch shall be excluded from calculation. Therefore, the Preliminary Objections were filed within the 30-day period and were thus timely in accordance with Arbitration Rule 41(5).⁶

B. The Legal Standard Under Rule 41(5)

27. The Respondent’s Preliminary Objection requires us to examine Arbitration Rule 41(5) in accordance with the general rule of interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”). We begin our analysis with the said provision.
28. Rule 41(5) provides in its relevant part that: “a party may ... file an objection that a claim is *manifestly without legal merit*.” (emphasis added) At the outset, the Tribunal observes that the word “manifestly” qualifies the term “without legal merit.” “Manifestly” as an adjective means⁷: “readily perceived by the senses and especially by the sense of sight” as well as “easily understood or recognized by the mind: obvious.”⁸ The word “merit” has several meanings: “obsolete: reward or punishment due; the qualities or actions that constitute the basis of one's deserts; a praiseworthy quality: virtue; character or conduct deserving reward, honor, or esteem; spiritual credit held to be earned by performance of righteous acts and to ensure future benefits; the substance of a legal case apart from matters of jurisdiction, procedure, or form; individual significance or justification.”⁹ On the other hand, “legal” has also several definitions: “of or relating to law; deriving authority from or founded on law: *de jure*; having a formal status derived from law often without a basis in actual fact: titular; established by law especially: statutory; conforming to or permitted by

⁶ The Respondent’s Preliminary Objections were presented earlier since the ICSID Secretariat was closed on Monday, 3 September in observance of Labor Day. See: <https://icsid.worldbank.org/en/Pages/News.aspx?CID=288>

⁷ In the context of the WTO, the Appellate Body has cautioned that dictionary definitions may be a start in the process of interpretation, however, an interpretation according to the VCLT is a *holistic exercise*: “The Appellate Body has previously held that, while a panel may start with the dictionary definitions of the terms to be interpreted, in the process of discerning the ordinary meaning, dictionaries alone are not necessarily capable of resolving complex questions of interpretation because they typically catalogue all meanings of words. Dictionaries are important guides to, but not dispositive of, the meaning of words appearing in treaties ... Under Article 31 of the Vienna Convention, the “ordinary meaning” of treaty terms may be ascertained only in their context and in the light of the object and purpose of the treaty.” WTO, Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348 (fns omitted).

⁸ “Manifestly” Merriam-Webster.com. 2019. <https://www.merriam-webster.com>. (29 March 2019).

⁹ “Merit” Merriam-Webster.com. 2019. <https://www.merriam-webster.com>. (29 March 2019).

law or established rules; recognized or made effective by a court of law as distinguished from a court of equity; of, relating to, or having the characteristics of the profession of law or of one of its members; created by the constructions of the law.”¹⁰

29. The tribunal in *Trans-Global Petroleum v. Jordan* examined the ordinary dictionary meaning of “manifestly” as well as the context provided by other provisions of the ICSID Convention and determined that: “...the ordinary meaning of the word [manifestly] requires the respondent to establish its objection *clearly and obviously, with relative ease and despatch.*” In light of this, it considered that the standard under Rule 41(5) was “set high” and that although “[the] exercise may not always be simple ... [and] thus be complicated; [...] *it should never be difficult.*” (emphasis added)¹¹
30. As to the phrase “without legal merit” it noted the significance of the adjective “legal” and considered that it “is clearly used in contradistinction to ‘factual’”, which would indicate that a tribunal is not concerned “*per se* with the factual merits.”¹² The phrase “legal merit” was considered in *Brandes v. Venezuela* as covering “all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal.”¹³

¹⁰ “Legal” Merriam-Webster.com. 2019. <https://www.merriam-webster.com>. (29 March 2019).

¹¹ *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal’s Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (hereinafter *Trans-Global Petroleum v. Jordan*) (Ex. RL-6), para. 88. In the same sense, para. 105 referring to a test of “clarity, certainty and obviousness.” See also *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009 (hereinafter *Brandes v. Venezuela*) (Ex. RL-7), paras. 62-64, and *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, 1 December 2010 (Ex. RL-10), para. 35. In *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia* (hereinafter *MOL v. Croatia*), ICSID Case No. ARB/13/32, Decision on Respondent’s Application under ICSID Arbitration Rule 41(5), 2 December 2014 (Ex. RL-11), paras. 44 and 45, the tribunal agreed with the standard drawn in *Trans-Global Petroleum v. Jordan*, although it distinguished between a claim “by an investor that can properly be rejected out of hand” and “one which requires more elaborate argument for its eventual disposition”, indicating that such distinction had to be maintained.

¹² *Trans-Global Petroleum v. Jordan* (Ex. RL-6), paras. 93 and 97. The Tribunal takes note that during the hearing, the Claimant placed an emphasis on the legal as opposed to the factual nature of an objection under this provision: “So the drafter needs to convey us or to transfer to us a very important message, that please, *abide to the word ‘legal.’ It’s not a matter of fact. It’s not a matter of discussing facts here.* It’s not a matter of interpretation or analysis to be concluded by the Tribunal whether to go to this side, interpreting this discussion, for the Claimant or for the Respondent. No basis or no rules for any interpretation or analysis or any disputable facts in this stage of the case. Accordingly, it is demonstrated that *the application of Rule 41(5) does not include any objections that might raise a challenge based on the factual flaws of a case.*” (emphasis added) Tr. H., p. 66:3-14.

¹³ *Brandes v. Venezuela*, (Ex. RL-7), para. 55.

31. In this regard, investment tribunals have held that Rule 41(5) concerns “a legal impediment to a claim” (not a factual one) which can go to jurisdiction or the merits of the dispute.¹⁴ Nonetheless, the tribunal in *Trans-Global Petroleum v. Jordan* recognized that “it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced.”¹⁵ In that case the tribunal expressed its view that:

“[T]he tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor ... accept a legal submission dressed up as a factual allegation. The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation.”¹⁶

32. The tribunal in *Eskosol v. Italy* also recognized the “level of sophistication” of investment proceedings while emphasizing that “the Rule 41(5) procedure is not intended, nor should it be used, as the mechanism to address complicated, difficult or unsettled issues of law.”¹⁷ The Tribunal agrees with the interpretations provided by the aforementioned tribunals and also shares the view expressed in *Emmis v. Hungary*, that a tribunal:

“*must ordinarily presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation). In the application of those presumed facts to the legal question of its jurisdiction, the tribunal must then decide whether, as matter of law, those facts fall within or outside the scope of the consent to arbitrate. Where the objection is taken under the procedure provided in Rule 41(5), it will decide to grant the objection if one or more of the claims fall clearly outside the scope of its jurisdiction so that, for the purpose of these proceedings, the claim must be treated as being ‘manifestly without legal merit’.*”¹⁸ (emphasis added)

¹⁴ *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (Ex. RL-5), paras. 4.2.1 and 6.1.1. “[T]he Parties agree that Rule 41(5) pertains only to legal defects, including those involving either jurisdiction or the merits, but not to factual defects. This does not mean that factual premises of claims may not be acknowledged in order to understand the essence of the legal claim asserted”, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent’s Application under Rule 41(5), 20 March 2017 (hereinafter *Eskosol v. Italy*) (Ex. RL-8), para. 35. See also *Brandes v. Venezuela*, (Ex. RL-7), paras. 55 and 59.

¹⁵ *Trans-Global Petroleum v. Jordan*, (Ex. RL-6), para. 97.

¹⁶ *Ibid*, para. 105.

¹⁷ *Eskosol v. Italy* (Ex. RL-8), para. 41.

¹⁸ *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* (hereinafter “*Emmis v. Hungary*”), ICSID Case No. ARB/12/2, Decision on Respondent’s Objection under ICSID Arbitration Rule 41(5), 11 March 2013 (Ex. RL-12), para. 26.

33. In view of the above, our task will be to determine whether taking the facts as a given, unless they are plainly without foundation, the claims are such that they “manifestly” (*i.e.* clearly and obviously) lack legal merit.

C. Whether Non-Compliance with Article 10(2) of the BIT Renders the Claim Manifestly Without Legal Merit

34. The Respondent argues that one of the grounds in which the claims manifestly lacks legal merit is “jurisdictional in nature.” In the Respondent’s opinion, Article 10(2) of the BIT conditions Kuwait’s consent to the lapse of a six-month negotiation period from the date on which an investor notifies Kuwait of a dispute under the BIT. According to the Respondent, the Claimant did not comply with the mandatory requirement of giving notice to Kuwait under Article 10(2) of the BIT, nor did it comply with the mandatory requirement of waiting six months after giving such notice before initiating this arbitration.¹⁹
35. The Claimant argues that, pursuant to an agreement, it ordered its partner to “follow all legal steps of ICSID rules for arbitration and to implement article 10(2) and 10(3) ... to convince the State of Kuwait to back down from its illegal refusal ... and to inform the state of Kuwait by our explicit consent to solve this disputes by arbitration in accordance with ICSID rules and the ... convention.”²⁰
36. Article 10 of the BIT establishes the following:

“1 – Disputes which arise between a Contracting State and an investor belonging to the other Contracting State, in relation to an investment in the territory of the first State which returns to the latter, shall be settled, as far as is possible, by amicable means.

2 – *If that dispute cannot be settled within six months of the date on which either of the two parties to the dispute requested an amicable settlement by notifying the other party in writing, then the dispute shall be referred for resolution by one of the*

¹⁹ Respondent’s Preliminary Objections, paras. 52, 53 and 58.

²⁰ Statement of Claimant, p. 16.

following means, to be chosen by the investor who is a party to the dispute.”²¹
 (Emphasis added)

37. The Tribunal observes that the first paragraph of Article 10 uses the language “shall be settled” when referring to amicable means. While such language could normally indicate an obligation, the phrase “as far as possible” presupposes that there will be cases where settlement under those conditions will not be achieved and resort to paragraph 2 will have to be made. All together the phrase “shall be settled, as far as is possible, by amicable means” would seem to indicate an obligation of the parties to try to settle the dispute through amicable means as a preferred method for dispute resolution while recognizing that this scenario may not always be possible.
38. On the other hand, paragraph 2 also incorporates mandatory language (“*shall be referred for resolution*”) and in addition to that, it establishes a period of six months from the date in which either of the two parties “*requested an amicable settlement by notifying the other party in writing.*” The Tribunal observes that the language used is *conditional*: the provision allows the referral of the dispute for resolution “if” the dispute is not solved within six-months starting from a specific action (“*the request of an amicable settlement*”) through *written notification*. The language of this provision plainly indicates that neither the written notification nor the six-month time-period is optional; rather, these steps are to be complied with before an arbitration may be initiated.
39. The purpose of paragraphs 1 and 2 of Article 10 is to allow the Parties in a dispute to try to reach a solution of the matter before resorting to arbitration. It seeks to prevent a dispute by giving advance notice to a State so that, if possible, a positive solution to the dispute may be achieved. This requirement is an integral part of the State’s consent rather than a negligible formality. However, although the treaty does not force the parties to reach an amicable settlement, the provision does condition resort to arbitration to the fulfillment of certain requirements, among them a notification to the other party in writing. In this Tribunal’s view compliance with the terms of Article 10 should be clear and unequivocal.

²¹ Agreement for the Promotion and Reciprocal Protection of Investments Between the Government of the Arab Republic of Egypt and the Government of the State of Kuwait, Articles 1 and 2 (Ex. R-03).

40. The Tribunal concurs with the opinion expressed by other investment tribunals to the extent that:

“The six-month waiting period requirement ... is designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration... by imposing upon investors an *obligation to voice their disagreement* at least six months prior to the submission of an investment dispute to arbitration, the Treaty *effectively accords host States the right to be informed about the dispute* at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration ... Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.”²²

“[It] constitutes a *fundamental requirement* ... It is not an *inconsequential procedural* requirement but rather a *key component of the legal framework* established in the BIT and in many other similar treaties... It amounts to ... an *essential mechanism* ... which *compels the parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration.*”²³

“The *explicit requirements* that the parties must seek to engage in consultations and negotiations ... and that there be a ... waiting period ... are accepted by the Tribunal as pre-conditions to submitting the dispute to arbitration ... *compliance is an essential element of Turkey’s prospective consent* to qualify its sovereignty to permit unknown future investors of the other contracting State to claim relief under the terms of the BIT against it in an international forum.”²⁴ (Emphasis added)

41. At the hearing, the Claimant argued that the waiting period “[was] a mere procedure and directly period to attempt alternative dispute resolution.”²⁵ To support its argument, the Claimant relied on *SGS v. Pakistan*. In that case, the provision at issue indicated that consultations had to take place between a State and the investor. If such consultations did not result in a solution within 12 months, the dispute would be submitted to arbitration.²⁶

²² *Burlington Resources INC. v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on jurisdiction, 2 June 2010 (Ex. RL-29), paras. 312 and 315.

²³ *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010 (Ex. RL-30), paras. 149, 151 and 154. In addition, “[a] failure to comply with that requirement would result in a determination of lack of jurisdiction”, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (Ex. RL-27), para. 88. In the same vein, see: *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013 (Ex. RL-28), para. 6.2.9.

²⁴ *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (Ex. RL-31), paras. 71 and 72.

²⁵ Tr. H., p. 77:6-8.

²⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 183.

The tribunal considered such requirement to be directory and procedural in nature rather than jurisdictional and mandatory:

“Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction ... It should also be noted that in the prolonged period of time from termination of the PSI Agreement by Pakistan to the submission of SGS’s written consent under the BIT, there was *little indication of any inclination on the part of either party to enter into negotiations or consultations in respect of the unfolding dispute*. Finally, it does not appear consistent with the need for *orderly and cost-effective procedure* to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant’s BIT claims to this Tribunal.”²⁷ (Emphasis added)

42. In the view of that tribunal, such procedural requirement could, for the sake of efficiency, be waived if there was no indication that consultations would be fruitful. The Claimant also quoted *Biwater Gauff v. Tanzania*.²⁸ In that case, the tribunal took the same view and adopted a “useful purpose” approach.

“In the Arbitral Tribunal’s view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, *where such settlement is not possible*. Non-compliance with the six-month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including: - preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, *even where further negotiations are obviously futile, or settlement obviously impossible for any reason*; - forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter. ... In this case, the course of events amply demonstrated that any further delay on BGT’s part would not have served any useful purpose. By the time the Request for Arbitration was filed, *a long process of negotiation and renegotiation had already failed*, and the Republic’s position was entrenched – in particular by virtue of Minister Lowassa’s public statement of 13 May 2005, and the steps that had since been taken to deport City Water personnel, and take over its operations. It was therefore entirely reasonable for BGT to proceed to arbitration, rather than seeking to resolve the dispute through “local remedies or otherwise”.²⁹ (Emphasis added)

²⁷ *Ibid*, para. 184.

²⁸ Tr. H., p. 77:22-25.

²⁹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 343-347. The tribunal in *Biwater v. Tanzania* also recalled the reasoning in *CMS v. Argentina* on whether the State had suffered or would suffer prejudice. The Claimant has also made reference to *Ronald S. Lauder v. The Czech*

43. The Tribunal respectfully disagrees with the views expressed in the cases referred to by the Claimant in as much as they considered certain consultation requirements procedural to be directory and procedural in nature. Moreover, in this Tribunal's opinion there are certain features that differentiate those cases from this one, such as: the difference in the treaty text at issue, the fact that in light of the circumstances and evidence presented those tribunals took into account the usefulness of consultations, as well as the fact that in two of those cases either a notification had been made or a process of consultations had even taken place.
44. The Tribunal turns now to examine whether it is manifest that the Claimant failed to comply with the requirement in Article 10(2) of the BIT, in light of the facts as put forward, and thus whether a legal impediment to the claims manifestly exists. The Claimant contends that this requirement was fulfilled. Thus, its legal premise is that, by virtue of the BIT it is entitled to have recourse to arbitration and the Respondent's Preliminary Objections in that regard should be dismissed.³⁰ The Tribunal observes, however, that a notification from the Claimant to the State of Kuwait pursuant to the BIT requesting for an amicable solution to a dispute has not been submitted to the State of Kuwait.
45. Specifically, the Claimant argues that it complied with Article 10(2) of the BIT, relying on the documents contained in exhibits C-8 and C-9. Exhibit C-8 contains a series of communications from agencies in Kuwait referencing Mr. Al-Otaibi and the heirs of another Kuwaiti national, but none of those communications identify the Claimant or the BIT at issue. Exhibit C-9 contains a letter that identifies the Claimant and the BIT is a communication solely from the Claimant to a Kuwaiti national mentioned in the other exhibits. However, this letter appears to be merely a between private parties to a contract whereby one party (the Claimant) request the other (a Kuwaiti national mentioned in other exhibits) to comply with its contractual obligations. The letter is not addressed to the State

Republic. In that case, the tribunal took the view that the six-month waiting period was not a jurisdictional provision and its purpose was "to allow the parties to engage in good-faith negotiations before initiating arbitration." The tribunal took into account that there was no evidence that the Respondent would have accepted to enter into negotiations and that another interpretation would amount in that case to an "unnecessary, overly formalistic approach." *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, paras. 181-190.

³⁰ Statement of Claimant, pages 16 and 17. Tr. H., p. 69:1-23.

of Kuwait, nor does it mention any specific provision of the BIT, a request for an amicable solution of the matter or even a dispute under the BIT. Consequently, the Tribunal considers that it is obvious that this does not constitute a notification from the Claimant to Kuwait requesting an amicable settlement of the dispute under Article 10(2) of the BIT.

46. In reference to one of the letters, the Claimant stated at the hearing: “I’m the one meant by the word ‘partners’. Nobody else proclaiming that. Yes, the Respondent says that there is -- the name of the Claimant is not mentioned here, but nobody else is proclaiming that he is the partner. I am the partner meant by this word here.”³¹ Additionally, evidence as to official legal representation from Claimant by the Kuwaiti national has not been presented to this Tribunal. The Tribunal further notes that the Joint Venture Agreement referenced does not provide for representation since it indicates that procedures in Kuwait should be made in the name of the Kuwaiti national and not in the name of the Claimant.
47. In examining whether the claims manifestly lack legal merit. We have taken the facts as pleaded by the Claimant. However, although the Claimant argues that it complied with the six-month waiting period and the notification requirement through a series of letters, none of these letters remotely support the Claimant’s position. This is manifest, clear and obvious just from simply looking at the text of the letters. While we must take the factual allegations at face value, we do not consider this is the case when the evidence presented flatly and unequivocally contradicts the legal premise advanced.
48. In light of the above, the Tribunal considers that it is manifest that the Claimant did not request an amicable settlement of the dispute through a written notification to the Respondent in accordance with Article 10(2) of the BIT. The Tribunal thus considers that there is a legal impediment which goes to the jurisdiction of the Tribunal.

³¹ Tr. H., pp. 69:24-25 and 70:1-4.

D. Whether the Claim Under Article 7 of the BIT is Manifestly Without Legal Merit

49. The Respondent argues that the Claimant’s expropriation claim is manifestly without legal merit since it “ignores the basic principle that liability for expropriation under international law is dependent on the existence and nature of the rights allegedly expropriated” and that “the existence and nature of such rights are defined by the domestic law of the State which has allegedly taken the expropriatory action.”³² In the Respondent’s view, Mr. Al-Otaibi, the Kuwaiti national who sold “an interest in the Land, [did] not possess any such property rights”, therefore, “he was quite obviously not able to transfer any such rights to Claimant” which, in turn, “lacks any legal grounds for asserting a claim against Respondent that it has expropriated such (non-existent) rights.”³³
50. The Claimant argues in its Request for Arbitration that it entered into a Joint Venture Agreement with Mr. Al-Otaibi, a Kuwaiti national, by virtue of which it “purchased and became the owner of 5% of the property of the whole land, in addition to his shares of 50% of this joint venture agreement.”³⁴ In its Statement of Claim it indicates that:
- “...the claimant (the second party) *purchased 5% of the Kuwaiti land* owned by the first party for an amount of \$20 million in order to establish with the first and third party residential and touristic communities and to invest in this land to establish such constructions and touristic resorts and to obtain *10% of all profits* gained from land and constructions ... the Kuwaiti government *prevented the claimant from taking ownership of the land, and seized and expropriated it for public benefit* and *did not hand over or compensate* the claimant for the value of its share.”³⁵ (Emphasis added).
51. According to the Claimant, the Respondent owes “compensation for the land which [it] expropriated from the Claimant.”³⁶
52. In its relevant part, Article 7 of the BIT provides the following:

³² Respondent’s Preliminary Objections, para. 50.

³³ *Ibid*, para. 51.

³⁴ Request for Arbitration, p. “e”.

³⁵ Statement of Claimant, p. 4.

³⁶ *Ibid*, p. 13. Although in the Request for Arbitration the Claimant argued breaches to Articles 6 and 7 of the BIT in its Request for Arbitration, upon a question from the Tribunal, it clarified that only Article 7 is being challenged. Tr. H., p. 80:10-19.

“1 – (a) Investments made by investors belonging to either of the two Contracting States in the territory of the other Contracting State shall not be subject to nationalisation, expropriation, or confiscation, nor shall they be subject, directly or indirectly, to measures whose effect is equivalent to nationalisation, expropriation, or confiscation (referred to collectively hereinafter as “expropriation”) by the other Contracting State, except for a public purpose relating to a national interest of that Contracting State, and then in return for compensation that is immediate, sufficient and effective, and on the condition that those measures are taken on a non-discriminatory basis, and in accordance with legal procedures in general usage.

...

3 – “Expropriation” also includes cases when a Contracting State expropriates the assets of a company or enterprise which was set up or founded in accordance with the laws in force in its territory, in which an investor belonging to the other Contracting State has a majority or important share, through owning stocks, shares, bonds, rights, or other interests.

4 – The term “expropriation” also includes any interference or regulatory procedures carried out by a Contracting State such as incorporating or restricting the investment, or the forced sale of all or part of the investment, or any other similar procedures having the same effect of seizing the property or expropriating it, and arising from which procedures, the investor is in actuality dispossessed of his property, or his majority or substantial interest in his investment, or suffers loss or damage to the economic value of the investment.”

53. As an essential starting point, investment tribunals have recognized the existence of rights under the relevant domestic law within the context of expropriation claims, such as in *Emmis v. Hungary*:

“Claimants *must have held a property right* of which they have been deprived. This follows from the ordinary meaning of the term. The *Oxford English Dictionary* defines ‘expropriate’ as ‘(of the state or an authority) take (property) from its owner for public use or benefit’/‘dispossess (someone) of property’”... The Tribunal in *Waste Management II* made the same point when it held that the object of expropriation is the *property of the claimant* ... In order to determine whether an investor/claimant holds property or assets capable of constituting an investment *it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.*”³⁷ (Emphasis added)

³⁷ *Emmis v. Hungary*, para. 162 (Ex. RL-24). That tribunal also held that: “it is important to emphasise that the protection from expropriation in relation to rights conferred under contract still requires identification of a property interest or asset held by the claimant... Moreover, such an interpretation also accords with the separate and distinct function of the protection against expropriation as compared to the other protections included within the framework of the wider investment treaty.” See paras. 165 and 167.

54. The tribunal in *EnCana v. Ecuador* also expressed that: “for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.”³⁸ Likewise, in *Quiborax v. Bolivia*, the tribunal agreed that: “in order for a right to be expropriated, it must first exist under the relevant domestic law (in this case, Bolivian law).”³⁹
55. The Claimant argues that the Respondent “prevented [it] from taking ownership of the land” and that it “expropriated its land and did not enable it to register its ownership in government departments.”⁴⁰ The Claimant alleges two bases for its ownership rights: a deed issued by Saudi Arabia in favor of Mr. Al-Otaibi, a Kuwaiti national [not the Claimant] and a private joint venture agreement between Mr. Al-Otaibi and the Claimant whereby Mr. Al-Otaibi agrees to sell the Land once such Land is recognized by Kuwaiti authorities.⁴¹
56. With regard to the private joint venture agreement, the Tribunal considers that a promise between two private parties contained in a private instrument, which has not been sanctioned or recognized by the host state, cannot be the basis of a property title.
57. In addition, regarding the deed, the Claimant has not argued or provided any evidence that such title [issued by Saudi Arabia in favor of a Kuwaiti national], has been recognized or registered by any Kuwaiti authority. Rather, it has asserted that the Respondent has “prevented the claimant from taking ownership of the land.”⁴² In that regard, Article 7 of

³⁸ *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481 (UNCITRAL), Award, 3 February 2006, (Ex. RL-25), para. 184.

³⁹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, (Ex. RL-3), para. 135. See also, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, (Ex. RL-26), para. 39.

⁴⁰ Statement of Claimant, p.11.

⁴¹ At the hearing, the Claimant was asked by the Tribunal whether it “had ever had any title to property” and “what [was] the title of Claimant?”, to which the Claimant responded “yes ... [t]he title agreement is owning 5% of the disputed land.” Tr. H., p. 116:6-13.

⁴² Statement of Claimant, page 4.

the Real-estate Registration Law, which was discussed during the hearing.⁴³ This provision provides the following:

“The non-registration shall result in that the said rights shall not be created, transferred, changed or cancelled among the concerned persons or others.”⁴⁴

58. Once again, the Tribunal is of the view that, while it must take the facts as given by the Claimant as true, it is not to turn a blind eye as to what the evidence provided shows on its face. In this case, it is obvious that an essential element for the Claimant’s expropriation claim is missing, *i.e.* the existence of property rights in accordance with the laws of Kuwait. Therefore, the legal premise that it owns 5% of the land which was expropriated by the Respondent manifestly lacks legal merit.

IV. COSTS

59. As stated in the procedural history, the Parties were invited to make their submission on costs. Having not received Claimant’s submission on costs, the Tribunal examined the Respondent’s Submission on Costs and found it reasonable under the circumstances of the case. It decided to ignore the Claimant’s failure to submit its statement on costs and expenses, because in any event, as explained below, it has determined that the Claimant has to bear them.
60. Article 61(2) of the ICSID Convention provides that “the Tribunal shall, except, as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.”

⁴³ At the hearing, the Respondent consulted with Kuwaiti counsel and indicated that “ownership of real property is effective upon registration of that property under Kuwaiti law.” Tr. H., p. 96:19-20. Claimant has neither contested this assertion nor offered an alternative interpretation of the relevant provision of Kuwaiti law.

⁴⁴ Tr. H., pp. 85:24-25, and 86:1.

61. This provision grants the Tribunal with authority and discretion to allocate costs and fees. In the exercise of such authority and discretion,⁴⁵ the Tribunal notes that the practice varies from case to case in light of the particular circumstances. In the present case, the Tribunal considers that costs should follow the event.
62. The Respondent has been successful in defeding its Objection on the grounds that the Claimant’s claims are “manifestly without legal merit”, pursuant to Rule 41(5) of the Arbitraton Rules. The claim was brought without complying with the requirements established in Article 10(2) of the BIT and the Claimant failed to demonstrate that it had a property right in accordace with the laws of Kuwait in order to bring an expropriation claim under Article 7 of the BIT. Thus, the claim should have never been brought in the first place.
63. In light of the Tribunal’s findings, the Tribunal deems appropriate to order the Claimant to bear its fees and expenses as well as the Repondent’s fees and expenses, which in the view of the Tribunal are reasonable.
64. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID’s administrative fees and direct expenses, amount to:⁴⁶

Arbitrators’ fees and expenses

Prof. Ricardo Ramírez Hernández	US\$ 95,218.60
Mr. Pascal Dévaud	US\$ 112,858.11 ⁴⁷
Prof. Dr. Rolf Knieper	US\$ 38,822.22

⁴⁵ See *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 152; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018, para. 388; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015, paras. 400-403; *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, paras. 220-221. See also *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, 1 May 2018, paras. 150-151; *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 8.3.4.

⁴⁶ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

⁴⁷ Due to the default in the payment of advances in this case, the Tribunal wishes to note that there was a total of US\$8,124.94 of additional fees which are owed to Mr. Dévaud. Therefore, the total amount that Mr. Dévaud would have claimed in this case would have been US\$120,983.05.

ICSID's administrative fees	US\$ 84,000.00
Direct expenses (estimated)⁴⁸	US\$ 22,460.27
Total	<u>US\$ 353,359.20</u>

65. The Claimant advanced to the Centre US\$149,935 and Respondent advanced \$200,000.⁴⁹ Given the outcome of the proceeding, the Tribunal deems appropriate to order the Claimant to bear the arbitration costs.


V. DECISION

66. Accordingly, for the reasons set out above, the Tribunal decides:
67. To accept the Respondent's Preliminary Objection that the Claimant's claims manifestly lacks legal merit due to the Claimant's obvious non-compliance with Article 10(2) of the BIT.
68. To accept the Respondent's preliminary objection that the expropriation claim manifestly lacks legal merit since it is obvious that an essential element for the Claimant's expropriation claim is missing, *i.e.* the existence of property rights in accordance with the laws of Kuwait.
69. That the Claimant shall bear all the costs of this proceeding, including fees and expenses of the Members of the Tribunal. Therefore, the Claimant shall pay the Respondent US\$ 200,000 in arbitration costs, and the legal costs incurred by Kuwait, in the amount of US\$ 612,986.39.

⁴⁸ This amount includes estimated charges relating to the dispatch of this Award (courier, printing and copying).

⁴⁹ On 12 September 2019, pursuant to Regulation 14(3)(d), the Secretary-General informed the parties of the default and gave an opportunity to either of them to make the required payment. On 30 October 2019, the Tribunal once more invited either party to make the required payment. If there is to be a remaining balance, this will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

70. This Award is adopted by a majority vote of two to one. Mr. Pascal Dévaud is dissenting.



Prof. Rolf Knieper
Arbitrator
Date: **1 NOV 2019**

Mr. Pascal Dévaud
Arbitrator
Subject to the attached dissenting opinion.
Date:



Mr. Ricardo Ramírez Hernández
President of the Tribunal
Date: **1 NOV 2019**